SUPREME COURT OF INDIA

T. S.THAKUR, C.J.I., F. M. I. KALIFULLA, J., A. K. SIKRI, J., S. A. BOBDE, J. & R. BANUMATHI, J.

CRIMINAL APPEAL NOS. 231-233 OF 2009
(WITH BATCH)

MUTHURAMALINGAM & ORS. ……..Appellant(s)

.Vrs.

STATE REP. BY INSP. OF POLICE ………Respondents(s)

(A) CRIMINAL PROCEDURE CODE, 1973 – S.31

"Whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he has been tried in a single trial ?" – Held, No – While multiple sentences for imprisonment for life can be awarded for multiple murders or other offences punishable with imprisonment for life, the life sentences so awarded can not be directed to run consecutively – Such sentences would, however, be superimposed over each other, so that any remission or commutation granted by the competent authority in one does not ipso facto result in remission of the sentence awarded to the prisoner for the other. (Para 31)

(B) CRIMINAL PROCEDURE CODE, 1973 – S.31

Whether the court can direct life sentence and term sentences to run consecutively ? – Held, the prisoner shall first undergo the term sentence before the commencement of his life sentence.

(Para 32)

Case Laws Referred to :-

1. (2015) 2 SCC 501 : *O.M.Cherian @ Thankachan vs.State of Kerala &Ors.*
2. (2015) 2 SCC 783 : Duryodhan Rout vs. State of Orissa.
3. (2005) 5 SCC 194 : Kamalanantha and Ors. vs. State of Tamil Nadu .
4. (2013) 3 SCC 52 : Sanaullah Khan vs. State of Bihar.
5. (1961) 3 SCR 440 : Gopal Vinayak Godse vs. State of Maharashtra.
6. (1979) 3 SCC 745 : Dalabir Singh vs. State of Punjab.
7. (1992) 2 SCC 661 : State of Punjab vs : Joginder Singh.
8. (1981) 1 SCC 107 : Maru Ram vs. Union of India and Ors.
9. (1991) 3 SCC498 : Ashok Kumar @ Golu vs. Union of India
10. (2000) 2 SCC 595 : Laxman Naskar vs. Union of India.
11. (2001) 4 SCC 458 : Subash Chander vs. Krishan La.l
12. (2001) 6 SCC 296 : Shri Bhagwan vs. State of Rajasthan.
13. (2008) 13 SCC 767: Swamy Shraddananda vs. State of Karnataka.
14. 2015 (13) SCALE 165 : Union of India vs. Sriharan.
15. (1991) 4 SCC 304 : Ranjit Singh vs. Union Territory of Chandigarh.

16. (1988) 4 SCC 183 : Akhtar Hussain @ Ibrahim Ahmed Bhatti vs. Assistant Collector of Customs (Prevention). Ahmedabad and Anr.
17. (2014) 2 SCC 153 : Manoj @ Panu vs. State of Haryana.
18. (2005) 5 SCC194 : Kamalanantha vs. State of Tamil Nadu.
19. (2013) 3 SCC 52 : Sanaullah Khan vs. State of Bihar.
20. (1996) 4 SCC 148 : Ravindra Trimbak Chouthmal vs. State of Maharashtra.
21. (1998) 3 SCC 625 : Ronny vs. State of Maharashtra.

For Appellant(s) : Mr. K.K.Mani
For Respondent(s) : Mr. M.Yogesh Kanna

Date of judgment: 19.07.2016

JUDGMENT

T.S. THAKUR, CJI.

1. A Bench comprising three-Judges of this Court has referred to us the following short but interesting question:

> *"Whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he has been tried in a single trial?."*

2. The question arises in the following circumstances:

3. The appellants were tried for several offences including an offence punishable under Section 302 of the Indian Penal Code, 1860 (for short, "the IPC") for several murders allegedly committed by them in a single incident. They were found guilty and sentenced to suffer varying sentences, including a sentence of imprisonment for life for each one of the murders committed by them. What is important is that the sentence of imprisonment for life for each one of the murders was directed to run consecutively. The result was that the appellants were to undergo consecutive life sentences ranging between two to eight such sentences depending upon the number of murders committed by them. Criminal appeals preferred against the conviction and the award of consecutive life sentences having failed, the appellants have filed the present appeals to assail the judgments and orders passed by the courts below.

4. When the appeals came up for hearing before a three-Judge Bench of this Court, learned counsel for the appellant appears to have confined his challenge to the validity of the direction issued by the Trial Court and affirmed by the High Court that the sentences of imprisonment for life awarded to each one of the appellants for several murders allegedly

committed by them would run consecutively and not concurrently. It was argued that in terms of Section 31 of the Criminal Procedure Code, 1973 (for short, "the Cr.P.C.") the sentence of life imprisonment awarded to the appellants for different murders alleged to have been committed by them could run concurrently and not consecutively as ordered by the Trial Court and the High Court. Reliance in support of that submission was placed upon a decision of a three-Judge Bench of this Court in *O.M. Cherian @ Thankachan vs. State of Kerala & Ors.,* (2015) 2 SCC 501 and a three-Judge Bench decision of this Court in *Duryodhan Rout vs. State of Orissa* (2015) 2 SCC 783.

5. On behalf of the respondent – State of Tamil Nadu, reliance appears to have been placed upon two other decisions of this Court in *Kamalanantha and Ors. vs. State of Tamil Nadu,* (2005) 5 SCC 194 and *Sanaullah Khan vs. State of Bihar,* (2013) 3 SCC 52 to argue that it was legally permissible to award more than one life sentence to a convict for different murders committed by him with a direction that the sentences so awarded shall run consecutively. The Bench hearing the appeal noticing a conflict in the views taken by this Court on the question whether consecutive life sentences were legally permissible, directed the matter to be placed before a larger bench comprising Five Judges to resolve the conflict by an authoritative pronouncement. That is precisely how these appeals have been placed before us for an authoritative pronouncement.

6. We have heard learned counsel for the parties at considerable length. Section 31 of the Cr.P.C. which deals with sentences in cases of conviction of several offences at one trial runs as under :

> *"31. Sentences in cases of conviction of several offences at one trial.*
>
> *(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.*
>
> *(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to*

inflict on conviction of a single offence, to send the offender for trial before a higher Court: Provided that-

(a) in no case shall such person be sentenced to imprisonment for longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."

7. A careful reading of the above would show that the provision is attracted only in cases where two essentials are satisfied *viz.* (1) a person is convicted at one trial and (2) the trial is for two or more offences. It is only when both these conditions are satisfied that the Court can sentence the offender to several punishments prescribed for the offences committed by him provided the Court is otherwise competent to impose such punishments. What is significant is that such punishments as the Court may decide to award for several offences committed by the convict when comprising imprisonment shall commence one after the expiration of the other in such order as the Court may direct unless the Court in its discretion orders that such punishment shall run concurrently. Sub-section (2) of Section 31 on a plain reading makes it unnecessary for the Court to send the offender for trial before a higher Court only because the aggregate punishment for several offences happens to be in excess of the punishment which such Court is competent to award provided always that in no case can the person so sentenced be imprisoned for a period longer than 14 years and the aggregate punishment does not exceed twice the punishment which the court is competent to inflict for a single offence. Interpreting Section 31(1), a three-Judge Bench of this Court in *O.M. Cherian's* case (supra) declared that if two life sentences are imposed on a convict the Court must necessarily direct those sentences to run concurrently. The Court said:

"Section 31(1) CrPC enjoins a further direction by the court to specify the order in which one particular sentence shall commence after the expiration of the other. Difficulties arise when the courts impose sentence of imprisonment for life and also sentences of imprisonment for fixed term. In such cases, if the court does not direct that the sentences shall run concurrently, then the sentences will run consecutively by operation of Section 31(1) CrPC. There is no

> *question of the convict first undergoing the sentence of imprisonment for life and thereafter undergoing the rest of the sentences of imprisonment for fixed term and any such direction would be unworkable. Since sentence of imprisonment for life means jail till the end of normal life of the convict, the sentence of imprisonment of fixed term has to necessarily run concurrently with life imprisonment. In such case, it will be in order if the Sessions Judges exercise their discretion in issuing direction for concurrent running of sentences. Likewise if two life sentences are imposed on the convict, necessarily, the court has to direct those sentences to run concurrently."*

8. To the same effect is the decision of a two-Judge Bench of this Court in *Duryodhan Rout's* case (supra) in which this Court took the view that since life imprisonment means imprisonment of full span of life there was no question of awarding consecutive sentences in case of conviction for several offences at one trial. Relying upon the proviso to sub-Section (2) of Section 31, this Court held that where a person is convicted for several offences including one for which life sentences can be awarded the proviso to Section 31(2) shall forbid running of such sentences consecutively.

9. It would appear from the above two pronouncements that the logic behind life sentences not running consecutively lies in the fact that imprisonment for life implies imprisonment till the end of the normal life of the convict. If that proposition is sound, the logic underlying the ratio of the decisions of this Court in *O.M. Cherian* and *Duryodhan Rout* cases (supra) would also be equally sound. What then needs to be examined is whether imprisonment for life does indeed imply imprisonment till the end of the normal life of the convict as observed in *O.M. Cherian* and *Duryodhan Rout's* cases (supra).That question, in our considered opinion, is no longer *res integra,* the same having been examined and answered in the affirmative by a long line of decisions handed down by this Court. We may gainfully refer to some of those decisions at this stage.

10. In *Gopal Vinayak Godse vs. State of Maharashtra,* (1961) 3 SCR 440 a Constitution Bench of this Court held that a prisoner sentenced to life imprisonment was bound to serve the remainder of his life in prison unless the sentence is commuted or remitted by the appropriate authority. Such a sentence could not be equated with a fixed term.

11. In *Dalabir Singh vs. State of Punjab,* (1979) 3 SCC 745 a three-Judge Bench of this Court observed:

> *"….life imprisonment strictly means imprisonment for the whole of the man's life, but in practice amounts to incarceration for a period between 10 and 14 years which may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large."*

12. Again in *State of Punjab vs. Joginder Singh* (1992) 2 SCC 661, this Court held that if the sentence is '*imprisonment for life'* the convict has to pass the remainder of his life under imprisonment unless of course he is granted remission by a competent authority in exercise of the powers vested in it under Sections 432 and 433 of the Cr.P.C.

13. In *Maru Ram vs. Union of India and Ors.* (1981) 1 SCC 107 also this Court following *Godse's* case (*supra*) held that imprisonment for life lasts until last breath of the prisoner and whatever the length of remissions earned the prisoner could claim release only if the remaining sentences is remitted by the Government. The Court observed:

> *"We follow Godse's case to hold that imprisonment for life lasts until the last breath and whatever the length of remission earned the prisoner can claim release only if the remaining sentence is remitted by the Government."*

14. In *Ashok Kumar @ Golu vs. Union of India* (1991) 3 SCC 498, this Court had yet another occasion to examine the true meaning and purport of expression *"imprisonment for life"* and declared that when read in the light of Section 45 of the IPC the said expression would ordinarily mean the full and complete span of life. The following passage in this regard is apposite:

> "12. *xxx*
> *The expression 'imprisonment for life' must be read in the context of Section 45, IPC. Under that provision the word 'life' denotes the life of a human being unless the contrary appears from the context. We have seen that the punishments are set out in Section 53, imprisonment for life being one of them. Read in the light of Section 45 it would ordinarily mean imprisonment for the full or complete span of life. ….."*

15. To the same effect is the decision of this Court in the case of *Laxman Naskar vs. Union of India,* (2000) 2 SCC 595 where this Court held that life sentence is nothing less than lifelong imprisonment although by earning

remission, the life convict could pray for pre-mature release before completing 20 years of imprisonment including remissions earned.

16. Reference may also be made to the decisions of this Court in *Subash Chander vs. Krishan Lal,* (2001) 4 SCC 458, *Shri Bhagwan vs. State of Rajasthan,* (2001) 6 SCC 296 and *Swamy Shraddananda vs. State of Karnataka*, (2008) 13 SCC 767 which too reiterate the legal position settled by the earlier mentioned decisions of this Court. A recent Constitution Bench decision of this Court in *Union of India vs. Sriharan,* 2015 (13) SCALE 165 also had another occasion to review the case law on the subject. Relying upon the decisions of this Court in *Sambhaji Krishna, Ratan Singh, Maru Ram* and *RanjitSingh's* cases (supra) this Court observed:

> *"It is quite apparent that this Court by stating as above has affirmed the legal position that the life imprisonment only means the entirety of the life unless it is curtailed by remissions validly granted under the Code of Criminal Procedure by the Appropriate Government or Under Articles 72 and 161 of the Constitution by the Executive Head viz., the President or the Governor of the State, respectively."*

17. The legal position is, thus, fairly well settled that imprisonment for life is a sentence for the remainder of the life of the offender unless of course the remaining sentence is commuted or remitted by the competent authority. That being so, the provisions of Section 31 under Cr.P.C. must be so interpreted as to be consistent with the basic tenet that a life sentence requires the prisoner to spend the rest of his life in prison. Any direction that requires the offender to undergo imprisonment for life twice over would be anomalous and irrational for it will disregard the fact that humans like all other living beings have but one life to live. So understood Section 31 (1) would permit consecutive running of sentences only if such sentences do not happen to be life sentences. That is, in our opinion, the only way one can avoid an obvious impossibility of a prisoner serving two consecutive life sentences.

18. A somewhat similar question fell for consideration before a three-Judge Bench of this Court in *Ranjit Singh vs. Union Territory of Chandigarh,* (1991) 4 SCC 304. The prisoner was in that case convicted for murder and sentenced to undergo life imprisonment. He was released on parole while undergoing the life sentence when he committed a second offence of murder for which also he was convicted and sentenced to undergo imprisonment for life. In an appeal filed against the second conviction and sentence, this Court by an order dated 30th September, 1983 directed that the imprisonment for life awarded to him should not run concurrently with his earlier sentence of

life imprisonment. The Court directed that in the event of remission or commutation of the earlier sentence awarded to the prisoner, the second imprisonment for life awarded for the second murder committed by him shall commence. Aggrieved by the said direction which made the second life sentence awarded to him consecutive, the prisoner filed a writ petition under Article 32 of the Constitution primarily on the ground that this Court's order dated 30th September, 1983 was contrary to Section 427 (2) of the Cr.P.C., according to which any person already undergoing sentence of imprisonment for life if sentenced to undergo imprisonment for life, the subsequent sentence so awarded to him shall run concurrently with such previous sentence. Relying upon *Godse's* and *Maru Ram's* cases (supra), this Court held that imprisonment for life is a sentence for remainder of the life of the offender. There was, therefore, no question of a subsequent sentence of imprisonment for life running consecutively as per the general rule contained in sub-section (1) of Section 427. This Court observed:

> *"8.xxxxxxxxx*
>
> *As rightly contended by Shri Garg, and not disputed by Shri Lalit, the earlier sentence of imprisonment for life being understood to mean as a sentence to serve the remainder of life in prison unless commuted or remitted by the appropriate authority and a person having only one life span, the sentence on a subsequent conviction of imprisonment for a term or imprisonment for life can only be superimposed to the earlier life sentence and certainly not added to it since extending the life span of the offender or for that matter anyone is beyond human might. It is this obvious situation which is stated in sub-section (2) of Section 427 since the general rule enunciated in sub-section (1) thereof is that without the court's direction the subsequent sentence will not run concurrently but consecutively. The only situation in which no direction of the court is needed to make the subsequent sentence run concurrently with the previous sentence is provided for in sub-section (2) which has been enacted to avoid any possible controversy based on sub-section (1) if there be no express direction of the court to that effect. Sub-section (2) is in the nature of an exception to the general rule enacted in sub-section (1) of Section 427 that a sentence on subsequent conviction commences on expiry of the first sentence unless the court directs it to run concurrently. The meaning and purpose of sub-sections (1) and (2) of Section 427 and the object of enacting sub-section (2) is, therefore, clear."*

19. Having said that, this Court declared that once the subsequent imprisonment for life awarded to the prisoner is superimposed over the earlier life sentence, the grant of any remission or commutation *qua* the earlier sentence of life imprisonment will not *ipso facto* benefit the prisoner *qua* the subsequent sentence of life imprisonment. Such subsequent sentence would continue and shall remain unaffected by the remission or commutation of the earlier sentence. This Court said :

> *"xxxxxxxxx*
> *In other words, the operation of the superimposed subsequent sentence of life imprisonment shall not be wiped out merely because in respect of the corresponding earlier sentence of life imprisonment any remission or commutation has been granted by the appropriate authority. The consequence is that the petitioner would not get any practical benefit of any remission or commutation in respect of his earlier sentence because of the superimposed subsequent life sentence unless the same corresponding benefit in respect of the subsequent sentence is also granted to the petitioner. It is in this manner that the direction is given for the two sentences of life imprisonment not to run concurrently."*

20. *Ranjit Singh's case* (supra) was no doubt dealing with a fact situation different from the one with which we are dealing in the present case, inasmuch as *Ranjit Singh's* case (supra) was covered by Section 427 of the Cr.P.C. as the prisoner in that case was already undergoing a sentence of life imprisonment when he committed a second offence of murder that led to his conviction and award of a second sentence of life imprisonment. In the cases at hand, the appellants were not convicts undergoing life sentence at the time of commission of multiple murders by them. Their cases, therefore, fall more appropriately under Section 31 of the Code which deals with conviction of several offences at one trial. Section 31(1) deals with and empowers the Court to award, subject to the provisions of Section 71 of the IPC, several punishments prescribed for such offences and mandates that such punishments when consisting of imprisonment shall commence one after the expiration of the other in such order as the Court may direct unless the Court directs such punishments shall run concurrently. The power to award suitable sentences for several offences committed by the offenders is not and cannot be disputed. The order in which such sentences shall run can also be stipulated by the Court awarding such sentences. So also the Court is competent in its discretion to direct that punishment awarded shall run

concurrently not consecutively. The question, however, is whether the provision admits of more than one life sentences running consecutively. That question can be answered on a logical basis only if one accepts the truism that humans have one life and the sentence of life imprisonment once awarded would require the prisoner to spend the remainder of his life in jail unless the sentence is commuted or remitted by the competent authority. That, in our opinion, happens to be the logic behind Section 427 (2) of the Cr.P.C. mandating that if a prisoner already undergoing life sentence is sentenced to another imprisonment for life for a subsequent offence committed by him, the two sentences so awarded shall run concurrently and not consecutively. Section 427 (2) in that way carves out an exception to the general rule recognised in Section 427 (1) that sentences awarded upon conviction for a subsequent offence shall run consecutively. The Parliament, it manifests from the provisions of Section 427 (2), was fully cognizant of the anomaly that would arise if a prisoner condemned to undergo life imprisonment is directed to do so twice over. It has, therefore, carved out an exception to the general rule to clearly recognise that in the case of life sentences for two distinct offences separately tried and held proved the sentences cannot be directed to run consecutively. The provisions of Section 427 (2) apart, in *Ranjit Singh's* case (supra), this Court has in terms held that since life sentence implies imprisonment for the remainder of the life of the convict, consecutive life sentences cannot be awarded as humans have only one life. That logic, in our view, must extend to Section 31 of the Cr.P.C. also no matter Section 31 does not in terms make a provision analogous to Section 427 (2) of the Code. The provision must, in our opinion, be so interpreted as to prevent any anomaly or irrationality. So interpreted Section 31 (1) must mean that sentences awarded by the Court for several offences committed by the prisoner shall run consecutively (unless the Court directs otherwise) except where such sentences include imprisonment for life which can and must run concurrently. We are also inclined to hold that if more than one life sentences are awarded to the prisoner, the same would get super imposed over each other. This will imply that in case the prisoner is granted the benefit of any remission or commutation *qua* one such sentence, the benefit of such remission would not *ipso facto* extend to the other.

21. We may now turn to the conflict noticed in the reference order between the decisions of this Court in *Cherian and Duryodhan's* cases (supra) on the one hand and *Kamalanatha and Sanaullah Khan's* cases (supra) on the other.

22. In *O.M. Cherian's* case (supra) the prisoner was convicted and sentenced to imprisonment for offences punishable under Sections 498 A and 306 of the IPC. The Courts below had in that case awarded to the convicts imprisonment for two years under Section 498 A of the IPC and seven years under Section 306 of IPC and directed the same to run consecutively. Aggrieved by the said direction, the prisoners appealed to this Court to contend that the sentences awarded to them ought to run concurrently and not consecutively. The appeal was referred to a larger bench of Three Judges of this Court in the light of the decision in *Mohd. Akhtar Hussain @ Ibrahim Ahmed Bhatti vs. Assistant Collector of Customs (Prevention), Ahmedabad and Anr.* (1988) 4 SCC 183. Before the larger bench, the prisoners relied upon *Mohd Akhtar Hussain's* case (supra) and *Manoj @ Panu vs. State of Haryana* (2014) 2 SCC 153 to contend that since the prisoners were found guilty of more than two offences committed in the course of one incident, such sentences ought to run concurrently. This Court upon a review of the case law on the subject held that Section 31 of the Cr.P.C. vested the court with the power to order in its discretion that the sentences awarded shall run concurrently in case of conviction of two or more offences. This Court declared that it was difficult to lay down a straightjacket rule for the exercise of such discretion by the courts. Whether a sentence should run concurrently or consecutively would depend upon the nature of the offence and the facts and circumstances of the case. All that could be said was that the discretion has to be exercised along judicial lines and not mechanically. Having said that, the Court observed that if two life sentences are imposed on a convict the court has to direct the same to run concurrently. That is because sentence of imprisonment for life means imprisonment till the normal life of a convict.

23. As noticed above, *Cherian's* case (supra) did not involve awarding of two or more life sentences to the prisoner. It was a case of two term sentences being awarded for two different offences committed in the course of the same transaction and tried together at one trial. Even so, this Court held that life sentences cannot be made to run consecutively plainly because a single life sentence ensures that the remainder of the life of the prisoner is spent by him in jail. Such being the case, the question of a second such sentence being undergone consecutively did not arise.

24. In *Duryodhan Rout's* case (supra) the prisoner was convicted for offences punishable under Sections 302, 376 (2)(f) and 201 of the IPC and sentenced to death for the offence of murder and rigorous imprisonment for the offence punishable under Section 376(2)(f). Imprisonment for a period of

one year was additionally awarded under Section 201 of IPC with a direction that the sentences would run consecutively. In appeal, the High Court altered the sentence of death to imprisonment for life while leaving the remaining sentences untouched. The petitioner then approached this Court to argue that the sentences ought to run concurrently and not consecutively as directed by the Courts below. Relying upon the decision of this Court in *Gopal Vinayak's* case (supra) and several other subsequent decisions on the subject this Court held that the sentence of imprisonment for life means imprisonment for the remainder of the life of the prisoner. The Court further held that Section 31 of the Cr.P.C. would not permit consecutive running of life sentence and the term sentence since the aggregate punishment of the petitioner would go beyond the outer limit of 14 years stipulated in the proviso to Section 31(2) of the Cr.P.C. The Court observed:

> *"Section 31 of Cr.P.C. relates to sentence in cases of conviction of several offences at one trial. Proviso to Sub-Section (2) to Section 31 lays down the embargo whether the aggregate punishment of prisoner is for a period of longer than 14 years. In view of the fact that life imprisonment means imprisonment for full and complete span of life, the question of consecutive sentences in case of conviction for several offences at one trial does not arise. Therefore, in case a person is sentenced of conviction of several offences, including one that of life imprisonment, the proviso to Section 31(2) shall come into play and no consecutive sentence can be imposed."*

25. While we have no doubt about the correctness of the proposition that two life sentences cannot be directed to run consecutively, we do not think that the reason for saying so lies in the proviso to Section 31 (2). Section 31(2) of the Cr.P.C. deals with situations where the Court awarding consecutive sentences is not competent to award the aggregate of the punishment for the several offences for which the prisoner is being sentenced upon conviction. A careful reading of sub-Section (2) would show that the same is concerned only with situations where the Courts awarding the sentence and directing the same to run consecutively is not competent to award the aggregate of the punishment upon conviction for a single offence. The proviso further stipulates that in cases falling under sub-section (2), the sentence shall in no case go beyond 14 years and the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to award. Now in cases tried by the Sessions Court, there is no limitation as to the Court's power to award any punishment sanctioned by

law including the capital punishment. Sub-section (2) will, therefore, have no application to a case tried by the Sessions Court nor would Sub-section (2) step in to forbid a direction for consecutive running of sentences awardable by the Court of Session.

26. To the extent *Duryodhan Rout* case (supra) relies upon proviso to Sub-section (2) to support the conclusion that a direction for consecutive running of sentences is impermissible, it does not state the law correctly, even when the conclusion that life imprisonment means for the full span of one's life and consecutive life sentences cannot be awarded is otherwise sound and acceptable.

27. In *Kamalanantha vs. State of Tamil Nadu,* (2005) 5 SCC 194, the prisoners were convicted amongst others for offences under Sections 376, 302, 354 of the IPC and sentenced to under rigorous imprisonment for life for offences under Sections 376 and 302 and various terms of imprisonment for other offences with the direction that the sentences awarded shall run consecutively. One of the issues that was raised in support of the appeal was that the Courts below were not justified in awarding consecutive life sentences. That contention was rejected by a two-Judge Bench of this Court in the following words:

> *"The contention of Mr. Jethmalani that the term "imprisonment" enjoined in Section 31 CrPC does not include imprisonment for life is nacceptable.The term "imprisonment" is not defined under the Code of Criminal Procedure. Section 31 of the Code falls under Chapter III of the Code which deals with power of courts. Section 28 of the Code empowers the High Court to pass any sentence authorised by law. Similarly, the Sessions Judge and Additional Sessions Judge may pass any sentence authorized by law, except the sentence of death which shall be subject to confirmation by the High Court. In our opinion the term "imprisonment" would include the sentence of imprisonment for life."*

28. The above view runs contrary to the ratio of this Court's decision in *Cherian's* case *(supra)* and *Duryodhan Rout's* case *(supra).* That apart the view taken in *Kamalanantha's* case has not noticed the basic premise that a life sentence once awarded would imply that a prisoner shall spend the remainder of his life in prison. Once that happens there is no question of his undergoing another life sentence. To the extent the decision in *Kamalanantha's* case takes the view that the Court can for each offence award suitable punishment which may include multiple sentences of

imprisonment for life for multiple offences punishable with death, there is and can be no quarrel with the stated proposition. The Court can and indeed ought to exercise its powers of awarding the sentence sanctioned by law which may include a life sentence. But if the decision in *Kamalanantha* purports to hold that sentence of imprisonment for life can also be directed to run consecutively, the same does not appear to be sound for the reasons we have already indicated earlier. We need to remember that award of multiple sentences of imprisonment for life so that such sentences are super imposed over one another is entirely different from directing such sentence to run consecutively.

29. *Sanaullah Khan vs. State of Bihar,* (2013) 3 SCC 52 simply follows the view taken in *Kamalanantha's* case and, therefore, does not add any new dimension to call for any further deliberation on the subject.

30. We are not unmindful of the fact that this Court has in several other cases directed sentences of imprisonment for life to run consecutively having regard to the gruesome and brutal nature of the offence committed by the prisoner. For instance, this Court has in *Ravindra Trimbak Chouthmal vs. State of Maharashtra* (1996) 4 SCC 148, while commuting death sentence penalty to one of imprisonment for life directed that the sentence of seven years rigorous imprisonment under Section 207 IPC shall start running after life imprisonment has run its due course. So also in *Ronny vs. State of Maharashtra* (1998) 3 SCC 625 this Court has while altering the death sentence to that of imprisonment for life directed that while the sentence for all other offences shall run concurrently, the sentence under Section 376 (2)(g) shall run consecutively after running of sentences for other offences. To the extent these decisions may be understood to hold that life sentence can also run consecutively do not lay down the correct law and shall stand overruled.

31. In conclusion our answer to the question is in the negative. We hold that while multiple sentences for imprisonment for life can be awarded for multiple murders or other offences punishable with imprisonment for life, the life sentences so awarded cannot be directed to run consecutively. Such sentences would, however, be super imposed over each other so that any remission or commutation granted by the competent authority in one does not *ipso facto* result in remission of the sentence awarded to the prisoner for the other.

32. We may, while parting, deal with yet another dimension of this case argued before us namely whether the Court can direct life sentence and term

sentences to run consecutively. That aspect was argued keeping in view the fact that the appellants have been sentenced to imprisonment for different terms apart from being awarded imprisonment for life. The Trial Court's direction affirmed by the High Court is that the said term sentences shall run consecutively. It was contended on behalf of the appellants that even this part of the direction is not legally sound, for once the prisoner is sentenced to undergo imprisonment for life, the term sentence awarded to him must run concurrently. We do not, however, think so. The power of the Court to direct the order in which sentences will run is unquestionable in view of the language employed in Section 31 of the Cr.P.C. The Court can, therefore, legitimately direct that the prisoner shall first undergo the term sentence before the commencement of his life sentence. Such a direction shall be perfectly legitimate and in tune with Section 31. The converse however may not be true for if the Court directs the life sentence to start first it would necessarily imply that the term sentence would run concurrently. That is because once the prisoner spends his life in jail, there is no question of his undergoing any further sentence. Whether or not the direction of the Court below calls for any modification or alteration is a matter with which we are not concerned. The Regular Bench hearing the appeals would be free to deal with that aspect of the matter having regard to what we have said in the foregoing paragraphs.

33. The reference is accordingly answered.

Reference answered.

2016 (II) ILR - CUT- 245

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

WRIT APPEAL NO. 70 OF 2016

AMRUTI PRADHAN ……..Appellant

.Vrs.

STATE OF ORISSA (FOREST & ENVIRONMENT DEPTT.) & ORS. ……..Respondents

WILD LIFE (PROTECTION) (ODISHA) RULES, 1979 – RULES 45AA, 45DD

Death of appellant's husband being attacked by wild animal while collecting mushroom inside the reserved forest area – Writ filed claiming compensation – Writ dismissed by the learned Single Judge –

Hence this appeal – Since the husband of the appellant entered into the reserved forest area at his own risk and was not legally permitted for the same, the appellant is not entitled to receive compensation under Rule 45AA in view of the exception provided under Rule 45DD – Rather the husband of the appellant is liable for commission of offence U/s.27 of the Odisha Forest Act, 1972 – Held, no illegality in the order of the learned Single Judge for interference – Writ appeal is dismissed.

(Paras 6 to 10)

Case Laws Referred to :-

1. AIR 1955 SC 376 : Jugalkishore Saraf v. M/s. Raw Cotton Co. Ltd.,
2. AIR, 1961 SC 674 : Shri Ram Daya Ram v. State of Maharashtra
3. AIR, 1968 SC 247 : Electrical Manufacturing Co. Ltd. v. D.D. Bhargava
4. AIR 1997 SC 1165 : Mohammad Ali Khan v. Commissioner of Wealth Tax,
5. AIR 2003 SC 317 : Colgate Palmolive (India) Ltd. v. M.R.T.P. Commission
6. AIR 2007 SC 2018 : State of Rajasthan v. Babu Ram
7. AIR 2007 SC 2245 : State of Haryana v. Suresh

For Appellant : M/s. Sanjib Mohanty & B.Biswal
For Respondents : Mr. B.P.Pradhan, Addl. Govt. Adv.

Date of Hearing : 20.06.2016
Date of Judgment : 20.06.2016

JUDGMENT

VINEET SARAN, C.J.

The husband of the appellant died on account of attack by wild animal in the reserved forest area. The writ petitioner-appellant claimed compensation under the provisions of the Wildlife (Protection) (Orissa) Rules, 1974. When no such compensation was paid, the appellant filed the writ petition bearing W.P.(C) No. 24319 of 2012 praying for a direction to the respondents for payment of compensation under the aforesaid Rules, 1974 (wrongly mentioned in the prayer as Wildlife (Protection) (Orissa) Amendment Rules 2011). The writ petition having been dismissed vide order of the learned Single Judge dated 14.01.2016, the present appeal has been filed.

8. Mr. S. Mohanty, learned counsel for the appellant submitted that the claim for payment of compensation was made under the Rules, 1974 whereas the learned Single Judge, while dismissing the writ petition, considered the provisions of the Orissa Forest Act, 1972 and hence the said order dated 14.01.2016 passed by the Single Judge is liable to be quashed.

9. Mr. B.P. Pradhan, learned Addl. Government Advocate has pointed out that under Section 27 of the Orissa Forest Act, 1972, it is an offence for any person to go inside the reserved forest area for any purpose, including removal of any forest produce.

10. The admitted facts of the case are that the husband of the appellant had gone into the reserved forest area for collecting mushroom, when he was attacked by wild animal and had succumbed to the injuries. The appellant claims that under Rule 45-AA of the Rules, 1974, compensation of Rs. 2.00 lakh is to be paid in case of death being caused by attack of the wild animal.

11. The Parliament has enacted an Act, to provide for the protection of wild animals, birds and plants and for matters connected therewith or ancillary or incidental thereto with a view to ensuring the ecological and environmental security of the country, called " The Wild Life (Protection) Act, 1972 (hereinafter referred to "1972 Act"). Section 64 of the 1972 Act states about the power of the State Government to make Rules. As per sub-section(1) of Section 64, the State Government may, by notification, make rules for carrying out the provisions of 1972 Act in respect of matters which do not fall within the purview of Section 63. In exercise of the powers conferred by Section 64 of the 1972 Act, the State Government has framed the Rules called "The Wild Life (Protection)(Orissa) Rules, 1974 (hereinafter referred to "1974 Rules"). Chapter-VAA has been substituted by incorporating Rule 45-AA to 45-JJ. Rule 45-AA and Rule 45-DD being relevant are extracted hereunder:

> "**45-AA. Compassionate payment on account of Human Kills-** In case of death of human beings caused by attack of Tiger, Leopard, Elephant, Crocodile, Sloth Bear, Indian Wolf locally called as 'Ram Siala', Boar, Gaur and Wild Dogs within a forest area or within a belt of five kilometers from the limits thereof compassionate payment of Rupees one lakh shall be made
>
> **45-DD. Exception in certain cases** – Notwithstanding anything contained in Rules 45-AA, 45-BB, and 45-CC, no compassionate payment shall be made under the said rules:

(i) for any case of death or injury caused a reserve forest, sanctuary, National Park, Game Reserve or inside a closed area if the entry of the human being thereto was not legally authorized:

(ii) for any case of death or injury caused during the period when the human being was engaged in an illegal activity punishable under the

Wild Life (Protection) Act, 1972, the Orissa Forest Act, 1981, the Orissa Kendu Leaves (Control of Trade) Act, 1961 and the Rules made thereunder:

(iii) for any case of death of cattle caused inside a reserved forest, Sanctuary, National Park, Game Reserve or inside a closed area"

12. The appellant claims compensation in view of the provisions contained in Rule 45-AA but Rule 45-DD of 1974 Rules provides for exception in certain cases. Sub-rule(1) of Rule 45-DD specifies that no compassionate payment shall be made under the rules, in case of death or injury caused in the reserved forest area, if the entry of the human being thereto was not legally authorized. It is not the case of the appellant that her husband was legally permitted to go inside the forest area for collection of mushroom. The husband of the appellant had entered into the reserved forest area at his own risk for which he was legally not permitted and as such, the case of the appellant would not be covered under the provisions of Rule 45-AA and would be squarely covered by the exception Clause (i) of Rule 45-DD of 1974 Rules.

13. The State legislature has enacted an Act to consolidate and amend the laws relating to protection and management of forests in the State called "The Orissa Forest Act, 1972". Section 27 of the said Act states about offences. The husband of the appellant having admittedly entered into the reserved forest area for the purpose of removal of forest goods, which is not legally authorized, is liable for commission of offence punishable under the said provisions of the Act.

14. On perusal of the provisions referred to above, it appears that the language of the provisions of the Act read with the Rules are very plain and simple. In **Jugalkishore Saraf v. M/s. Raw Cotton Co. Ltd.,** AIR 1955 SC 376, the apex Court held that cardinal rule of construction of statute is to read the statute literally, that is, by giving to the words used by the legislature their ordinary, natural and grammatical meaning. The said principle has be reiterated in **Shri Ram Daya Ram v. State of Maharashtra,** AIR, 1961 SC 674**, Electrical Manufacturing Co. Ltd. v. D.D. Bhargava,** AIR, 1968 SC 247**, Mohammad Ali Khan v. Commissioner of Wealth Tax,** AIR 1997 SC 1165**, Colgate Palmolive (India) Ltd. v. M.R.T.P. Commission,** AIR 2003 SC 317**, State of Rajasthan v. Babu Ram,** AIR 2007 SC 2018**, State of Haryana v. Suresh,** AIR 2007 SC 2245.

15. There is no ambiguity in the provisions of the Act and Rules referred to above and giving a plain meaning to the same it appears that the husband of the appellant having violated the provisions of the Act and Rules by entering into the reserved forest area, where his death was caused by the wild animal, for the purpose of collecting forest produce, it would not entitle the appellant to claim compensation, particularly when exception has been given under Rule 45-DD of the 1974 Rules that no compensation is to be paid in case of death or injury caused inside reserved forest area.

16. In the above view of the matter, this Court is of the considered opinion that the claim made by the appellant for grant of compensation due to the death of her husband has no merit. Accordingly, the writ appeal stands dismissed.

Writ appeal dismissed.

2016 (II) ILR - CUT- 249

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

W.P.(C) NO. 5133 OF 2015

M/S. BRG IRON & STEEL COMPANY (P) LTD. ……..Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART. 226

Show-cause notice issued to the petitioner asking to reply within three days – Non-supply of requisite materials – Time granted to submit reply is not sufficient – Issuance of show cause notice has become an empty formality, which does not comply with the principles of natural justice – Held, impugned show cause notice and the consequential action taken are quashed. (Paras 14,15,16)

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

1. (2001) 1 SCC 429 : State of Orissa & Ors. v. Union of India & Anr.
2. AIR 1988 SC 1531 : A.R. Antulay v. K.S. Nayak.
3. AIR 1981 SC 818 : Swadeshi Cotton Mills v. Union of India
4. AIR 2005 SC 2090 : Canara Bank v. Awasthy

For Petitioner : M/s. P.K.Mohanty, Sr. Cousel
D.N.Mohapatra, J.Mohanty, P.K.Nayak,
S.N.Dash, A.Das

For Opp. Parties : Sri P.K.Muduli, Addl.Standing Counsel

Date of Judgment : 18.05.2016

JUDGMENT

VINEET SARAN, C.J.

The petitioner-company, which is an integrated Steel Plant being incorporated as a Registered company under the Companies Act, 1956 and has its industry situated in the district of Dhenkanal, has filed this application challenging the demand and penalty made by the authorities on account of extraction of earth in the industrial premises, which was acquired and purchased by it in exercise of power under the Orissa Minor Mineral Concession Rules, 2004

2. The factual matrix of the case in hand is that the petitioner-company executed a Memorandum of Understanding (MOU) with the Govt. of Odisha on 04.05.2005 for establishment of a Steel Plant at Kurunti in the district of Dhenkanal and for the purpose of establishment of said plant the State Government had acquired the land, provided raw materials, energy, water supply and fuel available in the State with an objective to achieve the industrial growth, mineral development, economic growth and generation of employment in the State. As per the MOU, the petitioner's initial estimated investment was about Rs.228.05 crores for setting up of such industries. The Govt. of Odisha agreed to hand over about 250 acres of land through Odisha Industrial Infrastructure Development Corporation (IDCO) for construction of plant and allied facilities. In addition to the same, the company also purchased some extent of land and got the same mutated in its name. Accordingly, the petitioner-company set up its factory and plant in the year 2007 and the production started in the year 2008. It has also borne a cost of Rs.2.00 crores for conversion of kissam of land in terms of the provisions contained in Orissa Land Reforms Act, 1962. The petitioner-company had utilized and removed the earth from its premises. Consequentially, the Tahasildar, Odapada vide letter no.2430 dated 16.12.2009 called upon the petitioner-company to show cause within three days from the date of receipt of the letter as to why action under OMMC Rules, 2004 shall not be taken on the strength of the report of the Revenue Inspector, Motanga for use and extraction of 299250 CMs of earth for the purpose of use by it within the

area acquired by it in OMMC No. 49 of 2009. Submission of show cause reply within three days practically could not have been done, but the petitioner company filed show cause reply on 21.12.2009 denying the allegations stating that the proceeding has to be dropped and urged that copy of the report of the Revenue Inspector as mentioned in the show cause reply be provided to it to give its effective reply, but the same has not been supplied to it. Against the said order, the petitioner company had earlier approached this Court by filing W.P.C. No. 18666 of 2010 and this Court disposed of the said writ petition vide order dated 3.9.2014 granting liberty to the petitioner to file appeal under Rule 64 of the Orissa Minor Minerals Concession Rules, 2004. Accordingly, OMMC Appeal Case No. 1 of 2014 was filed on 20.11.2014, which was disposed of on 19.02.2015 rejecting the contention raised by the petitioner and directing payment of Rs.42,14,500/- pursuant to the letter no.2562 dated 24.12.2009 of the Tahasildar, Odapada and another notice no.2313 dated 31.07.2014 to deposit Rs.70,63,200/- by compounding the principal with interest after lapse of long five years. Hence, this petition.

3. Mr. P.K. Mohanty, learned Sr. Counsel appearing for the petitioner strenuously urged that adequate opportunity of hearing has not been given to the petitioner-company nor the order has been passed in compliance to the principles of natural justice. He contended that the demand so raised is arbitrary and unreasonable and violative of the provisions contained in OMMC Rules and as such the order so passed by the authorities cannot sustain in the eye of law. Thereby, he seeks for quashing of the same.

4. Mr. P.K. Muduli, learned Addl. Standing Counsel for the State-opposite parties justifying the order passed by the authorities states that the petitioner-company is liable to pay the demand raised by the authorities, which is in consonance with the provisions contained in OMMC Rules, 2004. To substantiate his contention, reliance has been placed on the judgment of the Apex Court in ***State of Orissa and others v. Union of India and another,*** (2001) 1 SCC 429.

5. On the basis of the facts pleaded above, both the parties do not dispute the factual matrix of the case and have agreed to dispose of the matter at the stage of admission. Accordingly, with the consent of the parties, the matter is heard and disposed of.

6. The facts having not been disputed by the parties, it appears that vide letter no.2430 dated 16.12.2009 in OMMC No. 49 of 2009 vide Annexure-4,

the Tahasildar, Odapada issued a show cause notice on illegal extraction and use of minor minerals basing on the report of the R.I. Motanga stating that the petitioner-company had extracted 299250 CMs of earth for the purpose of use by it within the area acquired by it without any supporting papers, which contravenes the provisions of OMMC Rules, 2004 and called upon the petitioner-company to show cause within three days of receipt of the letter as to why action will not be taken against it under OMMC Rules 2004, failing which action would be taken as per law. In response to the show cause notice issued on 16.12.2009, the petitioner-company requested vide letter dated 19.12.2009 to give at least one week time for complying the notice of show cause and finally it had submitted its reply on 21.12.2009 vide Annexure-6. In its reply, it has been specifically stated that the petitioner-company never used/extracted the above quantity of earth for the purpose of use by the company. The report of the R.I. Motanga in that regard is totally baseless and at no point of time, the R.I. Motanga had inspected the plant site in presence of the officials of the company. More so, request has been made to supply the report of the R.I. Motanga regarding illegal extraction of 299250 CMs earth for the use of the company for hearing of the matter. Without serving the said copy, demand has been raised for payment of royalty and penalty for use of minor mineral on 24.12.2009 vide Annexure-7. Challenging the same, the petitioner had earlier approached this Court by filing W.P.(C) No. 18666 of 2010 and this Court vide order dated 3.9.2014 disposed of the said writ petition with liberty to avail the alternative remedy under Section 64 of the Orissa Minor Minerals Concession Rules, 2004. Accordingly, the petitioner preferred OMMC Appeal Case No. 1 of 2014 raising similar grounds with regard to non-supply of the report of the R.I. Motanga and the calculation of extraction of 299250 CMs of earth basing upon which the royalty and penalty has been demanded. But the appellate authority without considering the same passed the order impugned directing for payment of Rs.70,63,200/-.

7. On perusal of the materials available on record, it appears that though the notice to show cause in Annexure-4 was issued solely basing upon the report of the R.I. Motanga that it has extracted 299250 CMs of earth for the purpose of use by the company, the report of the R.I. Motanga was not supplied to the petitioner-company even though the same was asked for. Further more with undue haste, the petitioner-company was called upon to file show cause reply within three days. This clearly indicates that the petitioner-company has not been given adequate opportunity to show cause and as such there has been violation of principle of natural justice which goes to the root of the matter.

8. In ***A.R. Antulay v. K.S. Nayak***, AIR 1988 SC 1531, the Apex Court held that by all standards, rules of natural justice are great assurances of justice and fairness.

9. In ***Swadeshi Cotton Mills v. Union of India***, AIR 1981 SC 818, it is held that the object underlying rules of natural justice is to protect fundamental liberties and civil and political rights. They, therefore, should be interpreted liberally so that they may conform, grow and tailor to serve public interest liberally and respond to the demands of an evolving society.

10. In ***Canara Bank v. Awasthy***, AIR 2005 SC 2090 and plethora of decisions of the Apex Court, it has been held that the golden rule which stands firmly established is that the doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice.

11. There is no dispute with regard to the law laid down by the Apex Court in ***State of Orissa and others*** mentioned (supra) referred by the opposite parties. But the present case factually stands on different footing than that of the judgment cited by learned Addl. Standing Counsel for the State. Therefore, this Court is of the considered view that the judgment relied upon by the Addl. Standing Counsel is not applicable to the present context.

12. In view of the law laid down by the Apex Court as discussed above, applying the same to the present context, it appears that the authorities have not complied the provisions of principles of natural justice inasmuch as while disposing of the W.P.(C) No. 18666 of 2010, this Court granted liberty to the petitioner to prefer appeal and in appeal also such question was raised but the same has not been answered by the appellate authority.

13. Merely by issuing notice to show cause, without supplying the material (which was the report of R.I. in the present case) and not granting adequate time to file reply, would not amount to compliance of the principles of natural justice. The purpose of issuing show cause notice is to give proper opportunity to the party to submit its reply, for which, not only sufficient time should be granted, but the requisite material should also be provided, as well as furnish reasons/grounds for which cause is to be shown, or else it would only be an empty formality.

14. In the present case, the show cause notice dated 16.12.2009 issued to the petitioner merely states that it was reported by the R.I., Motenga that the petitioner 'used/extracted 2,99,250 C.Ms of earth for the purpose of use by the company' and the reply was to be submitted within three days. The notice neither says as to when the earth was extracted or used by the company nor

was the report of the R.I. provided to the petitioner, despite their asking for the same.

15. In view of the aforesaid, this Court is of the considered view that neither the petitioner was provided the requisite material and information on the basis of which reply was to be furnished nor was sufficient time given to the petitioner to submit the reply. As such, the issuance of show cause notice was an empty formality, which does not comply with the principles of natural justice.

16. For the foregoing reasons, this Court has no hesitation to quash the notice of show cause dated 16.12.2009 (Annexure-4) and the consequential action taken as well as the demands raised vide Annexures- 7, 9, 11 and 12. Accordingly, the same are hereby quashed and remanded to the Tahasildar, Odapada to take necessary steps in consonance with the provisions of law and in compliance with the provisions of natural justice, in the light of the observations made herein above.

17. With the aforesaid observations and directions, this writ petition stands allowed to the extent indicated above. However, there is no order as to costs.

Writ petition allowed.

2016 (II) ILR - CUT- 254

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

W.P.(C) NO. 20674 OF 2015

CHITTA RANJAN BEHERA & ORS. ....Petitioners

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ARTS. 226, 227

Writ jurisdiction – Persons seeking equity must do equity – They should approach the Court not only with clean hands but also with clean heart and clean objective – Wide jurisdiction of the Court should not become a source of abuse of the process of law by the disgruntled litigant – No litigant can play “hide and seek” with the Courts or adopt “Pick and Choose” – True facts ought to be disclosed as the Court knows law, but not facts – One who does not come with candid facts

and clean breast, can not hold a writ of the Court with soiled hands – Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy – A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

In this case petitioners challenge the inquiry report submitted by the expert committee pursuant to the judgment Dt. 07.09.2012 passed in W.P.(C) No. 13305 of 2008 on the ground that they were not heard by the Committee and there was non-compliance of the principles of natural justice – However it appears from record that petitioner Nos. 1, 2 & 4 alongwith other villagers had represented village Sanamunda before the expert committee on 16.05.2013 so the question of any exparte hearing by the expert committee is bereft of records and the allegations of the petitioners that they were not given opportunity of hearing before the expert committee is misconceived, so the petitioners having not come to the Court with clean hands, the writ application filed by them merits no consideration, hence dismissed. (Paras 9 to16)

Case Laws Referred to :-

1. AIR 1993 SC 852 : Ramjas Foundation -V- Union of India
2. (1995) 1 SCC 242 : Noorduddin -V- K. L. Anand
3. (2010) 2 SCC 114 : AIR 2010 SC (Supp)116 : Dalip Singh -V-State of U.P.

For Petitioners : M/s. R.K.Mohanty, Sr. Adv. & M/s. S.Mishra, B.Mohanty, S.K.Samantray, D.Priyanka & E.Agarwal.

For Opp. Parties:M/s. Ashok Mohanty & S.K.Padhi, Sr. Advocates, and M/s. A.Dey & B.Panigrahi. Mr. P.K.Muduli, Addl.Standing Counsel.

Date of hearing : 30.06.2016
Date of judgment : 05.07.2016

JUDGMENT

Dr. B.R. SARANGI, J.

Petitioners, who are residents of village Sanamunda, have filed this writ petition in the nature of public interest litigation to quash the inquiry report dated 03.07.2013 vide Annexure-1 and further seeks for a direction to the opposite parties not to raise any embankment in Satrusagar Tank/Multi Irrigation Project (MIP).

2. The factual matrix of the case in hand is that the Satrusagara tank covering an area of about Ac.12.00 is existing in the village Sanamunda under the Kantamili Gram Panchayat in the district of Dhenkanal from time immemorial. It is a hilly area having no other water source. The only source of income of almost all the villagers being agriculture, about 200 years ago the ex-ruler, for the benefit of his subjects (villagers), dug out the said tank with a view to making the water available for all purposes. The villagers are using the tank for the purpose of irrigation, drinking and washing. Besides the villagers of Sanamunda, other three to four villagers also depend upon the said tank water. Originally, the tank was under the control of the ex-ruler, whose name was recorded in 1910 settlement, and the same was pertaining to one plot bearing Sabik Plot No. 1989 under Mouza Sanamunda. After the estate was abolished in or about 1958, the State Government became the owner of the said Satrusagar Tank. The dispute started, when in 1965 settlement the said tank was recorded, as Plot No. 1562, Khata No. 166 measuring Ac.7.23 dec., in the name of village Sanamunda, and Plot No. 512, Khata No. 100 measuring Ac. 4.45 dec., in the name of village Jharabeda, which are two adjoining villages in Hindol block in the district of Dhenkanal. Though such recording was erroneous one, as alleged, but major chunk of area stands in the name of village Sanamunda, whereas smaller chunk of area was recorded in the name of village Jharabeda. In any case, residents of both the villages share the water of Satrusagar Tank. The said tank/MIP caters to the need of two villages. Pursuant to such settlement recording of 1965, Satrusagar MIP has been allocated to Sanamunda village, whereas Satrusagar tank has been allocated to Jharabeda village. The tank which has been allocated to Jharabeda village is perennially without water as the level of part of the tank, is at much higher level vis-à-vis the level of the tank at the site of Sanamunda village. Thus, all the water flows down to the side of Sanamunda village, as there is no embankment to provide minimum water level for the Jharabeda village. The villagers of Sanamunda had approached this Court by filing OJC No. 6151 of 1997 in the nature of public interest litigation, challenging the proposed action of raising embankment over Sanamunda Satrusagar MIP, which was disposed of on 31.07.1997 with direction that the authority shall not raise any embankment by dividing the above project into two parts so as to interfere with the irrigation rights. The Gram Panchyat was also directed not to put the project to auction for the purpose of pisciculture. Pursuant to such direction of this Court, the dispute was resolved permanently and the villagers of both the villages were using the said tank water for all necessary purposes. But, the villagers of Jharabeda created

dispute by raising an embankment in the tank at the boundary line of village Jharabeda and Sanamunda. Aggrieved by such action of the villagers of Jharabeda, the villagers of Sanamunda raised a complaint before the Sub-Collector, Hindol and Inspector-in-charge, Balimi for necessary action. Pursuant to such complaint of the villagers of village Sanamunda, a meeting was convened to resolve the dispute amicably. Accordingly, with an agreement of both the villagers, it was decided on 27.04.2012 not to raise any embankment in the pond and not to create any disturbance over use of pond water by restricting/prohibiting the others. The Satrusagar tank allocated to Jharabeda village is under the control of Panchayati Raj Department and Satrusagar MIP allocated to village Sanamunda is under the control of Irrigation Department. There are poles demarcating the two portions allocated to each of the villages.

3. In spite of the amicably settlement made on 27.04.2012, the villagers of Jharabeda again took steps to raise an embankment and put soil at the dividing line between both the villages. Consequentially, the villagers of Sanamunda will be debarred from getting benefit of the tank water. Against such action, the villagers of Sanamunda filed representation on 02.05.2012 before the B.D.O., Hindol, Sub-Collector, Hindol and Tahasildar, Hindol for necessary action, with a request to prevent the villagers of Jharabeda from raising any embankment in the middle of the tank.

At this juncture, the villagers of Jharabeda approached this Court by filing W.P.(C) No. 13305 of 2008 seeking direction to the opposite parties to provide an embankment in Satrusagar tank, which will facilitate the provision of adequate water for use of irrigation and other purposes. This Court disposed of the said writ petition on 07.09.2012 directing the opposite parties therein to take appropriate decision in the matter to construct an embankment between Satrusagar Tank and Satrusagar MIP or make such other provisions for availability of adequate water for the villagers of Jharabeda. Accordingly, it was further directed to constitute a team of experts to study the situation and take into consideration all the relevant aspects of the case and decide whether an embankment is necessary for the purpose of providing water to the villagers of Jharbeda within a period of three months from the date of receipt of certified copy of the judgment. It was also directed that the decision to be taken should be implemented as expeditiously as possible. In the said writ petition, the Sanamunda village committee was impleaded as opposite party no.8 and it was represented through its counsel. The order in question was passed in presence of the Sanamunda village committee. The

same was to be implemented in letter and spirit. But, the villagers of village Sanamunda filed a writ petition in the nature of public interest litigation bearing W.P.(C) (PIL) No. 11554 of 2012 seeking for a direction to the opposite parties to take necessary action to prevent the villagers of Jharabeda under Dhenkanal district from raising any embankment in the Satrusagar tank and further to direct them to excavate/lift the soil already dumped in the tank for the purpose of raising the embankment dividing the pond.

4. This Court, entertaining the said application on 18.02.2013, issued notice and passed interim orders in misc. case no. 3297 of 2013 to maintain status quo. The said interim order of status quo was extended from time to time till it was clarified/modified by order dated 27.07.2015 to the extent that instead of maintaining status quo in general, the villagers of village Jharabeda are directed not to raise any embankment in Satrusagar Tank till 07.08.2015. The said modified interim order was also extended from time to time till 02.02.2016, when it was directed that the said interim order dated 27.07.2015 shall continue to operate till further orders. When W.P.(C) (PIL) No. 11554 of 2012 was pending for consideration, in compliance of the order passed by this Court in W.P.(C) No. 13305 of 2008 disposed of on 07.09.2012, the inquiry was conducted by the authority in presence of both the villagers, namely, Jharabeda and Sanamunda and inquiry report dated 03.07.2013 (Annexure-1) was submitted, which has been sought to be quashed by this Court in the present writ petition.

5. Mr. R.K. Mohanty, learned Senior Counsel appearing for the petitioners strenuously urged that, while preparing the impugned inquiry report in Annexure-1, no opportunity of hearing has been given to the villagers of Sanamunda and, as such, the same is liable to be quashed.

6. Mr. P.K. Muduli, learned Additional Standing Counsel appearing for the State vehemently urged that the authorities having caused enquiry in compliance of the judgment dated 07.09.2012 passed in WP(C) No.13305 of 2008 by affording opportunity of hearing to all the parties including the villagers of Sanamunda, interference of this Court is not warranted for and, hence, the writ petition is liable to be dismissed.

7. Mr. Ashok Mohanty, learned Senior Counsel appearing for the intervenor opposite party strenuously urged that the petitioners have not approached this Court with clean hands, rather they have placed the facts which are contrary to the records, inasmuch as the inquiry has been conducted in presence of villagers of Sanamunda including the petitioner no.1 who was present on behalf of Sanamunda village while conduct of the

inquiry. Therefore, the inquiry having been conducted in compliance of the judgment dated 07.09.2012 passed by this Court in WP(C) No.13305 of 2008, the same may not be interfered with by this Court in the present proceeding.

8. Considering the contentions raised by learned counsel appearing for the respective parties and having glanced through the records, it appears that the facts recapitulated hereinabove are not in dispute. Only question, which was raised by Mr. R.K. Mohanty, learned Senior Counsel appearing for the petitioners, is that there was non-compliance of the principles of natural justice, while conducting the inquiry in consonance with the judgment dated 07.09.2012 passed by this Court in WP(C) No.13305 of 2008, which is to be examined on the basis of the materials available on record. The present writ application having been filed by the villagers of Sanamunda, was heard analogously with W.P.(C) No.11554 of 2012, which was also filed by the said villagers. In the meantime, the pleadings of W.P.(C) No.11554 of 2012 having been exchanged and on submission of the inquiry report by the authority, the said application having become infructuous, Mr. R.K.Mohanty, learned Senior Counsel appearing along with Mr. B.Mohanty, learned counsel on behalf of the petitioners stated that the relief sought having been mitigated, the petitioners therein do not wish to press the said application, and accordingly the same was disposed of vide order dated 30.06.2016, as not pressed by the petitioners and the interim orders passed in the said case were also directed to be vacated.

9. In the present writ application, the consequences of submission of the inquiry report pursuant to the judgment dated 07.09.2012 passed in WP(C) No.13305 of 2008 having been challenged on the ground of non-compliance of principles of natural justice, it is specifically pleaded in Para 18 of the writ application stating that due to such ex parte report in Annexure-1 the villagers of Sanamunda are going to suffer and, therefore, those villagers pray for constitution of an expert committee afresh and to visit the spot and submit report to this Court to resolve the dispute for all time to come. There is no factual dispute involved in the case, save and except to see, while conducting inquiry principles of natural justice has been complied with or not. Therefore, with the consent of the learned counsel for the parties, without calling for counter affidavit, the matter has been heard and disposed of at the stage of admission.

10. As it appears from the records, in compliance of judgment 07.09.2012 passed by this Court in WP(C) No.13305 of 2008 (Brajabandhu Nath & Ors.

V. State of Orissa & Ors.) an expert team was constituted comprising members from different departments under the chairmanship of Project Director, DRDA, Dhenkanal to study the situation of villages, namely, Jharabeda and Sanmunda of Hindol Block and to take into consideration all the relevant aspects of the case and to decide whether an embankment is necessary for the purpose of providing water to the villagers of Jharabeda. Such constitution of committee has been made by the Collector-cum-District Magistrate, Dhenkanal on 01.02.2013. Accordingly, due notice was issued and all the committee members were present on 16.05.2013 for causing an inquiry including the representatives of Jharabeda and Sanamunda villages. They were all present at the time of conducting inquiry. It appears that ten number of villagers representing Jharabeda and ten number of villagers representing Sanamunda along with the Sarapanch of Kantimili were present before the expert team and they had given personal hearing and consequentially the impugned inquiry report has been submitted, wherein following suggestions have been made:

"1. For smooth necessity of water of two villagers of village Jharabeda and Sanamunda one earthen embankment is to be constructed in the demarcated area before two water bodies with a cement concrete structure head wall of 1 mtr height of 10 mtr length.

2. The embankment will be done after renovation of Jharabeda tank till maintaining the equal earthen bed level of two projects i.e. minimum 2 mtr below the sluice level.

3. The height of the earthen embankment should be equal level with the Satrusagar MIP."

11. It appears that petitioner no.1 Chitta Ranjan Behera, petitioner no.2 Bibhudendu Nath and petitioner no.4 Tarani Sen Nath along with other villagers, are signatories to have represented the village Sanamunda before the expert committee on 16.05.2013. The petitioners having participated in the process of inquiry before the expert committee, the allegations that they were not given opportunity of hearing is absolutely misconceived one, inasmuch as they have not approached this Court with clean hands. Therefore, the question of any ex parte hearing by the expert committee is bereft of records.

12. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the *equi-fundamentals of judicious litigation*. The legal maxim ***jure naturae aequum est neminem cum alterius detrimento et injuria fiery locupletiorem***, which

means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the Court should not become a source of abuse of the process of law by the disgruntled litigant. No litigant can play 'hide and seek' with the Courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the Court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy.

13. In ***Ramjas Foundation v. Union of India***, AIR 1993 SC 852 the Apex Court held that when a person approaches a Court of equity in exercise of its extraordinary jurisdiction under Article 226/ 227 of the Constitution, he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective.

14. In ***Noorduddin v. K.L. Anand***, (1995) 1 SCC 242, the apex Court observed as follows:

> *"……….Equally, the judicial process should never become an instrument of appreciation or abuse or a means in the process of the Court to subvert justice."*

15. In ***Dalip Singh v. State of Uttar Pradesh***, (2010) 2 SCC 114 : AIR 2010 SC (Supp) 116, the Apex Court noticed an altogether new creed of litigants, that is, dishonest litigants and went on to strongly deprecate their conduct by observing that, the truth constitutes an integral part of the justice delivery system. The quest for personal gain has become so intense that those involved in litigation do not hesitate to seek shelter of falsehood, misrepresentation and suppression of facts in the course of court proceedings. A litigant who attempts to pollute the stream of justice, or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

16. In view of the foregoing discussions, this Court is of the considered opinion that on the basis of the materials available on record, the contention raised that there was non-compliance of principles of natural justice cannot be sustained and as such, in our opinion, the petitioners having not come to the Court with clean hands, the writ application merits no consideration and is accordingly dismissed. No order as to cost.

Writ application dismissed.

2016 (II) ILR - CUT-262

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

W.A. NO. 555 OF 2015

JAYANTIBALA PATI ……..Appellant

.Vrs.

THE A.D.M., JAGATSINGHPUR & ORS. ……..Respondents

CONSTITUTION OF INDIA, 1950 – ART. 226

Advertisement for appointment of Anganwadi Worker – Both appellant and respondent No.3 applied for the post – Appellant got selected and engaged under preferential category of physically handicapped – Respondent No. 3 without raising any objection as required under the guidelines, challenged the selection of the appellant having participated in the selection process – Merely because she could not come out successful, she can not raise objection with regard to the selection of the appellant – Moreover, respondent No. 3 having not raised any objection in the appeal preferred by her with regard to the genuineness or correctness of the physically handicapped certificate granted by the competent Medical Board she can not make out a new case in the writ application preferred by her to frustrate the claim of the appellant – Held, the learned single judge has committed gross error apparent on the face of the impugned order, which can not sustain in the eye of law, hence the same is quashed – If the appellant is continuing in the said post, she shall be allowed to continue in service as before. (Paras 13,14)

Case Laws Referred to :-

1. AIR 1986 SC 1043 : Om Prakash Shukla -V- Akhlesh Kumar Shukla.
2. AIR 1995 SC 1088 : Madan Lal & Ors. -V- State of Jammu and Kashmir & Ors.

For Appellant :M/s. Dr. Manoranjan Panda, Sr. Adv. & Mrs. M.Panda

For Respondents :Mr. P.K.Muduli, Addl.Standing Counsel. Mr. A.P.Bose.

Decided on :13.07.2016

JUDGMENT

DR. B.R. SARANGI,J.

The appellant, being opposite party no.3 in the writ petition, has filed this intra-court appeal against the order dated 25.08.2015 passed by the

learned Single Judge in W.P.(C) No. 21730 of 2011 reversing the order dated 24.03.2011 passed by the Addl. District Magistrate, Jagatsinghpur in Anganwadi Appeal Case No.10 of 2010 quashing her selection as Anganwadi Worker and directing the authority to pass appropriate order regarding engagement of respondent no.3 against the said post.

2. The factual matrix of the case, succinctly put, is that respondent no.2 issued an advertisement on 08.09.2009 for engagement of Anganwadi Worker for seventy five additional Anganwadi Centres specifying the eligibility criteria for the candidates. The appellant and respondent no.3, who belong to village Jasobantapur under Jagatsinghpur Block, applied for the post of Anganwadi worker for the additional Anganwadi Centre, which was to be opened for Ward nos. 4 and 7 of village Jasobantapur under Jasobantapur Gram Panchayat in Jagatsinghpur Block. The last date of submission of the application was 29.09.2009 and scrutiny/verification of certificates was to be done between 01.10.2009 and 10.10.2009 in presence of the applicants. Objection, if any, was to be filed between 10.10.2009 and 19.10.2009. The scrutiny/appointment committee took into consideration such objection between 20.10.2009 and 28.10.2009 and proceeded with the selection process by adhering to the guidelines issued by the authorities from time to time. As per Clause-3 of the revised guidelines for selection of Anganwadi Worker issued by the Women and Child Development Department, Govt. of Odisha on 02.05.2007, which was then governing the field, it is clearly indicated therein that the minimum educational qualification for selection will be Matriculation. In the ITDA and MADA areas, however, if no Matriculate candidate is available, the educational qualification may be relaxed for the tribal candidates and SC candidates to Class-VIII examination from a recognized High School. Percentage of marks obtained in the Matriculation examination shall be the basis of drawing a merit list amongst the applicants. In addition to the above, preferential additional percentage of mark will be given to different categories. So far as physically handicapped women category is concerned, preferential mark of five percent is to be added. Following such guidelines, the appellant being a physically handicapped candidate, engagement order was issued in her favour on 11.12.2009, pursuant to which she joined against the said post and discharged her duty assigned to her. Respondent no.3, aggrieved by the selection of the appellant, preferred an appeal before the Sub-Collector on 21.12.2009, which was registered as Anganwadi Misc. Appeal Case No. 20 of 2009, but, since there was change of guidelines, she again preferred an

appeal before the Addl. District Magistrate, Jagatsinghpur, which was registered as Anganwadi Appeal Case No. 10 of 2010. The Addl. District Magistrate, Jagatsinghpur after hearing the parties dismissed the appeal vide order dated 24.03.2011 holding that the engagement of the appellant was legal and justified. Against the said order, respondent no.3 filed W.P.(C) No. 21730 of 2011 before this Court and the learned Single Judge allowed the writ petition vide order dated 25.08.2015 holding that the selection committee has given weightage by giving extra marks on the basis of the certificate dated 16.08.2009, which is not justified, and the selection and engagement of the appellant is not in consonance with the guidelines on the basis of which selection has been made. Accordingly, the learned Single Judge quashed the selection of the appellant and directed the competent authority to proceed with the matter by passing appropriate order regarding engagement of respondent no.3 within a reasonable period, preferably within a period of three weeks from the date of receipt of certified copy of the order. Hence this appeal.

3. Mrs. M. Panda, learned counsel for the appellant strenuously urged that the Govt. of Odisha in General Administration Department pursuant to the decision of the Government of India in the year 1978 and Section 32 of the Persons with Disabilities (Equal opportunities, Protection of right and Full participation) Act, 1995 prepared comprehensive list of posts suitable for persons disability, issued resolution and published in Orissa Gazete on 13th February, 2006, wherein “Anganwadi worker” finds place at Sl. No.2 of Group-D post. In the said list of categories of the persons with disabilities for purposes of reservation in employment, it has been mentioned as OL (one leg affected), BL(MNR) [both leg affected(Mobility not be restricted)], P.D. (Partially deaf). Further, the Government in its letter dated 2nd May, 2007 issued a revised guidelines in supersession of all previous guidelines/orders for selection and engagement of Anganwadi workers and subsequently issued a clarification on 01.08.2009. The same having been adhered to and the appellant having been duly selected and engaged as Anganwadi worker by getting preferential additional marks of five percent as a physically handicapped candidate, as she is having 45% prolapsed inter vertebral discard Neurological defect, which comes under the definition of disability under Section 2(1)(v) read with Section 2(t) of the 1995 Act, the learned Single Judge has committed gross error in quashing the selection of the appellant. It is further urged that with regard to the procedure envisaged under the guidelines dated 02.05.2007, especially in clauses-(c),(d) and (e),

respondent no.3 having not raised any objection in respect of the certificate produced by the appellant, she is estopped from raising such contention subsequently. As such, knowing fully well that the appellant's case has been considered under the category of physically handicapped and she is entitled to get five percent preferential marks and having participated in the process of selection, respondent no.3 cannot subsequently turn round and challenge her selection, as she could not come out successful. This aspect having not been considered by the learned Single Judge in the writ petition, a gross error apparent on the face of the record has been committed and, therefore, interference of this Court is warranted in this appeal.

4. Mr. P.K. Muduli, learned Addl. Standing Counsel appearing for the State strenuously urged that the selection of the appellant having been done in consonance with the guidelines issued by the State authorities and, more particularly, her case having been considered under the physically handicapped category pursuant to the certificate issued by the competent authority, the genuineness of which was not challenged by respondent no.3, she cannot assail the same subsequently in a writ application. More so, the consideration of the appellant having been done on the basis of the certificate issued by the competent authority under physically handicapped category and the same having not been objected to at the time of verification of the documents, which is required under the guidelines, respondent no.3 cannot urge that the selection of the appellant as Anganwadi worker is illegal. He, however, justifies with emphasis the order passed by the learned Addl. District Magistrate, Jagatsinghpur in Anganwadi Appeal Case No. 10 of 2010 disposed of on 24.03.2011.

5. Mr. A.P. Bose, learned counsel for respondent no.3 candidly admitted that at the time of scrutiny of the certificates, respondent no.3 had not raised any objection with regard to the physically handicapped certificate issued by the competent authority, but fairly admitted that the appellant has been selected under the physically handicapped category and, thereby, she has secured higher percentage of mark than that of respondent no.3. It is urged that if the preferential marks under the physically handicapped category would not have been awarded to the appellant, respondent no.3 would have a fair chance to be engaged as Anganwadi worker, as she secured higher marks than that of the appellant.

6. On the basis of the facts pleaded above and after going through the records, this appeal is being disposed of by affording opportunity of hearing to all the parties.

7. As the facts stated above are not in dispute, it is to be considered whether the learned Single Judge is justified in passing the order impugned by setting aside the selection and engagement of appellant as an Anganwadi worker pursuant to the advertisement issued on 08.09.2009. Admittedly, both appellant and respondent no.3 applied for the post of Anganwadi worker in respect of Jasobantpur Additional Anganwadi Centre for Ward nos. 4 and 7 of Jasobantapur Gram Panchayat of Jagatsinghpur Block and by following due procedure, as envisaged under the guidelines issued by the authority, the appellant was selected and engaged as Anganwadi worker under the preferential category of physically handicapped. The said selection was challenged by respondent no.3 by preferring an appeal before the Addl. District Magistrate, Jagatsinghpur being Anganwadi Appeal Case No. 10 of 2010. The pleadings made in the appeal memo are as follows:-

> *"1. That, the Appellant after her marriage on 29.04.07 has been residing permanently at village-Jasabantapur, under Ward No. 4 of Jasabantapur Grampanchayat, with her husband and in-laws, and in view of her such permanent residence the local Tahasildar, after proper enquiry has issued the Residential Certificate in her favour.*
>
> *2. That, the appellant is a Graduate in Class II Hon(s) in Political Science securing 67% in H.S.C. Examination.*
>
> *3. That, after the notification for the post of Anganwadi worker for a newly formed Anganwadi Centre in Ward No. 4 of Jasabantapur Gram Panchayat under Jagatsinghpur Panchayat Samiti, in the District of Jagatsinghpur, the appellant and the Respondent no.1 with other applicants applied for the said post.*
>
> *4. That, the application of the appellant is accompanied by her Educational Certificates, Residential Certificate along with all other necessary documents required for the said post. Similarly, other candidates also filed their application along with their required certificates.*
>
> *5. That, after verification of the Certificates of all the candidates it was found that the appellant has secured the highest marks and eligible for the said post and the appellant no.2 has opined that the letter of appointment would be sent to her in due process.*
>
> *6. That, the appellant believing the words of the Respondent no.2 remained silent awaiting the letter of appointment, but subsequently it is learnt that the Respondent no.1 has been selected in*

place of the appellant even though she has secured less marks and further it is also ascertained that the Respdt. No.2 under political influence has ignored the fundamental principle of natural justice, and taken such decision without complying the guidelines and principles and instructions framed by the authorities, on the subject. Hence this appeal.

Being aggrieved by such illegal order of appointment/selection of the Respondent no.1 the appellant above named, begs to prefer this appeal on the following amongst other.

GROUNDS

A) For that the selection of Respondent no.1 for the post of Anganwadi Worker for Ward No.4 of Josabantapur Gram Panchayat is illegal, not sustainable both in the eye of law and materials available on record, and hence the same is to be set aside.

B) For that when the appellant has secured the highest marks to the Respondent no.1, the C.D.P.O., the Respondent no.2 should have not issued the letter of appointment in favour of the Respondent no.1 and thereby the Respondent no.2 has committed serious illegality and hence the same to be set aside.

C) For that non-compliance of the statutory instructions issued by the authorities on the subject in case of Selection of Respondent no.1 by the Respondent no.2 is sheer arbitrary, illegal, without jurisdiction and liable to be cancelled.

D) For that when the provisions is to select the candidate for the post of Anganwadi Workers, who has secured the highest marks and the Respondent no.2 instead of selecting the Appellant, who has secured highest mark, selected the Respondent no.1 who has secured lowest mark is against the principle and as such, the said selection is to be cancelled.

E) For that non-selection of the Appellant without valid reason is perverse, vague and non-application of mind, and as such, the same is to be cancelled.

F) For that the Respondent no.2 has committed flagrant of mis - carriage of justice by not considering the selection in proper prospective, and hence is to be set aside.

g) For that the selection by the Respondent no.2 in selecting the Respondent no.1 to the post of Anganwadi Worker is otherwise illegal, and liable to be set aside.

PRAYER

It is, therefore, prayed that your honour would be graciously pleased to Admit this appeal, call for the records/report from the Respondent No.2, and after hearing, allow the appeal, set aside the selection of Respondent no.1, as Anganwadi Worker for the Ward No. 4 of Josabantapur G.P., and pass orders for selection/appointment of the appellant for the said post."

8. On perusal of the above mentioned appeal memo preferred by respondent no.3, it appears that she has not assailed the genuineness or correctness of physically handicapped certificate issued by the competent authority in favour of the appellant. The certificate dated 16.08.2009 for the persons with disabilities annexed to the writ appeal as Annexure-2 would show that a competent Medical Board has issued such certificate under Rule 4(2) of the Persons with Disabilities (Equal Opportunities, Protection of Right and full participation) Rules, 1995 and as per the guidelines given by the Ministry of Welfare, Government of India Gazette Notification dated 06.08.1986. In the said certificate, it is indicated that the appellant is 45% disabled having suffered from prolapsed inter vertebral discard Neurological defect. Such certificate has never been challenged by respondent no.3 at any stage nor has she raised any objection as per clauses- (c), (d) and (e) of the procedure envisaged in the guidelines issued by the authority dated 02.05.2007. But, the pleadings made in the appeal memo, which have been quoted above, do not indicate that in the appeal preferred before the learned Addl. District Magistrate, the genuineness of the certificate issued by the competent authority was challenged by respondent no.3. However, in the writ application filed by respondent no.3, before the learned Single Judge, she tried to make out a completely new case as to the genuineness of the certificate issued by the competent authority, which the learned Single Judge has taken into consideration and passed the impugned order.

9. The learned Addl. District Magistrate considering the grounds taken in the appeal memo categorically held that the appeal preferred by respondent no.3 has not whispered regarding the physically handicapped certificate issued by the District Medical Board, Jagatsinghpur in favor of the appellant. The notification provided to file objection in respect of physically handicapped certificate till 28.10.2009. Respondent no.3 having not preferred any objection in respect of physically handicapped certificate issued in favour of the appellant, prayer made at the time of hearing to verify

by one expert does not arise. From the letter issued on 15.09.2010 by the CDMO, Jagatsinghpur addressed to all the CDPO's, it appears that the name of the appellant has appeared at sl.no.8 of the verification report on authenticity of physically handicapped certificate issued in her favour. Therefore, disbelieving the said certificate does not arise. But only contention raised that respondent no.3 having secured higher percentage of marks in matriculation and if the preferential five percent of marks will not be added to the marks awarded to the appellant, respondent no.3 will be selected. This contention is also not correct and it is bereft of the record inasmuch as the selection committee including the CDPO, Jagatsinghpur verified all the certificates of the applicants, namely, Suhasini Panda, Surekha Rath-respondent no.3 and Jayantibala Pati-appellant and found that Suhasini Panda has secured 59.40%, Surekha Rath has secured 69.26% and similarly Jayantibala Pati has secured 69.40% marks, which is the highest percentage of marks among the applicants. In addition to the mark secured by the appellant, she has got extra five percent of preferential marks as she belonged to physically handicapped category pursuant to the certificate issued by the competent authority. Consequentially, the selection committee has selected her to be engaged as Anganwadi worker in respect of ward no.4 newly created under Jasobantapur Gram Panchayat of Jagatsinghpur Block. Therefore, no illegality and irregularity has been committed either by the selection committee or by the Addl. District Magistrate.

10. Apart from the above, as per the guidelines issued on 02.05.2007, under clause-(c) of the procedure, it is clearly stated that at the time of verification of documents of the applicants, in their presence, the CDPO would notify the names of the applicants in the office notice board, at the village, GP and Panchayat Samiti level. In case 16th day is a holiday then verification and notification of applicants will be done on the next working day. In clause-(d) of the procedure, it is stated that seven days time will be given for filing of objection, if any, by the community on the issue of nativity, educational qualification and caste certificate. Under clause-(e) it is stated that the selection committee may take seven days time to verify the objections received. At the time of verification of documents in presence of the applicants, respondent no.3 admittedly has not raised any objection with regard to the disability certificate issued by the Medical Board. Therefore, in subsequent stage in the writ application, respondent no.3 is estopped from raising such objection. Apart from the same, respondent no.3 having participated in the process of selection without raising any objection,

subsequently she having not been come out successful, cannot challenge the same.

11. In ***Om Prakash Shukla v. Akhilesh Kumar Shukla,*** AIR 1986 SC 1043, it has been clearly laid down by a Bench of three Judges of the Apex Court that when the petitioner therein appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

12. In ***Madan Lal and others v. State of Jammu and Kashmir and others,*** AIR 1995 SC 1088, it has been held that if a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted. In paragraph-9 of the said judgment it is held as follows:-

> *"9. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who take a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a Court of appeal and try to re-assess the relative merit of the concerned candidates who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee."*

13. Applying the above principles to the instant case, respondent no.3 having participated in the process of selection without raising any objection, as required under the guidelines issued on 02.05.2007, merely because she could not come out successful, she cannot raise objection with regard to the selection of the appellant. More so, in the appeal preferred by her,

respondent no.3 having not raised any objection with regard to the genuineness or correctness of the physically handicapped certificate granted by the competent Medical Board, in the writ application preferred by her, she cannot make out a new case to frustrate the claim of the appellant. In such view of the matter, we are of the considered view that the learned Single Judge has committed gross error apparent on the face of the record by passing the order impugned. Therefore, the order so passed by the learned Single Judge cannot sustain in the eye of law. Accordingly, the order dated 25.08.2015 passed by the learned Single Judge in W.P.(C) No. 21730 of 2011 is quashed.

14. While entertaining the appeal preferred by the appellant, this Court vide order dated 29.09.2015 in Misc. Case No. 744 of 2015 granted interim order directing that status quo as regards continuation of service of the appellant be maintained. But vide order dated 22.01.2016, this Court passed an order that learned counsel for the appellant is not present on the ground that he is sick, as stated by Smt. M. Panda, and this Court directed that the matter be listed on 01.02.2016 on the understanding that the *ad-interim* order is not operating and the appeal is supposed to be heard for final disposal. Meaning thereby, the interim order passed by this Court on 29.09.2015 even though was vacated on 22.01.2016, consequence thereof has not been given effect to. Learned counsel for the appellant states that the appellant is still continuing in service as Anganwadi Worker in respect of Ward no.4 of Additional Anganwadi Centre of Jasobantapur Anganwadi centre till date. Therefore, if the appellant is continuing in the said post, this Court makes it clear that she shall be allowed to continue in service as before.

15. With the above observation and direction, the writ appeal is allowed. No order as to cost.

Appeal allowed.

2016 (II) ILR - CUT- 272

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

W.P.(C) NO. 1881 OF 2016

M/S. B.M.P. & SONS PVT. LTD. ……..Petitioner

.Vrs.

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

TENDER – Though the petitioner was the lowest bidder, his tender was cancelled – The reason for cancelling his tender on the ground of suppression of the existing works undertaken by him as per clause-117 (a) of the DTCN is not correct – Moreover, the objection of the local MLA received by the tender committee have been considered without any rhyme and reason and without giving any opportunity of hearing to the petitioner – Held, depriving the petitioner of getting the contract, despite it being the lowest bidder, amounts to arbitrary and unreasonable exercise of power and as such the conclusion arrived at by the decision making process is contrary to the provisions of law – The impugned decision is quashed – Direction issued to the State-Opposite parties to take a fresh decision as expeditiously as possible.

(Paras 17,18)

Case Laws Referred to :-

1. (2000) 2 SCC 617 : Air India Ltd. -V- Cochin International Airport Ltd. & Ors.
2. (2007) 14 SCC 517 : Jagdish Mandal -V- State of Orissa & Ors.
3. AIR 1996 SC 11=(1994) 6 SCC 651 : Tata Cellular -V- Union of India
4. AIR 1990 SC 1031=(1990) 3 SCC 752 : Mahavir Auto Stores -V- Indian Oil Corporation
5. (2009) 1 SCC 150=AIR 2009 SC 684 : Karnataka State Forest Industries Corporation -V- Indian Rocks

For Petitioner : M/s.Milan Kanungo, Sr. Counsel
S.K.Mishra, P.S.Acharya, S.R.Mohanty,
Sk. Meherullah, B.P.Pattnaik.

For Opp. Parties : Mr. Ashok Mohanty, Sr. Counsel
Mr. B.K.Nayak-1.
Mr. P.K.Muduli, Addl.Standing Counsel.

Date of Hearing :19. 05.2016
Date of Judgment : 23.06. 2016

JUDGMENT

DR. B.R.SARANGI,J.

The petitioner, a Private Limited Company registered under the Companies Act, has filed this petition seeking to quash the award of tender

work pursuant to the proceedings of the tender committee meeting held on 05.12.2015 in Annexure-10 disqualifying the first lowest bidder and second lowest bidder as per clause-117 (a) of the Detailed Tender Call Notice (DTCN) for suppression of facts in respect of "Improvement of Kalunga-Bonai Road (MDR-26) from 45/000 KM to 54/000 KM under State Plan" and calling for the third lowest bidder for award of work in its favour.

2. The factual matrix of the case, in hand, is that opposite party no.2 floated a tender call notice on 10.06.2015 inviting tenders/bids from the intending tenderers/bidders to participate in the tender process for the work "Improvement of Kalunga-Bonai Road (MDR-26) from 45/000 KM to 54/000 KM under State Plan" which was subsequently modified/revised to certain extent pursuant to the order of opposite party no.2 dated 04.07.2015. The petitioner along with others submitted their tender bids and participated in the tender and on opening of the bids, it was found that the petitioner is the lowest bidder. Consequently it was called upon by opposite party no.2 vide letter dated 03.09.2015 to attend the office on or before 08.09.2015 for verification of the original documents, which the petitioner complied. Similarly, the second lowest tenderer, namely, Manju Acharya and the third lowest tenderer, namely, Promod Kumar Behera were called upon for verification of the original documents, but on verification of the documents, the bids of petitioner (L-1) and one Manju Acharya (L-2) have been rejected and Sri Promod Kumar Behera (L-3) has been called upon for negotiation. The reasons for non-consideration of the bids of petitioner (L-1) and one Manju Acharya (L-2) have been spelt out in the decision of the committee stating that the petitioner has suppressed two number of works and therefore, it incurred disqualification and accordingly, the tender committee decided not to award the work in its favour. So far as Manju Acharya (L-2) is concerned, her bid was also not considered as per Clause-117 (a) of the DTCN for suppression of facts. Hence, this petition.

3. Mr. Milan Kanungo, learned Sr. Counsel appearing for the petitioner strenuously urged that the non-awarding the work in favour of the petitioner on flimsy ground of suppression of two number of works, is misconceived one. It is contended that the mention made with regard to two number of works in the observation of the committee is without any basis and therefore, he seeks for a direction that the work should be awarded in favour of the petitioner.

4. Mr. P.K. Muduli, learned Addl. Standing Counsel for the State-opposite parties strenuously urged that on the basis of the materials available before this Court, an inventible conclusion can be drawn that there is suppression of fact by the petitioner and the authorities have acted in consonance with the conditions stipulated in the DTCN and therefore, due to suppression of facts as provided in Clause-117 (a) of the DTCN, the tender submitted by the tenderer is liable to be cancelled. In view of such power being exercised by the authority, no illegality or irregularity has been committed and therefore, the action taken against the petitioner is wholly and fully justified. To substantiate his contention, he has relied upon the judgments of the Apex Court in ***Air India Ltd. v. Cochin International Airport Ltd. and others,*** (2000) 2 SCC 617 and ***Jagdish Mandal v. State of Orissa and others,*** (2007) 14 SCC 517.

5. Mr. Ashok Mohanty, learned Sr. Counsel appearing for opposite party no.4 while supporting the contention raised by the learned counsel for the State submitted that since the petitioner has not complied with the conditions stipulated in the tender paper, the authorities are wholly and fully justified in not awarding the work in favour of the lowest bidder, the petitioner herein. Apart from the same, it is urged that as the State authorities have complied the norms, standard and procedure and that apart, the State has got absolute jurisdiction to choose its own method, in that case, the Court should not interfere with the decision making process in exercise of the power of judicial review and therefore, the writ petition filed by the petition should be dismissed.

6. Having heard learned counsel for the parties and after going through the records and examining the materials available before this Court, admittedly the opposite party-State floated a tender with value of work estimated at Rs.14,81,57,514/- and the period of completion of work was mentioned as 12 calendar months. This being an e-tender, the participants were directed to submit their bids from 20.06.2015 to 10.07.2015 and the bids were to be received only on 'on-line' on or before 5.00 P.M. of 10.07.2015 and the bids received 'on-line' shall be opened at 11.30 hours on 16.07.2015 in the Office of the Engineer in Chief (Civil), Nirman Soudha in the presence of the bidders who wish to attend. Clause 12 of the DTCN for road and bridge work deals with bid capacity which reads as follows:-

> "**12. Bid Capacity:** *Applicants who meet the minimum qualification criteria will be qualified only if their available bid capacity at the*

expected time of bidding is more than the total estimated cost of the works. The available bid capacity will be calculated as under.

*Assessed Available Bid Capacity=(A*N*-B), where A= Maximum value of works executed in any one year during the last five years (updated to the current price level) rate of inflation may be taken as 10 per cent per year (escalation factor) which will take into account the completed as well as works in progress.*

B= Value at current price level of the existing commitments and ongoing works to be completed during the next twelve months (period of completion of works for which bids are invited); and

N= Number of years prescribed for completion of the works for which the bids are invited.

(for work completion period less than one year the value may be taken as one year)

Note: In case of a Joint Venture the available bid capacity will be applied for each partner to the extent of his proposed participation in the execution of the works.

The statement showing the value of existing commitments and ongoing works as well as the stipulated period of completion remaining for each of the works listed should be countersigned by the Engineer-in-Charge not below the rank of an Executive Engineer.

Escalation factor

Following enhancement factors will be used for the costs of works executed and the financial figures to a common base value for works completed in India.

Year before	*Multiplying factor*
One	*1.10*
Two	*1.21*
Three	*1.33*
Four	*1.46*
Five	*1.61*

(Applicant should indicate actual figures of costs and amounts for the work executed by them without accounting for the above mentioned factors)

In case the financial figures and value of completed works are in foreign currency the above enhanced multiplying factors will not be

applied. Instead current market exchange rate (State Bank of India B.C. selling rate as on the last date of submission of the bid) will be applied for the purpose of conversion of amount in foreign currency into Indian rupees.

The information on Bid Capacity as on the date of this bid is to be furnished as per the format in Schedule-G.

The aforementioned clause also includes a condition that information on Bid Capacity as on the date of this bid is to be furnished as per the format in Schedule-G.

Clauses 117 & 122 of the DTCN read as follows:

"Clause-117 - Even qualified criteria are met, the bidders can be disqualified for the following reasons, if enquired by the Department

(a) Making a false statement or declaration.
(b) Past record of poor performance.
(c) Past record of abandoning the work half way/recession of contract.
(d) Past record of in-ordinate delay in completion of the work.
(e) Past history of litigation.

xx xx xx xx xx

Clause- 122 *-Eligibility Criteria- To be eligible for qualification, applicants shall furnish the followings.*

a. Required E.M.D. (Bid Security) as per the Clause No.06 and Cost of Bid document as per Clause No.04.

b. Scanned Copy of valid Registration Certificate, Valid VAT clearance certificate, PAN card along with the tender documents as per Clause No.07.

c. Information regarding (i) Evidence of ownership of principal machineries/equipments in Schedule-C as per annexure-1 of Schedule-C (ii) Annexure-III of Schedule-C & (iii) Annexure- IV of Schedule-C if required as per Clause No.10 scanned copy of all documents are to be furnished with the bid.

d. Information in scanned copy regarding current litigation, debarring/expelling of the applicant or abandonment of work by the applicant in Schedule "E" and affidavit to that effect including

authentication of tender documents and Bank guarantee in schedule "F" as per clause 11.

e. Submission of original bid security and tender paper cost as prescribed in the relevant clause of DTCN after last date and time of submission of bid but before the stipulated date & time for opening of the bid.

f. Submission of the required information of his/their available bid capacity at the expected time of bidding as per Clause 12.

The bidder who meets the above minimum eligible criteriashall be qualified."

As per sub-clause (f) of Clause 122 of the DTCN read with Clause 12, the bidders are obliged to furnish the existing commitments and on-going works as per Schedule-G.

7. In compliance to the same, the petitioner furnished information in Schedule –G, which has been annexed as Annexure-B/1, where the anticipated date of completion of the work has been stated as "18.05.2016". Basing on such information and in view of the affidavit given by the bidder to the effect of the correctness of the information, the technical evaluation was conducted and the bid capacity of the petitioner was assessed as more than the requirement of Clause 12 of the DTCN and it was declared qualified for opening of the price bid. But objections having been received by the Technical Committee from the local MLA and also the representation of Manju Acharya (L-2) and considering the same, the Tender Committee has categorically stated that the petitioner has suppressed the material facts so far as the existing works to be undertaken by it. It appears that the petitioner has concealed the fact of other two on-going works in Schedule-G. The Executive Engineer, R & B Division, Rourkela has submitted the status of the on-going works and existing commitments of the petitioner in his letter dated 20.03.2015 from which it is revealed that under Clause 12 of the DTCN, the tenderer has to countersign the statements showing the value of the existing commitments and ongoing works as well as stipulated period remaining for each of the work. On re-evaluation of the status of the Bid Capacity of the petitioner, it was found that the available bid capacity comes to Rs.175.28 lakhs, which is less than the requirement and therefore, it was found disqualified. The evaluation statement (re-evaluation) has also been enclosed to the counter affidavit filed by the opposite parties 1 to 3. It is

stated that due to non-compliance of such provisions, there is suppression of facts in respect of two works, namely:

(i) *Construction of peripheral road around NIT, Rourkela in the year 2013-14;*

(ii) *Improvement and widening to Kuanrmunda-Purnapani –Nuagaon Road ODR from 0/0 Km to 11/744 Km under NABARD assistance scheme.*

Since the petitioner failed to satisfy the requirement of Clause 12 of the DTCN, it was found ineligible and thus unqualified as per Clause 122 of the DTCN.

8. In the rejoinder affidavit filed by the petitioner it has specifically denied that it has not suppressed the material facts as alleged by the opposite parties 1 to 3. With regard to the allegation of suppression of fact by the petitioner, i.e. construction of peripheral road around NIT, Rourkela (0/00 to 7/850 Km Intermediate lane) for the year 2013-14, it is stated that the said work has been completed by the petitioner on 03.02.2015 save and except certain portion of work which the petitioner could not execute due to land dispute and litigations and that the petitioner had also taken back its EMD and security deposit. Therefore, as the work was completed so far as it relates to the petitioner, the petitioner had not mentioned such fact and thus not mentioning the said fact cannot be said as suppression of facts or a false statement. So far as the other allegation with regard to the work i.e. improvement and widening to Kuanrmunda-Purnapani –Nuagaon Road (ODR) from 0/00 to 11/744 Km under NABARD Assistance Scheme is concerned, it is stated that the tender for the said work was floated on a number of occasion and the petitioner was the lowest bidders therein but it was cancelled due to the reasons best known to the opposite parties. Finally, the tender for the said work was invited on 08.07.2014 and the last date of submission of tender/bid documents was fixed to 25.07.2014. The petitioner claims that it was the lowest bidder in the said contract, but the petitioner was unable to execute the work due to the Maoist activities in the said area. The petitioner was called upon to execute an agreement on 27.07.2015 and on executing the said agreement on the said date, the petitioner proceeded with work, which was completed on 31.03.2016 awaiting release of final bill. These facts have been strongly refuted by the State-opposite parties by giving a reply to the rejoinder affidavit filed by the petitioner. It is categorically stated that the bidder has not executed a portion of the work which could have been executed by it before closure of the said contract on

its request. The petitioner has executed the agreement for the work on 07.07.2015 and therefore the petitioner was under apprehension about the execution of the work and therefore it could not mention about the same while submitting the tender on 20.03.2015.

9. In course of hearing, this Court vide order dated 17.05.2016 called upon the State Counsel to produce the agreement said to have been executed on 07.07.2015 or 20.07.2015 as well as the agreement register to show the exact date of execution of the agreement. In compliance to the same, the copy of the agreement as well as the agreement register was produced before this Court. On perusal of the same, it appears that the petitioner executed the agreement on 07.07.2015 and vide letter dated 01.06.2015 tender for the work "improvement and widening to Kuanrmunda-Purnapani–Nuagaon Road (ODR) from 0/00 to 11/744 Km under NABARD Assistance Scheme" has been accepted by the Chief Engineer calling upon the petitioner to attend his office on 08.06.2015 along with balance amount of ISD and other documents for drawal of agreement and on that basis agreement has been executed on 07.07.2015. The work in respect of "construction of peripheral road around NIT, Rourkela (0/00 to 7/850 Km Intermediate lane) for the year 2013-14" having been completed by the petitioner and it having received the money, it cannot be construed that there is suppression of facts by the petitioner. It is further stated that so far as the work "improvement and widening to Kuanrmunda-Purnapani –Nuagaon Road (ODR) from 0/00 to 11/744 Km under NABARD Assistance Scheme" is concerned, agreement having been executed on 07.07.2015 and the said fact having been disclosed in the prescribed Schedule-G as per Annexure-B/1, it cannot be construed that there is suppression of facts by the petitioner.

10. ***In Tata Cellular v. Union of India****, AIR 1996 SC 11= (1994) 6 SCC 651, the Apex Court held as follows :*

> *"A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated, the following are the requisites of a valid tender:*
>
> *1. It must be unconditional.*
>
> *2. Must be made at the proper place.*
>
> *3. Must conform to the terms of obligation.*
>
> *4. Must be made at the proper time.*
>
> *5. Must be made in the proper form.*
>
> *6. The person by whom the tender is made must be able*

and willing to perform his obligations.

7. There must be reasonable opportunity for inspection.

8. Tender must be made to the proper person.

9. It must be of full amount.

It is true that tender notice did mention that no tender will be considered valid if it is not accompanied with the documents mentioned therein but the tender notice also mentioned that there may be other particulars and details of the contract which have to be of obtained from the office, and the tender of the contract which have to be of obtained from the office, and the tender form and the instructions to the tenderer attached along with the tender form mentioned clearly that if the receipt of deposit of the earnest money was not furnished along with the tender form, the tender shall not be considered but with regard to documents, it was mentioned that the tender was liable too be rejected if these documents, were not attached along with the tender form, it could not be said that submission of documents was a condition precedent, the non-performance of which would make the tender immediately void ab initio."

11. *In **Mahavir Auto Stores v. Indian Oil Corporation**, AIR 1990 SC 1031= (1990) 3 SCC 752, the Apex Court held as follows:*

"The freedom of Government to enter into business with anybody it likes is subject the condition of reason and fairplay as well as public interest."

12. It is well settled law laid down by the Apex Court that the Government cannot act arbitrarily at its sweet will and every activity of the Government must have a public element in it and it must therefore, be informed with reasons and guided by public interest and such activity will be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid. The Government cannot act arbitrarily even though the matter arises out of a contractual obligation.

13. *In* **Karnataka State Forest Industries Corporation v. Indian Rocks,** (2009) 1 SCC 150= AIR 2009 SC 684, the Apex Court held that when action of the State is arbitrary or discriminatory and also violative of Article 14 of the Constitution, writ application is maintainable for enforcement of the terms of the contract.

14. *In **Air India Ltd. (supra)**, the Apex Court held as follows:*

"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

15. *In **Jagdish Mandal (supra)**, considering the scope of the Court to interfere in tender and contractual matters in exercise of powers of judicial review, the Apex Court held as follows :*

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

OR

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

(ii) Whether public interest is affected.

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

16. Taking into consideration the law laid down by the Apex Court in ***Air India Ltd.*** **(supra)** as well as ***Jagdish Mandal*** **(supra),** this Court is conscious of the fact that its jurisdiction to interfere with the decision making process in exercise of powers under judicial review is very very limited in nature. But certainly this Court is of the considered view that when in a decision making process, there is arbitrary and unreasonable exercise of power, this Court has got jurisdiction to interfere with the same under Article 226 of the Constitution of India.

17. In view of the parameters as discussed above and applying the same to the present context, admittedly the opposite party-State floated a tender and basing upon such tender the participants including the petitioner submitted their bids within the time stipulated which were received on "on line" on or before 10.07.2015. The said bids were opened at 11.10 hours on 16.07.2015 in the office of the Engineer in Chief (Civil), Nirman Soudh in presence of the bidders. As per sub-clause (f) of Clause-122 of the DTCN read with Clause-12, the bidders are obliged to furnish the existing commitments and ongoing works as per Schedule-G. In compliance of the same, the petitioner having furnished the information in Schedule-G, the technical evaluation was conducted and the bid capacity of the petitioner was assessed as more than requirement as per clause-12 of the DTCN. Consequently, it was declared qualified for opening of price bid. But, the objection having been received by the technical committee from the local MLA and also representation from Manju Acharya (L-2), the tender committee on consideration of the same found that the petitioner has suppressed the material facts so far as the existing works being undertaken by it. Consequentially, the petitioner having failed to satisfy the requirement of Clause-12 of DTCN, it was found ineligible and unqualified as per Clause-122 of the DTCN. But, it appears that the petitioner being the lowest tenderer the reason for cancelling the tender, on the ground of non-compliance of the provisions contained in Clause-117 of the DTCN regarding suppression of facts, is not correct. Apart from the same, the facts

brought by the local MLA to the notice of the tender committee have been taken into consideration without any rhyme and reason and without giving any opportunity to the petitioner. Therefore, depriving the petitioner of getting the contract, despite it being the lowest one, amounts to arbitrary and unreasonable exercise of power and as such the decision making process reaching to such conclusion is contrary to the provisions of law.

18. In view of the aforesaid facts and circumstances, the action taken by the authority in not awarding the work in the favour of the petitioner on the ground of non-compliance of the provisions contained in Clause-117 (a) of the DTCN cannot sustain in the eye of law and accordingly, the decision to that extent vide Annexure-10 dated 05.10.2015 is hereby quashed. Consequently, the State-opposite parties are directed to take fresh decision in the light of observation made hereinabove as expeditiously as possible, preferably within a period of one month from the date of communication of the judgment.

19. The writ petition is accordingly allowed. No order as to costs.

Writ petition allowed.

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

W.A. NO. 631 OF 2015

RABINDRANATH @ RABINDRANATH JENA ……..Appellant

.Vrs.

BIJAYA KUMAR BHUYAN & ORS. ….….Respondents

ODISHA GRAMA PANCHAYAT ACT, 1964 – S.31

Whether the Additional Civil Judge, (Jr. Division) Digapahandi has territorial jurisdiction to hear the Election Petition ? In this case learned Judicial Magistrate of first class Digapahandi has been vested with the power of Addl. Civil Judge (Jr. Division) vide Notification Dt. 10.08.2005 of the Law Department of the government of Odisha – Moreover the Court of the Civil Judge (Jr. Division) includes the Court of Addl. Civil Judge (Jr. Division) under sub- section C of Section 2 of the Odisha Civil Courts Act, 1984 – Held, the Addl. Civil Judge, (Jr. division) Digpahandi has territorial jurisdiction to hear the election petition. (para 10)

Case Laws Referred to :-

1. (2015) 9 SCC 1 : Jogendrasinhji Vijaysinghji v. State of Gujarat & Ors.
2. 2009 (1) CLR 550 : Ashok Kumar Sahu Vs. Raghab Chandra Bhoi
3. AIR 1952 SC 64 : N.P. Ponnuswami v. Returning Officer.

For Appellant : M/s.H.S.Mishra, A.K.Mishra & K.Badhei
For Respondents: M/s.Deepali Mohapatra & S.Parida.

Date of Hearing : 18.05.2016
Date of Judgment: 20.05.2016

JUDGMENT

DR. B.R. SARANGI, J.

The appellant, being the writ petitioner, has filed this intra-Court appeal against the order dated 15.10.2015 passed by the learned Single Judge of this Court in W.P.(C) No. 26291 of 2013 confirming the orders dated 7.10.2013 passed by the learned District Judge, Ganjam in Election Appeal No.2 of 2013 and dated 31.01.2013 passed by the learned Addl. Civil Judge (Junior Division), Digapahandi in Election Petition No. 4 of 2012 holding that the election of the appellant to the office of Sarpanch of Dayanidhipur Grama Panchayat in the district of Ganjam is bad in law since it violates Section 25(1)(v) read with Section 31 of the Orissa Grama Panchayat Act 1964.

2. The factual matrix of the case, in hand, is that pursuant to a declaration for holding 3-tire Panchayatraj election by the State Election Commissioner, the Election Officer issued notification inviting nominations from the deserving candidates for election of Sarpanch of Dayanidhipur Gram Panchayat constituency in between 07.01.2012 and 12.01.2012. Accordingly, the appellant as well as respondent no.1 filed their nominations on 7.1.2012 for the office of Sarpanch of the Dayanidhipur Gram Panchayat constituency under Sanakhemundi Block. After scrutiny of the nomination papers, the appellant and the respondent no.1 were allotted election symbols, but the respondent no.1 raised objection with regard to the nomination of the appellant as he has more than two children after the date of commencement of the Orissa Gram Panchayat (Amendment) Act, 1994 as per the provisions of Section 25(1)(v) of the said Act. It is further stated that the appellant has two sons, namely, Balaram Jena, who was born on 10.03.1996 and Kalu Charan Jena who was born on 21.03.1998. Balaram is prosecuting his studies in +2 in Pochilima College while Kalu Charan is studying in Class IX in Alarigada Panchayat High School. The third female child, Sibani Jena, was

born on 25.01.1999 and prosecuting her study in class VII. At the time of submission of the nomination and more so, the third child having been born after the cut-off date, the appellant incurs disqualification as per the provisions of Section 25(1)(v) of the Orissa Gram Panchayat (Amendment) Act, 1994. Accepting the nomination on 13.1.2012, and over ruling the objection raised by respondent no.1 on 11.02.2012, election was held on 21.02.2012. Since the appellant was allowed to participate in the election itself in spite of the objection raised by respondent no.1, after he was elected to the said office, respondent no.1 raised election dispute under Sections 30 and 31 of the Orissa Gram Panchayat Act by presenting a properly constituted application before the learned Civil Judge, (Jr. Division), Digapahandi registered as Election Petition No. 4 of 2012 seeking declaration of election of the appellant as Sarpanch of Dayanidhipur Gram Panchayat void as he has incurred disqualification.

3. Though the election petition was filed before the learned Civil Judge, (Jr. Division), Digapahandi but it was heard by the learned Additional Civil Judge, (Jr. Division), Digapahandi. On examining the oral and documentary evidence, the learned Additional Civil Judge, (Jr. Division), Digapahandi allowed the Election Petition and declared that the appellant is disqualified to hold the post of Sarpanch of Dayanidhipur Gram Panchayat vide order dated 31.01.2013 and directed the Election Officer to hold fresh election. Challenging the said order, the appellant preferred an appeal before the learned District Judge, Ganjam, Berhampur in Election Appeal No.02 of 2013. The lower appellate Court vide judgment dated 07.10.2013 dismissed the appeal preferred by the appellant and confirmed the order passed by the learned Additional Civil Judge, (Jr. Division), Digapahandi. Against the said order, the appellant filed W.P.(C) No. 26291 of 2013 before this Court and the learned Single Judge by judgment dated 15.10.2015 did not feel inclined to interfere with the orders passed by the learned Additional Civil Judge, (Jr. Division), Digapahandi which has been confirmed by the learned District Judge, Ganjam, Berhampur in Annexures-1 & 3 respectively to the writ petition and dismissed the writ petition confirming the findings arrived at by both the Courts below. Hence this appeal.

4. Mr.H.S.Mishra, learned counsel for the appellant vehemently urged that the election petition cannot be heard by the learned Additional Civil Judge, (Jr. Division), Digapahandi as the Civil Judge, (Jr. Division), Digapahandi has territorial jurisdiction to entertain such application in view of the provisions contained in Section 31 of the Orissa Gram Panchayat Act.

Therefore, the judgment so rendered by the Additional Civil Judge, (Jr. Division), Digapahandi, who has no jurisdiction, is a nullity in the eye of law. Apart from the same, it is contended that no evidence of third child having been produced, the learned Courts below have come to an erroneous finding and declared the election of the appellant under Section 25(1)(v) of the Orissa Gram Panchayat (Amendment) Act, 1994 void, which is an error apparent on the face of record and therefore, he seeks for interference of this Court.

5. Ms. Deepali Mohapatra, learned counsel appearing for the contesting respondent no.1 raised a preliminary objection with regard to the maintainability of this appeal and further contended that if there is no Civil Judge, (Jr. Division) available in the territorial jurisdiction itself, it is only the Additional Civil Judge, (Jr. Division) having jurisdiction over the same who can entertain the application. It is further urged that if the fact finding Courts have already held that the appellant has a third child after the cut-off date concurrently, in that case this Court should not interfere with the concurrent finding of fact recorded by the Courts below with regard to the third child of the appellant. Accordingly, the same should not be interfered with.

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 Additional Civil Judge, (Jr. Division), Digapahandi has territorial jurisdiction to hear the Election Petition.

(iii) Whether this Court can interfere with the appeal at this stage when both the facts finding Courts below on the basis of the evidence (both oral and documentary) have held that the appellant incurs disqualification in view of the provisions of Section 25(1)(v) of the Orissa Gram Panchayat (Amendment) Act, 1994?

<u>Question No.(i)</u>

7. The question of maintainability of the Letters Patent Appeal has been considered elaborately by this Court in W.A. No. 222 of 2016 (**Saswati Patra Vrs. Saraswati Biswal and others**) disposed of on 16.05.2016. This Court has relied upon the judgment of the Apex Court in **Jogendrasinhji Vijaysinghji v. State of Gujarat and others,** (2015) 9 SCC 1, wherein the Apex Court in Paragraph 45 held 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.”*

8. Referring to the same principle, this Court in **Saswati Patra(Supra)** considering the Orissa Zilla Parishad Act, 1991, has already held that intra-Court appeal is maintainable.

9. Applying the same principle to the present context, this Court has no hesitation to hold that the writ appeal is maintainable. Consequently, the preliminary objection raised by respondent no.1 that the writ appeal is not maintainable fails and question no.(i) is answered accordingly.

<u>Question No.(ii)</u>

10. Mr. H.S. Mishra, learned counsel for the appellant raised an objection with regard to the territorial jurisdiction of the learned Additional Civil Judge, (Jr. Division), Digapahandi. As it appears from the provisions contained in Section 31(1) of the Orissa Gram Panchayat Act, election petition shall be presented before the Civil Judge (Jr. Division) having jurisdiction over the place at which the office of the Grama Sasan is situated. Sub-section (c) of Section 2 of the Orissa Civil Courts Act, 1984 provides:

“The Court of Civil Judge, (Junior Division) shall include the Court of Additional Civil Judge, (Jr. Division)”

There is no dispute that judicial Magistrate of First Class, Digapahandi has been vested with the power of Additional Civil Judge, (Jr. Division), vide Notification of the Law Department of the Government of Orissa dated 10.08.2005. As the Court of Civil Judge, (Jr. Division) includes the Court of Additional Civil Judge, (Jr. Division) under Sub-section (c) of Section 2 of the Orissa Civil Courts Act, 1984, the said Court having territorial jurisdiction, the Election Petition presented before the said Court can be considered as valid and justified as he has discharged the duties of Civil Judge (Jr. Division) having territorial jurisdiction over the same. Similar question came up for consideration before this Court in **Ashok Kumar Sahu Vs. Raghab Chandra Bhoi**, 2009 (1) CLR 550 wherein, this Court held as follows :

> *"8. On an analysis of Section 31 of the Act quoted above, it would be clear that not only that the election petition is prescribed to be filed before the Civil Judge (Jr. Division), but it is also necessary that he concerned Grama Sasan in respect of which the election dispute is raised, must be situated within the territorial jurisdiction of the said Civil Judge (Jr. Division). Since in the instant case, the Civil Judge (Jr. Division), Bolangir, who passed the impugned order, has no territorial jurisdiction over the concerned grama sasan, he cannot exercise jurisdiction in deciding the election dispute. The Additional Civil Judge (Jr. Division), Loisinga under whose territorial jurisdiction the concerned Grama Sasan is situated, can only have jurisdiction to entertain and try the election dispute and for this limited purpose, the classes of Civil Courts as mentioned in the Orissa Civil Courts Act shall come into play and the Additional Civil Judge (Jr. Division), Loisinga shall be construed to be the Civil Judge (Jr. Division), for the purpose of Section 31 of the Act."*

11. Taking into consideration the provisions contained in the Orissa Civil Courts Act read with the ratio decided in **Ashok Kumar Sahu(Supra)**, this Court unhesitatingly holds that the Additional Civil Judge, (Jr. Division), Digapahandi has jurisdiction to entertain the Election Petition under Section 31 of the Gram Panchayat Act. Thus, question No (ii) is answered accordingly.

Question No.(iii)

12. The fact finding Courts below having taken into consideration the oral and documentary evidence adduced by the parties have come to a

definite conclusion that Sibani Jena is the daughter of the returned candidate, Rabindranath Jena, being his third child and her date of birth is 25.01.1999 and the third child having been born after the commencement of the Orissa Gram Panchayat (Amendment) Act, 1994, the appellant incurs disqualification under Sub-section (1)(v) of Section 25 of the said Act. The findings arrived at by both the Courts below having not been dislodged at any point of time and the same being concurrent findings of fact, this Court is not inclined to interfere with the same unless palpable irregularity has been indicated by the appellant. More so, the appellant having failed to show any palpable irregularity, this Court is not inclined to interfere with the findings of fact arrived at by the Courts below concurrently. Thus, question No.(iii) is answered accordingly.

13. At this point of time it has been brought to the notice of the Court that during pendency of this intra-Court appeal, the State Election Commission, Odisha has issued a notification on 30.04.2016 in exercise of the powers conferred under Article 243K of the Constitution of India, read with Section 16 of the Orissa Gram Panchayat Act, 1964 and Rule 85(1) of the Orissa Gram Panchayat Rules, 1965 fixing the date and time for the by-election in respect of Sarpanches and Ward Members and accordingly the election process having been started, this Court has no jurisdiction to interfere with the same at this stage. It is well settled principles of law laid down by the Apex Court in **N.P. Ponnuswami v. Returning Officer,** AIR 1952 SC 64, that once the election process has started, the Courts have no jurisdiction to interfere with the same. This view of the Apex Court having been consistently followed till date and in view of the notification issued by the State Election Commission on 30.04.2016, this Court is not inclined to interfere with the process of election to the office of Sarpanch, Dayanidhipur Gram Panchayat.

14. Considering the facts from all angles as discussed above, we find no merit in this intra-Court Appeal both factually and legally warranting interference by this Court. Accordingly the same is dismissed. No order as to cost.

Appeal dismissed.

2016 (II) ILR - CUT- 290

VINOD PRASAD, J. & BISWANATH RATH, J.

MATA NO. 63 OF 2012

SONALI SAMAL …….Appellant

.Vrs.

VIKRANT PARIDA ……..Respondent

HINDU MARRIAGE ACT, 1955 – S.13(i)(a)

"Cruelty" – Meaning of – Those acts which affect life, health or even the comfort of the party aggrieved and give a reasonable apprehension of bodily hurt, are called "cruelty" – However acts merely accidental, though they inflict great pain, are not "cruel" in the sense of the word as used in statutes against cruelty – In this case husband sought divorce on the ground of cruelty which was allowed by the Family Court but it appears from the facts narrated and evidence recorded, that some level of misunderstanding developed/occurred between the spouses which can not amount to "cruelty" – Parties got married over a period of 1 and ½ years being blessed with a son – Held, the impugned judgment is set aside – Direction issued to the respondent-husband to embrace the appellant-wife and child in his fold of family relationship and maintain them as they are entitled to.

(Paras 13 to17)

Case Laws Referred to :-

1. (1975) 3 SCR 967 : N.G. Dastane v. S. Dastane.
2. [2012] 7 S.C.R 607 : Vishwonath S/o Sitaram Agrawal v. Sau Sarla Vishwanath Agrawal.
3. (2007) 4 Supreme Court Cases 511 : Samar Ghosh v. Jaya Ghosh.
4. (2006) 34 OCR (SCV)-159 : Vinita Saxena v. Pankaj Pundit.
5. (2012) 7 S.C.R.607 : Vishwanath S/o Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal.

For Appellant : Mr. S.D.Das, Senior Advocate
M/s.Prabodh Ku. Patnaik, A.K.Dwivedy, S.K.Patnaik, A.K.Mohanty, A.K.Mishra, G.M.Rath, R.Mohanty.

For Respondents : M/s. Sidhartha Mishra, Bhaktadas Mohanty

Date of hearing : 25.02.2016
Date of Judgment :19.04. 2016

JUDGMENT

BISWANATH RATH, J.

The opposite party-wife is the appellant assailing here the judgment passed by the Judge, Family Court, Cuttack in Civil Proceeding No.04 of 2012 whereby, allowing the application for divorce in favour of the husband/petitioner-the present respondent while considering his application under Section 13(i)(a) of the Hindu Marriage Act, 1955 vide impugned judgment and order dated 7.05.2012, the marital status between contesting spouses has been snapped.

2. Brief facts of the case are that the respondent/husband filed an application under Section 13(i)(a) of the Hindu Marriage Act, 1955 for grant of divorce with pleadings that the respondent married the appellant/wife on 5.12.2007 following the Hindu rites and customs. The respondent was working in N.S.N Company as HR Executive at Bhubaneswar. Their marriage had taken place on 5.12.2007 and after the marriage both the respondent and the appellant were staying in respondent's house at Bhubaneswar. The respondent claimed to be the only child of his parents. The respondent alleged that Miss Ayesha Jamal was his distant relation. She was also close to his wife and his wife used to talk with her over mobile for long spell. When both the respondent and appellant were in their honeymoon trip to Thailand on 22.12.2007, his wife talked with Miss Ayesha Jamal for long time resulting his mobile bill up to Rs.17,000/- (Rupees Seventeen thousand only). The respondent then alleged in the application that on their return from honeymoon, the appellant behaved with his family as well as with him abnormally and used to leave the bed late. The appellant was also spending most of her times in bathrooms remaining busy in talking with her friends over telephone closing the door of the bathroom from inside, even at times the appellant was sleeping at nights inside the bathroom while taking on mobile phones. It is also alleged that the appellant was treating the respondent as unfit, impotent and a low paid company employee. The appellant was resisting the foods prepared in his house by cook and also used to make baseless complaints against respondent before her parents and his visitors. On 16.01.2008 she stayed at Cuttack for a month and in every week the appellant used to visit the house of her parents without the consent of either the husband or his parents. Saddening with the behaviour of the appellant her mother breathed her last on 9.04.2008 suffering from severe heart attack. Frustrating with her activities her younger brother also attempted to commit suicide by taking poison. On 9.06.2008 the appellant went to Cuttack with her elder mother and brother taking her clothes and ornaments

threatening not to return to respondent's house any further. She stayed at Cuttack for almost five months and on being forced by her father and brother, the appellant joined the respondent ultimately on 10.11.2008. On 23.09.2009, the appellant gave birth to a male child at Kar Clinic in Bhubaneswar and on 24.10.2009 she went away to Cuttack with the small baby of about a month without consent of her husband or the consent of his family members and from that time the appellant did not return to the house of the husband. While refusing to join the respondent, the appellant lodged a complaint before a NGO namely "Maa Ghara" at Bhubaneswar against her husband and his family members. Following development, in the said matter Mrs. Rutupurna Mohanty of Maa Ghara visited the wife's house at Cuttack and asked her father to have her treated by a Psychiatrist. It is alleged that the appellant was not only abusing her husband and his mother in obscene languages but also giving threaten to them to put the respondent and his family members behind the Bar by committing suicide or by burning herself. On failure in all his attempts to convince the appellant and following her threatening the respondent on 21.02.2010 made a Station Diary bearing Entry No.512 in Lingaraj Police Station. The husband sent copy of the report to Human Rights Commission, State Commission for Women and Police Commissioner. The respondent further alleged that in the meantime, the appellant started selling her ornaments and gave the money so earned to Ayesha. Even the appellant did not hesitate to sell the mobile phone of the respondent. The respondent further alleged that on 5.12.2009 on the eve of marriage anniversary, he along with his parents went to the house of appellant making an effort to convince her to return to their house, which attempt had failed as the appellant did not even come close to the husband and his family members. On 1.1.2010 again the respondent and his family members went to the residence of the appellant and they also waited for an hour there but the appellant refused to meet even the respondent and in laws and finally the respondent and his family members returned back. On 11.02.2010 the appellant jumped with her four months old child from the 1st floor of her house at Cuttack and then went to Mahila Police Station with injured condition to lodge a complaint against the respondent and his father for their forcing her to come back to her husband's house. She was then rescued by one Saila Behera attached with a N.G.O. namely Basundhara, Cuttack from Mahila Police Station and handed over to her father on being instructed by the Mahila Police who were very much aware of her condition.

After some time and in the month of March, the appellant again lodged an F.I.R. in the Mahila Police Station, Cuttack making allegation of torture. The Mahila Police did not take any action on the same being aware of her conduct. Being aggrieved, the wife made a complaint before the State Commissioner for Women and also sent a copy to the Police Commissioner. On the same day she lodged a complaint before the High Court of Orissa. While the matter stood thus, on 25.11.2010 the appellant asked him to send an application for divorce by mutual consent immediately on the plea that she was not willing to stay with the respondent.

3. It is on the allegation of cruelty; the respondent filed an application bearing C.P. No.354 of 2011 asking the Family Court to pass the following :

"Prayer

It is therefore prayed that your honour may graciously be pleased to

a. Pass an order of decree of dissolution of marriage dt.-5.12.2007 in favour of the petitioner.
b. Cost of the suit be awarded in favour of the petitioner."

4. On receipt of notice, the present appellant on her appearance filed a written statement indicating therein that it is a fact that said Ayesha is a distant relation of the respondent and she came to know her because of such relationship only. Appellant denied the allegation that she used to talk with Ayesha for two to three hours. Appellant also refuted the allegation about the telephone bill of Rs.17,000/- (Rupees Seventeen thousand) on account of her talking with Ayesha. The appellant further alleged that the respondent has made out a false story with an intention to hide his mischievs and negligence towards her.

The appellant claimed that her trip to Bangkok was measurable and torturous for unwanted interference of parents in laws through phone. The appellant also denied the allegations made against her in paragraph No.6, 7 & 8 of the C.P. application. The appellant rather claimed that she remained cooperative despite difficulties / restrictions created by the respondent's parents as well as her husband, she had never conveyed any displeasure or sorrow to anybody during her stay in her in laws house. In response to the allegation made in paragraph No.9, the appellant submitted that the averments made therein are shocking more over reflecting the mischievous attitude of the respondent and his parents. The appellant on the other hand, alleged that her mother died due to physical and mental torture meted out to

her in the in-laws house. The appellant further alleged that the allegations made in paragraph No.10 of the application are intended to avoid the accountability on misappropriation of the appellant's valuable things presented to her during marriage. The appellant next contended that the allegation of making an attempt to bring peace in the home by the husband and his parents are all false and have been made only to make out a case against the wife. While denying all the allegations, the wife on the other hand, contended that she was forced to leave the house of the husband along with her minor child by the respondent and his parents and they allthrough refused her to reinduct her to their home despite her all efforts along with her father, brother as well as the well wishers.

The appellant next contended that she had never abused the respondent or his mother in filthy language over telephone. She on the other hand, alleged that the respondent and his mother used to threaten her with dare consequence, in the event, she does not agree for divorce. She claimed that the allegation that the wife was threatening the husband and his family members for putting them behind the bars by committing suicide or by burning herself are all false and concocted with oblique motive.

The appellant-wife further contended that filing of the writ petition in High Court, was an attempt at the instance of the respondent taking assistance of Ayesha Jamal obtaining signature of the appellant on falsehood and with intention to create misunderstanding between the appellant and her father. She also denied to have done anything to either humiliate the respondent or his parents. She also denied the allegation that she had sent a police team to the working place of the husband on 18.3.2010 based on false allegations. The assertions with regard to the NGO and the IIC Mahila P.S were all flatly denied by the wife. Claiming to be innocent, peace loving girl and based with all sorts of good attitude, appellant disclosed her willingness to join the husband thereby requesting the Family Court to decline the prayer for divorce at the instance of the husband with a rider from the Court that their normal marital life should be without any interference from any quarter.

5. Upon completion of pleadings, both the parties led their oral and documentary evidence before the Family Court. In the process, the respondent examined four witnesses whereas the appellant examined three witnesses including herself. The respondent exhibited as many as nine documents i.e. Exts.1 to 9 whereas the appellant exhibited three documents i.e. Exts.A, A/1 and A/2.

Parties also relied on certain decisions taken note of by the Judge, Family Court in the impugned judgment. Considering the rival contentions of the parties, materials available from the evidence as well as the documents filed by both parties, the Judge, Family Court, Bhubaneswar by his judgment dated 07.5.2012 allowed the Civil Proceeding No.4 of 2012 with the following order:

> "The petition is allowed on contest without costs. The marriage solemnized on 05.12.2007 between petitioner-Vikrant Parida and O.P-Sopnal8i Samal is hereby dissolved by a decree of divorce subject to payment by petitioner a sum of Rs.6,00000/-(Rupees Six Lakhs) as permanent alimony to O.P-Sonali Samal and Rs.1,00000/-(Ruypees One Lakh) to Sonali Samal for the maintenance and education of her child, within three months of this order."

6. In assailing the impugned order, the appellant-wife apart from relying on a written note submitted on her behalf through Sri S.D. Das, Senior Counsel contended that from the entire pleading and the evidence on behalf of the respondent, the allegation of cruelty has not been established. Present case does not fall within the ambit of Section 13(1)(ia) of the Hindu Marriage Act. The Judge, Family Court, Bhubaneswar has failed in appreciating the requirement of conditions for grant of divorce on the ground of cruelty and further relying on decisions reported in AIR 2011 SC 114 as well as (2007) 4 SCC-511 and AIR 2006 SC-1675, Mr.S.D. Das, learned Senior counsel appearing for the appellant contended that the impugned judgment is bad in law and thus needs to be interfered and set aside.

7. Mr.Sidhartha Mishra, learned counsel appearing for the respondent-husband though very fairly contended that many of the allegations made against the wife does not fall within the ambit of the cruelty requiring a declaration of divorce but taking into the sum totality of allegations, the conduct and behavior of the wife all through and based on the formula fixed by the Hon'ble Apex Court in the case of Samar Ghosh-vrs-Jaya Ghosh reported in (2007)4 SCC-511 in para-101 of the judgment as well as the decision of the Hon'ble Apex Court as reported in AIR 1964 SC 40 and another decision in the case of Vinita Saxena-vrs-Pankaj Pandit reported in (2006) 34 OCR (SC) 159 contended that the respondent has clearly made out a case attracting the provision of Section 13 (1) (ia) of the Hindu Marriage Act and therefore claimed that the trial Court did no wrong in passing the impugned judgment which is valid and cannot be interfered with.

8. From the pleadings of the parties, it appears that the respondent in order to bring home the charge of cruelty under the provision of Section 13(1)(ia) of the Hindu Marriage Act through his pleadings, brought the following allegations:

> "(i) While he and his wife were on a honeymoon trip to Thailand, the wife always remained busy on telephone with Ayesha Jamal instead of enjoying the trip, resulting the ISD call on respondent mobile at Rs.17,000/.
>
> (ii) After coming back from honeymoon trip, appellant started behaving the husband and his parents in a very abnormal manner. In the process, she used to get up at 9 A.M in the morning and asking for breakfast at 10 A.M while respondent was leaving for Office.
>
> (iii) Appellant used to spend maximum time in the bath room by closing the door from inside and remaining busy telephoning to her friend with intention that nobody can listen her conversation with the particular girl and many times she used to sleep inside bath room in the night while talking over mobile.
>
> (iv) Appellant misbehaved with the husband treating him to be an unfit husband, impotent, low paid company servant.
>
> (v) Appellant used to object the food prepared by the cook in the house claiming to be unfit for her consumption.
>
> (vi) Appellant used to belittle the respondent before his friends and relatives.
>
> (vii) Appellant used to visit her parent's home every week without taking permission either of the husband or parents of the husband
>
> (viii) Appellant left the husband's premises with the small child of hardly 31 days on 24.10.2009 on her own volition and despite several attempts by the husband as well as his parents, did not chose to return back to the house of the husband."

9. In course of argument, Mr. Mishra, learned counsel appearing for the husband taking us to different orders passed by this Court in the very proceeding, claimed that attempt of this Court for reunion of the parties having failed and there being a gap of almost seven years from the separation of the parties, there is no possibility of reunion any further and this is a clear case for divorce.

10. The provision dealing with divorce on account of cruelty as contained in the Hindu Marriage Act at Section 13(1)(ia), reads as follows;

> "Section 13-Divorce-any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented either by the husband or the wife, be dissolved by a decree of divorce on the ground that the other party.
>
> xxx xxx xxx
>
> (ia) As after the solemnization of the marriage, treated the petitioner with cruelty."

11. Before we critically examine the impugned judgment in the light of settled law and taking into consideration the provision of law in the Act, it has become imperative to understand and comprehend the concept of cruelty.

The Shorter Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'. The term "mental cruelty" has been defined in the Black's Law Dictionary [8th Edition, 2004] as under: "Mental Cruelty - As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

The concept of cruelty has been summarized in Halsbury's Laws of England [Vol.13, 4th Edition Para 1269] as under:

> "The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on

the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."

In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse."

In the instant case, our main endeavour would be to define broad parameters of the concept of 'mental cruelty'. Thereafter, we would strive to determine whether the instances of mental cruelty enumerated in this case by the appellant would cumulatively be adequate to grant a decree of divorce on the ground of mental cruelty according to the settled legal position as crystallized by a number of cases of this Court and other Courts.

The concept of cruelty has been explained as an intentional and malicious infliction of physical suffering upon living creatures, particularly human beings; or, as applied to the latter, the wanton, maliciously, and unnecessary infliction of pain upon the body, or the feelings and emotions; abusive treatment; inhumanity and outrage. It has been also described such as “cruel and abusive treatment, “cruel and barbarous treatment, or “cruel and inhuman treatment”. These explanation concept can be found in various court’s decisions such as see May v. May, 62 Pa. 206; Waldron v. Waldron, 85 Cal. 251, 24 Pac. 049, 9 L.r.A. 48T; Ring v. Ring, 118 Ga. 183, 44S.E. 801, 62 L.R.A. 878; Sharp v. Sharp, 16 111. App. 348; Myrickv.Myrick, 67 Ga. 771; Shell v. Shell, 2 Sneed (Tenn.) 716; Vignos v. Vignos, 15III. 180; Poor v. Poor, 8 N. II. 307, 29 Am. Dec. 604; Goodrich v.Goodrich, 44 Ala. 670; Bailey v.Baiey, 97 Mass. 373; Close v. Close, 25N.J.Eq. 520; Cole v. Cole, 23 Iowa. 433; Turner v. turner. 122 Iowa, 113.97 N.W.

997; Levin v. Levin, 68 S.C. 123, 40 S.E. 945. Those acts which affects life, health, or even the comfort of the party aggrieved and give a reasonable apprehension of bodily hurt, are called "cruelty." What merely wounds the feelings is seldom admitted to be cruelty, unless the act be accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation or even occasional sallies of passion will not amount to legal cruelty. A fortiori, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number among its necessaries is not cruelty. The negative descriptions of cruelty are perhaps the best, under the infinite variety of cases that may occur, by showing what is not cruelty. Cruelty includes both willfulness and malicious temper of mind with which an act is done, as well as a high degree of pain inflicted. Acts merely accidental, though they inflict great pain, are not "cruel," in the sense of the word as used in statues against cruelty.

12. From the pleadings of the parties, it appears that the marriage was solemnized on 05.10.2007.The parties were blessed with a child on 23.9.2009 and the separation between the parties took place on 24.10.2009. The respondent alleged that the wife suo-motu deserted the husband on 23.9.09 voluntarily leaving the house of the respondent with the minor child on her own volition whereas the appellant claims that she gave birth to the male child in the company of the husband in Kar hospital at Bhubaneswar on 23.9.2010. She was very much residing along with the minor child in the house of the husband upto 24.10.2009 on which date she along with 31 days baby were forcefully driven out from the house of the husband.

At the same time, from reading of the entire evidence led by both the sides, the wife as D.W.1 in para-13,14 and 15 discloses as follows:

> "**13.** That under such predicament, I gave birth to a male child at Bhubaneswar and remains uncared for and hence my father brought me and my son to Cuttack for better nourishment of both.
>
> **14.** That after lapse of some times, I found that neither my husband nor in-laws showed any interest to take me and my son back to my matrimonial home in spite of several requests by my parents and other relations.
>
> **15.** That I am eager to restitute my conjugal rights with my husband, yet it appears that he has no love and affdinity towards me and my son, dashing my dreams of living a comfortable marital life."

Further in para-30 of her deposition she discloses as follows:

> "On 24.10.2009 I finally left petitioner's house. It is not a fact that thereafter I had not gone to petitioner's house at any point of time. But I cannot say that dates of those visits. It is not a fact that from 24.10.2009 I have voluntarily deserted the petitioner and that I did not meet petitioner in my house on 5.12.2009 and 1.1.2010 when he had come to my house."

13. From the facts narrated hereinabove and the evidence so recorded by the Family Court, there is no doubt that there appears some level of misunderstanding in between the spouses. But then the questions arises can the above be construed to be so cruel a behavior so as to attract an order for divorce. Considering the period of disturbance and level of disturbance, we also tried to reconcile them in the Court and we observed that the appellant – wife appears to be very lenient to go back to the matrimonial home and start life afresh, but the respondent-husband remain adamant and sticks to his position of not accepting the wife any further. Position of law is verymuch clear to the effect that the married life should be reviewed as a whole and a few isolated instances at the very early of start of married life that too over a period of 1 and ½ years should not be snapped especially when the spouses have been blessed with a child and such frivolities of life cannot amount to cruelty. We find that Family court has measurably failed in appreciating the above legal aspect and has thus arrived at wrong decision for granting divorce.

14. Public interest demands not only that the married status should, whenever as far as and as long as possible should be maintained in the particular facts of the case taking into account the length of cruelty alleged. In the present case it can in no remote sense even be imagined that the marriage between the spouses has been wrecked beyond the hope of salvage. Even though there were some allegations and counter allegations by the other spouse, yet there has been some holy moment between the spouses yielded in blessing them with a child. From the pleadings by the wife, the evidence at the instance of the wife and the attempts made by this Court in the pendency of the current proceeding, it appears that even though the wife is very much inclined to join the husband, yet the husband remain adamant not to reconcile the matter and refuse to re-start the conjugal life afresh. The husband, as appears, has even forgotten his responsibility in the upcoming of the minor child (son). It is strange to perceive that the husband is making an attempt to buy separation on payment of permanent alimony.

15. The husband and his relations should have understood that the wife has come to their residence from a different atmosphere and they ought to have created an atmosphere having little leniency towards her. A little attempt by both the spouses could have made their lives wonderful.

Looking to the definition of cruelty in different dictionaries and through different pronounciation at international level referred to hereinabove, by no stretch of imagination the present case false within the ambit of cruelty.

16. In the case ***N.G. Dastane v. S. Dastane*** reported in **(1975) 3 SCR 967** the Hon'ble Apex Court has observed:-

> "The Court has to deal not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near ideal one will probably have no occasion to go to a matrimonial Court for even if they may not be able to drown their differences, their ideal attitudes may help them over look or gloss over mutual faults and failures."

Similarly in another case ***Vishwonath S/o Sitaram Agrawal* v. *Sau Sarla vishwanath Agrawal*** reported in *[2012] 7 S.C.R 607* Hon'ble Apex Court has observed that expression "Cruelty" has an inseparable nexus with human conduct or human behavior. It is always dependant upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been considered by their social status.

Examining the matter from the angle of decisions rendered by the Hon'ble Apex Court, we are of the view that looking to the facts and circumstances involved in the case, the position of law indicated herein above, all the findings in the judgment impugned are far from satisfactory. From the further perusal of the impugned judgment, we also observes that even though the trial court has taken note of the decision of the Hon'ble Apex Court in the case of ***Samar Ghosh v. Jaya Ghosh****, (2007) 4 Supreme Court Cases 511* while recording his finding, it has not at all followed the principle laid down by the Hon'ble Apex Court. There is even no endeavour to bring the case within the fold of any of the items/grounds indicated in the said judgment. In the said judgment, the Hon'ble Apex Court in Paragraphs-x, xiv and xv has held as follows:

> "(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty.

The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage may amount to cruelty. ***Not in Supreme Court decision)***

(xv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

In the case of ***Vinita Saxena v. Pankaj Pundit***, *(2006) 34 OCR (SCV)-159*- Paragraph-18 and 20 it has been laid down:-

18. It was submitted that in order to make out a ground for divorce under Section 13(1) (i-a) of the Act, the conduct complained of should be grave and weighty so as to come to the conclusion that the appellant spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". For this proposition, he relied on the judgment of this Court in ***A. Jayachandra vs. Aneel Kaur*** *(supra)*. Para 13 of the aforementioned judgment is as under:

"13….but before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether theconduct was such that no reasonable person would tolerate it…."

20. Answering the contention raised by the counsel for the appellant that the parties have not lived together for a long time and therefore, this is a fit case to pass a decree of divorce, learned counsel for the respondent, submitted that this is a wholly untenable argument and has to be rejected by this Court. For this, he relied on the ruling of this Court in the case of ***A. Jayachandra vs. Aneel Kau***r *(supra).*

In the case of ***Vishwanath S/o Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal***, *(2012) 7 S.C.R.607* it has been held in;
Paragraph-17 as under :-

> 17. The expression 'cruelty' has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status. In *Sirajmohamedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan and another*, a two-Judge Bench approved the concept of legal cruelty as expounded in *Sm. Pancho v. Ram Prasad,* wherein it was stated thus:-
>
> "Conception of legal cruelty undergoes changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition that a second marriage is a sufficient ground for separate residence and separate maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment,
>
> Cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which may undermine the health of a wife."
>
> It is apt to note here that the said observations were made while dealing with the Hindu Married Women's Right to Separate Residence and Maintenance Act (19 of 1946). This Court, after reproducing the passage, has observed that the learned Judge has put his finger on the correct aspect and object of mental cruelty."

17. From reading of the guideline set out by Hon'ble Apex Court as noted hereinabove, we do not find that the case of the husband satisfies either of the clauses adopted by the Hon'ble Apex Court for granting a decree of divorce.

Under the circumstances, the impugned judgment is unsustainable and, therefore, while setting aside the same, we allow present matrimonial Appeal No.63 of 2012. Respondent is directed to embrace the appellant-wife and his child in his fold of family relationship and is directed to maintain them as they are entitled to. Appellant and her child will have untraveled right to stay with respondent-husband who is directed to maintain them taking care all their needs.

18. The Matrimonial Appeal stands allowed, however there is no order as to cost.

2016 (II) ILR - CUT-304

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

W.P.(C) NO. 19864 OF 2015

M/S. HINDALCO INDUSTRIES LTD., HIRAKUD ……..Petitioner

.Vrs.

THE DY. COMMISSIONER OF SALES TAX, SAMBALPUR-II CIRCLE, SAMBALPUR & ANR. ……..Opp. Parties

(A) ODISHA VAT ACT, 2004 – S.60(1)

For exercising power of withholding refund, the following three conditions are to be satisfied :-

(i) The order giving rise to the refund is the subject matter of an appeal or further proceeding; and
(ii) The commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue; and
(iii) **It may not be possible to recover the amount later.**

(Para 14)

(B) ODISHA VAT ACT, 2004 – S.60

Proceeding to withhold refund – Second appeal preferred by State-Revenue before the Odisha Sales Tax Tribunal against the order of the first appellate authority who had accepted the declaration forms, not produced before the assessing authority and reduced the demand – Authorities, instead of granting refund within sixty days from the date of receipt of the appellate order U/s. 57 of the Act with interest U/s. 59(1) of the said Act, issued notice to show cause as to why the refund granted by the First Appellate Authority would not be withheld U/s. 60 of the Act during pendency of the Second Appeal – Hence the writ petition – Commissioner has not recorded his opinion that such refund is likely to affect the revenue or it is not possible to recover the amount later – Since no decision was taken to withhold the refund, natural justice can not be said to have been violated – Held, since there is violation of section 57 of the Act, this Court directed the petitioner-assessee to appear before the commissioner of Sales Tax on 06.06.2016, who after hearing the petitioner would pass order either to withhold the refund or payment of refund as per law.

(Paras19,20,21)

Case Laws Referred to :-

1. W.P.(C) No.13723 of 2014 :M/s. Unit Construction Company Pvt. Ltd. v. The Commissioner of Commercial Taxes, Orissa,Cuttack & Ors.
2. AIR 1990 SC 1984 : (S.N. Mukherjee v. Union of India)
3. (1995) 5 SCC. 482 : LIC of India and another v. Consumer Education & Research Centre & Ors.
4. (1998) 8 SCC. 194 : (Basudeo Tiwary v. SIDO Kanhu University & Ors.)

For Petitioner : M/s. B.P.Mohanty, N.Paikray & U.K.Behera
For Opp. Parties : Mr. S.P.Dalai, Addl. S.C. (Sales Tax)

Date of hearing : 27.04.2016
Date of Judgment:19.05.2016

JUDGMENT

DR. D.P. CHOUDHURY, J.

The captioned writ petition is filed by the petitioner challenging the arbitrary action of the opposite parties in not granting refund of tax demand arising out of the first appellate order.

FACTS

2. The unfolded story of the petitioner is that petitioner is a registered dealer under the Odisha Value Added Tax Act (hereinafter called "OVAT Act") and also under the Central Sales Tax Act (hereinafter called "CST Act"). It carries on business in manufacturing and sale of aluminum ingots, carbon electrode paste, aluminum sheets etc. During the period from 1.4.2011 to 31.3.2012 the petitioner had effected sales against declaration in Form 'C' to the tune of Rs.404,91,16,679/-. Similarly, petitioner had made branch transfer and consignment sale for an amount of Rs.1608,86,12,150/- and effected sales to SEZ to the tune of Rs.18,20,241/-.

3. It is further case of the petitioner that the Assistant Commissioner of Sales Tax, Sambalpur II Circle, Sambalpur being the Assessing Officer made assessment illegally by not awarding sufficient opportunity to the petitioner to produce balance declaration Form 'C' and 'F' to the tune of Rs.4,69,57,870/- and Rs.85,59,51,925/- respectively. Also the Assessing Officer did not allow time for producing certificate in Form-I in respect of sales made to SEZ. Accordingly, on 19.1.2013 the learned Assessing Officer

made assessment order and directed to make demand of Rs.3,74,26,551/- upon the petitioner to pay.

4. The petitioner filed appeal against the order of the Assessing Officer before the First Appellate Authority. After hearing the appeal the Deputy Commissioner of Sales Tax (Appeals) passed order by allowing the appeal in part and made the demand by reducing the same to Rs.99,851/- to be paid by the petitioner. This order was passed on 10.11.2014. Against the order of the First Appellate Authority the Revenue filed Second Appeal before the Second Appellate Authority. In the meantime the petitioner requested the opposite party No.1 to refund of tax as demand has been reduced to Rs.99,851/- against the deposit of Rs.74,85,310/- during pendency of appeal by the petitioner.

5. It is also stated by the petitioner that the opposite party No.1 is obliged to grant refund within sixty days from the receipt of the appellate order under Section 57 of the OVAT Act with interest accrued under Sub-Section (1) of Section 59 of the OVAT Act. Instead of refund of such tax, it is alleged, inter alia, that the opposite party No.2 issued notice on 7.11.2015 calling upon the petitioner to explain as to why the refund as granted by the First Appellate Authority would not be withheld under Section 60 of the OVAT Act when the revenue has preferred Second Appeal before the Appellate Authority. Against initiation of proceeding under Section 60 of the OVAT Act the petitioner has preferred the present writ petition.

6. Per contra, the opposite parties have filed the counter affidavit stating that during assessment proceeding the petitioner failed to file the 'C' Form, 'F' Form and 'I' Form in respect of respective sales. But before the First Appellate Authority the dealer filed 'C' Form, 'F' Form and 'I' Form to the tune of Rs.20,43,334.00, Rs.88,45,36,836.00 and Rs.18,10,241.00, respectively. At the same time, the petitioner failed to file 'C' Forms for Rs.14,40,453.00 and 17,76,049.00 before the First Appellate Authority. But the tax component of the said transactions was not covered by 'C' Form and 'F' Form for which the learned First Appellate Authority reduced the same to Rs.99,851.00. It is also stated in the counter that no interest or penalty was levied on the tax by the First Appellate Authority for which the Revenue filed the Second Appeal on 31.1.2015.

7. It is also stated by the opposite parties that the provision of Section 60 (1) of the OVAT Act has been complied since notice has been issued on 7.11.2015 with intimation to petitioner of having an opportunity of hearing on 7.12.2015 and to show as to why the refund shall not be withheld on the

ground that State has filed the Second Appeal before the Orissa Sales Tax Tribunal. The petitioner has no ground to file the present petition claiming refund before disposal of Second Appeal. It is submitted to reject the writ petition.

SUBMISSIONS

8. It is submitted by the learned counsel for the petitioner that Section 57 of the OVAT Act clearly enshrines that refund of tax demand arising out of appellate order should be refunded within sixty days of receipt of the order. He also contended that not only the tax but also interest and penalty or both if paid by the dealer should be refunded to the assessee. According to him the opposite parties have erred in law by not following Section 57 of the OVAT Act.

9. Learned counsel for the petitioner further submitted that the provision of Section 60 (1) of the OVAT Act has not been followed by the opposite parties in this case and there is no finding in the notice issued by the opposite parties that the pre-conditions of Section 60 (1) of the OVAT Act have been complied resulting issuance of notice to withhold the refund. According to him mere filing of Second Appeal is not enough ground to withhold the demand of tax deposited by the petitioner. Mere sending notice is not enough to show the compliance of natural justice and the opposite parties have failed to observe to pass the speaking order before issuance of notice. So, he submitted issuance of notice is illegal, arbitrary for which the same should be set aside and the refund of demand of tax with interest should be allowed to be paid to the petitioner. Petitioner has also relied on the decision of this Court passed in ***M/s. Unit Construction Company Pvt. Ltd. v. The Commissioner of Commercial Taxes, Orissa, Cuttack and others*** (W.P.(C) No.13723 of 2014) and prays to allow the writ petition accordingly.

10. Learned Standing Counsel for Revenue submitted that there is no cause of action for the petitioner to file the writ inasmuch as the petitioner has been given opportunity while it is proposed by the opposite parties to withhold the refund of tax claimed by the petitioner. Section 60 (1) does not direct for issue of a notice while refusing refund of demand of tax. But the opposite parties have taken extra care to issue notice so that the petitioner can submit before the opposite parties and claim the refund on the grounds submitted by petitioner. It is also submitted that Section 57 of the OVAT Act has to be only complied on the application made by the petitioner and in the fact and circumstances of the case even if the petitioner has claimed the refund but due to filing of the Second Appeal and there is every possibility of

winning the appeal before the Appellate Tribunal, the refund has been held up. So, he submitted to dismiss the writ application as there is no fault on the part of the opposite parties in compliance of the provisions of law and natural justice.

11. Points for consideration:-

The main points for consideration of the case are -

(i) Whether the provisions of the OVAT Act have been complied by the opposite parties.

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

DISCUSSIONS

POINT NO.(i) :

12. It is admitted fact that the petitioner was assessed by the Assessing Officer for the period from 1.4.2011 to 31.3.2012 and the Assessing Officer has passed order for a demand of Rs.3,74,26,551/-. It is also not disputed that against the assessment order the First Appellate Authority reduced the demand to Rs.99,251/- on the appeal preferred by the petitioner. It is also admitted fact that the petitioner had deposited the entire demand amount as assessed by the Assessing Officer and has claimed refund of same after adjusting the reduced amount. But the Commissioner of Sales Tax issued notice by proposing to withhold the refund to pay.

13. Section 57 (1) of the OVAT Act speaks as follows:-

"57. Refund.-

(1) Subject to other provisions of this Act and the rules, the assessing authority shall refund to a dealer, within a period of sixty days of the date of receipt of such order giving rise to such refund, the amount of tax, including interest or penalty or both, if any, paid by such dealer in excess of the amount due from him, through refund adjustment or through refund voucher:

Provided that the assessing authority shall first adjust such excess amount towards the recovery of any amount due in respect of which a notice under sub-section (4) of Section 50 has been issued, or any amount due for any period covered by a return but not paid and, thereafter, refund only the balance, if any."

The aforesaid provision clearly spells out that it is the duty of the Assessing Officer to make refund within a period of sixty days from the date of the order directing to refund the demand of tax including the interest and penalty or both after adjusting the demand of tax. In the present case

admittedly he has deposited the entire demand and the First Appellate Authority vide Annexure-2 has directed that the demand is reduced to Rs.99,851.00 and rest of the amount be refunded to the petitioner. In the present case such action on the part of the Assessing Officer has not been exhibited.

14. Section 60 of the OVAT Act is quoted below for better appreciation:-

60. Power to withhold refund in certain cases.-

(1) Where any order giving rise to a refund is the subject matter of an appeal or further proceeding, or where any other proceeding under this Act is pending, and the Commissioner is of the opinion that the grant of such refund is likely to adversely affect the revenue and that it may not be possible to recover the amount later, the Commissioner may withhold the refund till the final order is passed in such appeal or proceeding.

(2) Where a refund is withheld under sub-section (1), the dealer shall be entitled to interest as provided under sub-section (1) of Section 59, if he becomes entitled to the refund as a result of the appeal or further proceeding or, as the case may be, any other proceeding, under this Act."

The above provision makes it clear that Section 60 has ample power with the opposite parties to withhold refund in certain cases. What are the conditions precedents to withhold the refund has been well described by this Court in the decision reported in the case of ***M/s. Unit Construction Company Pvt. Ltd. v. The Commissioner of Commercial Taxes, Orissa & others*** where Their Lordships observed at para-7:-

"7. A bare reading of sub-section (1) of Section 60 of the OVAT Act would go to show that for exercising power of withholding refund, the following three conditions are to be satisfied.

(i) The order giving rise to the refund is the subject matter of an appeal or further proceeding; and

(ii) The Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue; and

It may not be possible to recover the amount later."

With no disagreement with the aforesaid view it has to be found whether the said provision has been complied or not. By going through the materials on record it is found that the First Appellate Authority has passed

the order of demand of tax by reducing the demand. Moreover, in this case the Commissioner has not recorded his opinion that such refund is likely to affect the revenue or it is not possible to recover the amount later. Instead the opposite party No.2 issued a notice in the following form:-

OFFICE OF THE COMMISSIONER OF COMMERCIAL TAXES, ODISHA, CUTTACK

Letter No.15954/CT Dated 7.11.2015
E File No.II (II) 26/2015

To

M/s. Hindalco Industries Ltd., Hirakud,
Sambalpur,

Tin-21601703134

Take notice that it is proposed to withhold sanction of refund u/s 60 (1) of the OVAT Act of Rs.73,85,459.00 flowing from Appeal order No.AA-106/SAII/CST/12-13, Dated 10.11.2014 on the ground that the State has preferred second appeal against the appeal order passed by the DCST (Appeal), Sambalpur Range, Sambalpur giving rise to the refund under consideration.

You are therefore, directed to appear before the undersigned on 27.11.2015 at 11.00 A.m. in his office chamber at Banijyakar Bhawan, Old Secretariat Compound, Cantonment Road, Cuttack and explain as to why the refund so granted by the 1st appellate authority will not be withheld as per provision of section 60 (1) of the OVAT Act.

You may produce the documents and records on which you may rely in support of your arguments.

In the event of failure on your part to appear in person or by your authorized representative, on the date specified in this notice, the matter will be decided on merit.

Sd/-
Commissioner of Sales Tax,
Odisha, Cuttack."

In the aforesaid notice it is clear that the learned Commissioner of Sales Tax has proposed to withhold the refund on the plea that the appeal is pending before the Second Appellate Authority and the refund is the subject matter of appeal. Even the ground has been spelt out it has to be seen whether

by such notice the natural justice has been complied by the Assessing Officer who is undoubtedly a quasi-judicial authority.

15. It is reported in ***AIR 1990 SC 1984*** (S.N. Mukherjee v. Union of India) where Third Lordships observed at para-35:-

> "**35.** Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. xxx xxx What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge".

16. It is also reported in ***(1995) 5 Supreme Court Cases 482*** (LIC of India and another v. Consumer Education & Research Centre and others) where Their Lordships observed at para-23:-

> "**23.** Every action of the public authority or the person acting in public interest or any act that gives rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged with public element (*sic* that) becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simplicitor, do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons."

17. It is also reported in ***(1998) 8 Supreme Court Cases 194*** (Basudeo Tiwary v. SIDO Kanhu University and others) where Their Lordships observed at para-10:-

> **"10.** In order to impose procedural safeguards, this Court has read the requirement of natural justice in many situations when the statute is silent on this point. The approach of this Court in this regard is that omission to impose the hearing requirement in the statute under which the impugned action is being taken does not exclude hearing - it may be implied from the nature of the power - particularly when the right of a party is affected adversely. The justification for reading such a requirement is that the Court merely supplies omission of the legislature (***Mohinder Singh Gill v. Chief Election Commissioner: (1978) 1 SCC 405***).

From the aforesaid decisions of the Hon'ble Apex Court, it is clear that every decision either judicial or quasi-judicial must be supported by reasons because by every decision the right of a party is affected adversely. Moreover, for procedural safeguards the requirement of natural justice in many situations has to be complied with when statute is silent on this point. Natural justice is said to have been complied if a person concern is given opportunity of being heard. By virtue of such awarding natural justice the administrative authority excludes the chances of arbitrariness and ensures degree of fairness in the process of decision making. When such is the principle, it has to be scrutinized whether in the present case awarding of natural justice has been observed or not.

18. Now adverting to the fact of the case it is found from the notice that the learned Commissioner of Sales Tax has proposed to withhold the refund but no decision has been taken to withhold the refund although Section 57 of the Act clearly awards right to the petitioner to get refund from the Assessing Officer within sixty days of the order of the Appellate Court.

19. Since the aforesaid notice was issued by the opposite parties to the petitioner asking him to appear in person for hearing of the matter on payment of the refund or withholding the same and there is no decision taken to withhold the refund except a proposal from the side of the Commissioner, it cannot be said that natural justice has been violated and the order to withhold the refund has been finally passed by the opposite parties. It is true that Section 57 of the OVAT Act has been abridged as the Assessing Officer has not performed his duty for no payment of the refund within sixty days from the date of receiving of the order of the Appellate Court but the refund

which has to be paid under Section 60, has been proposed to be withheld for the reasons stated. The show cause notice issued vide Annexure-8 can be termed as a stage before decision taken under Section 60 of the Act and therefore, it cannot be said that Section 60 of the OVAT Act has remained as non-compliance. Thus, the point No.(i) is answered accordingly.

POINT NO.(ii) :

20. Petitioner has prayed for a direction to grant refund of the tax as per the statement of calculation vide Annexure-7 with statutory interest and after quashing the notice dated 7.11.2015 issued vide Annexure-8. Since the notice dated 7.11.2015 has been issued and no order of withholding the refund has been passed, it is not justified to quash the notice. Since under Section 60 the opposite parties have got power to withhold the refund subject to the circumstances as enumerated therein and the Commissioner of Sales Tax has requested the petitioner to come up for hearing, it is too early to say that Section 60 of the Act has been complied. So, the reliefs claimed by the petitioner are premature for which it is for the petitioner to obtain opportunity of personal hearing and claim refund with interest from the opposite parties. The point No.(ii) is answered accordingly.

CONCLUSION:

21. In view of the aforesaid analysis, we are of the considered view that Section 57 of the OVAT Act has been violated but the violation of Section 60 is yet to be found out. When there is notice to show cause issued to a proposal to withhold the refund but there is no order of withholding refund, the natural justice cannot be said to have been violated. We, therefore, in the fact and circumstances of the case direct the petitioner to attend the personal hearing before the learned Commissioner of Sales Tax on 6.6.2016 at 11.00 A.M. and the opposite party No.2 would pass order either to withhold the refund or payment of refund within two weeks from that date according to law and with the parameters as observed in the aforesaid paragraphs. The writ petition is disposed of accordingly.

Writ petition disposed of.

2016 (II) ILR - CUT- 314

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

W.P.(C) NO. 19310 OF 2015

PRATYUSH RANJAN BAGH …….Petitioner

.Vrs.

VICE-CHANCELLOR, O.U.A.T. & ORS. ……..Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART.15

Education – Admission into P.G. Course in Veterinary Science for the year 2015-16 – Petitioner belongs to S.C. Category – He was refused admission as he has not secured Overall Grade Point Average (OGPA) at least 6.60 out of 10 points in the subject applied for as per clause 2.2.1 of the Prospectus 2015-16 – Hence the writ petition – Non consideration of the relaxation of percentage of OGPA for S.C./S.T. and physically challenged students – Relaxation of marks in OGPA provided in clause 2.2.3 of the prospectus 2014-15, is omitted in clause 2.2.3 of the Prospectus 2015-16 – Action of the opposite parties is illegal and arbitrary and there is clear violation of Articles 14 & 15 of the Constitution of India – Petitioner having secured 5.90 marks in OGPA is eligible for admission in view of the relaxation clause – Although admission for the year 2015-16 is over but by an interim order this Court directed to keep a seat in S.C./S.T. category vacant, direction issued to the Opp. Parties to relax clause 2.2.1 of the Prospectus 2015-16 and allow the petitioner to get admission and allow him to clear the back papers. (Paras 15,16,17)

For Petitioner : M/s. H.N.Mohapatra, H.Sethy & A.Samantray.
For Opp. Parties : M/s. P.M.Pattajoshi, S.N.Rath & N.C.Das.

Date of Argument : 03.05.2016
Date of Judgment : 21.06.2016

JUDGMENT

DR. D.P. CHOUDHURY, J.

Challenge has been made to the inaction of the opp. Parties in not giving admission to the petitioner who is a member of Scheduled Caste category into Master's Courses in Veterinary Science in the year 2015-16.

FACTS :

2. The factual context as enumerated leading to the case of the petitioner is that the opp. Party-University has invited applications from eligible

candidates for taking admission into P.G. Programme for the year 2015-16 vide Annexure-1. Clause 2.2.1 of the prospectus indicates that a candidate must have passed Bachelor Degree of Examination securing overall grade point Average (OGPA) of at least 6.60/10.00 in ten point scale, 3.25/5.00 in fire-point scale, 2.60/4.00 in four point scale for General category whereas for SC/ST/ Physically challenged (PC) candidates, the said requirement is OGPA at 5.60/10.00,2,75/5.00, 2.20/4.00 respectively.

3. It is stated that the petitioner belongs to S.C. category, being eligible in all respects and having passed B.V. Sc. & A.H. from College of Veterinary Science and Animal Husbandry, Bhubaneswar securing OGPA 5.903 points out of 10 points applied for taking admission in M.V.Sc. (Master Degree in Veterinary science). Thereafter opp. Party no.2 sent letter inviting the petitioner by assigning intimation slip at sl.no.67 under general category and sl.no.12 under S.C. category to attend counseling on 25.8.2015, but unfortunately he was told at the counseling that since he has not secured OGPA at least 6.60 out of 10 points, he could not be given admission in M.V.Sc. courses. It is also alleged inter alia that the opp. Parties invited the attention of the petitioner to clause 2.2.3 of the prospectus which does not allow the petitioner to take admission. It is stated in the petition that such clause 2.2.3 read with clause 2.2.1(h) provide that the candidate has to secure at least 6.60 out of 10 points in the subject applied for, but never it speaks about relaxation for the candidate of S.C./S.T. category.

4. It is stated that during 2014-15 no such clause 2.2.3 as appearing in the prospectus 2015-16 was there. It is mentioned in the prospectus 2014-15vide clause 2.2.3 that minimum percentage of marks/OGPA and GPA as indicated shall not be applicable to SC/ST candidates, State sponsored candidate, OUAT in-service candidates, foreign candidates and candidates sponsored by ICAR. But the opposite parties omitted in clause 2.2.3 of prospectus for 2015-16 as to relaxation of percentage of OGPA for the students belonging to S.T./S.C. category and physically challenged students. This is clear violation of Articles 14 and 16 of the Constitution.

5. It is further stated that ICAR for Master degree programme has clearly prescribes that candidate must have passed Bachelor of Veterinary Science by securing OGPA at least 6.60/10 in ten point scale, 3.25/5.00 in five-point scale, 2.60/4.00 in four-point scale for general category and for SC/ST and physically challenged candidates, the said requirement of OGPA should be 5.60/10.00,2.75/5.00 and 2.20/4.00 respectively. When ICAR has prescribed such clause, under no circumstances clause 2.2.3 of the impugned

prospectus disallowing the petitioner to take admission is absolutely illegal and against law. The petitioner made representation to consider his case, but since no action was taken, he knocked the door of the Court.

6. Per contra, counter affidavit is filed by the opp. Parties. It is submitted in the counter affidavit that the prospectus 2015-16 for admission in M. V. Sc. course was issued by the opp. party no.2 after same being approved by the academic Council, OUAT vide resolution No.6994 dated 26.5.2015, for which benefit under 2015-16 prospectus cannot be raised. Apart from this it is stated that the prospectus for 2015-16 has been issued by following the Rules and Regulations contained therein. It is also mentioned that since the admission for the academic year 2015-16 has already been completed since 25.8.2015 and midterm examination has already started, the petitioner's claim becomes infructuous.

7. It is stated by the opp. Parties that the petitioner was intimated to attend the counseling for M.V.Sc. degree admission on the basis of the mark secured in the qualifying examination as per sub-clause 2.2.1(a) and (b), but since he has not secured the requisite percentage in the 10.00 scale in the subject study as per clause 2.2.1 (b) of the prospectus, he was not allowed to take admission. He was called to attend the counseling basing on his entitlement criteria vide sub-clause 2.2.1(a) of the prospectus 2015-16, but he has not qualified under clause 2.2.1(b) for which he was not allowed to take admission. As the action of the opp. Parties is according to Rules and Regulations of the University with approval of the academic Council, the petitioner has no right to claim any admission. So, he submits to dismiss the writ application.

SUBMISSIONS:

8. Mr. H.N. Mohapatra, learned counsel for the petitioner submitted that the action of the opp. Parties is arbitrary, illegal and reservation policy of the State. He further submitted that the prospectus of 2014-15 has taken care of the S.C./S.T. and physically challenged category students by inserting Clause 2.2.3 where minimum marks as required in Overall Grade Point Average (OGPA) and the subject of study has been made relaxable. He further submitted that in the prospectus of 2015-16 the Clause 2.2.3 has made relaxation of almost all category of student except S.C./S.T. and physically challenged students. He submitted that because of relaxation of the mark on overall grade as appearing in the Clause 2.2.1(a) in the prospectus of 2015-16, the opposite parties have forgotten about relaxation in the subject of study as per Rule 2.2.(1)(a). But the opposite parties have forgotten the fact that

Clause 2.2.3 in the prospectus of 2015-16 has omitted relaxation of marks in Rule 2.2.(1)(b) in the subject of study unlike the said relevant provision maintained in the prospectus of 2014-15.

9. Mr. Mohapatra, learned counsel for the petitioner submitted that there is relaxation in OGPA for the SC/ST category students and same facility has been given in clause 2.2.1(a), whereas in the impugned advertisement clause 2.2.1(b) has been introduced stating that 60% marks of OGPA or 6.60 in 10 points in the subject of study is must for Master Programme, clearly depriving the right of the students of SC/ST category by showing such clause applicable to all category of students. According to him introducing such clause (b) is not in consonance with the fundamental rights of the member of SC/ST, for which such clause not only takes out the rights of the petitioner to take admission, but also has caused serious injustice to the petitioner and similarly situated students. He further submitted that under Article 15 of the Constitution the member of the SC/ST should be given benefit by special legislation or provision in all admission and employment, but said provision has not been taken care by the opp. Parties. So, he prayed to allow the writ application by directing the opp. Parties to give admission to the petitioner in M.V.Sc. courses.

10. Mr. P.M. Pattajoshi, learned counsel for the opp. Parties submitted that the University has right to frame policy to give admission to the candidates in each year and the petitioner has no locus standi to challenge the same. He further submitted that as per the policy formulated during 2014-15 prospectus was issued showing eligibility criteria for giving admission to M.V.Sc. courses during 2014-15. Similarly, the University has made policy for promoting quality of study, for which it has kept some percentage of mark in OGPA in the subject of study to which the students would apply. So, it is submitted by Mr. Pattajoshi that the petitioner having not met the criteria as per clause 2.2.1(b), the action of the opp. Parties is valid and proper. He further submitted that the policy of the academic counsel has been reflected by issuing prospectus in 2015-16 and for such policy matter, the Court should be slow by entering into controversy and the Court should allow the opp. parties to go ahead with the admission of the students. He also submitted that as per the settled position of law the Court should be reluctant to interfere with the affairs and policy of the University as they intend to promote the quality of education. So, he submitted to dismiss the writ application.

POINT OF CONSIDERATION:

Whether the petitioner is entitled to take admission in M. V. Sc. First year Programme by relaxing clause 2.2.1(b) of the prospectus for the year 2015-16?

DISCUSSIONS:

11. It is admitted fact that the petitioner has applied for his admission to P.G. course for M.V.Sc. and A.H. Degree for the year 2015-16. It is also not dispute that the opp. Parties have issued the prospectus for 2014-15 and 2015-16. It is also admitted fact that the petitioner was called to counseling during 2015-16, but was not given admission.

12. It is the settled principle of law that the University can make policy for admission to different courses and such policy must meet the provisions of the statutes and the Constitution. In the instant case for admission to different courses, the opp. Party-University has issued prospectus showing the criteria for admission into Master Programme 2014-15. The same is depicted for better appreciation:-

> "**2.2.1 For Masters' Programme**:
>
> (a) Candidate must have secured 55% of marks in aggregate or Overall Grade Point Average (OGPA) 6.00 in 10 point scale.
>
> (b) 55% marks or OGPA of 6.00 in 10 point scale in the subject of study."

At the same time clause 2.2.3 of the prospectus 2014-15 has made the following provision:-

> "Clause:-2.2.3. The requirement of minimum percentage of marks/OGPA/GPA as indicated above shall not be applicable to Scheduled Caste and Scheduled Tribe candidate, State Government sponsored candidates, OUAT in-service candidates, Foreign candidates and candidates sponsored by ICAR."

But in the next year 2015-16 the above clauses were replaced with new Clauses as hereunder:-

> **"2.2.1 For Masters' Programme:-**
>
> (a) Candidate must have passed Bachelor degree examination securing an Overall Grade Point Average (OGPA) of at least 6.60/10.00 in ten point scale, 3.25/5.00 in five point scale, 2.60/4.00 in four-point scale for General category whereas for SC/ST/physically Challenged (PC) candidates, the said requirement is an OGPA of at least 5.60/10.00, 2.75/5.00, 2.20/4.00, respectively. In other cases, where grade points are not awarded and only marks are awarded, the candidate must have secured at least 60% marks for General category, whereas for SC/ST/PC categories the requirement

is 50% marks. (Please note that equivalence between OGPA and % marks will not be acceptable).

(b) 60% marks or OGPA of 6.60 in 10 point scale in the subject of study.

2.2.3:- The requirement of minimum percentage of marks/OGPA/GPA as indicated above shall not be applicable to State Government sponsored candidates, OUAT in-service candidates, Foreign candidates and candidates sponsored by ICAR."

13. The aforesaid provisions makes it clear that there was relaxation for the candidate of SC/ST category while applying for the Master Programme in both aggregate or in the subject of study during 2014-15. In the impugned prospectus 2015-16 similar clause 2.2.3 is not there. The aforesaid provision Clause 2.2.3 of prosepectus 2015-16 has omitted dispensing with the minimum percentage for the candidates of SC/ST and physically challenged category. It is obvious that such omission has been made for the purpose of relaxation as already made for such category students in clause 2.2.1(a) of the prospectus 2015-16. When a student is allowed to take admission in Master Programme he has to qualify in clause (a) and (b) of clause 2.2.1 of the prospectus. When there is relaxation for the category of student of SC/ST and physically challenged in their marks in aggregate as per the above paragraph it is not understood what is the policy for not awarding such benefit while keeping the minimum marks in the subject of study. This anomaly was not present in the prospectus 2014-15 because presence of clause 2.2.3 therein was taking care of all category of students except general category. Learned counsel for the opp. Parties and the counter affidavit are silent as to omission of such relaxation in the subject of study for the candidate of SC/ST and physically challenged. No document is produced by the opp. Parties showing formulation of policy for omission of relaxation for the students of SC/ST or physically challenged in the subject of study.

14. Article 14 of the Constitution speaks as follows:

"Article 14:- **Equality before law**.- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 15 of the Constitution speaks as follows:-

"Article 15:- **Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth**.-(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of t hem, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) [Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

(5) [Nothing in this article or in sub-clause(g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause(1) of article 30.]"

15. From both the provisions it is clear that the members of the SC/ST should be given relaxation in higher education and in order to meet such requirement the State have been allowed enormous power to prepare special legislation. For that also the University Grant Commission has issued Regulations at different occasions keeping reservation policy for upliftment of the students of these categories to sub-serve justice for members of such category. Keeping in view of this settled Constitutional provisions and the provisions of U.G.C. Act, the minimum requirement in aggregate mark and subject in study has been waived in the prospectus 2014-15. Same is also reflected in clause 2.2.1(a) of the prospectus 2015-16, but sub-clause (b) is left out by the opp. parties creating such hurdle for taking admission by the students of SC/ST categories. It appears that for physically challenged candidates there is provision in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 to keep reservation of seats for admission in educational institutions.

16. In view of the aforesaid discussion, we are of the considered view that by omitting any relaxation in the marks secured in the subject of study for the students of SC/ST, sub-clause (b) of clause 2.2.1 of the impugned prospectus has become inoperative. In our opinion similar relaxation as in sub-clause (a) of clause 2.2.1 should be also applicable for the category of SC/ST and physically challenged in securing OGPA in the subject of study. Therefore, we are of the view that clause (b) is to be read with clause (a) by applying same relaxation in the subject of study for the year 2015-16. The point is answered accordingly.

<u>CONCLUSION:</u>

17. In view of the aforesaid discussion, it is found that the opp. Parties by omitting the relaxation for the students of SC/ST and physically challenged category in the subject of study has not only deprived the petitioner from getting justice, but also violated the Constitutional provision meant for the reservation category. We have already observed in the aforesaid paragraphs that similar relaxation as in clause 2.2.1(a) of the prospectus is also applicable to clause 2.2.1(b) for the category of students of SC/ST and physically challenged. We are, therefore, of the view that the petitioner is eligible for admission by securing mark OGPA 5.90 for the subject of study in the event of relaxation of sub-clause (b) in the line of sub-clause (a) of clause 2.2.1 of the prospectus 2015-16. We are aware that the admission for the year 2015-16 is over, but by interim order we have directed to keep a seat in SC/ST category vacant and it has also kept as submitted by learned counsel for the opp. Parties. We, therefore, direct the opp. Parties to relax the sub-clause (b) in the light of sub-clause (a) of clause 2.2.1 of the prospectus for 2015-16 and allow the petitioner to get admission into the same. He will also be given chance to clear the back papers in the semesters. The writ application is allowed.

Writ application allowed.

2016 (II) ILR - CUT-322

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

W.P.(C) NO. 3269 OF 2007

M/S. AGARWALA SPICES & FOOD PROCESSORS PVT. LTD. ……..Petitioner

.Vrs.

COMMISSIONER OF SALES TAX, ORISSA & ORS. ……..Opp. Parties

ODISHA SALES TAX ACT, 1947 – Ss. 6, 7

Exemption of tax – Petitioner-dealer registered as small scale industrial unit with DIC, started commercial production on and from 14.04.1989, claims exemption of tax on purchase of raw material, machinery and spare parts and sale of finished products for a period of 5 years under I.P.R., 1986 and 7 years under I.P.R., 1989 – Unit of the petitioner is certified by DIC as "Spice making Unit" using pulveriser – Entry 21 under serial No. 30FF of "list of ineligible industries" appended to the Finance Department Notification Dt. 16.08.1990 [related to IPR, 1989, Dt. 01.12.1989] makes "making of Spices, Pampad, Dal, etc." ineligible to avail exemption – Entry 51 in the expanded "list of ineligible industries" under Serial No. 30FF by way of amendment Dt. 28.04.1992 to the Finance Department Notification Dt. 16.08.1990 makes "pulversing units" ineligible to avail exemption – The dealer is not entitled to benefit of Finance Depatment Notification Dt. 16.08.1990 read with the Finance Department Notification Dt. 28.04.1992 claiming as "pulverising unit" – Exemption period of five years expired on 13.04.1994 – Held, the petitioner-dealer is not entitled to claim exemption for the years 1994-95, 1995-96 and 1996-97 as it is covered under I.P.R. 1986 but not I.P.R., 1989.

Case Laws Referred to :-

1. 2005 (142) STC 76 : Vadilal Chemicals Ltd. V. State of Andhra Pradesh.
2. OJC No.4153 of 1990 : M/s. Mansfield Electronics vrs. State of Orissa. & Anr.

For Petitioner : M/s. J.Sahu, N.K.Rout & P.Mohapatra
For Opp. Parties: Mr. S.P.Dalei, Addl. Standing Counsel, Revenue

Date of hearing : 09.02.16
Date of Judgment :16.03.16

JUDGMENT

DR. D.P. CHOUDHURY, J.

Challenge is made to the order dated 20.2.2007 passed by the Commissioner of Sales Tax, Odisha in Revision Case No. SU-04/06-07 confirming the order dated 28.4.2006 of the Assessing Officer for the period 1994-95, 96 and 1996-97and 1996-97.

FACTS:

2. The factual matrix leading to the case of petitioner is that the petitioner is a registered Company runs pulverizing unit and is engaged in manufacture and sale of garam masala powder and curry powder. It is a registered small scale industrial unit under the Industrial Policy Resolution, 1986 (in short "IPR-1986") under the District Industries Center (DIC), Jagatpur having permanent registration certificate. By using this sophisticated pulverizer the petitioner started commercial production on 14.4.1989 duly certified by the D.I.C.

3. It is also averred inter alia that eligibility certificate has been issued by the opp. Party no.4 avail Sales Tax exemption on purchase of raw material, machinery and spare parts and sale of finished products for a period of five year i.e. from 14.04.1989 to 13.04.1994 in accordance with Finance Department Notification dated 13.02.1987 bearing SRO No. 83./87. It is stated that this exemption has been accepted by the Assessing Authorities vide Annexure-1 series. After completion of assessment of Sales Tax under section 12 (4)of Orissa Sales Tax Act (hereinafter called "OST Act") for the period 1989-90 1990-91, the same has been accepted by the Assessing Authority towards exemption of sale of finished products. But later reassessment proceeding was drawn purportedly under section 12 (8) of the act on the plea that grant of exemption in assessment was irregular. The opp. Party no. 3 after considering the case of the petitioner in reassessment proceeding dropped the proceeding by affirming the grant of exemption as correct on.

4. It is further stated that opp. Party no. 2 in exercise of suo motu Revision under section 23(4)(a) of the OST Act read with Rule-80 of the Orissa Sales Tax Rules (hereinafter called "Rules") initiated Sou Motu Revision for the period 1989-90 and 1990-91. Opp. Party no.2 by order dated 22.7.1994 dropped the Sou Motu Revision proceeding by observing that the petitioner has purchased the pulverizing unit from M/s. Jayems Engineering Co. Pvt. Ltd., Kolkata. Ultimately opp. Party no.2 found the petitioner's pulverizing unit eligible to tax exemption as per IPR-86 on the sale of its products. The petitioner has narrated about the good effect of pulverizers. It is further averred that the petitioner claimed exemption in

original assessment completed under section 12(4) of the act for the period 1995-96 and 1996-97 in the reassessment notice issued by the authorities dated 12.1.2001 vide Annexure-3. It is alleged inter alia that opp. Party no.3 observing that there was no escape turnover or under assessment turnover, dropped the reassessment proceeding by order dated 10.5.2002 although such order was actually passed on 30.3.2002. It is alleged that such order dated 10.5.2002 put to cover the 1994-95 to 1996-97 although the order was actually passed on 30.3.2002 dropping the reassessment proceeding.

5. It is further alleged that Opp. Party no.2 issued a Suo Motu Revision notice vide notice dated 7.5.2005 purportedly under section 23(4)(a) of the OST Act read with Rule 80 of the Rules for the periods from 1994-95, 1995-96 and 1996-97 to revise the order of reassessment. In the notice it is stated that since IPR-86 is only giving exemption of tax purchase and sale for a period of five years i.e. from 1989 to 1994, the petitioner is not entitled to avail benefit for additional two years as the petitioner is not entitled to avail same under IPR-1989. The opp. Party no.2 suo motu initiated a Revision proceeding without service of any the notice on petitioner against the reassessment order for the period 1994-95 to 1996-97.Opp. Party no.2 illegally observed that Entry 21 of the ineligible list vide Finance Department Notification dated 16.8.1990 setting out "unit making spices, Pampad, Dal etc." and further Entry 51 providing pulverizing units to be ineligible under IPR-92, do not extend any exemption to the petitioner to avail the benefit. It is observed illegally that the exemption of sale of the petitioner expire on 13.4.1994 Such order of opp. Party no.2 demanding to pay back refund for 1994-1997 already received, has been agitated on several grounds.

6. The petitioner being aggrieved by the order the opp. Party no.2 preferred Revision before the Commissioner of Sales Tax (O.P.No.1) on different grounds, but the Commissioner of Sales Tax confirmed the order of the Assessing Officer and dismissed the Revision. Since no notice was served while the revision order was passed, the petitioner claims that he has not been given reasonable opportunity to put his grievance. Thus, it is prayed to allow the petition and confirm the exemption of pulverizing unit of the petitioner unit of the petitioner to pay any tax on the self-same period from 1994- 95 to 1996-97. Hence the writ petition.

SUBMISSIONS:

7. Learned counsel for the petition submitted that since the petitioner runs a sophisticated pulverizing unit and manufacturing various Garam Massala Powders/curry Powders and the General Manager of the D.I.C. has

allowed the exemption of sales tax under IPR-1986, the impugned order of demand is wrong, illegal and not proper, In view of an amendment of Entry No.30FF under Section 6 of the OST Act, the demand of duty by the impugned order is unjustified. Moore over, the exemption period has been allowed for seven years from the date of commencement of commercial production, but the impugned order has lost sight of such period of seven years. According to him, the commercial production started on 18.4.1989 and it should cover up to 1996 according to the revised Circular issued by the State Government. He further submitted that when the Assessing Officer has not found fault with the statement submitted under section 12(4) and 12(8) of the OST Act and subsequent proceeding also went in favour of the petitioner, the suo motu Revision proceeding by opp. Party no.2 under section 23(4)(a) of the OST Act read with Rule 80 of the Orissa Sales Tax Rules,1980 (hereinafter called the Rules) is illegal, arbitrary and unsustainable. It is submitted that the impugned orders passed by the authority are erroneous because the pulverizing unit although notified to be ineligible at sl.no.51 vide notification dated 28.4.1992, the industrial unit run by the petitioner ineligible otherwise to avail exemption from payment of tax being unaffected by such notification in view of the foot note available in the notification protecting the industrial units who have availed the sales tax exemption prior to 28.2.1992. He further submitted that the eligibilie certificate granted to the petitioner to avail sales tax exemption as an eligible unit under IPR, 1986 as required under section 6 of the OST Act cannot be denied by illegal executive action to subvert the entire statutory entitlement of the petitioner . It is also contended that in view of the decision reported in **Vadilal Chemicals Ltd. V. State of Andhra Pradesh,** reported in 2005 (142) STC 76, the impugned order passed against such decision and the State Committee is perverse and illegal. He also submitted that according to the decision of this Court also the impugned order suffers from illegality and have passed without jurisdiction. Hence he submitted to set aside the said order.

8. Learned Standing Counsel for the Revenue submitted that the petitioner was manufacturing 11 items of finished products. Being a small scale industry was under IPR1986. All these 11 items are spice powder and primarily they are spice production unit, for which the unit of the petitioner cannot be exempted from eligibility of sales tax. He further stated that although the petitioner claimed that the spice powders were prepared by using pulverizers, but preparation by any means will not take away the structure of finished products, which is not exempted from payment of sales

tax. On the other hand, he submitted that the assessment order under section 12(4) of OST Act and the subsequent orders are not correct, but he supports the impugned order passed according to law. In whole, he submitted that the suo motu Revision proceeding purportedly started against the petitioner is legal and proper. According to him the assertion of the petitioner that he used the pulverizers for grinding the spices is immaterial because the spice production unit is not exempted from payment of sales tax beyond five years as per the IPR-1986. The unit of the petitioner is not under IPR 1989 for which benefit of seven years exemption is not applicable to the petitioner. The petitioner has already availed the benefit for five years under IPR-1986 and he has failed to show any document stating that the DIC has already certified it to be cover under IPR-1989. So he submitted that the present impugned orders suffer from no illegality and the same should be confirmed.

POINTS FOR CONSIDERATION

9. Now the question arises whether the petitioner is entitled for exemption from payment of tax for the period from 1994 to 1997 and consequently for refund of the amount already paid ?

DISCUSSION

10. It is admitted fact that the petitioner is a dealer of small scale unit under Industrial Policy Resolution, 1986 (hereinafter in short 'IPR' 1986) engaged in manufacturing and processing of quality spices under the brand name, 'Swadist'. It is also not disputed that it has got certificate from District Industries Centre (hereinafter in short 'DIC') under IPR 1986 for obtaining exemption from the payment of sales tax for the period of five years under IPR 1986 and also it has availed the benefit of such IPR 1986 for a period of five years from 1989 when he commenced production of spices. It is also not disputed that a notification dated 16.8.1990 was issued by the State Government to the effect that the benefit of exemption would be extended for a period of seven years. It is also not disputed that the State Government issued another notification dated 28.4.1992 (Annexure-12) stating that no industrial unit indicated in the ineligible list shall qualify for receipt of the exemption under IPR 1989.

11. It is revealed from the Annexure-1 that the petitioner was issued certificate for eligibility of sales tax exemption on finished products of small scale industrial unit from DIC under Odisha Sales Tax Act, 1947 & Central Sales Tax Act, 1956 (hereinafter in short called ('CST Act') as continuing unit of IPR 1986 as defined in IPR 1989. Such notification shows that the

petitioner-unit started commercial production on 14.4.1989 to avail the benefit of IPR 1989 but it was issued in the following manner:

Annexure-1

DISTRICT INDUSTRIES CENTRE : JAGATPUR.
No.3502 /Dt. 8.9.95
CERTIFICATE FOR ELIGIBILITY OF SALES TAX CONCESSION ON FINISHED PRODUCTS OF SMALL SCALE INDUSTRIES OF CST AND CST AS CONTINUING UNIT OF IPR 1986 UNDER IPR 1989.

……..

To
M/S. Agrawala spcies & Food Processors,
Plot No.2460,2461 & 2462,
Nimpur, Jagatpur.

THIS IS TO CERTIFIY THAT:-

1. The above noted industrial unit is a Small Scale Industry which has been accorded PMT Regn.No.15/04/0657/PMT/SSI dtd.07.06.89, 11.08.89 and 07.02.90 for manufacture of the following finished products. The unit has been registered under the OST Act, 1947 bearing regn. Certificate No. CU-II-4663 dtd. 29.12.87 valid with effect from 29.12.87 and CST Act. 1956 bearing regn. No. CUC-ii-891 dt.29.12.87 valid with effect from 29.12.87.

Sl. No.	Name of the finished products to exempted	quantity /value
1.	Haladi Powder	
2.	Dhania Powder	
3.	Jeera Powder	
4.	Chilly Powder	
5.	Qurry Powder.	
6.	Garama masal Powder.	
7.	Black Pepper Powder.	
8.	Black Salt Powder.	4,54.200Kgs.
9.	Panchu Phutan.	
10.	Amchur Powder.	
11.	Sambar Powder	

2. The unit has started fixed capital investiment after 1.4.86. and has gone into commercial production on 14.04.89
3. The unit a Small Scale continuing unit of 1989 policy as defined in the IPR- 1989 and is eligible for exemption from payment of sales tax on sale of its finished products for a period of 7 (Seven) years from the date of commercial production as per IPR-1989 and subject to such rustication and condition as laid down in Finance Department Notification No. SRO-789/90 dt.16.8.90 as amended from time to time.

4. This certificate is issued for the year 1995-96 i.e. from 1.4.95 to 13.4.96.only.

MANAGER (CREDIT) PROJECT MANAGER

Memo No. _____/ Dt.

Copy forwarded to the Commissioner, Commercial Taxes, Orissa, Cuttack / C.T.O., Circule-II, Badambadi, Cuttack/Director of Industries, Orissa, for favour of information and necessary action.

MANAGER (CREDIT) PROJECT MANAGER

12. The aforesaid list of finished products vide Annwxure-1 not state that the petitioner is exempted to pay sales tax on the items as finished products. Aforesaid Annexue-1 does not state that the finished products were prepared by using pulverizing method although the DIC issued letter on 8.9.19095. Annexure-1 crept doubt in the mind as to why such certificate of eligibility was issued on 8.9.1995 showing exemption for seven years from date of production in 1989 under IPR 1989 when petitioner claims that it is cover under IPR 1896 and it commercial production was started on 14.4.1989 and as per Annexure-11 the IPR 1989 came into force on 1.12. 1989. So the Annexure-1 is not support of the case of the petitioner. On going through the Annexures 4 & 5 it appears that the petitioner was assessed by the concerned Assessing Officer for 1995-96 & 1994-95 respectively. The orders are also identical to each other. For better appreciation, relevant portion of the Annexure-5 is reproduced below.

“Annexure-5

xxx xxx xxx

Though there certain force in the contention of the dealer it was not very clear from his arguments as to why the said unit would not be

> considered as a spice making unit. To clarify the doubt a reference was made to the General Manager, District Industry Centre, Cuttack, the issuing authority of eligibility certificate to the unit. The General Manager, vide his letter No. 2303 dt. 10.4.92 clarified that the concern is not an ordinary spices grinding unit but a pulverising unit that functions with a pulveriser fitted with a blower integrator and dust collector."

xxx xxx xxx

13. From the aforesaid relevant portion of the order passed by the Assessing Officer relying upon the contention of the petitioner to the effect that the unit of the petitioner is pulverizing one, as it has been clarified by the General Manager in his letter no. 2303 dated 28.4.1992 that the unit of the petitioner is not an ordinary spice grinding unit but pulverizing unit which functions with a pulverizer with a blower interrogator and its collector. Moreover the Assessing Officer relying upon the finance Department Notification dated 16.8.1990 vide Annexure-11 to the effect that the exemption of sale tax on the finished product has been extended upto7 years from the date of commercial production of the petitioner. It is true that the clarification made by the General Manager shall not be questioned but such letter is not filed in this case. Moreover, pulverizer is not an ordinary spice grinding unit as clarified by the General Manager DIC but never denies it is an instrument used for spice grinding purpose. Moreover, the unit of the petitioner is spice making unit as the end product is the spices which are used for sales and tax imposed on the sale of finished products. Thus the reason given vide Annexures-4 and 5 did not apparently convince the Court to rely on it. Apart from this the notification dated 16.8.1990 vide Annexure-11 is issued under IPR-1989 as it is amendment to the Finance Department Notification dated 23.4.1976 to the effect that Section 30FF to the schedule of OST Act has been incorporated. That notification vide serial No. 21 takes out spice making unit from the exemption list. So the stipulation of 7 years exemption is not applicable to the spice making unit from one 1.12.1989. Such notification does not contain the pulverizing unit as ineligible for exemption, but the certificate of the General Manager has made it clear that it's a spice grinding unit using pulverizer as available from the order of the Assessing Officer. At any rate it is reiterated that the unit of the petitioner being spice grinding unit cannot avail 7 years' exemption as per Annexure-11.

14. Annexure-2 is the order passed by the Commissioner of Sales Tax by initiation suo motu revision against the present petitioner under section 23(4)(a) of the Orissa Sales Tax Act read with Rule 80 of the Odisha Sales Tax Rules. The relevant extract of that order is reproduced below:

> xxx xxx xxx
>
> I have carefully gone through the assessment record and the written submissions filed by the learned advocates. I have also perused the case law cited by the learned advocate. It has been contented that the Industrial Unit of the dealer is a pulverizing unit eligible for tax exemption on sale of the its products as per IPR 1986. It has been further stated that pulverizing unit have become ineligible to avail tax exemption vide Finance Deptt. Notification No. 19194/CTA-72/92F dt.28.4.98 and in the footnote of the said notification it has been stated that the Industrial Units which are set-up and in receipt of incentive under the notification of Govt. of Orissa in Finance Deptt. No. 27662- CTA-56/90F dt./16.8.90 will continue to the said incentives. In this connection I have perused the certificate granted by the Project Manager D.I.C., Jagatapur according to which it has been that the unit is eligible for exemption from payment of sales tax on sale of its finished products for a period of 5 years from the date of its commercial production as per I.P.R. 1986. It is also noticed from purchase bill bearing No. 62 Dt,11.2.88 that the dealer has purchased a pulverizing unit at a cost of Rs.50,190/- from M/s Jayems Engineering Co.(P) Ltd, Calcutta.
>
> xxx xxx xxx

15. After observing the same the Assistant Commissioner of Sales Tax drooped the proceeding initiated under the relevant provision of the Act and Rules thereof for the assessment years 1980-90 & 1990-91. The concerned Assistant Commissioner of Sales Tax on the footing that the pulverizing units were eligible for tax exemption pursuant to the notification dated 16.8.1990 and as such eligible to continue the same under IPR 1989. This order relates to years 1989-90 and 1990-91 but does not relate to the disputed years of 1994-95 and 1995-96, against which relief has been claimed, therefore, Annexure-2 has no strength to support petitioner. On 7.5.2005 vide Annexure-6 the sou motu revision notice section 23(4)(a) or OST Act read with Rule 80 of OST Rules was issued by the Assistant Commissioner, Sales Tax because they found that the petitioner has availed the tax exemption for the period 1994-97 showing it as pulverizing unit not spice making unit which is not eligible under IPR1989 and under 30FF of the OST Act and the Sales Tax Officer has accepted the same against the interest of Revenue. It appears from Annexure-8 that after the notice was issued, the matter was heard and was disposed of by the Assistant Commissioner, Sales Tax,

Cuttack II Range. Thus the proceeding under section 23(4)(a) of the Act and Rule 80 of the Rules was pressed into service purportedly stating that the spice making unit is not eligible for tax exemption. Necessary extract of the order is placed hereunder for better analysis.

“Annexure-8

xxx xxx xxx

8. When the assessee realized that spice making unit is not eligible for tax exemption he took the contention that his unit is not spice making unit but a pulverizing unit. In order to cover up the Lapse, he represented to DIC, Jagatpur and DIC, Jagatpur vide their letter No. 1967 dt.21/4/91 intimated that the unit is not an ordinary spice making unit but a highly sophisticate spice making unit where grinding is done with a high carbon steel hammer which is cooled by cold water supply being circulated around the grinding chamber. By this, the colour, the flavour and the natural taste of the ingredients remain unchanged. From the letter of DIC it is clear that the unit is making spice and nothing else, but the production is made through an advance technological method. Whether spice is made manually at home of though manufacturing units with highly technological process the product remains the same i.e. spices. It is known as spices in Commercial Circles irrespective of the method of production. The word Spice means “automatic or pungent vegetable substances use to flavour food”. The taste and the purpose for which it is produced remains the same. The production through machine only reduces the cost of production and gives the product a lusture but the inherent character of the commodity remains unchanged. Therefore, the connection of the appellant that it is not spice making unit but pulverizing unit does not hold enough water.

9. While things stood thus, Govt, vide notification No-19194 CTA72/92f dt. 28/04/92 added another 38nos. Of industries to the ineligible List and according to Sl, No.-51 of the said list pulversing units are excluded from tax exemption list. So by 29.04.92 both spice making unit and pulverizing units are excluded from tax exemption on sale of its finished products for a period of 5 years from the date of commercial production as per entry 30FF (pre amended) of tax free list of CST rate chart. Since this unit has started commercial production from 14/04.89, the period of exemption on sale of finished products expires on 13/04/89, and no exemption is available thereafter. Hence allowance of exemption beyond 13/04/94 is erroneous, irregular and against revenue.

xx xx xx"

16. It appears that the concerned officer has observed clearly in the aforesaid paras that the unit of the petitioner was spice manufacturing unit and also it is filtered that the period of exemption of sale of finished products is five years under IPR 1986 and it has expired on 13.4.1994. Hence the concerned Sales Tax Officer disallowed the exemption granted to the petitioner on finished products for the year 1994-95, 1995-96, 1996-97 amounting to Rs. 42,64,754.00. On going through the detailed order, it appears that the concerned authority has distinguished the case of the present petitioner from the case law cited by the petitioner before him and he is of the view that the five years of exemption was granted to the petitioner and it expired on 13.4.1994. Learned counsel for the petitioner submitted that the exemption period could be extended for seven years in view of the Government notification dated 28.4.1992. On going through the Notification dated 28.4.1992 vide Annexure-12 it appears that 38 categories of Industries with its expansion have been added to the Schedule under Section 6 of OST Act showing the same as ineligible to avail exemption under serial No.30FF of the Schedule vide notification issued on 16.8.1990. Essentially pulverizing unit vide serial No. 51 has also been ineligible to avail exemption from 29.4.1992. But there is a foot note stating industrial unit which are set up and in receipt of the incentive under that notification of Government of Orissa Finance Department Notification No. 27662-CTA-56/90Fdated 16.08.1990 (Annexure-11) will continue to receive the said incentive. It has already been discussed above that the unit petitioner was not having pulverizing unit nut a spice grinding unit the finished products of different spices. Thus the pulverizing unit even if became ineligible under Notification dated 28.4.1992 (Annexure-12), cannot be also allowed to avail the exemption as claimed by the petitioner. It is also reiterated that Annexure-12 is further addition to Notification dated 16.8.1990 (Annexure-11) and the Notification dated 16.8.1990 relates to IPR-1989. When there is no claim of the petitioner that his unit is covered under IPR-1989 but covered under IPR-1986 whereunder, neither the spice making unit nor the pulverizing unit can be said to have availed the exemption of 7 years,' thus the order passed the learned Assessing Officer vide Annexure-8 cannot be said to illegal.

17. Annexurre-9 is the impugned order where appeal was preferred against the order dated 28.4.2006 vide Anexure-8 Relevant portion of the order is also placed below:

"xxx xxx xxx

But in the case of the petitioner, the SSI Unit was a 'spice making unit' and subsequently it was changed to 'Pulverizing Unit' but the end product remains the same as "spices" even though the claim of the petitioner is that he has used sophisticated machinery for pulverization. The production/manufacture by the pulverizing unit is spices and is being sold as spices in the market. Both the spice making industry and / or the pulversing unit was declared ineligible by the Notification issued by Government by F.D. Therefore, the claims of the petitioner that on the strength of the 'footnote' it will continue to enjoy exemption of additional two years are unsustainable. The incentives envisaged under IPR7989 has been abridged/modified/enlarged as per the aforesaid guidelines issued by Government in F.D placing clearly the spice making industry and subsequently pulverizing unit beyond the pale of exemption of sales tax.

Further the intention of the 'foot note' is not to deny the incentive to industrial units which have made investment pursuant to a promise or representation made in IPR-1989. But the fact of the appellant is that it has made investment during IPR- 1986 and has not made any investment under IPR-89. Therefore, there is no case for application of the 'foot note' to the notification dated 29.04.92 to the case of the petitioner.

Moreover, the appellant's unit is entitled to benefit of exemption under IPR-1986 and entry 30-FF of the tax free schedule for period of 5 years from 14.04.89 to 13.04.94 It is only from 14.04 .94. It is only from 14.04.94 that claims to exemption from sales tax on sale of finished product for an additional period of 2 years, over and above 5 years allowed. Under IPR-1986 arises. Till that date the petitioner was not in receipt of any incentive under IPR-1989, Accordingly, the 'foot note' in the notification dated 29.04.92 does not apply.

Entry 30FF originally allowed sales tax incentives of sale of finished products to industrial units of IPR-1989. To allow additional benefit of 2 more years, the entry was amended in notification dt. 16.08.90 substituting the period of 5 years in column 3 of the entry to 7 years. And the existing lit of ineligible industries was also substituted as per Annexure-1 of IPR-1989. The question whether the units of IPR-1986, which were availing benefit of exemption under 30FF would cease to avail benefit for any balance period out of 5 years was considered by the Hon'ble High Court of Orissa in the case of M/s. Mansfield Electronics Vrs. State of Orissa and Anr. in OJC No. 4153 of 90 decided in 1st May 1992. In that case, the petitioner was a manufacture of Black & White Television sets and enjoying sales tax exemption under entry 30FF of the notification dt.13.02.1987. The exemption for manufacture of Black & White Television sets was withdrawn by the notification dt. 16.08.90 by amendment of entry 30FF.

> The Hon'ble Court held that an exemption which was granted by one notification to remain operative for a period of time as till that period is over irrespective of the fact, as to whether the notification is subsequently amended by abridging the period of exemption. It was concluded that "such units are to enjoy the privilege of exemption till lapse of full period as was allowed to them under the earlier notification". Thus, according to this decision, industrial units which were eligible to incentive under IPR-1986 but were declared ineligible under IPR-1989 would not be entitled to the benefit for additional 2 years under IPR-1989.
>
> xxx xxx xxx"

18. In the impugned order dated 20.2.2007 (Annesure-9) passed by the Commissioner of Sales Tax, Cuttack (O.P.No.1) it is abundantly clear that SSI unit of petitioner was spice making unit but subsequently used pulverizer to prepare spices but the finished products remained the same and the sales tax imposed is exempted on the finished products which do not undergo any change. Beyond the relevant portion as extracted above, Appellate Authority has also gone into the depth of the interpretation of the industrial unit and also other aspects of the case to unveil the real truth. It is clear from the impugned order that IPR-1989 is not at all applicable to the facts of the case of present petitioner and his case is governed under IPR-1986 and IPR-1986 is clear to the effect that the incentive can be availed for exemption of the payment of sales tax for a period of five years audit has been availed as observed in the impugned order, that is from 14.4.1989 to 13.4.1994.

19. So far as the foot note to the Notification dated 28.4.1992 (Annexure-12) is concerned, the exemption will not be available to the petitioner as the said industrial unit of the petitioner is not covered under IPR-1989. Even if the petitioner claimed that the vide Notification dated 16.8.1990 (Annexure-11) read with Notification dated 28.4.1992 (Annexure-12) are taken into consideration and in view of the foot root, he will continue to avail the said incentive, it must be held that neither the spice making unit nor the pulverizing unit being excluded from the exemption list, is liable to get any benefit. Apart from this on going through the notification vide Annexure-11 it is found that the exemption for a period of 7 years from the commercial production must be certified by the General Manager of concerned DIC and bereft of that certificate, in the present case, the petitioner cannot claim the benefit of such notification dated 16.8.1990 read with dated 28.4.1992. This fact has also been clearly available from the impugned order under Annexure-9. On facts, the case of the petitioner has become unsuccessful.

20 Learned counsel for the petitioner has relied on the decision of the is Court in **Shri Ganesh Roller Mills (supra**) according to him, the exemption for a period of seven years should be available on sale of finished products. On going through the said decision, it appears that in the said case this Court analysed the definition of 'manufacture' and interpreted the entry no. 43 in the list of ineligible industries mentioning 'units manufacturing besan out of Dal'. Here the case is different as no interpretation of any serial number of para-30FF is required in this case. In that case, entry no. 43 taken as eligible industry and as such extended 7 years' exemption. So on the facts the case in hand is distinguished from the facts of the case for which such case law is not applicable to the facts and circumstances of the present case. Moreover, learned counsel for the petitioner relied upon the decision of **Vadilal Chemicals Ltd (supra).** In that the Hon'ble Apex Court clearly observed that the Sales Tax Officer has no power to interpret notification of the industry department being a functionary of the Government. Here with no respectable disagreement of the said view of the Hon'ble Apex Court, we are also of the view that the Government Notification is binding on the authorities of the Sales Tax Department but the facts of the present case is distinguishable from the facts of the said case. So the said decision will not be of any help to the petitioner. On the other hand, learned counsel for the Revenue has cited decision of this Court in **M/s. Mansfield Electronics vrs. State of Orissa and another** in OJC No. 4153 of 1990 decided on 1st may, 1992 where the question of exemption of manufacturing black and white television was considered. There this Court held that an exemption which was granted by one notification to remain operative for a period of the time as specified in that notification, would continue to remain in force that period is over irrespective of the fact as to whether the notification is subsequently amended by abridging the period exemption. Since in the instant case IPR-1986 did not extend any time of exemption but limited to five years and the petitioner has availed the same, the question of extension for two years under abridge notification dated 16.8.1990 (Annexure-11), cannot be extended under IPR-1989 to the petitioner. So the decision cited by the learned counsel for the Revenue is not applicable to the facts and circumstances of the present case. As such the point for determination goes in favour of the Revenue.

<u>CONCLUSION,</u>

21 In view of the aforesaid analysis, we are of the view that the unit of the present petitioner being a spice making unit is only eligible for exemption

for a period of five years from the date of manufacture and is cannot avail the exemption for the year 1994-95, 1995-97 and 1996-97. Since the dispute for 1996-1997 is not raised before us, we limits this order to the period of 1994-95 and 1995-96. On the other hand, the refund availed by the petitioner for these two on the pretext of such notification, is illegal and the impugned order under Annexures-8 and 9 are legal and proper. We, therefore, affirm the orders passed under Annexures- 8 & 9 . Hence the writ petition is dismissed.

Writ petition dismissed.

2016 (II) ILR - CUT-336

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

W.P.(C) NO. 19078 OF 2010

THE C.G.M., S.B.I. & ANR. ……..Petitioners

.Vrs.

THE PRESIDENT, S.B.I. EMPLOYEES UNION ………Opp. Party

INDUSTRIAL DISPUTES ACT, 1947

Labour Court passed award directing the petitioner-Management to regularize the service of the opposite party-workman with all consequential service benefits including pay & other allowances – Award challenged – Opposite party-workman was working as Lift operator in SBI Local Head office, Bhubaneswar against a permanent sanctioned post, through process of selection – It has been admitted by the petitioners that the Local Head Office approved two posts of Lift Operators and advised the Zonal Office to recruit the Liftmen calling candidates from local employment – In the said sanctioned posts, they allowed the petitioner to work from 05.10.1993 and since then he is working in that post uninterruptedly and from December, 2004 the Bank is paying him the basic salary of a Lift Operator plus DA – Hence the engagement of the workman may be irregular but not illegal – He has been continuing in the sanctioned post for more than 10 years and discharging his duty to the satisfaction of the authority and his continuance in the said post is not with the intervention of Courts or Tribunals – Held, there is no infirmity or irregularity in the impugned award calling for interference by this Court. (Paras 5, 6, 7)

Case Laws Referred to :-

1. AIR 2006 SC 1806 : Secy., State of Karnataka & Ors. -V- Umadevi & Ors.
2. (2009) 4 SCC 342 : State of Karnataka 7 Ors. -V- Chandrashekhar

For Petitioners : M/s. Kali P.Mishra, S.Mohapatra & T.P.Tripathy
For Opp. Party : M/s. Somanath Mishra, B.C.Bastia, A.Sahoo & G.Tripathy

Date of Hearing : 28.06.2016
Date of Judgment:11.07. 2016

JUDGMEMT

S. PANDA, J.

The petitioners in this writ petition challenge the award dated 09.07.2010 passed by the Central Government Industrial Tribunal-cum-Labour Court, Bhubaneswar in Industrial Dispute Case No. 1/2003 directing the petitioners-Management to regularize the service of the opposite party/workman against the sanctioned regular post of Lift Man with effect from 05.10.1993 with all consequential service benefits including pay scale and other allowances.

2. The brief facts leading to the writ application are as follows:

The opposite party-workman claimed to have been working as Lift Operator in State Bank of India, Local Head Office, Jawaharlal Nehru Marg, Bhubaneswar since 05.10.1993 against the permanent sanctioned post through the process of selection. Since his service was not regularized, he filed an application before the appropriate authority for regularization of his service. Thereafter, the Government of India in the Department of Ministry of Labour, in exercise of the powers conferred under clause (d) of sub-section (1) and sub-section 2 (A) of Section-10 of the Industrial Dispute Act, 1947 referred an industrial dispute existing between the petitioners-Management and the opposite party-workman vide letter No. L-12012/ 236/2002 IR (B-I) dated 23.12.2002 to the following effect.

> *Whether the action of the Management of State Bank of India, Bhubaneswar for not regularizing the service of Shri Bijay Kumar Panda, Lift Operator who has rendered more than nine years of continuous service without any break against sanctioned regular post of Lift Operator and also not paying on the basis of scale of wages for the sub-staff w.e.f., 05.10.1993 is justified?. If not, what relief the workman is entitled and from which date?".*

Before the Tribunal the opposite party-workman contended that he had been working as Lift Operator on temporary roll under petitioner no.1 since 05.10.1993. His appointment was made through due process of selection against the permanent sanctioned post of Lift Man and even though he has been working in his duties efficiently and diligently and by that process he had completed 17 years of service, but the service of the opposite party-workman is not being regularized by petitioner No.1 and appropriate pay scale and other service benefits at par with other employees of the bank is not being released in his favour. Therefore, he contended that the opposite party-workman is entitled to be regularized against the sanctioned post of Lift Man and for payment of regular pay scale and other service benefits from the date of his initial engagement in the said post.

The petitioners-management while denying the contentions of the opposite party-workman contended that the workman had never been engaged as Lift Operator on temporary roll and he was engaged as an independent contractor on retainer basis for lift operation at its zonal office. His engagement was valid till the need of the management and there was no relationship of employer and employee between the workman and the petitioners-management. The management also denied the contention of the workman that he was appointed in due process of selection against the sanctioned post.

Before the Tribunal the opposite party-workman examined himself as W.W.1 and exhibited documents from Exts-1 to 11. On the other hand the management examined two witnesses and did not exhibit any document in support of their case. The Tribunal after going through the pleadings of the respective parties framed four issues such as

1. Whether this Tribunal has jurisdiction to try this case ?
2. Whether the services of the workman Shri Bijay Kumar Panda, Lift Operator can be regularized ?
3. Whether Shri Bijay Kumar Panda, workman has got necessary qualification to be regularized against a permanent post ?
4. If not, to what relief he is entitled to?

After considering the materials available on record, the Tribunal came to a conclusion that the disputant-workman is entitled for regularization of his service against the regular sanctioned post of Lift Man. His service is to be regularized with effect from his initial engagement, i.e. 05.10.1993 and he is entitled to all consequential service benefits including the pay scale and other

allowances. Such Award of the Tribunal dated 09.07.2010 passed in Industrial Dispute Case No. 1/2003 is challenged by the petitioners-Management in the present writ application.

3. Learned counsel for the petitioners submits that the opposite party-workman was engaged purely on retainer basis as a stop-gap arrangement and he has not been recruited through the selection process. His engagement was purely through backdoor method and as such the opposite party-workman has no enforceable legal right to be permanently absorbed and regularized in view of the law laid down by the Constitution Bench of the Hon'ble Apex Court in the case of ***Secretary, State of Karnataka and others v. Umadevi and others***, reported in ***AIR 2006 SC 1806***.

He further submits that the opposite party-workman since does not fulfill the laid down criteria for appointment of Lift operator in the Bank, the submission of the opposite party-workman to have engaged in due process of selection is wrong. He further submits that since the Employment Exchange failed to sponsor adequate names of the candidates, no permanent appointment of Lift Operators was made and the sanction lapsed during the course of time. However the management has not denied the continuance of the workman in the post from 1993. The workman has discharged his duties to the satisfaction of his authority having requisite qualification, etc.

4. Learned counsel appearing for the opposite party-workman supported the impugned award. He submitted that the action of the management is nothing but exploitation of a workman for a longer period without regularizing his service, even if sanctioned posts are available and he has been working in the said post since 1993.

5. This Court heard the rival contentions raised by the parties in the writ application vis-à-vis perused the award and materials on record. It has been admitted by the petitioners that the Local Head Office approved two posts of lift operators and advised the Zonal Office to recruit the liftmen calling candidates from local Employment. In the said sanctioned posts, they allowed the petitioner to work from 05.10.1993 till today. As such the petitioner has been working in sanctioned post uninterruptedly and discharging his duty efficiently and diligently. It is also the admitted fact that since December, 2004 the Bank is paying the workman the basic salary of a Lift Operator plus DA.

6. This Court also went through the decisions rendered by the Hon'ble Apex Court in the case of ***Secretary, State of Karnataka and others v.***

Umadevi and others reported in ***AIR 2006 SC 1806***, wherein it has been held thus:-

> *There may be cases where irregular appointments (not illegal appointments) as explained in S.V. NARAYANAPPA, R.N. NANJUNDAPPA (supra), and B.N. NAGARAJAN (supra) and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment.*

The aforesaid principle has also been followed in the case of ***State of Karnataka & others v. G.V. Chandrashekhar reported in (2009) 4 SCC 342***.

7. From the above facts, it can be inferred that the engagement of the workman may be irregular, but not illegal. He has been continuing as such for more than 10 years in a sanctioned post and discharging his duty to the satisfaction of the authority. That apart, his continuance in the said post is not with the intervention of Courts or Tribunals.

In view of the above, this Court finds no infirmity or irregularity in the impugned award. There is no error on the face of the record. Accordingly, this Court is not inclined to interfere with the impugned award. The writ petition stands dismissed. No costs.

Writ petition dismissed.

2016 (II) ILR - CUT-340

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

OJC NO. 8556 OF 1995

PURNA CHANDRA NAYAK ……..Petitioner

.Vrs.

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

(A) ODISHA ESTATES ABOLITION ACT, 1951 – S.38-B

Revision – Limitation – No period of limitation prescribed under the Act – However such power can be exercised within a reasonable

time – Absence of limitation is an assurance to exercise power with caution or circumspection to effectuate the purpose of the Act or to prevent miscarriage of justice or violation of the provisions of the Act or misuse or abuse of the power by the lower authorities or fraud or suppression.

In this case, though the Tahasildar Nimapara has no power or authority, had conferred tenancy right in favour of the petitioner while exercising power U/s. 8(1) of the Act – An order passed without jurisdiction is non est in the eye of law and can be challenged at any time – Limitation would not stand on the way of challenging such order – Member Board of Revenue was justified in entertaining its power U/s. 38-B after lapse of 21 years of passing of the order by the Tahasildar which is within a reasonable period – Held, there is no illegality in the impugned order calling for interference by this Court.

(Para 10)

(B) ODISHA ESTATES ABOLITION ACT, 1951 – Ss. 8(1), 38-B

Conferment of tenancy right by the Tahasildar, Nimapara, without obtaining prior confirmation of the Member Board of Revenue is without jurisdiction – Order passed by the Tahasildar is non est – Member Board of Revenue is justified in entertaining the revision and setting aside the order passed by the Tahasildar.

(C) ODISHA ESTATES ABOLITION ACT, 1951 – S. 8(1)

To invoke a right U/s. 8(1) of the Act, two basic requirements are to be satisfied i.e.,

(i) a person claiming to be a tenant under the ex-intermediary has to satisfy the authority that he was, in fact, inducted as a tenant under the ex-intermediary, and

(ii) he was in cultivating possession over the land in question on the date of vesting.

So, section 9(1) of the Act makes no provision for an application, only question of possession plays a vital role for invoking right U/s. 8(1) of the Act.

In the instant case father of the petitioner made an application to recognize him as a tenant by accepting rent so the nature of enquiry conducted by the Tahasildar, Nimapara U/s. 8(1) of the Act is administrative in nature and while exercising such power the Tahasildar has no scope to adjudicate the disputed question of possession, which is under the exclusive domain of the civil court having jurisdiction – Since non of the basic requirement of section 8(1) of the Act is satisfied, no reliance can be placed on Chirastai Patta and

the rent receipts stated to have been granted by the ex-intermediary and the petitioner can not derive any benefit out of the same.

(Paras 11,12)

Case Laws Referred to :-

1. (1995) Supp.3 SCC 249 : State of Orissa Vs. Brundaban Sharma.
2. 73(1992) CLT 868 : Smt. Basanti Kumari Sahu vs State Of Orissa & Ors.
3. 1988 (II) OLR 572 : Chandra Sekhar Rath Vs. Collector, Dhenkanal.
4. 57 (1984) CLT 1 : Radhamani Dibya and others Vs. Braja Mohan Biswal & Ors.
5. 2013 (II) OLR 780 : State of Orissa –v- Baidyanath Jena (since dead).
6. AIR 1955 SC 328 : Sita Maharani And Ors. vs Chhedi Mahto & Ors.,
7. AIR 1964 Pattna 1 (FB) : Ram Nath Mandal And Ors. vs Jojan Mandal & Ors.

For Petitioner : Mr. N.K.Sahu
For Opp. Parties : Addl. Govt. Advocate

Date of Judgment : 18.05.2016

JUDGMENT

K.R. MOHAPATRA, J.

Legality and propriety of the order dated 10.11.1995 passed by the Member, Board of Revenue, Orissa, Cuttack in O.E.A. Revision Case No. 9 of 1994 under Section 38-B of the Orissa Estate Abolition Act, 1951 (for short 'the Act') is under challenge in this writ petition.

2. The dispute relates to C.S. Plot No. 583 to an extent of Ac.2.00 under Khata No.168 of village Nuagaon, Nimapara Tahasil, Kissam "Kanta Jangal-Anabadi" in the district of Puri (for short 'the case land'). The case land was a part of intermediary estate recorded in the name of Mahanta Gadadhar Ramanuj Das Goswami of Emar Math.

The case of the petitioner in nut shell is that on 02.09.1938, the ex-intermediary granted permanent lease in favour of the father of the petitioner, namely, late Nalu Nayak, for the purpose of agriculture and inducted him as a tenant on payment of rent. In the year 1953-54, the estate vested to the State free from all encumbrances. On the date of vesting, the father of the petitioner was in cultivating possession over the disputed land by virtue of the said permanent lease. In the year 1973, said Nalu Nayak initiated OEA Case No. 595 of 1973 to recognize him as a tenant under the State and to accept the rent from him. Thus, the Tahasildar, Nimapara on 14.08.1973 directed the R.I. to make an enquiry in respect of the claim of said Nalu

Nayak and submit a report to that effect. The R.I. conducted an enquiry and submitted his report on 16.11.1973 stating that the father of the petitioner was inducted as a tenant by the ex-Landlord and was continuing in possession over the same till the date of submission of the report. Taking into consideration the report of the R.I., the Tahasildar, Nimapara vide his order dated 25.1.1974 directed for realization of rent from the petitioner accepting him as a tenant under the State over the case land. Accordingly, rent was accepted from the petitioner on 26.5.1974 with effect from 1953-54 and he was recognized as a tenant under the State on payment of rent for a period of twenty years. However, some of the villagers filed an application before the Tahasildar, Nimapara on 01.07.1975 challenging the correctness of the said proceeding under which the petitioner was recognized as a tenant by the State. Considering the grievance of the villagers, the Tahasildar, Nimapara on 06.08.1975 reopened the matter and directed for fresh hearing of the matter. On 28.4.1976, the Tahasildar, Nimapara reviewed his own order and cancelled the Patta issued in favour of the father of the petitioner. Assailing the same, the father of the petitioner, namely, Nalu Nayak, preferred OEA Appeal No. 2 of 1976. The Sub-Collector, Nimapara by his order dated 23.05.1979, set aside the order of cancellation dated 28.04.1976 and restored the original order dated 25.01.1974. Subsequently, on recommendation of the Tahasildar, Nimapara, the Collector, Puri referred the matter to the Member, Board of Revenue, Cuttack for initiation of the proceeding under Section 38-B of the Act to revise the order of settlement made in favour of the petitioner. On the basis of the said reference, OEA Revision Case No.9 of 1994 was initiated by the Member, Board of Revenue, Orissa, Cuttack-opposite party No.2. The opposite party No.2 taking into consideration several aspects of the matter allowed the revision holding that the order dated 25.01.1974 of the Tahasildar, Nimapara is not sustainable in the eye of law and set aside the same. The petitioner being aggrieved by the said order has filed this writ petition.

3. The petitioner assailed the order of the Member, Board of Revenue, Orissa, Cuttack mainly on the ground of maintainability of the revision contending that the instant revision cannot be entertained after lapse of twenty one years of passing of the order by the Tahasildar, Nimapara. Further, he challenged the findings recorded in the impugned order on merit.

4. The opposite parties filed their counter affidavit refuting the allegations made in the writ petition. Admitting the chronology of events set out in the writ petition, the opposite parties stated that since the Tahasildar,

Nimapara has settled the land in favour of father of the petitioner in exercise of power under Section 8(1) of the Act in OEA Case No.595 of 1973, the same is amenable to the revisional jurisdiction of the Member, Board of Revenue, Orissa, Cuttack. It is further contended in the counter affidavit that the case land was never leased out in favour of the father of the petitioner and unregistered lease deed (Annexure-1) is not admissible under law. The case land is incapable of being leased out as it is a Kanta Jungle kissam of land, the rent receipts alleged to have been issued by the Ex-intermediary are forged and fabricated for the purpose of this case. After vesting of the estate in the year, 1953 under Section 3 of the Act read with G.O. No. 3026/E.A. dated 27.11.1953, the Ex-intermediary did not furnish any Zamabandi in favour of Nalu Nayak, the father of the petitioner. Further, relying upon a decision in the case of ***State of Orissa Vs. Brundaban Sharma***, reported in (1995) Supp.3 SCC 249, the opposite parties submitted that conferment of tenancy right by the Tahasildar, Nimapara without confirmation of the Member, Board of Revenue, Orissa, Cuttack, is without jurisdiction. Though proclamation issued by the Tahasildar, Nimapara in his order dated 28.11.1973 inviting public objection was stated to have been served in the locality and Bhaskar Lenka, Khetra Mohan Biswal, Achambit Lenka, Nishakar Lenka and Maheswar Lenka were stated to have signed on the body of the said proclamation, but subsequently they filed affidavits stating that they had not signed on the proclamation and their signatures were forged. They also stated in the affidavits that the villagers came to know about the settlement of the land in favour of the present petitioner, when he removed the embankment of the tank which was used for public and charitable purpose. This necessitated the Tahasildar, Nimapara to review his own order and cancelled the Patta issued in favour of Nalu Nayak vide his order dated 28.4.1976. However, the order of the Tahasildar, Nimapara dated 28.4.1976 was set aside by the Sub-Divisional Officer, Puri in OEA Appeal No.2 of 1976 and the order dated 25.1.1974 passed by the Tahasildar, Nimapara was restored. The said fact was brought to the knowledge of the Tahasildar, Nimapara by the villagers in the year, 1992. The Tahasildar, Nimapara after verifying the case record in OEA Lease Case No.595 of 1973 submitted a proposal to the Collector, Puri for filing of a revision under Section 38-B of the Act. The petitioner assailing initiation of OEA Revision Case No. 9 of 1994 moved this Court in OJC No. 2540 of 1995. The said writ petition was disposed of on 8.5.1995 with an observation that the writ application was premature. Further, this Court held that all the points with regard to the maintainability of the OEA Revision so also merit of the case can be agitated

before the Member, Board of Revenue, Orissa, Cuttack. Accordingly, the Member, Board of Revenue, Orissa, Cuttack proceeded with the Revision Case No. 9 of 1994 and passed the impugned order. All the four issues raised by the petitioner have been discussed in thread bare by the Member, Board of Revenue, Orissa, Cuttack while adjudicating the matter. It is also contended that the Member, Board of Revenue, has dealt with the matter in its proper perspective and passed the reasoned order referring to the facts and law involved in the case. As such, the same warrants no interference by this Court.

5. Mr. N.K. Sahu, learned counsel for the petitioner assailing the impugned order raised the following points for consideration.

(i) The order dated 25.01.1974 passed by the Tahasildar, Nimapara in OEA No.595 of 1973 cannot at all said to be an order of settlement made under the provisions of the Act. It is merely the order of recognition of tenancy of the petitioner under Section 8 (1) of the Act;

(ii) Thus, the Revision under Section 38-B of the Act is not maintainable and the Member, Board of Revenue has no jurisdiction to exercise power under Section 38-B of the Act;

(iii) The Revision is not entertainable after lapse of 21 years of passing of the order dated 25.01.1974 by the Tahasildar, Nimapara.

(iv) The findings recorded by the Member, Board of Revenue are devoid of any merit and thus, the impugned order is not sustainable in the eye of law.

6. Mr. Sahu in support of his contentions submitted that the Tahasildar, Nimapara has no jurisdiction to settle the land in purported exercise of power under Section 8(1) of the Act accepting premium for such settlement conferring tenancy right on a person. In such event, the Member, Board of Revenue has jurisdiction to entertain *suo motu* revision in exercise of power under Section 38-B of the Act. In the instant case, father of the petitioner made an application to recognize him as tenant by accepting rent though no application is contemplated under Section 8(1) of the Act. However, the Tahasildar dealt with such application on the administrative side and made enquiry in order to be satisfied that the petitioner was, in fact, in possession of the holding (case land) as a tenant under the ex-intermediary on the date of vesting. Thus, the order passed under Section 8(1) of the Act is not amenable to the revisional jurisdiction of the Member, Board of Revenue. The father of the petitioner, namely, Nalu Nayak, was inducted as a tenant under the ex-

intermediary by virtue of an unregistered lease deed executed on 02.09.1938 (Annexure-1). Said Nalu Nayak continued to be in cultivating possession of the case land on payment of rent to the ex-intermediary till the date of vesting. Some of the receipts granted by the ex-intermediary are annexed to the writ petition as Annexure-2 series. After the date of vesting, the father of the petitioner continued to be in cultivating possession over the case land. In order to be recognized as a tenant under the State, said Nalu Nayak made an application under Section 8(1) of the Act and was accordingly recognized as a tenant on acceptance of rent (Annexure-4 series).The Tahasildar, Nimapara having no jurisdiction reviewed the said order vide order dated 28.04.1976. However, the Sub-Divisional Officer, Puri set aside the order dated 28.4.1976 in OEA Appeal No.2 of 1976 and the original order dated 25.01.1974 was restored. Accordingly, ROR was issued in favour of the petitioner under Sthitiban status (Annexure-7). Neither the order dated 23.05.1979 passed in OEA Appeal No.2 of 1976 nor the ROR was ever challenged in the higher forum within the statutory period. Thus, the same attained finality. After the lapse of 21 years, on the recommendation of the Tahasildar, Nimpara, the Collector, Puri referred the matter to the Member, Board of Revenue and the learned Member, Board of Revenue exercised its power under Section 38-B of the Act, which is without jurisdiction.

7. In order to test the veracity of the contentions raised by Mr.Sahu, this Court examined the case record produced by Mr.Kishore Kumar Mishra, learned Additional Government Advocate. On perusal of the application dated 14.08.1973, it appears that the petitioner on behalf of his father, Nalu Nayak made a prayer, inter alia to declare him as a tenant under the State and to accept rent from him with effect from the date of vesting. On consideration of his application, the Tahasildar, Nimapara vide his order dated 25.01.1974 settled the case land in favour of the petitioner subject to payment of Salamai of Rs.11 and 22 paise. The nature of prayer made in the application and the aforesaid order passed by the Tahasildar do not come within the purview of Section 8(1) of the Act. Law is no more *res integra* on this issue. A Full Bench of this Court in the case of ***Smt. Basanti Kumari Sahu vs State Of Orissa And Ors***, reported in 73(1992) CLT 868 had held as follows:-

> "10. Where, however, in exercise of powers under Section 8 (1), the officer settles the land with the applicant in course of a proceeding and confers tenancy right, the proceeding, the adjudication and the settlement are without jurisdiction. A proceeding in purported exercise of jurisdiction not vested, i. e., by usurpation of jurisdiction, is also a proceeding under the Act

and Section 38-B would be attracted and the Board of Revenue in exercise of powers conferred by Section 38-B would be entitled to annul the same."

8. In the case of ***Chandra Sekhar Rath Vs. Collector, Dhenkanal***, reported in 1988 (II) OLR 572, this Court relying upon a Full Bench decision in the case of ***Radhamani Dibya and others Vs. Braja Mohan Biswal*** and others, reported in 57 (1984) CLT 1 categorically came to the conclusion that a person seeking declaration/recognization as a tenant under the ex-intermediary can only move the common law forum, i.e., Civil Courts having competent jurisdiction for redressal of his grievance. Similar view is also taken in the case of ***State of Orissa –v- Baidyanath Jena*** (since dead), reported in 2013 (II) OLR 780.

In view of the law laid down in the decision referred to supra, there is no room for doubt that the Tahasildar, Nimapara exceeded his jurisdiction by settling the land in faovour of the petitioner in exercise of power under Section 8(1) of the Act and the same is amenable to the revisional power conferred on the Member, Board of Revenue under Section 38-B of the Act.

9. Mr. Sahu, further contended that the power under Section 38-B of the Act should not have been exercised after a lapse of 21 years from the date of the order, i.e. 25.01.1974, passed by the Tahasildar, Nimapara recognizing the petitioner as a tenant.

10. No period of limitation has been prescribed for exercise of power under Section 38-B of the Act. Borrowing the words from the case of *Brundaban Sharma (supra)*, it can be said that the revisional power conferred on the Board of Revenue under Section 38-B of the Act should be exercised in a reasonable manner which inheres the concept of exercise of power within a reasonable time. Absence of limitation is an assurance to exercise power with caution or circumspection to effectuate the purpose of the Act, or to prevent miscarriage of justice or violation of the provisions of the Act or misuse or abuse of the power by the lower authorities or fraud or suppression. Length of time depends upon the factual scenario in a given case. The Member, Board of Revenue has dealt with the issue of limitation at paragraph-14 of the impugned order. On assessment of the materials, he observed that the villagers as early as on 01.07.1975 raised objection with regard to settlement of the land in favour of the petitioner. On hearing the parties, the Tahasildar, Nimapara by order dated 28.04.1976 cancelled such settlement. The said order was not given effect to and the Patta issued in favour of the petitioner was not cancelled. The petitioner, however, assailed the said order in OEA

Appeal No. 2 of 1976 without impleading the villagers at whose instance the settlement was cancelled as parties. When they came to know that the order dated 28.04.1976 was set aside by the appellate authority vide order dated 23.05.1979 in OEA Appeal no.2 of 1976, they made grievance before the Tahasildar, Nimapara. Upon receiving complaint from the villagers, the Tahasildar, Nimapara verified the case record and upon being satisfied that there are illegalities and irregularities in settlement of land in favour of the petitioner, moved the Collector, Puri. The Collector, Puri in turn, on assessment of the materials on record referred the matter to the Member, Board of Revenue. The Tahasildar, Nimapara has no power or authority of conferment of a tenancy right while exercising power under Section 8 (1) of the Act as has been done in this case. An order passed without jurisdiction is *non est* in the eye of law and can be challenged at any time. Limitation would not stand on the way of challenging such order. Thus, taking into consideration the facts and circumstances of the case, it cannot at all be held that the power under Section 38-B of the Act was not exercised within a reasonable period.

11. The next question that arises for consideration is whether the impugned order is sustainable on merit. Mr.Sahu, learned counsel for the petitioner strenuously urged that the father of the petitioner, namely, Nalu Nayak was inducted as a tenant and permanent lease was granted in his favour on 02.09.1938 by executing an unregistered deed of lease (Annexure-1). By virtue of the said lease, he continued to be in possession and paid rent to the ex-intermediary. In support of his case, the petitioner also filed copies of certain rent receipts (Annexure-2 series). The estate vested to the State in the year 1953. On the date of vesting, the father of the petitioner was in cultivating possession over the case land. Further, the Tahasildar, Nimapara initiated OEA case No.595 of 1973 and recognized the petitioner as a tenant and accepted rent from him. Thus, he continued to be a tenant under the State on payment of the rent. He further contended that the statute does not provide the mode of enquiry to be conducted by the Tahasildar while exercising power under Section 8(1) of the Act. The Tahasildar can make such enquiry as would deem necessary for acceptance of rent from the person who has been in possession of the holding of the ex-intermediary on the date of vesting. Thus, the Patta granted by the ex-intermediary coupled with the rent receipts convey that the petitioner was a tenant under the ex-intermediary. Further, the report of the R.I. pursuant to the direction of the Tahasildar, Nimapara clearly disclosed that the father of the petitioner was a tenant under

the ex-intermediary. Mr.Sahu also relied upon a letter dated 08.01.1974 purported to have been issued by the law agent of the ex-intermediary recognizing the petitioner as a tenant. Thus, he claimed that the petitioner was rightly recognized as a tenant by the Tahasildar, Nimapara. Learned Member, Board of Revenue at paragraph-16 of the impugned order discussed regarding rent receipts stated to have been granted by the ex-intermediary. He has scrutinized the rent receipts meticulously. The first rent receipt stated to have been granted by the ex-intermediary bears Sl. No.21152 and a sum of Rs.4/- and 2 anna has been tendered as rent for 1344-45 sala and the person who alleged to have accepted the rent have signed the receipt on 05.09.1938. On scrutiny of the said rent receipt, the Member, Board of Revenue came to a conclusion that though the Chirastai Patta stated to have been executed on 02.09.1938, the rent was accepted for the period when the lease deed was not in existence, which is not permissible under law. Further, he also found some irregularities in subsequent rent receipts, such as, over-writing in the rent receipt dated 04.09.1944. Further, the Chirastai Patta (Annexure-1) stated to have been issued by the ex-intermediary is an unregistered one. Law is well-settled that an agricultural tenancy can be created orally and no deed is required to be executed for the same, but when such deed is reduced to writing, which is subject to payment of rent, it requires registration under Section 17 of the Indian Registration Act, 1908 and if the same is not registered, the deed renders inadmissible in evidence as per Section 49 of the Indian Registration Act. This view gets support from a decision in the case of ***Sita Maharani And Ors .vs Chhedi Mahto And Ors***., reported in AIR 1955 SC 328. Further, in the case of ***Ram Nath Mandal And Ors. vs Jojan Mandal And Ors***, reported in AIR 1964 Pattna 1 (FB), their Lordships held as follows:-

> "…...............under Section 117 of the Transfer of Property Act a lease for agricultural purposes is not necessary to be made by a written instrument. It may be effected by an oral agreement, and when so effected no registration is required, but if the transaction is reduced to writing, then, in the case of a lease from year to year or for any term exceeding a year or reserving a yearly rent, registration would be required under Section 17 of the Registration Act, and, if unregistered, the lease will be inadmissible in evidence under Section 49 of the Registration Act, and other evidence of its terms will be precluded under Section 91 of the Evidence Act…......."

The petitioner claims that his father, namely, Nalu Nayak, was in cultivating possession over the case land on the date of vesting. On the other hand, the villagers claimed that said Nalu Nayak was never in possession over the case land. They came to know about such erroneous recording of the case land in

the name of the petitioner, when he created disturbance and tried to cut the ridge. To invoke a right under Section 8 (1) of the Act, two basic requirements are to be satisfied i.e. (i) a person claiming to be tenant under the ex-intermediary has to satisfy the authority that he was, in fact, inducted as a tenant under the ex-intermediary and (ii) he was in cultivating possession over the land in question on the date of vesting. Thus, question of possession plays a vital role in invoking right under Section 8 (1) of the Act. The nature of enquiry conducted by the Tahasildar, Nimapara under Section 8 (1) of the Act is administrative in nature. Thus, the Tahasildar, Nimapara while exercising the power under Section 8 (1) of the Act has no scope to adjudicate the disputed question of possession, which is under the exclusive domain of Civil Court having jurisdiction. In view of the above, none of the basic requirements of Section 8 (1) of the Act is satisfied in this case and thus, no reliance can either be placed under Annexure-1 or Annexure-2 series, i.e., Chirastai Patta and the rent receipts stated to have been granted by the ex-intermediary and the petitioner cannot derive any benefit out of the same.

12. In that view of the matter, the impugned order needs no interference. Accordingly, the writ petition fails and stands dismissed.

Writ petitioin dismissed.

2016 (II) ILR - CUT-350

B. K. NAYAK, J.

CRLMC NO. 3197 OF 2015

MANOHAR RANDHARI ……..Petitioner

.Vrs.

STATE OF ORISSA (VIG.) & ANR. ……..Opp. Parties

(A) CRIMINAL PROCEDURE CODE, 1973 – S.197(1)

Cognizance taken against the petitioner U/s. 409 I.P.C. for misappropriation of public fund by manipulating office record – Order of cognizance challenged on the ground that no sanction has been taken from the competent authority – Held, since misappropriation of public fund by manipulation of official record is no part of the official duty of the petitioner-public servant, sanction for prosecution U/s. 197 Cr.P.C. is not necessary – No infirmity in the impugned order taking cognizance against the petitioner. (Paras 4,5)

(B) PREVENTION OF CORRUPTION ACT, 1988 – S.19

Cognizance taken against the petitioner U/s. 13(2) read with section 13(1)(C) P.C. Act – Order of cognizance challenged on the ground of lack of sanction by the competent authority – Held, since the petitioner had already resigned from the post and his resignation has been accepted much prior to the order taking cognizance, no sanction U/s. 19 of the Act is required – No infirmity in the impugned order taking cognizance against the petitioner. (Paras 4,5)

Case Laws Relied on :-

1. AIR 1997 SC 2102 : Shambhoo Nath Misra -V- State of U.P. & Ors.

Case Laws Referred to :-

1. 2007 (5) Supreme-426 : B.S. Goraya v. U.T. of Chandigarh
2. AIR 1960 SC 1016 : The Commissioner of Income Tax, Bombay City, Bombay v. The Elphinstone Spinning and Weaving Mills Co.Ltd
3. 1979 (4) SCC 204 : K.S. Dharmadatan v. Central Government and Ors.
4. 1998 (6) SCC 411 : Kalicharan Mohapatra v. State of Orissa

For Petitioner :M/s. D.P.Dhal, B.S.Dasparida, S.K.Dash & S.Mohapatra

For Opp. Parties :Mr. Pani, Addl. Standing Counsel (Vig.)
M/s. Patitapaban Panda, S.Satpathy, L.N.Rayatsingh & M.L.Mishra

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Date of hearing : 31.03.2016
Date of judgment : 19.04.2016

JUDGMENT

B.K.NAYAK, J.

Order dated 30.04.2015 passed by the learned Special Judge, Vigilance, Jeypore in I.C.C. No.1 of 2013 taking cognizance of offences under Section 13(2) read with Section 13(1) (c) of the Prevention of Corruption Act,1988 and Section 409 of the I.P.C. and directing for issuance of summons to the petitioner-accused, has been assailed in this application under Section 482, Cr.P.C.

2. Prosecution allegations against the petitioner are that while functioning as Senior Clerk-cum- in charge of Store and Development Section of Nandahandi Block, the petitioner misappropriated a sum of Rs.6,29,696/- showing false issue of cement forging signature/LTIs of the

recipients, mis-balancing the totals and manipulating the office records. It is further alleged that the total cost of loss of stock and store in respect of cement, perlin, AC sheets, ridges, iron doors and iron windows etc. is to the tune of Rs.6,29,696/-.

On consideration of the allegations in the complaint petition, the initial statement of the complainant, the statements of witness recorded during enquiry under Section 202, Cr.P.C. and the enquiry report submitted by the vigilance department under Section 210 of the Cr.P.C., the learned Special Judge was satisfied that offences were prima facie committed and accordingly he took cognizance and directed for issue of summons to the petitioner.

3. In assailing the impugned order, the learned counsel for the petitioner has raised only one contention that sanction under Section 19 of the P.C. Act,1988 and Section 197, Cr.P.C. having not been taken from the authority competent to remove the petitioner from his office, the order of cognizance is bad, illegal and are liable to be set aside.

Mr. Pani, learned Additional Standing Counsel for the Vigilance Department, on the other hand, contends that for the offence under Section 13 (2) read with Section 13 (1) (c) of the P. C. Act, no sanction under Section 19 of the Act is necessary inasmuch as much before the date of cognizance the petitioner had already resigned from the post and the resignation has been accepted. It is also his submission that for the offence under Section 409 of the I.P.C. also no sanction under Section 197, Cr.P.C. is required since committing misappropriation or criminal breach of trust of government property cannot be held to be in the discharge of official duty of government servant.

4. It is trite law as has been held by the Hon'ble apex Court in the decision reported in ***2007 (5) Supreme-426 :B.S. Goraya v. U.T. of Chandigarh*** that if the accused is not a public servant on the date cognizance was taken then sanction under Section 19 of the P.C. Act is not required for such cognizance. In so holding the Hon'ble Court referred to and followed decisions in the cases of ***The Commissioner of Income Tax, Bombay City, Bombay v. The Elphinstone Spinning and Weaving Mills Co.Ltd : AIR 1960 SC 1016***, ***K.S. Dharmadatan v. Central Government and Ors. : 1979 (4) SCC 204*** and ***Kalicharan Mohapatra v. State of Orissa : 1998 (6) SCC 411.***

Therefore, not obtaining sanction from the Block Development Officer under whom the petitioner was working on the date of commission of

offence would not vitiate the order of cognizance of the offence under P.C. Act inasmuch undisputedly on the date of order of cognizance, the petitioner was no more working in the post of Senior Clerk-cum-Store in charge of the Block office. So far as the offence under Section 409 of the I.P.C. is concerned, it is also trite law, as has been held by the Hon'ble Supreme Court in the decision reported in ***AIR 1997 SC 2102 : Shambhoo Nath Misra v. State of U.P. and others*** that fabrication of record and misappropriation of public fund by public servant is no part of his official duty and therefore sanction for prosecution under Section 197 of the Cr.P.C. is not necessary.

Therefore, both the contentions of the learned counsel for the petitioner are rejected.

5. In the light of the discussions made above, I find no infirmity in the impugned order. Accordingly, the CRLMC is dismissed.

Application dismissed.

2016 (II) ILR - CUT-353

B. K. NAYAK, J.

CRLMC NO. 276 OF 2013

MADHUSMITA SAHOO @ ANUSUYA …….Petitioner

.Vrs.

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

(A) CRIMINAL PROCEDURE CODE, 1973 – S.482

The expression, "otherwise to secure the ends of justice" appearing in section 482 Cr.P.C. is of wide amplitude and it includes within its meaning the inherent power of the High Court to set aside any order, which is legally unsustainable and also to issue such direction which a lower court has illegally omitted or failed to issue.

In this case, inspite of availability of sufficient materials against opposite party Nos. 9 & 10, making out a prima facie case regarding their involvement in the alleged offences, the learned SDJM did not issue summons to them – Order challenged U/s. 482 Cr.P.C. – While taking cognizance U/s 190 Cr.P.C. and issuance of Process the

Magistrate is required to see whether the materials on record prima facie make out a case against the accused persons – Held, direction issued to the learned SDJM, Dhenkanal to array O.P.Nos. 9 & 10 as accused in the aforesaid case and issue process against them.

(Paras 5,7,8)

(B) CRIMINAL PROCEDURE CODE, 1973 – S.482

Failure of Magistrate to issue process against persons against whom prima facie materials are available – Order challenged U/s. 482 Cr.P.C. – Maintainability – Held, the application is maintainable and the High Court can correct such order in exercise of its inherent power U/s. 482 Cr.P.C. (Para 6)

For Petitioner : Mr. Hemant Ku. Mohanty

For Opp. Parties : Addl. Standing Counsel (O.P.No.1)
Mr. Himansu Sekhar Mishra (O.P.No.10)

Date of hearing : 24.06.2016
Date of judgment: 01.07.2016

JUDGMENT

B.K.NAYAK, J.

This application under Section 482, Cr.P.C. has been filed with a prayer to direct the learned S.D.J.M., Dhenkanal to issue summons to opposite party nos.9 and 10 in G.R. Case No.609 of 2009, in modification of the order of cognizance dated 14.12.2012 passed by the learned S.D.J.M. in that case.

2. The petitioner's marriage with opposite party no.2 was solemnized on 10.07.2005, but it ran into troubled waters. The petitioner filed F.I.R. on 27.07.2009 giving rise to registration of Motonga P.S. Case No.123 of 2009 under Sections 498-A/506/34 of the I.P.C. read with Section 4 of the D.P. Act against her husband and other in-laws, corresponding to G.R. Case No.609 of 2009 of the court of the learned S.D.J.M., Dhenkanal. On 10.08.2010, the Investigating Officer submitted final form reporting insufficient evidence in respect of the alleged offences. The learned S.D.J.M., Dhenkanal issued notice to the petitioner, who filed protest petition. Thereafter, the learned S.D.J.M. recorded the initial statement of the petitioner and conducted enquiry under Section 202, Cr.P.C., during course of which he recorded the statements of some witnesses. On completion of enquiry by order dated 14.12.2012, the learned S.D.J.M. took cognizance of the offences under Section 498-A/294/323/506/34 of the I.P.C. read with

Section 4 of the D.P. Act. and issued process (summons) to opposite party nos.2 to 8.

It is the grievance of the petitioner, that in spite of availability of sufficient materials making out a prima-facie case regarding involvement of opposite party nos.9 and 10 in the alleged offences, the learned S.D.J.M. did not issue summons to them. The petitioner has therefore filed this application praying to secure the ends of justice by directing issuance of summons to opposite party nos.9 and 10 in the aforesaid case.

3. Learned counsel for opposite party nos.9 and 10 submitted that the application under Section 482, Cr.P.C. is not maintainable for getting the nature of relief sought for by the petitioner in the present petition. It is also his submission that the protest petition and the statement of the petitioner and the witnesses examined during enquiry do not make out a prima facie case regarding commission of the alleged offences by opposite party nos.9 and 10 and, therefore, the learned S.D.J.M. has rightly decided not to proceed against those opposite parties.

4. Section 482, Cr.P.C. saves the inherent powers of the High Court and it reads as follows :

> "**482**. **Saving of inherent powers of High Court**.- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

5. The expression, '*otherwise to secure the ends of justice'* appearing in Section 482, Cr.P.C. is of wide amplitude and it includes within its meaning the inherent power of the High Court to set aside any order, which is legally unsustainable and also to issue such direction which a lower court has illegally omitted or failed to issue. While under the first category the positive action of a lower court is susceptible to challenge, under the second category it is the omission and failure of the lower court to pass just order or decision which is challengable.

6. Learned counsel for opposite party nos.9 and 10 in the instant case has not brought to my notice any authority to show that failure of a Magistrate to issue process against persons against whom prima facie materials have been brought on record with regard to their involvement in alleged offences, cannot be corrected any exercise of inherent power under Section 482, Cr.P.C. The contention of the learned counsel for opposite party nos.9 and 10 about non-maintainability of this petition, therefore, fails.

7. With regard to the second contention, it is necessary to see whether the materials, the initial statement of the petitioner and the statements of the witnesses recorded during enquiry under Section 202, Cr.P.C. prima facie make out the involvement of opposite party nos.9 and 10 in the alleged offences. Opposite party no.9 is the sister-in-law (wife of the husband's brother) of the petitioner and petitioner no.9 is the maternal uncle of petitioner's husband. It is alleged in the protest petition that as per the demand of the accused persons, the petitioner's father had given some gold ornaments, T.V., Steel Almirah, double bed and some other household articles and Rs.40,000/-, out of demand of dowry of Rs.80,000/- and that the accused persons were unhappy for non-fulfilment of their demand of dowry in full. It is alleged specifically that on the 4th day of her marriage, in the petitioner's matrimonial house, the father of the petitioner begged apology for his inability to meet the demand of the accused persons in full and promised to fulfill the same in future whereupon the accused persons including opposite party no.10 rebuked the petitioner's father and other witnesses in filthy language. It is further alleged that opposite party no.10 even instigated the other accused persons to ill-treat the petitioner and her family members in order to extract the dowry and when the father of the petitioner asked the accused persons to sign on the list of dowry articles already given at the time of marriage, the present opposite party no.10 instigated the other accused persons not to sign the list and even he snatched away the article list from the hand of the petitioner's father. It is specifically alleged that after the 4th day of the marriage all the in-laws including opposite party no.9 started ill-treating the petitioner physically and mentally and always demanded her to bring further dowry from her father. Along with some of the accused persons, opposite party no.9 also forced the petitioner to do all the household works like cleaning of utensils and cow shed, washing the wearing clothes of all the family members all alone by herself and did not provide her food and clothing. They had been abusing her in filthy language. It is also alleged that opposite party no.9 specifically threatened the petitioner that she would be tortured life long if she did not bring dowry like her. It is also alleged that on the day following Sabitri Amabasya of 2006 the accused including opposite party no.9 forcibly took her to their well in the dreadful night and attempted to throw her into the well and when she begged mercy and assured to bring the balance amount of dowry, they let her off with threats.

The petitioner has also stated the aforesaid facts in her initial statement recorded by the learned S.D.J.M. The statement of witnesses

recorded during enquiry under Section 202, Cr.P.C. goes to specifically implicate opposite party no.10 in harassing the petitioner and also instigating the other accused persons to harass her for non-fulfillment of the dowry demand in full.

Thus, the materials available on record prima facie reveal involvement of opposite party nos.9 and 10 in the alleged offences. At the stage of taking cognizance under Section 190, Cr.P.C. and issuance of process the Magistrate is required to see whether the materials on record prima facie make out a case against the accused persons. At that stage, he is not required to examine in detail whether the materials and statement of witnesses are sufficient for recording a conviction.

8. Since this Court finds that there are materials making out a prima facie case against opposite party nos.9 and 10, this Court allows this CRLMC and direct the learned S.D.J.M., Dhenkanal to array opposite party nos.9 and 10 as accused in the aforesaid case and issue process against them. The CRLMC is accordingly disposed of.

Application disposed of.

2016 (II) ILR - CUT-357

B. K. NAYAK, J.

CRLMC NOS. 4189 & 4948 OF 2015

MADHOO @ MADHAB CH. KHUNTIA ……..Petitioner

.Vrs.

STATE OF ORISSA ……..Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – Ss. 173(2)(8)

Whether a Magistrate is competent to permit further investigation of a case, where charge sheet has already been submitted against some of the accused persons U/s. 173(2) Cr.P.C. – Held, the Magistrate is not only competent to permit further investigation U/s. 173(8) Cr.P.C. but also to issue N.B.W. and process under sections 82, 83 Cr.P.C. upon the prayer made by the I.O. if situation so demands.

In this case the I.O., while submitting preliminary charge sheet against six apprehended accused persons in terms of section 173(2) Cr.P.C. kept the investigation open for further investigation U/s. 173(8)

of the code – Learned Magistrate committed those six accused persons and sent the original record to the court of session and opened a part file of the G.R. case – Orders passed by the Magistrate in the part file issuing N.B.W. and directing issuance of process against the petitioner U/ss. 82, 83 Cr.P.C. was challenged on the ground of competency of the Magistrate – Held, since further investigation is still continuing, the Magistrate is still in seisin of the matter – There is no illegality in the impugned order calling for interference by this Court.

(Paras 9,10)

Case Laws Referred to :-

1. AIR 2013 SC 3018 : Dharam pal & Ors. -V- State of Haryana & Anr.
2. AIR 2011 SC 2962 : State of Punjab -V- C.B.I & Ors.

For Petitioner : Mr. Milan Kanungo, Sr. Adv.
For Opp. Party : Addl. Govt. Adv.

Date of hearing :21.04.2016
Date of judgment:29.06.2016

JUDGMNENT

B.K.NAYAK, J.

These two applications under Section 482, Cr.P.C. are filed by the same petitioner and they arise out of G.R. Case No.1726 of 2012 of the court of the learned S.D.J.M., Puri, which arises out of Puri Town P.S. Case No.117 of 2012 registered for alleged commission of offences under Sections 120-B/302/379/201/34 of the I.P.C. read with Sections 25 and 27 of the Arms Act for murder of one Guna @ Taluchha Bhagaban Mohapatra.

2. CRLMC No.4189 of 2015 has been filed challenging the order dated 16.12.2013 passed by the learned S.D.J.M., Puri in G.R. Case No.1726 of 2012 directing issuance of NBW against the present petitioner, whereas CRLMC No.4948 of 2015 has been filed by the same petitioner challenging the order dated 17.05.2014 passed by the learned S.D.J.M., Puri in the same G.R. Case directing issuance of process under Sections 82 and 83 of the Cr.P.C. against the petitioner.

3. The undisputed facts are that during the course of investigation, the police apprehended six other accused persons in the aforesaid case, who continued in judicial custody. On 24.12.2012, the Investigating Officer submitted preliminary charge-sheet in terms of Section 173 (2), Cr.P.C. against those six accused persons under Sections 302/379/201/ 120-B/34 of the I.P.C. and Sections 25 & 27 of the Arms Act, keeping the investigation open with regard to involvement of other persons in the crime. On receipt of

the charge-sheet, the learned S.D.J.M. took cognizance of the offences against those charge-sheeted accused persons. On 22.01.2013, the learned S.D.J.M. committed those six accused persons to the Court of Session. Since the investigation had been still kept open, the learned S.D.J.M. opened a part file as G.R. Case No.1726 of 2012 (A) and sent the original records to the Court of Session. Subsequently, during the course of further investigation, the Investigating Officer made prayers to the learned S.D.J.M. in the split up G.R.Case to issue NBW and process under Sections 82 and 83, Cr.P.C. against the present petitioner, who was said to have been absconding. Those prayers have been allowed by the impugned orders.

4. Learned Senior Counsel appearing for the petitioner raises two contentions, that once the learned SDJM took cognizance of the offences and committed the case to the court of session, thereafter he does not have any further power to take cognizance again and that after the commitment it is only the court of session who is competent to take cognizance against the persons appearing from the materials on record to be involved in the commission of offences or the court may issue process subsequently during trial under Section 319, Cr.P.C. only when evidence with regard to involvement of any person is found. Therefore, the learned S.D.J.M. has no power to issue NBW against the present petitioner. In this connection, the learned counsel for the petitioner relies on the Constitution Bench decision of the Hon'ble Supreme Court in the case of ***Dharam pal & Ors. v. State of Haryana and Another : AIR 2013 SC 3018*** and similar other decisions. It is his further submission that the petitioner has not been named in the F.I.R. nor any material with regard to his involvement came forth till the time of submission of charge-sheet against the apprehended accused persons and that any further material, if any, against the petitioner collected after submission of charge-sheet against the apprehended accused persons is fabrication at the behest of persons inimically disposed of towards the petitioner and therefore, the impugned order directing issuance of NBW and the subsequent impugned order directing issuance of process under Sections 82 and 83 of the Cr.P.C. are legally unjustified and hence liable to be set aside.

5. Learned counsel for the opposite parties submitted that since the investigation into the case had not been fully over and that charge-sheet was filed only against some of the accused persons and the investigation was further kept open which is proceeding, it cannot be said that the learned S.D.J.M. is incompetent to pass orders for issuance of NBW and process under Sections 82 & 83 of the Cr.P.C. against the petitioner against whom

some incriminating materials have come to light during such further investigation. It is submitted that since under Section 173 (8) of the Cr.P.C. the Judicial Magistrate has power to direct or allow further investigation, it has the jurisdiction to deal with any other accused persons whose complicity in the crime can be prima facie found out during such further investigation.

6. The main plank of argument of the learned Senior Counsel appearing on behalf of the petitioner is that since charge-sheet was submitted against apprehended accused persons and cognizance was taken of the offences and the case has already been committed to the court of session, the Magistrate has no further power to take cognizance of the offences against the petitioner in the event any further charge-sheet would be filed and that it is the Court of Session, which is only to take cognizance as decided in the case of ***Dharam Pal & Ors.*** (supra).

7. In the instant case, we are not confronted with the question whether the Judicial Magistrate will take cognizance of the offences, so far as the present petitioner is concerned, in the event charge-sheet is submitted against him. Admittedly, the offence is one under Section 302, I.P.C. along with other sections including Section 120-B of the I.P.C. Further investigation of the case is still going on in terms of Section 173 (8) of the Cr.P.C. with regard to complicity of the present petitioner and other persons. The argument advanced by the learned Senior Counsel for the petitioner relying on the decision of the apex Court in the case of ***Dharam Pal & Others*** (supra) is not relevant for the lis in hand. Should charge-sheet be filed against the petitioner or any other person after further investigation, the Magistrate need not have to further take cognizance of the offences. He has only to commit the case to the Court of Session in respect of such new accused persons. This is so laid down in ***Dharama Pal's*** case (supra) where in paragraph-27, the Constitution Bench has held as follows :

> **27.** This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Sessions assumes original

> jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there by any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Sessions Judge."

The contention of the learned counsel for the petitioner, therefore, does not hold good.

8. On the contrary, the question that arises is whether it is competent for the Magistrate to direct or permit further investigation of a case where charge-sheet has already been submitted against some accused persons in terms of sub-section (2) of Section 173, Cr.P.C. It is trite law that the Magistrate has power to permit further investigation in terms of sub-section (8) of Section 173, Cr.P.C. It has been held by the Hon'ble Supreme Court in the case of ***State of Punjab v. Central Bureau of Investigation & Ors: AIR 2011 S.C.2962*** as follows:

> "**13.** Sub-section (1) of Section 173 of the Cr.P.C. provides that every investigation by the police shall be completed without unnecessary delay and sub-section (2) of Section 173 provides that as soon as such investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government. Under sub-section (2) of Section 173, a police report (charge-sheet or challan) is filed by the police after investigation is complete. Sub-section (8) of Section 173 states that nothing in the Section shall be deemed to preclude any further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate. Thus, even where charge-sheet or challan has been filed by the police under sub-section (2) of Section 173, the police can undertake further investigation but not fresh investigation or re-investigation in respect of an offence under sub-section (8) of Section 173 of the Cr.P.C."

9. Taking up or continuing with further investigation by the police under Section 173 (8), Cr.P.C. and the Magistrate permitting the same is distinct from the power of superior courts, such as the High Court and the Supreme Court, to direct re-investigation or fresh investigation of the case. Re-investigation or fresh investigation is one done by another investigating agency irrespective of whether the previous investigation by the police has already been completed in all respects or not, whereas further investigation is

one by the same agency where investigation is not fully complete, but charge-sheet under Section 173 (2), Cr.P.C. might have been filed against some accused persons at any stage of the investigation before its final completion.

10. In the instant case, though charge-sheet was submitted against six apprehended accused persons, the Investigating Officer kept the investigation further open which is still continuing. Investigation is not finally over. It is legal and competent for the investigator to proceed with the investigation in accordance with the provision of sub-section (8) of Section 173, Cr.P.C. In the event during such further investigation, the investigator collects materials with regard to complicity of any other person(s) in the alleged offences, it can take recourse to other provisions of the Cr.P.C. including making a prayer to the Magistrate to issue NBW and/or process under Sections 82 and 83 of the Cr.P.C., if the situation so demands. The impugned orders of the S.D.J.M. in the instant case directing issuance of NBW and process under Sections 82 and 83 of the Cr.P.C. are not challenged on merits, but only on the ground of competency of the Magistrate as aforesaid. Since it is found that the Magistrate is competent to issue such process where the investigation or further investigation is still continuing and he is still in seisin of the matter and some materials have come to light about complicity of the petitioner, no exception can be taken to his authority to pass the impugned orders. I therefore, find no merit in these applications, which are accordingly dismissed.

Applications dismissed.

2016 (II) ILR - CUT- 362

S. K. MISHRA, J.

W.P.(C) NO. 13683 OF 2012

GORETI XESS ……..Petitioner

.Vrs.

JYOTI XAXA & ANR. ……..Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-41, R-2

Election petition filed by O.P.No.1 challenging the election of the petitioner as Sarpanch on the ground that the petitioner had filed false affidavit in her nomination paper suppressing the fact that she was not involved in any criminal case – Petitioner filed an application under

order 14, Rule 2 C.P.C. before the election tribunal to take up the issue that the election petition is not maintainable – Application rejected – Hence the writ petition – Held, non-mentioning of the fact of pendency of criminal case in the affidavit by the returned candidate cannot be said to be a corrupt practice U/s. 41 of the G.P. Act – The election petition filed by O.P.No.1 is not maintainable and the issue being a pure question of law, can be taken up under O-14, R-2(2) C.P.C. – The impugned order is set aside – The election petition not being maintainable is rejected. (Paras 12 to 16)

Case Laws Relied on :-

1. (2010) 1 OLR 486 : Sridhar Jena -V- Santosh Kumar Jena & Ors.

For Petitioner : M/s. Prafulla Ku. Rath, D.Mohapatra, P.K.Satpathy, R.N.Parija, A.K.Rout, S.K.Pattnaik,D.P.Pattnaik & A.Behera

For Opp. Parties: M/s. Partha Sarathi Nayak, Md. G.Madani & S.K.Jena

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Date of judgment: 29.4.2016.

JUDGMENT

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

In this writ petition the petitioner, being the Sarpanch of Karamdihi Grama Panchayat in the district of Sundargarh, assails the order dated 23.7.2012 passed by the learned Civil Judge (Jr. Division), Sundargarh in Election Misc. Case No.10/2012 rejecting her prayer to take up the issue of maintainability of the Election Misc. Case under Sub-rule 2 of Rule of Order 14 of the Code of Civil Procedure, 1908 (hereafter referred to as the "Code" for brevity) and thereby dismissing her application.

2. Opposite party No.2, Jyoti Xaxa, filed a petition under Section 30 of the Orissa Grama Panchayat Act, 1964 (hereinafter referred to as the "Act" for brevity) challenging the election of the present petitioner to the post of Sarpanch for Karamdihi Grama Panchayat in the district of Sundargarh. Nomination papers were filed on 7.1.2012 to 12.1.2012 by the intending candidates and, accordingly, the present petitioner filed her nomination paper on 12.1.2012 before the Election Officer, Karamdihi Grama Panchayat. It is alleged that in her nomination paper she has given a false affidavit that she is not involved in any criminal case. It is stated that previously she is involved in a Vigilance Case and this fact was suppressed in her affidavit filed along with the nomination paper.

3. On 13.1.2012 on the date of scrutiny of the nomination paper the election petitioner had filed her written objection before the Election Officer, Karamdihi alleging that the present petitioner has filed a false affidavit and her nomination paper should be rejected. It was not taken into consideration by the Election Officer and he allegedly accepted the illegal/improper nomination paper that led to filing of election petition against the present petitioner and others. During pendency of the election petition, the present petitioner filed an application before the Election Tribunal, inter alia, alleging the point that there is no prohibition in a statute against acceptance of an affidavit by the Election Officer on the ground of false statement in the affidavit filed by the returned candidate.

4. Notification No.1-SEC, Bhubaneswar dated Ist January, 2004, issued by the State Election Commission, was relied upon wherein at Clause (3), it has been provided that non-furnishing of affidavit by the candidate shall be considered to be a violation of that Order and the nomination paper of the candidate concerned shall be liable to rejection at the time of scrutiny by the Election Officer/Returning Officer. Clause (6) provided that the Election Officer/Returning Officer shall neither undertake verification of the correctness or otherwise of the information furnished in the above mentioned affidavit nor reject the nomination paper on the ground of furnishing wrong information or suppressing material information in the affidavit.

5. Therefore, the returned candidate, i.e. the present petitioner, filed an application urging before the learned Civil Judge (Jr. Division), Sundargarh-cum-Election Tribunal to take up the issue under Order 14, Rule 2 of the Code and to dismiss the Election Misc. Case as not maintainable. However, the learned Civil Judge (Jr. Division), Sundargarh rejected the application and held that this is mixed question of facts and law and cannot be decided as a preliminary issue.

6. Rule 2 of Order 14 of the Code provides that the Court to pronounce judgment on all issues. But sub-rule (2) is an exception to the same. It is appropriate to quote the same:-

2. (1) xxx xxx xxx xxx

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to –

(a) the jurisdiction of the Court, or
(b) a bar to the suit created by any law for the time being in force,

And for that purpose may, it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

7. Now the maintainability of the writ petition because of non-availability of any provision declaring the election be not void for furnishing a false affidavit is a pure question of law and it touches the jurisdiction of the Court.

8. Section 39 of the Act provides for declaring election void, which reads as follows:-

"39. Grounds for declaring election void- (1) The Civil Judge (Junior Division) shall declare the election of a returned candidate void, if he is of the opinion-

(a) that on the date of his election the candidate was not qualified or was disqualified to be elected under the provisions of this Act or the rules made thereunder ; or

(b) that any corrupt practice has been committed by the candidate; or

(c) that any nomination paper has been improperly rejected or accepted; or

(d) that such person was declared to be elected by reason of the improper rejection or admission of one or more votes for any other reason was not duly elected by a majority of lawful votes; or

(e) that there has been any non-compliance with or breach of any of the provisions of this Act or of the rules made thereunder;

Provided that in relation to matters covered by Clause (a) the Civil Judge (Junior Division) shall have due regard to the decision, if any, made under Section 26 before making a declaration under this section.

(2) The election shall not be declared void merely on the ground of any mistake in the forms required thereby or of any error, irregularity or informality on the part of the officer or officers charged with carrying out the provisions of this Act or of any rules made thereunder unless such mistake, error, irregularity or informality has materially affected the result of the election."

9. It is apparent that in this case, the election petitioner's main thrust is that on clause (c) of sub-section (1) of Section 39 of the Act which provides that election can be challenged or set aside if any nomination paper has been improperly accepted by overruling the objection of the election

petitioner at the time of scrutiny. The fact that the petitioner had filed her nomination, she had filed an affidavit and in her affidavit she has omitted to mention about the pendency of criminal case against her are not disputed in this case. The only question that remains to be decided is whether on the ground for not reflecting the fact of a criminal case pending against the petitioner can be a ground to set aside an Election under Section 39 of the aforesaid Act. Section 11 of the Act provides for qualification for membership in the Grama Panchayat, which reads as follows:

> "11. Qualification for membership in the Grama Panchayat – Notwithstanding anything in Section 10 no member of a Grama Sasan shall be eligible to stand for election –

(a) as a Sarpanch if he –

(i) is a candidate for election[***] as a member of the Grama Panchayat in respect of any ward; or

(ii) [***]

(iii) is a candidate for election or holds office as a Sarpanch of any other Grama Panchayat;

(b) as a Sarpanch or Naib-Sarpanch, if he has notattained the age of twenty-one years or is unable to read and write Oriya;

(c) as a member –

(i) for more than one ward in the Grama or for more than one Grama Panchayat ; or

(ii) if he is unable to read and write Oriya; and

(iii) if he has not attained the age of twenty-one years."

10. A bare perusal of the aforesaid Section does not reveal any where a person is disqualified for being Member of the Grama Panchayat because of filing a false affidavit at the time of nomination papers.

11. Section 25 of the Act provides for disqualification for membership of Grama Panchayat. It is appropriate to quote the same.

> "25. Disqualification for membership of Grama Panchayat –
>
> (1) A person shall be disqualified for being elected or nominated as, a Sarpanch or any other member of the Grama Panchayat constituted under this Act, if he –

(a) is not a citizen of India ; or

(b) is not on the electoral roll in respect of the Grama or of the ward, as the case may be ; or

(c) is of unsound mind ; or

(d) is an applicant to be adjudicated as an insolvent or is an undischarged insolvent ; or

(e) is a deaf-mute, or is suffering from tuberculosis ; or in the opinion of the District Leprosy Officer is suffering from an infectious type of leprosy ; or

(f) is convicted of an election offence under any law for the time being in force ; or

(g) is convicted for an offence involving moral turpitude and sentenced to imprisonment of not less than six months unless a period of five years has elapsed since his release or is ordered to give security for good behavior under Section 110 of the Code of Criminal Procedure, 1898 (5 of 1898); or

(h) holds any office of profit under the State or Central Government or any local authority; or

(i) is a teacher in any school recognized under the provisions of the Orissa Education Code for the time being in force; or

(j) holds the office of a Minister either in the Central or State Government; or

(k) has been dismissed from the service of the State Government or of any local authority; or

(l) being a member of a Co-operative Society, has failed to pay any arrear of any kind accrued due by him to such society before filing of the nomination paper in accordance with the provisions of this Act and the rules made thereunder;

Provided that in respect of such arrears a bill or a notice has been duly served upon him and the time, if any, specified therein has expired; or

(m) is in the habit of encouraging litigation in the Grama and has been declared to be so on enquiry by the Collector in the prescribed manner or by any other authority under any law for the time being in force; or

(n) is interested in a subsisting contract made with or in any work being done for the Grama Panchayat or the Samit, or any Government except as a shareholder other than a Director in an incorporated company or as a member of a Co-operative Society; or

(o) is a paid and trained legal practitioner on behalf of the Grama Sasan; or

(p) is a member of the Orissa Legislative Assembly or of either of the Houses of Parliament; or

(q) is a member of the Samit elected under Clause (h) of Sub-section (1) of Section 16 of the Orissa Panchayat Samit Act, 1959(Orissa Act 7 of 1960); or

(r) is disqualified by or under any law for the time being in force for the purposes of an election to the Legislature of the State; or

(s) is disqualified by or under any law made by the Legislature of the State ; or

(t) is in arrear of any dues payable by him to the Grama Panchayat; or

(u) has more than one spouse living; or

(v) has more than two children :

Provided that the disqualification under Clause (v) shall not apply to any person who has more than two children on the date of commencement of the Orissa Grama Panchayat (Amendment) Act, 1994 or, as the case may be, within a period of one year of such commencement, unless he begets an additional child after the said period of one year.

(2) A Sarpanch or any other member of a Grama Panchayat shall be disqualified to continue and shall cease to be a member if he-

(a) incurs any of the disqualifications specified in Clauses (a) to (j) Clauses (m) to (p) and Clauses (t) to (v) of Sub-section (1) ; or

(b) has failed to attend three consecutive ordinary meetings held during a period of four months commencing with effect from the date of the last meeting which he has failed to attend; or

(c) being a legal practitioner appears or acts as such against the Grama Sasan; or

(d) Being a member of a Co-operative Society has failed to pay any arrears of any kind accrued due by him to such society within six months after a notice in this behalf has been served upon him by the society.

(3) Without prejudice to the provisions of the foregoing Sub-sections the Sarpach of a Grama Panchayat shall be disqualified to continue and cease to be the Sarpanch, if he fails to attend three consecutive ordinary meetings of the Samiti, of which he is a member, without the previous permission in writing of the said Samit.

(4) Notwithstanding anything contained in the foregoing sub-sections-

(a) the State Government may remove any one or more of the disqualifications specified in Clauses (f), (g), (k) and (I) of Sub-sections (1) ;

(b) when a person ceases to be a Sarpanch or Naib-Sarpanch or any other member in pursuance of Clause (g) of Sub-section (1) he shall be restored to office for such portion of the term of office as may remain unexpired on the date of such restoration, if the sentence is reversed or quashed on appeal or revision or the offence is pardoned or the disqualification is removed by an order of the State Government; and any person filling the vacancy in the interim period shall on such restoration vacate the office."

12. This Section also do not provide that if a returned candidate has filed an affidavit with a wrong information or false information that he/she become disqualified to hold the post. On top of it, the State Election Commission, Odisha Notification No.1-SEC, Bhubaneswar, dated 1st January, 2004 provides that the Election Officer-cum-Returning Officer has no jurisdiction to undertake verification of the correctness or otherwise of the information furnished in the above mentioned affidavit nor reject the nomination paper on the ground of furnishing wrong information or suppressing material information in the affidavit.

13. Interpreting this provision, this Court in the case of ***Sridhar Jena Vs. Santosh Kumar Jena and others***; (2010) 1 OLR 486 has held that if the petitioner has furnished affidavit as required under law, but has suppressed about pendency of criminal case against him, as per Clause-6 of the order of the Election Commissioner, the order of suppression cannot be a ground for rejecting the nomination paper. This Court further held that the petitioner may be criminally liable for that. But, it would not amount to corrupt practice. It was further held that his election cannot also be declared void on that ground.

14. On top of that, this Court takes note of sub-section (2) of Section 39 of the Act. It provides that the election shall not be declared void merely on the ground of any mistake in the forms required thereby or of any error, irregularity or informality on the part of the officer or officers charged with carrying out the provisions of this Act or of any rules made thereunder unless such mistake, error, irregularity or informality has materially affected the result of the election. It is not the case of the election petitioner that non-mentioning of the pendency of criminal case against the present petitioner has materially affected the result of the election.

15. Learned counsel for opposite party no.1 in this case has contended that this act of non-mentioning of the fact of pendency of criminal case in the affidavit by the returned candidate is a corrupt practice. Unfortunately

the contentions raised by opposite party no.1 is incorrect as corrupt practice has been defined under Section 41 of the Act. It is appropriate to quote the same:-

"41. Corrupt practices - The following shall be deemed to be corrupt practices for the purposes of this Chapter, namely ;

(1) Bribery, that is to say, any gift, offer or promise by a candidate or by any other person on his behalf or any gratification to any person whomsoever-

(i) with the object, directly or indirectly of inducing –

(a) a person to stand or not to stand as or to withdraw from being a candidate, or to retire from contest at such election; or

(b) an elector to vote or refrain from voting at such election; or

(ii) as a reward to –

(a) A person for standing or refraining from standing as a candidate, or for having withdrawn his candidature or for having retired from contest ; or

(b) an elector for having voted or for refraining from voting.

Explanation- For the purposes of this clause, the term gratification includes all forms of entertainment and all forms of employment for rewards; but does not include the payment of any expenses incurred bona fide for the purposes of such election.

(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of a candidate or any other person on his behalf, with the free exercise of the electoral right of any person:

Provided that –

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein, who-

(i) threatens any candidate or any elector or a person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and ex-communication or of expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right

of such candidate or elector within the meaning of this clause; and

(b) a declaration of public policy or, a promise of public action or the mere exercise of a legal right without intent to interfere with an electoral right shall not be deemed to be interference within the meaning of this clause;

(3) The systematic appeal by a candidate or by any other person on his behalf to vote or refrain from voting on grounds of caste, race, community or religion or of the use of national symbols such as the National Flag or the National Emblem, for the furtherance of the prospects or the candidate's election.

(4) The publication by the candidate or by any other person on his behalf of any statement of fact which is false and which he either believes to be false or does not believe to be true in relation to the personal character or conduct of any candidate, or in relation to the candidature or withdrawal or retirement from contest of any candidate, being a statement reasonably calculated to prejudice the prospect of that candidate's selection.

(5) The hiring or procuring whether on payment or otherwise, of any vehicle or vessel by a candidate or by any other person on his behalf for the conveyance of any elector, other than the candidate or any member of his family to or from any polling station or place fixed for the poll.

Explanation- In this clause, the expression "vehicle" means any vehicle used or capable of being used for the purpose of road transport whether propelled by mechanical power or otherwise and whether used for drawing other vehicles or otherwise.

(6) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or by any other person on his behalf of any assistance, other than the casting of a vote, for the furtherance of the prospects of the candidate's election from any person in the service of the State Government or in the employ of any, local authority."

16. It is apparent that not mentioning that a criminal case is pending against the returned candidate in affidavit attached to the nomination paper is not a corrupt practice within the four corners of Section 41 of the Act. So this Court holds that the election petition filed by opposite party no.1 is not maintainable and the issue being a pure question of law and can be taken up under sub-rule (2) of Rule 2 of Order 14 of the Code. Accordingly, the order

dated 23.7.2012 passed by the learned Civil Judge (Jr. Division), Sundargarh in Election Misc. Case No.10/2012 is hereby set aside and consequently the Election Petition is not maintainable and the same is rejected.

17. With such observation, the Writ Petition is allowed. However, keeping in view the aforesaid facts there shall be no orders with regard to costs.

Writ Petition allowed.

2016 (II) ILR - CUT-372

DR. A.K.RATH, J.

W.P.(C) NO. 12357 OF 2008

NETRANANDA DALAI ....Petitioner

.Vrs.

RATNABATI NAYAK (DEAD) & ANR. ....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – S.152

Whether a decree can be corrected by the Court U/s. 152 C.P.C, when there is no clerical or arithmetical mistake or error arising from any accidental slip or omission, but the mistake has been committed by the litigating parties ? Held, No.

In this case the counsel for the petitioner cited a decision of this Court reported in 2013(I) OLR 363, where this Court held that a decree can be amended and corrected in exercise of power U/s. 151 & 152 C.P.C. even if a mistake is committed by the parties but such decision was rendered on concession as both parties have agreed in that case for correction of the decree and accordingly a direction was issued to the learned trial court – Since the Court does not adjudicate that case upon the rights of the parties, it can not be said to have laid down any principle, so such judgment has no binding precedent – The only thing in a judges decision binding as an authority upon a subsequent judge is the principle upon which the case was decided – Statements which were not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative – Held, the writ petition is dismissed.

(Paras 7,8,9)

<u>**Case Laws Relied on**</u> :-

1. 2016(I) ILR-CUT-969 : Jayanta Ku. Rath (since dead) through L.Rs. -V- Pravas Ku. Rath (since dead) through L.Rs.
2. (1989) 1 SCC 101 : Municipal Corporation of Delhi -V- Gurnam Kaur

Case Laws Referred to :-

1. AIR 1950 Madras 751 : Appat Krishna Poduval -V-Lakshmi Nathar & Ors.
2. AIR 1976 Karnataka 204 : Shankergouda -V- Garangouda & Ors.
3. AIR 1976 Karnataka 205 : Rayappa Basappa Killed -V- The Land Tribunal & Ors.
4. AIR 1979 Punjab & Haryana 47 : Mohinder Singh & Ors. -V- Teja Singh & Ors.
5. 2013 (I) OLR-363 : Santosh Ku. Sahoo -V- Radhanath Sahoo & Ors.

For Petitioner : Mr. N.P.Patnaik
For Opp. Parties : Mr. T.Barik

Date of Hearing :12.07.2016
Date of Judgment:16.07.2016

JUDGMENT

DR.A.K.RATH, J.

The sole question that arises for consideration is as to whether the decree can be corrected by the Court under Section 152 CPC, when there is no clerical or arithmetical mistake or error arising from any accidental slip or omission, but the mistake has been committed by the litigating parties.

2. The petitioner as plaintiff instituted Title Suit No.30 of 1992 before the learned Civil Judge (Junior Division), Phulbani for permanent injunction impleading the predecessors-in-interest of opposite parties 1 and 2 as defendants. In the schedule of the plaint, the suit schedule property has been described as khata no.16, plot no.753, measuring an area Ac.0.20 decimal of mouza-Jiringapada. The suit was decreed. Thereafter the plaintiff levied execution case, being E.P.No.1 of 2004. The executing court refused to execute the decree since khata number was wrongly mentioned. Assailing the order of the executing court, he filed W.P.(C) No.14601 of 2005. The said petition was withdrawn so as to file an appropriate application in the executing court. This Court observed that if an application under Section 152 CPC is filed, the same shall be considered by the executing court. While the matter stood thus, he filed an application under Section 152 CPC for correction of the decree by inserting khata no.25, instead of 16. It is stated that khata number of the suit land is 25, but not 16. The executing court came to hold that wrong khata number in the plaint, judgment and decree is not due to accidental slip or arithmetical mistake and omission by the court. It will not be appropriate to allow the amendment of khata number in the decree alone without amending the khata number in the plaint and judgment. Held so, the learned trial court rejected the application.

3. Assailing the said order, Mr.Pattnaik, learned Advocate for the petitioner submitted that the learned trial court committed an error in not allowing the application for correction of decree. He further submitted that the Court has inherent power to amend the decree even if mistake has been committed by the parties. He relied on the decisions of different High Courts in the case of Appat Krishna Poduval Vrs. Lakshmi Nathiar and others, AIR 1950 Madras 751, Shankergouda Vrs. Garangouda and others, AIR 1976 Karnataka 204, Rayappa Basappa Killed Vrs. The Land Tribunal and others, AIR 1976 Karnataka 205, Mohinder Singh and others Vrs. Teja Singh and others, AIR 1979 Punjab and Haryana 47 and Santosh Kumar Sahoo Vrs. Radhanath Sahoo and four others, 2013(I) OLR-363.

4. Per contra, Mr.T.Barik, learned counsel for the opposite parties supported the impugned order.

5. The subject matter of dispute is no more re integra. An identical question came up for consideration before this Court in the case of Jayanta Kumar Rath (since dead) through L.Rs. Vrs. Pravas Kumar Rath (since dead) through L.Rs, 2016(I)-ILR-CUT-969. This Court, on a survey of the earlier decisions held thus:-

> "8. In Papu Khan (supra), this Court held that when there is no clerical or arithmetical mistake or error arising from any accidental slip or omission, Section 152 CPC has no application.
>
> 9. In Niyamat Ali Molla (supra), the apex Court held that a decree may be corrected by the court both in exercise of its power under Section 152 CPC as also under Section 151 CPC.
>
> 10. In Bishnu Charan Das v. Dhani Biswal and another, AIR 1977 Orissa 68, this Court held that if the decree is not in conformity with the judgment it must be allowed to be amended under Sections 152 and 151 CPC to bring it in line with the judgment and that in exercising the power under Sections 151 and 152 CPC the Court merely corrects the mistake of its ministerial officer by whom the decree was drawn up. Paragraph-4 of the report is quoted hereunder:
>
> "Section 152, CPC is based on two important principles. The first of them is the maxim that an act of the Court shall prejudice no party and the other that the Courts have a duty to see that their records are true and that they represent the correct state of affairs. In proceedings for amendment of a decree, the inquiry is confined only to seeing whether the decree correctly expresses what 5 was really decided and

intended by the Court. Order 20, Rule 6 clearly provides that the decree shall agree with the judgment. If the decree is not in harmony with the judgment the Court has no alternative but to rectify the mistake which has been committed. As the power to amend is exercised for the promotion of justice, it should be exercised liberally so as to make the decree conform to the judgment on which it is founded. I am fortified in this view by an earlier decision of this Court reported in AIR 1966 Ori 225, (Sagua Barik v. Bichinta Barik) wherein it was held on a review of the authorities that if the decree is not in conformity with the judgment it must be allowed to be amended under Sections 152 and 151 to bring it in line with the judgment and that in exercising the power under Sections 151 and 152 the Court merely corrects the mistake of its ministerial officer by whom the decree was drawn up."

11. The case of the petitioners may be examined on the anvil of the decisions cited supra. On a bare perusal of Section 152 CPC, it is evident that clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either on its own motion or on the application of any of the parties. If clerical or arithmetical mistakes in the judgments, decrees or orders or errors arising therein from the accidental slip or omission has been committed by the court, then the court may correct the same on its own motion or on the application of any of the parties. It does not comprehend the correction of any error on the part of any of the litigating parties. The error must be on the part of the court. In an application under Section 152 CPC, the Court cannot ascertain the intention of the parties making the compromise and filing the application. The said section cannot be invoked for the purpose of explaining as to what was the intention of the parties in arriving at the compromise. Since the parties have filed a compromise petition admitting the contents to be correct and thereafter the court has recorded the same, Section 152 CPC cannot be pressed into service to correct the compromise petition and decree." (emphasis laid)

6. In view of the authoritative pronouncement of this Court in the case of Jayanta Kumar Rath (supra), this Court prefers to take the same view since the same is the binding precedent. The ratio laid down in the cases of Appat

Krishna Poduval (supra), Shankergouda (supra), Rayappa Basappa Killed (supra) and Mohinder Singh and others *(supra)* cannot be said to be the binding precedent.

7. Much emphasis has been laid by Mr.Pattnaik, learned Advocate for the petitioner, on a decision of this Court in the case of *Santosh Kumar Sahoo (supra),* wherein a Bench of this Court held that a decree can be amended and corrected in exercise of power under Sections 151 and 152 C.P.C. even if a mistake is committed by the parties. On a bare perusal of the said judgment, it is evident that the judgment was rendered on concession. Both parties agreed in that case for correction of the decree. Accordingly, a direction was issued to the learned trial court. The question does arise whether the same is a binding precedent? The answer is empathetically no.

8. In Municipal Corporation of Delhi Vrs. Gurnam Kaur, (1989) 1 Supreme Court Cases 101, the apex Court in paragraph-10 of the report in no uncertain terms held that when a direction or order is made by consent of the parties, the court does not adjudicate upon the rights of the parties nor does it lay down any principle. Quotability as 'law' applies to the principle of a case, its ratio decidendi. The only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided. Statements which were not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative.

9. In the result, the petition is dismissed. No costs.

Writ petition dismissed.

2016 (II) ILR - CUT-376

DR. A.K.RATH, J.

W.P.(C) NO. 10083 OF 2016

HRITHIK MOHANTY ……..Petitioner

.*Vrs.*

**KENDRIYA VIDYALAYA NO. 2,
BHUBANESWAR & ORS.** ………Opp. Parties

EDUCATION – Admission – Petitioner's admission to class-XI in the Science stream with Mathematics was refused on the ground that he has secured 7.8 CGPA with B2 grade in Mathematics and Science in class-X in CBSE Examination, 2016 instead of minimum B1 Grade in

Mathematics and Science with 7.6 CGPA, as per the amended guidelines which is meant to improve the standard of education and to produce better students in future – Whether it is permissible to create a class within a class in the matter of promotion of a student to class-XI in the same School ? Does it imply that the petitioner is less meritorious than the students who has secured only 7.6 CGPA with B1 grades in Mathematics and Science ? A student who has secured B2 in Mathematics and Science does not mean that he can not excel in class XI examination – No material has been produced before this Court that fixing the cut-off marks in the subjects Mathematics and Science over and above the CGPA would result in producing more brilliant students, rather it would debar a meritorious student, who secured 7.8 CGPA – Such classification is illegal, discriminatory and suffers from the vice of arbitrariness – Held, direction issued to opposite party No. 1 to admit the petitioner in class-XI Science stream. (Paras 17,18,19)

Case Laws Referred to :-

1. AIR 1955 SC 191 : Budhan Choudhury & Ors. -V- State of Bihar
2. AIR 1974 SC 555 : E.P.Royappa -V- State of Tamil Nadu

For Petitioner : Mr. Mahendra Ku. Sahoo
For Opp. Parties : Mr. A.K.Dash

Date of hearing : 20.07. 2016
Date of judgment: 22.07.2016

JUDGMENT

DR. A.K.RATH, J

Justice R.C. Patnaik (as he then was) in Narayan Sahoo and others v. State of Orissa and others, 1989 (II) OLR 394 while classifying the litigants proclaimed:

> "By and large, common man is not litigation-minded nor he is averse to litigation. Litigation is not his pursuit, his hobby. Sometimes, however, he inherits litigation and willy-nilly pursues it. Often, however, a litigation is thrust on him…"

The petitioner belongs to last category. Lackadaisical attitude exhibited by the opposite parties in fixing cut off marks in Mathematics and Science over and above the Comprehensive Grade Point Average obtained by the applicant in CBSE/Class-X for admission into Class-XI Science stream in the academic Session 2016-17 compelled him to approach the portals of this Court as a last resort.

2. Sans details the case of the petitioner is that Kendriya Vidyalaya No.2 Bhubaneswar is imparting education upto Class-XI. The School is affiliated to Central Board of Secondary Education (hereinafter referred to as "the CBSE"). It is guided by the rules and regulations of the CBSE. The CBSE conducts final examination. All the Kendriya Vidyalayas including opposite party no.1 are controlled and administered by Kendriya Vidyalaya Sangathan, New Delhi, a creature of the Central Government, (hereinafter referred to as "the KVS"). The KVS used to follow the instructions issued by the CBSE in the matter of admission/class promotion and final examination. Opposite party no.2, after introduction of Comprehensive Grade Point Average (in short, "CGPA"), revised the admission guidelines in consonance with the CBSE norms applicable with effect from the academic session 2014-15 onwards. The admission guidelines were communicated to all KVS. The practice was followed in the matter of class promotion/admission from a lower class to higher class in the same school. The authorities of the KVS decided to follow the guidelines for admission which was introduced for the sessions 2014-15 and 2016-17. Accordingly, KVS issued admission guidelines for the academic session 2016-17, vide Annexure-1. Part-A of Clause-9 of the guidelines provides for the method of admission into Class-XI. The merit list is prepared as per CGPA obtained by the applicant in CBSE/Class X result in every school. Clause 9(b) provides for allotment seats to the applicant as per the rank in the merit list prepared in accordance with Clause 9(a). The minimum student strength shall be 40 and maximum 53. Till the vacancies in respect of a stream are available, the students of their own school are to be accommodated. While the matter stood thus, the said guideline was changed and accordingly the admission notice was issued by the opposite party no.1 on 30.5.2016, vide Annexure-2. The notice provides for admission into science streams as follows:

> "**(1) Science Streams (with Maths).**
>
> (i) A minimum of B1 Grade in Maths;
> (ii) A minimum of B1 Grade in Science
> (iii) A minimum of 7.6 CGPA.
> A student has to secure minimum B1 grade in Mathematics and B1 grade in Science. Over and above he has to secure 7.6 CGPA."

3. The petitioner asserts that he has secured 7.8 CGPA in the examination conducted by CBSE, 2016. He has secured B2 grade in Mathematics and Science respectively. Despite securing 7.8 CGPA, he has

been debarred from making application for Science with Mathematics in view of the minimum cut off marks provided for Science and Mathematics. With this factual scenario, this writ petition has been filed.

4. Pursuant to issuance of notice, a counter affidavit has been filed by the opposite parties 1 to 4. The sum and substance of the case of the opposite parties is that Kendriya Vidyalaya No.2, C.R.P.F., Bhubaneswar, opposite party no.1, is controlled by the rules framed by the KVS. The school has its own guidelines and admission procedure. The CBSE used to conduct examination and declare result. The CBSE has no control over the internal administration with regard to admission process of KVS. Opposite parties follow the CBSE syllabus for admission into different classes. The KVS is controlled by own guidelines and same is changed by the authorities for the betterment of the students. The KVS has amended its admission guideline to improve the standard of education and to produce the better students in future looking into the educational background of the State. Therefore, the opposite parties issued the amended rules for admission for the academic session 2016-17. Accordingly, the students are eligible to be promoted from Class-X to Class-XI if he or she secures B1 grade in Mathematics and B1 grade in Science with minimum 7.6 CGPA and Science without Mathematics if the student secures B1 grade in Science with at least 7.6 CGPA. The opposite parties have the authority to amend the admission guideline. The old students who have secured grades with cut off range are also promoted and allowed to take admission according to the option. No students of the school have been deprived of taking admission into the higher class i.e. from Class-X to Class-XI. The admissions are strictly on merit. In the instant case, the petitioner has secured 7.8 CGPA. But then, he has secured B2 grade in Mathematics and B2 grade in Science. Therefore, he is not eligible for admission for Science with Mathematics. He has been offered Commerce stream according to his eligibility. The guardians of some of the students have written to KVS, New Delhi for liberal consideration, but the same has not been accepted. Opposite party no.1 is not the authority to override the guidelines issued by KVS.

5. Heard Mr.M.K. Sahoo, learned counsel for the petitioner and Mr. A.K. Dash, learned counsel for the opposite party no.1.

6. Mr. Sahoo, learned counsel for the petitioner, submits that the impugned restriction so far as Mathematics and Science streams are concerned providing B1 grade in the said subjects has not been imposed by the CBSE authorities. Further, the admission of a student in Class-XI in the school is not a fresh admission. The same is a promotion. The petitioner is a

student of Class-X in the opposite party no.1-school and as such no restriction can be imposed. Therefore, the impugned notification suffers from vice of arbitrariness. The impugned restriction is contrary to the law laid down by the apex Court in the case of Principal, Kendriya Vidyalaya and others v. Saurabh Chaudhary and others, (2009) 1 SCC 794. The restriction is arbitrary and illegal inasmuch as the same does not project any rational goal to achieve. Further, restriction was not there in the previous order. There is no justification to provide the cut off marks in Science and Mathematics over and above the cut off marks provided to the Science stream. Further, as per the admission guideline, one section of Class-XI shall be the maximum 53 students. Last year, as per the permissible strength three sections were there in Class-XI Science stream for the own students of the opposite party no.1-school. In the present session, at best 159 students can be accommodated on the basis of their ranking prepared on merit. He further submitted that the petitioner is a National Sports awardee. He got national certificate granted by KVS. As per the previous practice, a candidate, who is a participant in KVS National Sports, is to be awarded 0.6 CGPA in addition to his/her total grade point obtained in Class-X. In view of the same, the additional mark has to be provided to him. He further submitted that 191 students of opposite party no.1-school had appeared at the Class-X CBSE Examination, 2016. All the students have passed. Out of them, 47 students secured CGPA-10, 62 students secured CGPA-9 to 9.9, 37 students secured CGPA-8.4 to 8.9. The petitioner comes within the zone of admission into the Science stream with Mathematics, but he has been illegally deprived of admission.

7. Per contra Mr. Dash, learned counsel for the opposite parties, submitted that the CBSE has no control over the internal administration of KVS. The KVS follows the CBSE syllabus. The CBSE conducts the examination. The KVS has to frame guidelines for providing admission/promotion. Opposite party no.1-school is controlled by the guidelines issued by the KVS. To improve the standard of education, keeping in view the future of the students and their educational background, the opposite party no.1 has issued the guidelines for admission for the academic session 2016-17. Accordingly, the students of the opposite party no.1-school are eligible for promotion from Class-X to Class-XI in Science stream with Mathematics provided he/she has secured B1 grade in Mathematics and B1 grade in Science with minimum 7.6 CGPA. The students, who have secured less grade below the cut off marks have been allowed to take admission in other streams. No students have been deprived of promotion to the next higher class. Since the petitioner has secured B2 grade in Science and B2

grade in Mathematics and 7.8 CGPA, he is not eligible to get admission in Science with Mathematics. He has been offered Commerce stream according to his eligibility.

8. Before proceeding further, it is apt to state here the guidelines for admission for Class-X and XI for the academic session 2016-17 issued by the KVS. Clause-9 of Part-A of the guideline is quoted hereunder;

> "**9. ADMISSION FOR CLASS X AND XII**
>
> Admissions to class X & XII, other than KV students, will be entertained subject to availability of vacancies. Such admissions to class X and XII will be considered by the Deputy Commissioner of the Region concerned, only if, the average strength in class X/XII is below 40. This will further be subject to the following conditions:
>
> i) The child has been in the same course of studies i.e. in a CBSE-affiliated school.
>
> ii) For Class X, the child must have obtained not less than 6.5 CGPA in class IX (CGPA be calculated as per formula applied by CBSE in class X). For admission to class XII, 55% marks in class XI examination is mandatory.
>
> iii) The child should OTHERWISE be eligible as per KVS admission guidelines.
>
> iv) The combinations of subjects opted by the student are available in Kendriya Vidyalayas."

9. Clause 9(I)(a) of Part-C of the guidelines provides that the merit list will be drawn/prepared as per CGPA obtained by applicant in CBSE/Class X results in every School.

10. The opposite party no.1-school has issued admission notice on 30.5.2016, vide Annexure-2, for admission into Class-XI for the session 2016-17. Clause-1 of the notice deals with Science Streams (with Mathematics). The same is quoted hereunder;

> "(1) Science Streams (with Maths)
> (i) A minimum of B1 Grade in Maths.
> (ii) A minimum of B1 Grade in Science.
> (iii) A minimum of 7.6 CGPA."

11. In Principal, Cambridge School and another v. Payal Gupta (Ms) and others (1995) 5 SCC 512, the apex Court held that once a student is given an admission in any educational institution by making an application, he is not required to submit fresh application forms after he passes a class for his

admission to the next higher class. The admission of the students to the next higher class after passing Class-X cannot be construed to a fresh admission/re-admission in the Higher Secondary School Examination and the Class-X cannot be regarded as a terminal examination for those who want to continue their study in eleventh and twelfth classes of the said school.

12. In Principal, Kendriya Vidyalaya and others v. Saurabh Chaudhary and others, (2009) 1 SCC 794 the question arose as to whether it is permissible for laying down a cut off mark. The apex Court in paragraph-18 held thus:

> "**18.** One can have no objection to a school laying down cut off marks for selection of suitable stream/course for a student giving due regard to his/her aptitude as reflected from the Class X marks where there are more than one stream. But it would be quite unreasonable and unjust to throw out a student from the school because he failed to get the cut off marks in the Class X examination. After all the school must share at least some responsibility for the poor performance of its student and should help him in trying to do better in the next higher class. The school may of course give him the stream/course that may appear to be most suitable for him on the basis of the prescribed cut off marks."

13. In view of the authoritative pronouncement of the apex Court in the decisions cited supra, it is open to the school laying down cut off marks for selection of suitable stream/course giving due regard to his/her aptitude as reflected from Class X marks where there are more than one stream. In the instant case, the school in question is imparting different courses for the students. Thus the school can fix a cut off mark for selection of a suitable stream/course for a student in a particular stream.

14. So far as the Science stream is concerned, minimum 7.6 CGPA has been provided. But then the question arises as to whether the opposite parties can fix cut off marks in the subjects Mathematics and Science over and above CGPA.

15. In Budhan Choudhry and others v. State of Bihar, AIR 1955 SC 191, the Constitution Bench of the apex Court in paragraph-5 of the report held :

> "It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the

statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

16. In E.P. Royappa v. State of Tamil Nadu and another, AIR 1974 SC 555, the apex Court in paragraph-85 held thus:

85. xxx xxx xxx

Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality."

17. Does the sub-classification withstand the test enumerated in Budhan Choudhry (supra) ? To put in other words, whether it is permissible to create a class within a class in the matter of promotion a student to Class-XI in the same School ?

18. On the anvil of the decisions cited supra, the case of the petitioner may be examined. The admission notice issued by the opposite party no.1 provides the eligibility criteria for admission to Class-XI Science and Commerce. It stipulates that in order to be eligible for admission into Science stream with Mathematics, a student must secure a minimum of B1 Grade in Mathematics, B1 Grade in Science with 7.6 CGPA. Admittedly the petitioner has secured 7.8 CGPA with B2 grade in Mathematics and Science in Class-X in CBSE Examination, 2016. Does it imply that he is less meritorious than the student who has secured only 7.6 CGPA with B1 grades in Mathematics and Science ? A student who has secured B2 in Mathematics and Science does not mean that he cannot excel in Class-XI Examination. The stand of the opposite parties is that the admission guideline has been

amended to improve the standard of education and to produce the better students in future looking into the education background of the State. Neither any study was undertaken, nor any survey was made. No material has been produced before this Court that fixing the cut off marks in the subjects-Mathematics and Science over and above the CGPA would result in producing more brilliant students. Rather fixing the cut off marks in Mathematics and Science over and above CGPA will debar a meritorious student, who has secured 7.8 CGPA. In the name of improvement of standard of education and to produce the better student in future looking to the education background of the State, the opposite parties cannot debar a student from taking admission into Class XI in their whim and caprice. The classification is illegal and suffers from the vice of arbitrariness. The same has resulted in discrimination against some of the students and the object achieving meritorious students would not be achieved.

19. In view of the aforesaid analysis, the writ application is allowed. The opposite party no.1 is directed to admit the petitioner in Class-XI Science stream. No costs.

Writ appeal allowed.

2016 (II) ILR - CUT-384

DR. A.K.RATH, J.

O.J.C. NO. 2124 OF 1998

JASOBANTA MOHANTY ……..Petitioner

.Vrs.

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

SERVICE LAW – Petitioner, while adjusted against a trained intermediate post w.e.f. 24.04.1976, the post was upgraded to a trained graduate post – He passed B.Ed. on 13.05.1985 – He became entitled to trained graduate scale of pay as per notification of Government vide Letter No. XIV EDET 5/83, 5680 EYS Dt. 07.02.1983 – He approached the authorities for the above benefits but failed – Hence the writ petition – Held, the petitioner is entitled to trained graduate scale of pay w.e.f. the date he acquired B.Ed. qualification – With regards to arrear salary, he is entitled for a period of three years prior to the date of filing of the writ petition – Since the petitioner has retired from service, his pensionary benefits shall be calculated accordingly.

(Paras 4 to 9)

Case Laws Relied on :-

1. 1998 (II) OLR-334 :Madhab Ch. Podh -V- State of Orissa & Ors.
2. (2008) 8 SCC 648 : Union of India & Ors. -V- Tarsem Singh

For Petitioner : Ms. Mira Ghose
For Opp. Parties : Mr. M.Bisoi, Standing Counsel (S&ME)

Date of Hearing : 12.07.2016
Date of Judgment:16.07.2016

JUDGMENT

DR.A.K.RATH, J.

By this writ application under Article 226 of the Constitution of India, the petitioner has prayed inter alia for a direction to the opposite parties to allow him to draw trained graduate scale of pay with effect from the date of acquiring B.Ed. qualification.

2. Case of the petitioner is that he was appointed as an Assistant Teacher in the trained matric post in Nimpur Sasan High School on 15.7.1969 by the Managing Committee of the school. The school in question was established in the year 1969. It got recognition in the year 1971 and came under the fold of grant-in-aid scheme in the year 1974. He was adjusted against the trained intermediate post with effect from 24.4.1976. The post was upgraded to a trained graduate post. While the matter stood thus, he passed B.Ed examination in May,1984 and the result thereof was published on 13.5.1985. After he became a trained graduate, he is entitled to get trained graduate scale of pay as per the notification of the Government vide letter no.XIV EDET 5/83, 5680 EYS dated 7.2.1983. Thereafter he approached the authorities for allowing him trained graduate scale of pay from 13.5.1985, but the same was denuded. With this factual scenario, the writ application has been filed.

3. Pursuant to issuance of notice, a counter affidavit has been filed by opposite party no.3. It is stated that the Managing Committee of Nimapur Sasan High School appointed the petitioner as an Assistant Teacher, 5th Trained Graduate without observing the principles of Yardstick, 1981 prescribed by the Government. Only one science graduate is working in the school. The yardstick of the year 1981, which came into force with effect from 1.6.1983, prescribed that in the aided high schools there shall be four trained graduate teachers excluding the headmaster. Amongst those four trained graduate teachers, two must be trained arts graduate and two must be science graduate. From those two science graduates, one must be of P.C.M.

group and another must be from C.B.Z. group. The post against which the present petitioner was continuing is the 5th post which is exclusively meant for a science graduate having C.B.Z combination. The same is earmarked for the trained graduate teacher having C.B.Z. group of subject. The petitioner, being a B.A. B.Ed., cannot be accommodated against such post and as such no approval can be granted.

4. An identical question came up for consideration before this Court in the case of Madhab Chandra Podh Vrs. State of Orissa and 4 others, 1998 (II) OLR-334. The petitioner was appointed against an I.A.C.T. post on 22.2.1973 in Sachidananda High School in the district of Bolangir. The post he was holding was upgraded with effect from 28.1.1975 to a trained graduate post. He continued in that post in the scale of pay of I.A.C.T. Teacher as he was a graduate. In December, 1983 he became a trained graduate. In accordance with the decision of the Government in its letter No.XIV EDET 5/83, 5680 EYS dated 7.2.1983 addressed to the Deputy Director of Public Instructions, Orissa, he was entitled to the trained graduate scale of pay. The grievance of the petitioner was that though he was continuing against a trained graduate post, yet he was refused to be granted the trained graduate scale of pay since the date of his acquiring such qualification.

5. Relying on the letter No.XIV EDET 5/83, 5680 EYS dated 7.2.1983 addressed to the Deputy Director of Public Instructions, Orissa, the State of Orissa justified its action. This Court held thus:-

> "In the decision of the Government communicated to the Deputy Director of Public Instructions on 7.2.1983 it was decided that there is no bar to allow trained scale of pay to all untrained graduate appointed against a trained graduate post as soon as he acquires training qualification. This decision was being taken by the Government in the background of the fact as to whether there was any necessity to amend the Rule 8(2)(b) of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (hereinafter referred to as the '1974 Rules'). The decision was that there was no need for amendment of the Rule to achieve the purpose of granting Trained Graduate Scale of pay to a teacher who had been appointed against a Trained Graduate Post but was being paid a lesser scale of pay because of his not having the trained qualification. This was a general decision applicable to all such teachers and undoubtedly since the petitioner was holding the appointment against the Trained Graduate post since 1975, he became entitled to the Trained Graduate Scale on his acquiring the trained qualification. Such right of the petitioner is not to be defeated only because

of the revised yardstick. All that the revised yardstick purported to say was that in a school there must be two Trained Science Graduate Teachers and two Trained Arts Graduate Teachers besides the Headmaster. It did never say that the teacher who has become entitled to the Trained Graduate scale of pay would be deprived of the same. Rule 8(2)(b) of the 1974 Rules was the rule which deals with promotion of in service teachers in a school providing that the managing committee can, with the prior approval of the Government promote a teacher to a post carrying higher scale of pay if there is a vacancy. The decision was being taken in that background that the prior approval of the Government would not be necessary in view of the fact that the Government had no objection to the grant of higher scale of pay to the teachers who had acquired trained qualification while holding their appointments against the Trained Graduate Posts. If as a result of a teacher acquiring trained qualification there was a surfeit of Trained Arts Graduate Teachers or the Trained Science Graduate Teachers in the school, as the case may be, the obvious thing to be done is to transfer the required Teachers to some other institutions and in their place get the teachers as are necessary for the purposes of the school. It is for such reason that the petitioner must succeed to the declaration that he is entitled to be granted the Trained Graduate scale of pay from December 1983 and be placed in the cadre of Trained Graduate Teachers from that date. The authorities are free to transfer the petitioner, if the necessity so arises, in accordance with the requirement of the yardstick as in Annexure-C. The arrear dues of the petitioner in the Trained Graduate scale of pay be paid to him within three months from the date of receipt of the writ from this Court."

6. The ratio of Madhab Chandra Podh (supra) applies with full force to the facts and circumstances of the present case.

7. The next question that arises for consideration of this Court whether the petitioner is entitled to arrear salary with effect from he acquired B.Ed. qualification. In the case of Union of India and others Vrs. Tarsem Singh, (2008) 8 Supreme Court Cases 648, the apex Court in paragraph-7 of the report held thus:-

"7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If

> the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."

8. In view of the authoritative pronouncement of the apex Court in the case of Tarsem Singh (supra), the petitioner is entitled to arrear salary for a period of three years prior to the date of filing of the writ application.

9. The inescapable conclusion is that the petitioner is entitled to trained graduate scale of pay with effect from the date he acquired B.Ed. qualification. With regard to the arrear salary, the same shall be calculated and paid to the petitioner for a period of three years prior to the filing of the writ application. Since the petitioner has retired from service, his pensionary benefits shall be calculated accordingly. The entire exercise shall be completed within a period of six months. The writ application is allowed. No costs.

10. Before parting with the case, this Court is of the view that the claim of the petitioner was denuded on jejune grounds. The immortal words of Chief Justice Chagla in the case of Firm Kaluram Sitaram Vrs. The Dominion of India, AIR 1954 Bombay 50, that when the State deals with a citizen it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent judges, as an honest person.

Writ petition allowed.

2016 (II) ILR - CUT-389

DR. A.K. RATH, J.

W.P.(C) NO. 6360 OF 2006

NALINIPRAVA BEHERA ……..Petitioner

.Vrs.

EXE. ENGINEER, E.H.T., KEONJHAR & ANR. ………Opp. Parties

MOTOR VEHICLE ACT, 1988 – S.166

Whether an application for compensation U/s. 166 of the Act, can be dismissed for default ?

Section 166 of the Act, casts a mandate on the Tribunal to pass an award determining the amount of compensation – If Rules 5,16,17,19 & 20 of the Odisha Motor Vehicles (Accident Claims Tribunals) Rules, 1960 will be read alongwith section 166 of the Act it will be clear that the Tribunal has no jurisdiction to dismiss a claim petition for default after issues have been framed – But, if an award has been passed, the same can be set aside taking resort to Order 9 of C.P.C – Held, the impugned orders of the Tribunal dismissing the claim petition as well as the application for restoration are quashed and the claim application is restored to file. (Paras 4 to7)

Case Law Relide on ;-

1. 1996(II) OLR 298 : Bhagaban Mallik-Vrs.-Nagendra Biswal & anr.

For Petitioner : Mr. Ravi Raj Jaiswal for Mr. S.P. Mishra, Sr. Adv.
For Opp. Parties : Mr. Pranab Kumar Pasayat on behalf of
Mr. P.K.Mohanty, Sr. Adv.

Date of hearing :28.06.2016
Date of judgment:28.06.2016

JUDGMENT

DR. A.K.RATH, J

This petition challenges the order dated 07.04.2006 passed by the learned Ist M.A.C.T., Keonjhar in C.M.A. No. 07 of 2006 arising out of Claim Misc. Case No. 370/1990 whereby and whereunder the learned Tribunal rejected the application filed by the claimant-petitioner for restoration of the claim application.

2. For the death of one Kangali Charan Behera in a motor vehicle accident, the petitioner-daughter filed an application for compensation under Section 166 of the Motor Vehicle Act before the learned Motor Accident Claims Tribunal, Keonjhar. The claim application was dismissed for default

on 16.01.2006. Thereafter, the application for restoration under Order 9 Rule 9 of C.P.C. read with Section 5 of the Limitation Act was filed before the learned Tribunal. By order dated 07.04.2006, learned Tribunal dismissed the application for restoration.

3. Heard Mr. Rabi Raj Jaiswal, learned Advocate for the petitioner and Mr. Pranab Kumar Pasayat, learned Advocate for opposite party no.2.

4. The sole question that hinges for consideration is whether an application for compensation under Section 166 of the Motor Vehicles Act can be dismissed for default.

5. The subject-matter of dispute is no more res integra. A Division Bench of this Court, speaking through Justice Dipak Mishra (as he then was), in the case of Bhagaban Mallik-Vrs.-Nagendra Biswal and another 1996(II) OLR 298 in paragraph 8 of the report held thus:-

> " 8. By incorporation of Rule 20, Order 9 has been made applicable. The said rule has to be read in harmony with other Rules. Rule 5 confers express power on the Tribunal to dismiss an application in a summary manner. As already indicated earlier Rule 16 deals with framing of issues. Rule 17 provides that after framing the issues the Claims Tribunal shall proceed to record evidence thereon which each party may desire to adduce. As envisaged under Rule 19 the Claims Tribunal in passing the order shall record concisely in a judgement the findings on each of the issues framed and the reasons for such finding and make an award, justifying the amount of the compensation to be paid by the insurer and also the person or persons to whom compensation shall be paid. If an application is not summarily dismissed it continues to reach its logical end, and the logical end is as provided for under Rule 19 of the Rules. That apart, Sec. 166 (old Sec.110-B) casts a mandate on the Tribunal to pass an award determining the amount of compensation. Reading the Rules in juxtaposition of Sec. 166 of 1988 Act (110-B of the old Act) it is beamingly clear that the Tribunal has no jurisdiction to dismiss a claim petition for default after issues have been framed. But, if an award has been passed, the same can be set aside taking resort to Order 9 of the Code (emphasis laid).
>
> xxx xxx xxx".

6. The learned tribunal travelled beyond its jurisdiction in dismissing the claim application for default.

7. In view of the authoritative pronouncement of this Court, the order dated 16.01.2006 as well as the order dated 07.04.2006 passed by the learned Ist M.A.C.T., Keonjhar in C.M.A. No. 07 of 2006 arising out of Claim Misc.

Case No. 370/1990 are quashed. The claim application is restored to file. The learned Tribunal is directed to conclude the case by end of September, 2016. The petition is allowed. No costs.

Writ petition allowed.

2016 (II) ILR - CUT-391

D. DASH, J.

RSA NO. 328 OF 2012

GIRISH MAHANAIK & ANR. ……..Appellants

.Vrs.

KARTIKA MAHANAIK & ORS. ………Respondents

LIMITATION ACT, 1963 – S.5

Condonation of delay – The expression "Sufficient cause" would largely depend on the bonafide nature of the explanation given by the applicant – If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bonafides, then it may condone the delay – However, if the explanation is found to be concocted or the applicant is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay.

In this case the utter negligence of the appellants is clearly exposed and they moved the application at a highly belated stage when a valuable right has already accrued in favour of the respondents which is not excusable – The delay being 400 days and the explanation given by them appears to be such that its acceptance would not be a legitimate exercise of discretion in condoning the delay.

(Paras7,8,9)

Case Laws Referred to :-

1. (2012) 5 SCC 157 : Maniben Devraj Shah -V- Municipal Corpn. of Brihan Mumbai.

For Appellants : M/s. A.R.Dash, S.K.Nanda-1, S.Sahoo, B.N.Mohapatra, A.N.Swain, S.N.Sahoo, K.S.Sahu, L.D.Achari.

For Respondents : M/s. Samir Ku. Mishra, J.Pradhan, S.K.Rout, D.K.Pradhan, N.Das, Miss S.Sarangi

Date of hearing : 22.09.2015
Date of judgment: 06.10.2015

JUDGMENT

D. DASH, J.

This appeal has been filed challenging the order passed by the learned District Judge, Mayurbhanj in R.F.A. No.17 of 2012 rejecting the application under section 5 of the Limitation Act and refusing to condone the delay in filing the appeal and consequently dismissing the same.

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

> "Whether the learned lower appellate court is justified in law in holding that each day of delay is required to be explained by the person who is seeking relief under section 5 of the Limitation Act?"

3. These appellants were the defendants in Civil Suit No.267 of 2007 of the Court of the Civil Judge (Sr. Division), Baripada. The said suit had been filed by the respondent nos.1 to 5 as the plaintiffs for partition of the joint family properties. By judgment dated 14.09.2009 followed by decree dated 05.10.2009, the suit was disposed of by passing a preliminary decree. No appeal was carried by any of the parties. Thereafter, the plaintiffs filed a petition for making the preliminary decree final.

In that final decree proceeding, these defendants being noticed did not raise any objection. The trial court deputed Civil Court Commissioner to make division of the property in accordance with the preliminary decree keeping in view the directions contained therein. By order dated **19.02.2011**, the said report of the Civil Court Commissioner was accepted and thereafter stamp paper being supplied, the final decree was engrossed on it and that was sealed and signed on 17.03.2011. The plaintiffs then filed a petition for execution of the said final decree which was numbered as Execution Case No.17 of 2011. These appellants being shown as the judgment debtors on 28.10.2011 entered appearance in that execution case being noticed. Thereafter, they challenged the final decree dated 17.03.2011 (as stated in the memorandum of appeal) by presenting the memorandum of appeal in the Court of the learned District Judge, Mayurbhanj on 26.03.2012.

In fact, the trial court by order dated 19.02.2011 had accepted the report of the Civil Court Commissioner and passed an order that the preliminary decree is made final with the said report and its annexure forming a part of the final decree. In the eye of law, the date of final decree

thus is 19.02.2011 and not the date when it was engrossed on the stamp paper and sealed and signed, i.e., on 17.03.2011. So in that way, the appeal before the lower appellate court as laid was incompetent and, in fact, was not maintainable as the said order by which the report was accepted and final decree was passed being not challenged within the period of limitation as prescribed, i.e., by 21.03.2011, the same had already attained finality. This has unfortunately been lost sight of by the lower appellate court. The settled position of law is that once the preliminary decree is made final by acceptance of the report of the Commissioner, for the purpose of challenging the same, the period spent thereafter for the purpose of engrossment on the stamp paper does not enure to the benefit of the challengers and the legal effect of the final decree for the purpose of being challenged does not get suspended for its non-engrossment on stamp paper on account of delay in supplying the stamp papers. Even the period of limitation for the purpose of filing execution of the said final decree starts to run from that day onwards although for the final decree being executable, it is required to be engrossed on the stamp paper. So, that order dated 19.02.2011 having not been challenged by carrying the appeal within time, even upon condonation of delay as prayed for, the lower appellate court could not have gone to set aside the final decree sealed and singed on 17.03.2011 being engrossed on stamp paper which is precisely the prayer in the memorandum of appeal filed in the lower appellate court when also the certified copy of the order dated 19.02.2011 had not been filed along with that memorandum of appeal.

Here the first order of acceptance of the Civil Court Commissioner's report as passed on 5.12.2013 is not conditional. There the report of the Commissioner had been accepted in *toto*. Thus it appears that the lower appellate court has proceeded with the matter without being alive to the settled position of law.

4. The decree is defined in Section 2(2) of the Code of Civil Procedure Under the explanation, it is explained that a decree is preliminary decree when further proceeding is taken before the suit can be completely disposed of and it is final when such adjudication completely disposes of the suit. The settled position thus is that a preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings when as a result of further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. Final decree may be

said to have attained its finality in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest Court, (ii) when, as regards the Court passing the decree, the same stands completely disposed of.

Section 96 of the Code provides that save as otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decision of such court. So, an appeal certainly lies against the final decree subject to the restriction contained in Section 97 of the Code that where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

5. At this stage, let us also have a look at the provision of order 20 Rule 6-A of the Code as inserted in the Code by the Amendment Act of 1976 which is as under:

> "6-A. Last paragraph of judgment to indicate in precise terms the reliefs granted-
>
> (1) The last paragraph of the judgment shall state in precise terms the relief which has been granted by such judgment.
>
> (2) Every endeavour shall be made to ensure that the decree is drawn up as expeditiously as possible, and, in any case, within fifteen days from the date on which the judgment is pronounced; but where the decree is not drawn up within the time aforesaid, the Court shall, if requested so to do by a party desirous of appealing against the decree, certify that the decree has not been drawn up and indicate in the certificate the reasons for the delay, and thereupon-
>
> (a) an appeal may be preferred against the decree without filing a copy of the decree and in such a case the last paragraph of the judgment shall, for the purposes of Rule 1 of Order XLI, be treated as the decree; and
>
> (b) so long as the decree is not drawn up, the last paragraph of the judgment shall be deemed to be the decree for the purpose of execution and the party interested shall be entitled to apply for a copy of that paragraph only without being required to apply for a copy of the whole of the judgment; but as soon as a decree is drawn up, the last paragraph of the judgment shall cease to have the effect of a decree for the purpose of execution or for any other purpose;

> Provided that, where an application is made for obtaining a copy of only the last paragraph of the judgment, such copy shall indicate the name and address of all the parties to the suit."

Thus, Rule 6-A enjoins as it was then:-

> "that the last paragraph of the judgment shall state in precise terms the relief which has been granted by such judgment. It has fixed the outer time limit of 15 days from the date of the pronouncement of the judgment within which the decree must be drawn up. In the event of the decree not so drawn up, clause (a) of sub-rule (2) of Rule 6A enables a party to make an appeal under Rule 1 of Order XLI, C.P.C. without filing a copy of the decree appealed against and for that purpose the last paragraph of the judgment shall be treated as a decree."

However, the same has been substituted by Amendment Act No. 46 of 1999 in Section 28 which has come into force w.e.f. 1.7.2002 which reads as under:-

> "(2) An appeal may be preferred against the decree without filing a copy of the decree and in such a case the copy made available to the party by the court shall for the purposes of Rule 1 of Order XLI be treated as the decree. But as soon as the decree is drawn, the judgment shall cease to have the effect of a decree for the purposes of <u>execution or for any other purpose</u>."

6. It therefore follows that the decree becomes enforceable the moment the judgment is delivered and merely because there will be delay in drawing up of the decree, it cannot be said that the decree is not enforceable till it is prepared. Similarly, an appeal may be preferred against the decree without it being formally drawn up and without filing a copy of decree.

So, in my considered view, the appeal filed by the appellant in the lower appellate court was incompetent and not maintainable in the eye of law.

7. That apart even assuming for a moment that in the said appeal the order dated 19.02.2011 was called in question then also there had been delay of 400 days. It may be mentioned here that the period of delay as calculated by the lower appellate court without cross-verifying the office note is an error on its part. In that way the delay is coming to be 366 days even by allowing time spent for obtaining certified copy. It reveals from the case record that these appellants were very much contesting the suit and in that final decree proceeding notices were duly served and made sufficient but

they have chosen to remain absent. Thereafter, in the execution case they were also served with notice and having entered appearance on 28.10.2011 through their counsel had prayed for grant of time to file objection which was allowed. The ground taken for the condonation of delay in filing the appeal is that the appellants were not aware of the final decree proceeding and the same was passed without their knowledge and especially the appellant no.1 had not personally received the notice.

Be that as it may, notice was personally served on both the appellants in the execution case where upon they appeared. But there remains absolutely no explanation as to what prevented them at least since 28.10.2011 till 25.03.2012. Even it is seen that they have applied for obtaining the certified coy of sealed and singed final decree only on 03.03.2012. Thus here is a case where the explanation lacks bonafides and does not have even the semblance of credibility. The utter negligence of the appellants is clearly exposed and the highly belated move in such matter when a valuable right has already accrued in favour of the respondents is not excusable in the facts and circumstances of the case.

8. It has been held in case of ***Maniben Devraj Shah vs. Municipal Corpn. of Brihan Mumbai; (2012) 5 SCC 157,*** this Court referred to some of the judicial precedents in para 23 and 24 as under:-

> "23. What needs to be emphasized is that even though a liberal and justice-oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.
>
> 24. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

9. In the light of the above laid down propositions, when the case in hand is examined, the explanation given by the appellants for the delay of

400 days appears to be such that its acceptance would not be a legitimate exercise of discretion in condoning the delay. The substantial question of law thus is accordingly answered which runs against the appellants.

10. Resultantly, the appeal stands dismissed and in the facts and circumstances with cost throughout.

Appeal dismissed.

2016 (II) ILR - CUT-397

D. DASH, J.

CRIMINAL APPEAL NO. 376 OF 2010

BHAKTA KISAN …….Appellant

.Vrs.

STATE OF ORISSA …….Respondent

PENAL CODE, 1860 – S.376 (2) (g)

Rape – Conviction based on the solitary testimony of the victim – Hence this appeal – No legal bar for the Court to base a finding and record conviction for the offence of rape, placing reliance on the sole testimony of the victim, if the same is found to be worthy of credence – It is not the absolute rule of law that it must receive corroboration from independent sources, so as to form the basis of a finding of guilt – Corroboration is not always a requirement but it is insisted when the evidence of the victim is not found to be trust worthy – Impugned judgment of conviction and sentence is confirmed. (Paras 8,10)

For Appellant : M/s. Niranjan Singh, Akshaya Sahoo
For Respondent : Mr. K.K.Nayak, Addl.Standing Counsel

Date of hearing : 24.05.2016
Date of judgment: 03.06.2016

JUDGMENT

D. DASH,J.

The appellant having been convicted by the learned Adhoc Additional Sessions Judge, Sundargarh in S.T. No.23/7 of 2010 for commission of offence under section 376(2)(g) of the I.P.C. and sentenced to undergo rigorous imprisonment for a period of 10 years and pay fine of Rs.1,000/- in default to undergo rigorous imprisonment for one month has filed this appeal in assailing the finding of guilt recorded against him as also the sentence that he has been visited with.

2. Prosecution case is that on 12.07.2009, it was between 1 to 1.30 P.M. the victim girl P.W.6 was on her way to the market. It is stated that when she arrived near Bharat Gas Godown situated by the side of the State Highway, accused Bijaya Majhi with four others including the present appellant forcibly dragged her near the boundary wall of the godown. It is alleged that accused-Bijaya and the appellant entered inside the premises of the gas godown by scaling over the boundary wall and then the three other accused persons lifted the victim so as to facilitate Bijaya and this appellant to take her inside the premises of the gas godown. It is further alleged that thereafter accused-Bijaya forcibly undressed the victim, laid her on the ground with her face upward and did sexual intercourse upon her. During the process, the appellant assisted the accused-Bijaya by holding the hands of the victim and gagging in seeing that no resistance is aired. Still when the victim did not remain silent accused-Bijaya had slapped her. It is stated that one Tibraj Rohidas-P.W.3 was then passing nearby and hearing the cry of the victim, she with other co-villagers, including P.W.2 went near the godown and found those four boys sitting on the boundary wall when accused-Bijaya was sleeping over the victim inside the godown. All of them fled away at their sight. Although they made the attempt to apprehend them, yet the same did not succeed. Thereafter, they saw the victim lying inside the godown in an unconscious state being naked, with her garments lying scattered. She was shifted to the District Headquarter Hospital, Sundargarh for necessary treatment. The police arrived at the spot on receiving information about the incident and one Sukanta Rohidas-P.W.2 lodged the F.I.R. before the I.I.C. of Town Police Station.

Necessary case having been registered, the investigation commenced. In course of investigation, the investigating officer visited the spot, recorded the statement of the witnesses including the victim after she regained her sense in the hospital, collected the medical examination reports, seized the wearing apparels of the victim and finally could only apprehend the present appellant. In view of such apprehension of the appellant, the Investigating Officer made a prayer for holding the Test Identification Parade in so far as the appellant was concerned which was so held. The incriminating articles were sent for chemical examination. Finally on completion of the investigation, charge-sheet was laid against this appellant and three others. Due to non-apprehension of the other accused persons, the case against this appellant was spilt up and it was committed to the Court of Sessions which ultimately came to be tried by the learned Adhoc Additional Sessions Judge, Sundergarh.

3. During trial, the prosecution examined as many as 10 witnesses including the victim-P.W.6, the independent witnesses including the informant, medical officer and other witnesses to the seizure as also the investigating officer. From the side of the prosecution, F.I.R. has been admitted in the evidence and marked as Ext.2, the medical examination report of the victim has been marked as Ext.4 as also the T.I. parade report as Ext.10 besides the other documents, such as, the seizure list, spot map, chemical examination report etc.

4. The trial court as is seen from the judgment having formulated the points required for determination as regards the factual aspect of the case concerning the allegations levelled against the appellant has taken up the exercise of examination of evidence and their scrutiny to find out if those have been proved. It has ultimately recorded the answer in favour of the prosecution in saying that this appellant is guilty for commission of offence under section 376 (2)(g) of the I.P.C. and accordingly sentenced as stated above has been awarded.

5. Learned counsel for the appellant submits that the evidence of P.W.6-the victim in so far as the role said to have been played by this appellant is not acceptable as it is without any corroboration from independent sources on material particulars. For the purpose, he has taken the pain of placing the evidence of P.W.6 line by line as also P.Ws.1, 2 and 3. According to him, the evidence being cumulatively viewed, this appellant's role as attributed by the prosecution cannot be said to have been proved beyond reasonable doubt. Therefore, he urges for to set at naught the finding that the appellant is guilty for the said offence under section 376(2)(g) of the I.P.C. Thus, he submits that the judgment of conviction and the order of sentence as passed by the trial court are vulnerable and liable to be set aside.

6. Learned Additional Standing Counsel contends that the evidence of P.W.6, the victim who is aged about 10 years is totally free from any such suspicious feature so as to even seek any corroboration from other sources on material particulars. It is his contention that this appellant was not known to the victim before hand and he has been duly identified by the victim during trial which has received due corroboration from the earlier identification in course of test identification parade as proved in this case. So, according to him, there remains no reason to say for a moment that the victim had any axe to grind against this appellant. It is submitted that the evidence of the victim is clear, cogent and acceptable in describing the part played by the appellant in the crime scenario and her testimony is wholly reliable. So, he contends

that the trial court has rightly convicted the appellant for the offence for which he stood charged and has sentenced him accordingly.

7. In view of above rival submission, now the prosecution evidence are required to be scanned so as to test the sustainability of the finding of guilt recorded by the trial court against the appellant.

8. It may be kept in mind that there is no legal bar for the court to base a finding and record conviction for the offence of rape placing reliance on the solitary testimony of the victim, if the same is found to be worthy of credence. It is not the absolute rule of law that the solitary testimony must receive corroboration from independent sources so as to form the basis of a finding of guilt. The corroboration is not always the requirement. However, corroboration is insisted upon when the solitary testimony of the victim is not found to be trustworthy.

9. The star witness for the prosecution in this case is the victim-P.W.6. When she has stated her age to be 10 years, the assessment of the court during the examination stands that she was by then about 14 years of age. She has stated that when on the date of occurrence she was going to bazaar around 1 P.M. near Bharat Gas Godown accused-Bijaya dragged her forcibly and four persons associated with him including the appellant who has been identified caught hold up her and took her to the side of the boundary wall of the godown. She has further stated that as to how she was finally taken inside the godown by accused-Bijaya and so far as the role of the appellant is concerned, her evidence is specific and pinpointed that when accused-Bijaya was sexually assaulting her, this appellant had caught hold her hands by force and gagged her so as to prevent her from raising any hulla and pose any resistance. She has further stated that during the incident she lost her sense and that she regained around 5 P.M. when she found herself in the hospital and immediately thereafter she claims to have narrated the incident before the police. The narration goes like natural flow. She has also stated to have identified this appellant in the test identification parade held inside the District Jail in presence of the Magistrate stating about the role in nutshell played by this appellant in the said incident. During cross-examination, she has further reiterated about the presence of this appellant. So far as the incident is concerned right from the beginning still she regained her sense despite scathing cross-examination, no such material appears to have been surfacing on record so as to doubt her testimony on any of the above aspects. The medical evidence fully corroborates the version of this victim that recent sign and symptom of sexual intercourse had been noticed. The witnesses

arriving shortly after the incident of rape have consistently deposed about the presence of the appellant and as to how he took to his heels at their sight. There remains no such material on record even to remotely suggest as to why this minor victim would choose this appellant in roping him in the said crime.

10. Thus, I find that P.W.6-the victim is a wholly reliable witness and her testimony is accordingly found to be above board so as to be accepted in so far as the role of the appellant in the entire incident is concerned. This clearly leads to conclude that the prosecution in has successfully proved its case beyond reasonable doubt against the appellant and for that he has been rightly fastioned with the finding of guilt for commission of offence under section 376(2)(g) of the I.P.C., which needs no interference. The sentence as imposed is also found to be just and proper. Accordingly, the judgment of conviction and order of sentence which have been impugned in this appeal are hereby confirmed.

11. In the result, the appeal stands dismissed.

Appeal dismissed.

2016 (II) ILR - CUT-401

S. PUJAHARI, J.

CRLREV NO. 215 OF 2016

AMARENDRA ROUTRAY ……..Petitioner

.Vrs.

SARAT CH. MOHANTY & ORS. ………Opp. Parties

CRIMINAL PROCEDURE CODE, 1973 – S.133

"Public nuisance" – Meaning of – For constituting "Public nuisance", an illegal omission is not sine-qua-non – However any act, though not tantamount to an illegal omission, but, if capable of causing any common injury, danger or annoyance to the public at large or even to the people dwelling or holding any property in the vicinity, will come within the definition of "public nuisance".

In this case there is no denial by the petitioner that his workshop is situated/located in a prime residential area and opposite party Nos. 1 to 4 are residing in its vicinity – Moreover the process carried in the workshop includes cutting, drilling, hammering, welding

and painting of steel structures and operation of such a unit is detrimental to the convenience of the local inhabitants in leading normal life – Held, there is no illegality in the impugned order directing shifting of workshop/fabrication unit to a place beyond the residential area for the purpose of preventing "public nuisance", calling for interference by this Court. (Paras 7,8)

For Petitioner : M/S. Subha Kumar Mishra
For Opp. Parties : M/S. Dayanidhi Mohanty

Date of Order : 20.06.2016

ORDER

S. PUJAHARI, J.

The petitioner herein challenges the order dated 10.03.2016 passed by the Additional Deputy Commissioner of Police-cum-Executive Magistrate, Cuttack in Criminal Misc. Case No.104 of 2015, a proceeding initiated under Section 133 of the Code of Criminal Procedure (for short "Cr.P.C."), directing the petitioner to shift his fabrication unit / workshop under the trade name "Routray & Routray" established and run over Hal Plot No.456/1966 in Khata No.650/580 at Aparna Nagar (Ananda Vihar) within a local limit of Chauliaganj Police Station, Cuttack from its existing location to the outside of the prime residential area.

2. A perusal of the record would reveal that the proceeding aforesaid was initiated by the Additional Deputy Commissioner of Police-cum-Executive Magistrate, Cuttack pursuant to a petition filed by the present opposite party nos.1 to 4 (first party members) alleging, inter-alia, that the continuance of the fabrication unit was causing public nuisance inasmuch as the sound pollution and air pollution created thereby was resulting in health hazards and mental trauma to the inhabitants of the locality. On being noticed, the petitioner entered appearance in the proceeding and filed his show-cause repudiating the allegation of the opposite party nos.1 to 4 on the grounds, inter-alia, that he was running the workshop which was a Cottage Industry since the year 2000 on being duly permitted by the District Industries Centre, Cuttack and also on obtaining "No Objection Certificate" from the Municipal Corporation. According to him, the workshop runs from 10 a.m. to 5 p.m. with lunch break and that the trade was being carried out by him without any detriment to public much less creating any air or sound pollution. The further defence plea taken by him is that there was never any complain from the local public and that the present Opposite party nos.1 to 4,

who cannot be construed as ‘public’, have brought false allegation of “public nuisance” out of their personal grudge.

3. The learned Additional Deputy Commissioner of Police-cum-Executive Magistrate, Cuttack in course of the enquiry recorded evidence from the rival sides and on considering the materials so produced coupled with those collected during enquiry arrived at a finding that operation of the fabricated unit by the present petitioner was resulting in noise pollution causing annoyance, disturbances and discomfort to the first party members (opposite party nos.1 to 4 herein) who are residing in the vicinity of the said unit. Ultimately, the learned Additional Deputy Commissioner of Police-cum-Executive Magistrate, Cuttack has passed the impugned order directing the petitioner to shift the fabrication unit to some other place beyond the prime residential area. Hence, this revision petition questioning the legality and propriety of the said order.

4. I have gone through the materials on record vis-à-vis the impugned order and heard the learned counsel for both the sides.

5. It is the contention of the learned counsel for the petitioner that the workshop being a Cottage Industry can be run in a residential area, with due permission from the appropriate authorities. He would further submit that it is factually incorrect to say that the operation of the workshop created any hazard to the local inhabitants inasmuch as while the first party members who brought the allegations, are only four in number, a good number of inhabitants of the locality have come in support of the petitioner denying the alleged nuisance or inconvenience. His ultimate argument is that the learned Additional Deputy Commissioner of Police-cum-Executive Magistrate, Cuttack failed to appreciate the facts and evidence in right perspective and committed gross error in issuing the direction for shifting of the workshop, to the prejudice of the petitioner.

6. The learned counsel appearing for the opposite party nos.1 to 4, however, supports the impugned order on the ground of the same being based upon due consideration of the available materials on record.

7. “Public nuisance” is defined under Section 268 of the Indian Penal Code as follows :-

> “**268. Public nuisance.-** A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must

necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage."

It thus appears that for constituting "public nuisance", an illegal omission is not sine-qua-non. To put it in other words, any act though not tantamount to an illegal omission, but if capable of causing any common injury, danger or annoyance to the public at large or even to the people dwelling or holding any property in the vicinity, will come within the definition of "public nuisance". "Public nuisance" as offence is punishable under Chapter-XIV of I.P.C., whereas the Executive Magistrate is conferred with power to prevent commission of the said offence as per the provisions under Chapter-X of Cr.P.C. Now reverting to the present case, there is no denying from the side of the petitioner that the workshop is situated in a residential area, and the opposite party nos.1 to 4 are residing in its vicinity. In course of enquiry, the learned Additional Deputy Commissioner of Police-cum-Executive Magistrate, Cuttack has taken into consideration, inter-alia, the reports furnished by the State Pollution Control Board and local police. As it appears, the Police Officer - P.W.6 vide his report dated 25.02.2015 has mentioned that the operation of the Industry was creating "public nuisance" by causing inconvenience to the normal life of the local inhabitants. The Asst. Environment Engineer appears to have conducted inspection in the workshop on 27.02.2012 and vide his report dated 05.04.2012 he observed that the cutting, hammering, drilling and spray and painting activities carried on in the workshop created noise hampering the sanctity of the residential area, and the operation of the said unit in the close proximity of the residential area was undesirable. The Regional Officer of the State Pollution Control Board while forwarding the aforesaid inspection report to the Collector, Cuttack suggested for taking appropriate action in order to obviate "public nuisance" in the area. As it further appears, the Deputy Environment Scientist of the State Pollution Control Board pursuant to a public complaint inspected the workshop on 18.02.2015 and observed, inter-alia, that the manufacturing process carried on in the workshop included cutting, drilling, hammering, welding and painting of steel structures, and operation of such a unit is detrimental to the convenience of the local inhabitants in leading normal life, inasmuch as the workshop is located in a prime residential area. It would further reveal from the letter dated 14.01.2016 addressed by the Deputy Commissioner, Cuttack Municipal Corporation to the present

petitioner that the trade licence for the fabrication unit in question that was previously issued by the Municipal Corporation has not been renewed since the year 2013 due to complain received from the local public that the trade carried on by the petitioner caused nuisance.

8. Having regard to the materials aforesaid besides the oral evidence produced during the enquiry, this Court finds no patent illegality or impropriety in the impugned order passed by the learned Additional Deputy Commissioner of Police-cum-Executive Magistrate, Cuttack directing for shifting of the fabrication unit to a place beyond the residential area for the purpose of preventing "public nuisance". The revision petition is, therefore, found to be bereft of any merit.

9. In the result, this revision petition being devoid of any merit stands dismissed. L.C.R. received be sent back forthwith along with a copy of this order.

Revision dismissed.

2016 (II) ILR - CUT- 405

BISWANATH RATH, J.

M.A.C.A. NOS. 1213 OF 2014 & 66 OF 2015

PRIYATAMA SWAIN & ANR. ....Appellants

.Vrs.

RAMA PRUSTY & ANR. ....Respondents

(A) MOTOR VEHICLES ACT, 1988 – S.168

Just compensation – Future prospectus – Whether the claimants are entitled to Rs. 6,17,976/- towards future loss of income ? Since the deceased was self employed on fixed salary without any provision for annual increments, the claimants are not entitled to the benefit on account of future loss of income – Held, direction of the Tribunal for payment of Rs. 6,17,976/- towards future loss of income is set aside. (Para 11)

(B) MOTOR VEHICLES ACT, 1988 – S.171 & Sch.II

Tribunal awarded Rs. 25, 000/- each towards funeral expenses and loss of love & affection – This Court while confirming the award towards funeral expenses, enhanced the compensation towards love

and affection from Rs. 25,000/- to Rs. 50,000/- for both the claimants – This court further held that the claimants are entitled to 9% interest P.A. all through instead of 7% interest award by the learned Tribunal – However, if compensation is not paid within one month from the date of judgment, claimants will be entitled to recover the entire amount with 10% interest for the delayed period. **(**Para 12)

(C) MOTOR VEHICLES ACT, 1988 – S.166

Motor accident – Compensation – Deceased was working as an engineer in a private firm and earning a sum of Rs. 12,073/- per month – He was 25 years old at the time of accident and a bachelor – Tribunal awarded Rs. 19, 04, 000/- as compensation – Hence the appeal – This Court assessed the loss of income as Rs. 26,07,768/- - Since personal expenses of an individual can not exceed 1/3 of his earning, this Court held Rs. 17,38,512/- as the loss of income for the petitioners.

(Para 10)

Case Laws Referred to :-

1. 2013 AIR (SCW) 3120 : Reshma Kumari and Ors. Vs. Madan Mohan & Anr.
2. (2014) 15 SCC 65 : Yerramma & Ors. Vrs. G. Krishna Murthy & Anr.
3. (2011) 14 SCC 481 : Municipal Corporation of Delhi, Delhi Vs. Uphaar Tragedy Victims Association & Ors.

For Appellants : M/s. S.N.Kar, Ashok Ku. Behera, S.R.Ojha, D.Behera, M/s. Amitav Das, H.K.Mahali, M.M.Das, P.K.Sahu

For Respondents : None (Resp. No. 1)
M/s. Amitav Das, H.K.Mahali, M.M.Das, P.K.Sahu M/s. B.Parida, T.Mohapatra

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Date of hearing : 28.06.2016
Date of Judgment: 11.07.2016

JUDGMENT

BISWANATH RATH, J.

Both the appeals are directed against the award passed by the 1st M.A.C.T., Jagatsinghpur in M.A.C. No.15 of 2012. Both the appeals are heard together and decided by this common judgment.

2. M.A.C.A. No.1213 of 2014 is at the instance of the claimants challenging the quantum of compensation awarded by the 1st M.A.C.T., Jagatsinghpur in M.A.C. No.15 of 2012 in favour of the appellants therein whereas the M.A.C.A. No.66 of 2015 is at the instance of

the National Insurance Co. Ltd.-respondent No.2 in M.A.C. No.15 of 2012 assailing the very same award on the premises of being excess.

3. Facts as narrated in the appeals are that on 31.12.2011 at about 11 P.M. for rash and negligent driving of the driver of the offending bus bearing registration No.OR-05-G-3199, there occurred an accident involving the deceased who was pulling on a motorcycle having no petrol, in the left side of the road near O.M.P. Square, Cuttack. For sustaining severe injuries, the injured was shifted to SCB Medical College, Cuttack for treatment where, he was declared dead.

Basing upon some information, the local Police initiated a case bearing Chauliaganj P.S. Case No.01/12. For loss of life of the bachelor son of Appellant No.1, mother and brother of the deceased-appellant No.2 as claimants filed an application under Section 166 of the M.V. Act claiming compensation of Rs.30,00,000/- (Rupees Thirty Lakhs only). The claimants in the claim application claimed that at the time of death the deceased was about 25 years old and he was working as a FMS Engineer at Kartavya Consultant Private Ltd., Sahid Nagar, Bhubaneswar. It is claimed that he was earning Rs.12,073/- as salary.

4. On its appearance the Insurance Company-respondent No.2 in M.A.C.A Case No.1213 of 2014 and the appellant in M.A.C.A. Case No.66 of 2015 by filing an objection while denying all the averments of the claimants, asked the claimants for production of some documents for proving of the age, income and employment of the deceased. The Insurance Company also called upon some document from the claimants to prove the accident, involvement of the vehicle and also the death of the deceased in the said accident. The Insurance Company also prayed to direct the owner of the vehicle to produce the D.L. of the driver, rout permit, document of the vehicle and on failure of which requested the Tribunal to draw adverse inference.

Similarly, the owner on its appearance filed a separate written statement denying all the allegations against it and at the same time pleaded that the accident took place due to the fault of the deceased, he also admitted that at the time of accident and place, the driver had a valid and effective driving license vide DL No.OR0519860203819 issued by the Licensing Authority, Cuttack and the same was valid till 12.06.2012 with a valid batch of the driver vide No.69. The owner in the Court below also claimed that the vehicle was also insured at the relevant point of time.

5. Basing upon the pleadings of the respective parties, the Tribunal framed the following points for determination:-

"1. Whether the M.A.C. case is maintainable or not?
2. Whether due to rash and negligent driving of the Driver of the vehicle bearing Regd. No.OR-05-G-3199 (Offending Bus) the accident took place?
3. Whether due to that accident one succumbed to the injuries?
4. Whether the O.Ps or any of the O.P. is liable to pay compensation?
5. To what other relief or reliefs the petitioners are entitled to?"

6. The claimants examined three witnesses including the claimant No.1 as P.W.1 and they have also exhibited eight documents in proof of their case. On the other hand, the Insurance Company neither adduced any oral evidence nor filed any documentary evidence in support of its defense. The owner even though filed a written statement but abstained at the time of hearing. Considering the rival contentions of the respective parties and the materials available on record, Tribunal decided the issue Nos.2 & 3 holding that the Insurance Company is liable to pay compensation for the negligent Act of the driver of the offending vehicle. Similarly, in deciding the issue No.4, the Tribunal held that the claimants are entitled to compensation of Rs.19,03,928.00/- (Rupees Ninteen lacs Three thousand nine hundred twenty eight only). Relying upon the documents vide Ext.Nos.3 & 4, Tribunal found that the vehicle was fully insured and consequently, directed the Insurance Company to pay the compensation decided in the matter for the fault of the driver.

In concluding the matter Tribunal while allowing the application, directed the Insurance Company to pay compensation of Rs.19,04,000/- (Rupees Nineteen lacs and four thousand) only to the claimants and also further directed that out of the compensation amount a sum of Rs.10,00,000/- (Rupees Ten lacs) only in the name of the appellant No.1, Rs.2,00,000/- (Rupees Two lacs) only in the name of the appellant No.2 shall be kept in shape of fixed deposit in any Nationalized Bank for a period of six years without any mortgage or premature withdrawal benefit and the balance amount along with 7% interest per annum on the loss of income of the petitioners of Rs.12,35,952/- shall be paid to the appellant No.1 from the date of filing i.e. 1.02.2012 and the amount was directed to be paid within two months from the date of the order, failing which, the appellants were also granted liberty to realize the amount in due process of law along with penal interest.

7. In assailing the aforesaid award, the claimants as appellants in M.A.C.A. No.1213 of 2014 contended that they had a claim of Rs.30,00,000/- (Rupees Thirty lacs) only but the Tribunal unfortunately granted a measurable amount of compensation to the tune of Rs.19,04,000/- and consequently, claimed that the award is at a very lower side. These appellants further claimed that the Tribunal failed in accepting the gross salary of the deceased and the compensation has been calculated on the net salary of the deceased, which is not permissible in the eye of Law. Similarly, the appellants also claimed that the Tribunal has failed to appreciate the future prospect of 35 years of the deceased as an Engineer. It is also alleged that the amount granted towards love and affection is also at a lower side.

Further, the Tribunal has also lost the sight of the provision contained in Section 147 (1)(b)(i) of the M.V. Act.

8. Similarly, the Insurance Company in filing the M.A.C.A No.66 of 2015 assailed the very same award being illegal, erroneous against the weight of evidence on record, the salary aspect of the deceased @Rs.11,444/- per month without any documentary evidence and further in absence of any document to prove the salary particular. The Insurance Company also assailed the award on the premises that the award suffers for non-production of document by the claimants on the deceased's qualification being an Engineer. The Insurance Company further assailed the direction of the Tribunal on compensation on the head of funeral expenses and towards the loss of love and affection. The Insurance Company also assailed the award on the premises of the interest granted by the Tribunal, which is at a higher side and claimed that the rate of interest should have been @ 6% per annum from the date of award and not from the date of filing of claim application.

9. Heard. Considering the pleadings and submissions of the respective parties as well as the materials available on record, this Court finds that there is no denial to the fact that the claimants have suffered on account of death of the deceased. There is also no denial to the fact that the deceased was working as FMS Engineer at Kartavya Consultant Private Ltd., Sahid Nagar, Bhubaneswar. There is no denial to the fact that at the time of death, the deceased was aged about 25 years of age. From the rival contentions of the parties, it also clearly appears that there is no dispute with regard to the fact that the Driver of the offending vehicle was holder of a valid license and the offending bus was also having a valid Insurance Policy at the relevant point of time. This being the admitted situation and the only question remains to be considered in both the appeals is that as to whether the award of

compensation as well as other benefits along with percentage of interest is proper or not?

10. Considering the sole issue involved in the matter, this Court finds that the claimants have a positive claim that the deceased was not only working as an Engineer but he was also earning a sum of Rs.12,073/- per month. This claim of the claimants has been fully corroborated by P.W.3, who was holding an important post in the organization engaged the deceased. There is no evidence to disprove such claim of the claimants. This Court further finds that the deceased-Engineer was drawing his gross salary of Rs.12,073/- as clearly borne from the Xerox copy of the Bank account. Similarly, the Tribunal has also a clear finding on the age of the deceased at the time of death. From perusal of the evidence, this Court finds that the computation of compensation on the basis of net salary runs contra **(2014) 15 SCC 65**. Consequently, this Court taking into consideration the age of the deceased, assessed the loss of income of the petitioners to a sum of Rs.12073 X 12X18=26,07,768/-. Now coming to the question of deduction of personal expenses, this Court observes that the personal expenses of an individual cannot exceed 1/3rd of his earning and thus $^{2}/_{3}{}^{rd}$ of his income should go to the family. Thus this Court takes out $^{1}/_{3}{}^{rd}$ from the total loss of income and holds the loss of income to the petitioners would be Rs.26,07,768/- - Rs.8,69,256/-= Rs.17,38,512/-.

11. Coming to the question of claimants' entitlement to Rs.6,17,976/- towards future loss of income, objection is being raised by Sri Das, learned counsel for the Insurance Company that since the deceased was self employed, otherwise was on fixed salary without having any provision for annual increments, he was only entitled to compensation on loss of income and the grant of amount on account of Future prospect is inappropriate and in justifying its claim, learned counsel for the Insurance Company referred to the paragraph No.36 of a decision reported in **2013 AIR (SCW) 3120** in the case in between ***Reshma Kumari and Ors. Vs. Madan Mohan and another,*** this Court observed that the Hon'ble Apex Court in paragraph 36 of the said decision held as follows:

> "**36.** The standardization of addition to income for future prospects shall help in achieving certainty in arriving at appropriate compensation. We approve the method that an addition of 50% of actual salary be made to the actual salary income of the deceased towards future prospects where prospects where the deceased had a permanent job and was below 40 years and the addition should be only 30% if the age of the deceased was 40 to 50 years and no addition should be made where the age of the deceased is more

than 50 years. Where the annual incomeis in the taxable range, the actual salary shall mean actual salary less tax. In the cases where the deceased was self-employed or was on a fixed salary without provision for annual increments, the actual income at the time of death without any addition to income for future prospects will be appropriate. A departure from the above principle can only be justified in extraordinary circumstances and very exceptional cases."

Thus, while observing that the position of Law on this aspect is well settled, this Court from the pleadings involved in the present case particularly keeping in view that the deceased was on a fixed salary employee, finds that the principle laid down in the above cited case is very much applicable to the present case and consequently, comes to hold that the claimants are not entitled to the benefit on account of future loss of income. Thus, the direction of the Tribunal for payment of Rs.6,17,976/- towards future loss of income is hereby set-aside.

12. Now coming to decide on the question of funeral expenses as well as loss of love and affection @ Rs.25,000/- on each account, this Court observes that there is no illegality in the grant of Rs.25,000/- on the head of funeral expenses but following the recent decisions of the Hon'ble Apex Court as laid down in the case of ***Yerramma & Ors. Vrs. G. Krishna Murthy & Anr.*** as reported in (**2014) 15 SCC 65**, Civil Appeal No.348-349 of 2015 in the case of ***Smt. Neeta W/o- Kallappa Kadolkar & Ors. Vs. The Divisional Manager, MSRTC, Kolhapur*** delivered on 13.01.2015 in the matter of loss on love and affection, this Court enhances the said head from Rs.25,000/- to Rs.50,000/- for both the claimants. Thus the claimants will be entitled to Rs.12,35,952/- towards loss of income, Rs.25,000/- towards funeral expenses and Rs.50,000/- each towards loss of love and affection. Further finding that the claimants are suffering on account of death of the deceased since 31.12.2011, following the dictum of the Hon'ble Apex Court in ***Municipal Corporation of Delhi, Delhi Vs. Uphaar Tragedy Victims Association and others*** reported in ***(2011) 14 SCC 481*** this Court also holds that the claimants will also be entitled to interest on all the above items at least @ 9% per annum allthrough. This Court also directs the National Insurance Company to release all the above amounts in 75/25 proportionate in favour of the claimants-the mother and the brother of the deceased within a period of one month from the date of this judgment. Failure of which the claimants will be entitled to recover the entire amount from the National Insurance Company with interest @ 10% for the delayed period.

13. Both the Appeals are disposed in terms of the direction contained hereinabove. Under the circumstances, there is no order as to cost.

Appeals disposed of.

2016 (II) ILR - CUT- 412

S. K. SAHOO, J.

JCRLA NO. 29 OF 2009

NANKUN NAIK ……...Appellant

.Vrs.

STATE OF ORISSA ………Respondent

(A) PENAL CODE, 1860 – S.376 (2)(f)

Rape – Delay of 18 days in lodging F.I.R. – Victim was 16 years at the time of occurrence – On the date of occurrence i.e. on 18.10.2005 the parents of the victim were absent as they had been to her uncles house on the eve of Durga Puja and on their return on 05.11.2005 the victim narrated the entire incident before her mother and thereafter the F.I.R. was scribed and lodged on 06.11.2005 – Held, in view of the explanation offered, prosecution case cannot be doubted on the ground of delay in lodging F.I.R. (Para 10)

(B) PENAL CODE, 1860 – S.376 (2)(f)

Rape – Age of the victim has been proved to be less than sixteen years at the time of occurrence – Since there was sufficient time gap between the date of occurrence and medical examination, the findings of the doctor will no way affect the prosecution case regarding commission of rape on the victim – The statement of the victim that she has delivered a son on account of the forcible sexual intercourse by the appellant also leads support to the prosecution case – Held, there is no infirmity or illegality in the impugned judgment of conviction and sentence, calling for interference by this Court.

(Para 10)

(C) ODISHA VICTIM COMPENSATION SCHEME, 2012

Victim of rape given birth a son on account of forcible intercourse by the appellant – She is not only maintaining herself and her son but also providing her son education by doing labour work – This court felt pity for the victim and recommended her case to the District Legal Services Authority, Sundergarh to examine the case of the victim for grant of compensation under the above scheme.

(Para 11)

For Appellant : Mr. Arunendra Mohanty, (Amicus curiae)
For Respondent : Mr. Arupananda Das, (Addl.Govt. Adv.)

Date of Argument:29.03.2016
Date of judgment: 25.04.2016

JUDGMENT

S. K. SAHOO, J.

Child is a symbol of simplicity. Childhood is a period of innocence and purity. Acquiring the trust of a child is very easy. Betraying her trust and abusing her sexually taking advantage of her simplicity is not only shameful, iniquitous but also inhuman. The physical and emotional pains of sexual abuse create a deep and unending agony on her. She cries many a time in solitude remembering the horrifying experiences. Sometimes she gets a very little support from her family and relatives. Preventive education of sexual abuse at the young age, family support and security to the child can reduce such excruciating happenings in future.

2. The appellant Nankun Naik faced trial in the Court of learned Sessions Judge –cum- Special Judge, Sundargarh in Sessions Trial No. 4 of 2007 for offences punishable under section 376 of the Indian Penal Code and section 3(1)(x)(xi) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereafter '1989 Act').

The learned Trial Court vide impugned judgment and order dated 02.03.2009 while acquitting the appellant of the charge under section 3(1)(x)(xi) of 1989 Act has been pleased to convict him under section 376 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.5000/- (rupees five thousand), in default, to undergo rigorous imprisonment for six months.

3. The prosecution case as per the First Information Report lodged by one S.B. (hereafter 'the victim') who belonged to Scheduled Caste community is that her parents had been to her uncle's house on the eve of Durga Puja and she along with her brother and grandmother were in the house. On 18.10.2005 one opera show was going on at Kanika on the eve of Manikeswari Puja. The appellant who is a co-villager of the victim came to her house at about 8 p.m. on 18.10.2015 and asked the victim to accompany him to visit the opera show with his younger daughter and further told her that he would bear the expenses of the ticket of the opera show. The appellant further told that his daughter and the other girls were also waiting to visit the

opera show. The simpleton victim believed the appellant and accompanied him on his cycle but on the way near Khajuribania, the appellant started misbehaving with the victim and when she shouted, she was forcibly taken inside the jungle. The appellant removed her dresses forcibly and committed rape on her and threatened her not to disclose the incident in the village otherwise she would face dire consequences and thereafter the appellant left the victim near her house and with much difficulty, the victim returned home. It is the further prosecution case that on 05.11.2005 when the parents of the victim returned home, the victim narrated the entire incident before her mother and then accompanied her father to the Police Station and presented the First Information Report on 06.11.2005.

On the basis of the written report of the victim, P.W. 13 Tarakanta Khatua, who was posted as the Junior Sub-Inspector, Hemgir Police Station registered Hemgir P.S. Case No.100 of 2005 under section 376(2)(f) of the Indian Penal Code read with section 3 (1)(xii) of the 1989 Act in the absence of the officer in charge and took up investigation of the case.

During course of investigation, P.W.13 examined the victim and her parents, visited the spot and prepared a spot map Ext.13. He also seized broken bangles of the victim from the spot and prepared a seizure list Ext.2. He also seized one green colour chudidar, one green colour Punjabi, one green colour odahani and one chadi on the production of the victim which were seized as per seizure list Ext.3. The victim was sent to the District Headquarters Hospital, Sundargarh for her medical examination under police requisition, where she was examined by Dr. Subashini Pandey (P.W.8) on 07.11.2005 who proved her report Ext.4. P.W.12 Kartika Chandra Swain, D.S.P., Crime, Sundargarh as per the order of S.P., Sundargarh took over the charge of investigation of the case on 7.11.2005 and he revisited the spot, examined the witnesses, arrested the appellant, seized one check lungi from his possession under the seizure list Ext.5, sent the appellant for his medical examination to Hemgir U.P.H.C. under police requisition where the appellant was examined by Dr. Sumitra Kumar Patel (P.W.11) on 07.11.2005. P.W.12 seized one envelope containing sample semen, pubic hair and sample blood under seizure list Ext.6. He also seized one envelope containing pubic hairs, vaginal swab of the victim under seizure list Ext.7. He produced the material objects before S.D.J.M., Sundargarh for sending the same to the Deputy Director, R.F.S.L., Sambalpur for chemical analysis. He obtained a report from the Tahasildar, Hemgir that the victim belonged to Mehera by caste which comes under scheduled caste and the appellant was Meher which was

coming under general caste. He also received chemical analysis report which has been marked as Ext.12. On completion of investigation, charge sheet was submitted against the appellant on 23.02.2006 under section 376 of the Indian Penal Code read with section 3 (1)(xii) of the 1989 Act.

4. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned Trial Court charged the appellant under section 376 of the Indian Penal Code and section 3 (1)(x)(xi) of the 1989 Act on 29.08.2007 and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the Sessions Trial procedure was resorted to prosecute him and establish his guilt.

5. During course of trial, in order to prove its case, the prosecution examined thirteen witnesses.

P.W.1 is the victim who is also the informant in the case.

P.W.2 Biranchi Barik is the father of the victim and he states about his and his wife's absence from the house at the time of occurrence and further stated about the disclosure made by the victim about the incident after their return from his father-in-law's house.

P.W.3 is the mother of the victim and she has stated like P.W.2 about disclosure made by the victim about the occurrence.

P.W.4 Sunil Kumar Bhoi is the scribe of the F.I.R as per the instruction of the victim.

P.W.5 Bairagi Pradhan did not support the prosecution case of seizure of different articles.

P.W.6 Nirmala Chandra Bhoi stated about the seizure of the wearing apparels of the victim by police on her production.

P.W.7 Purna Chandra Pujahari did not support the prosecution case of seizure of different articles.

P.W.8 Dr. Subashini Pandey was the lady Asst. Surgeon, District Headquarters Hospital, Sundargarh who examined the victim on police requisition on 07.11.2005 and proved her report Ext.4.

P.W.9 Budhan Chandra Urmal was the homeguard attached to Hemgir Police Station who did not support the prosecution case for which he was declared hostile.

P.W.10 Md. Ahmed was the constable attached to Hemgir Police Station who stated about the seizure of different articles under seizure list Exts.6 and 7.

P.W.11 Dr. Sumitra Kumar Patel was the Asst. Surgeon, U.P.H.C., Hemgir who examined the appellant on 7.11.2005 on police requisition and proved his report Ext.8.

P.W.12 Kartika Chandra Swain, D.S.P., Crime, Sundargarh is the Investigating Officer.

P.W.13 Tarakanta Khatua is the Junior Sub-Inspector, Hemgir police station who not only registered the F.I.R but also investigated the case at initial stage.

No witnesses were examined on behalf of the defence.

The prosecution exhibited thirteen documents. Ext.1 is the F.I.R, Exts.2, 3, 5, 6, 7 are the seizure lists, Ext.4 is the medical examination report of the victim, Ext.8 is the medical examination report of the appellant, Ext.9 is the forwarding letter of sending the material objects for chemical analysis, Ext.10 is the requisition to the Tahasildar, Ext.11 is the report of the Tahasildar regarding caste of the victim and the appellant, Ext.12 is the chemical analysis report and Ext.13 is the spot map.

6. The defence plea of the appellant was one of denial and it was suggested to the relevant witnesses that the victim was the mistress of the appellant and there was illicit relationship between the petitioner and the victim.

7. The learned Trial Court held that the medical examination of the victim was not conducted immediately after the incident and it was done 18 days after the incident and this occasioned because of delayed lodging of the F.I.R and it was quite natural that the injury, if any, the victim had sustained on her private part had healed up by the time she was examined and therefore the opinion expressed by P.W.8 will not affect the prosecution case and the version of the victim that she was subjected to forcible intercourse by the appellant which was otherwise found to be true and trust worthy. It was further held that the victim was subjected to searching and incisive cross-examination by the defence, but nothing was elicited to impeach her credibility or to cast a doubt on her veracity and the victim also narrated the incident to her parents that she had been ravished by the appellant and such disclosure being relevant fact admissible under section 8 of the Evidence Act gives credence to the victim's version on sexual molestation. It was further held that the victim has explained delay in lodging the F.I.R satisfactorily and mere delay in lodging the F.I.R does not in any way renders the prosecution case as false. It was further held t hat the v ictim was under 16 years of age

when the appellant committed the rape on her and absence of injury on the private parts of the victim would not necessarily indicate that she was a consenting party to the rape and since she is proved to the below 16 years of age, her consent is immaterial. It was further held that the victim belonged to scheduled caste community and the appellant is a member of general category and since neither the F.I.R nor the evidence revealed that the appellant ravished the victim because she belonged to scheduled caste, the ingredients of offence under section 3 (1)(x)(xi) of the 1989 Act are not attracted.

In the ultimate analysis, the learned Trial Court held that the prosecution has been able to bring home the charge under section 376 of the Indian Penal Code against the appellant beyond reasonable doubt but not under section 3(1)(x)(xi) of the 1989 Act.

8. The victim was examined in the Trial Court on 14.01.2008 and she stated her age to be 16 years and further stated that the occurrence took place when she was aged about 11 to 12 years. She stated that on the occurrence day at about 8 to 9 p.m. the appellant came to her house and called her to visit the opera with his daughter and when she denied visiting the opera as she had no money, the appellant told that he would pay the charge of the ticket for the opera. She further stated that on the way the appellant took her to bushy jungle, torn her salwar and forcibly committed intercourse with her against her will and consent. She further stated that at the time of sexual intercourse, the appellant threatened her to kill in case she raised shout. She further stated that her parents were absent from the house at the time of occurrence and when they returned, she narrated the incident before them and then she lodged the First Information Report.

In the cross-examination it was suggested to the victim that she had illicit relation with the appellant prior to the occurrence for which her father was expressing anger to her as well as to the appellant. The victim denied such suggestion. It was further suggested that she was aged about 16 to 17 years and that she voluntarily accompanied the appellant to see the opera. The victim also denied such suggestion. The victim has categorically stated that she has a son who is aged about one year and that child was born out of forcible intercourse by the appellant.

Nothing has been elicited in the cross-examination to disbelieve the statement of the victim.

P.W.2 Biranchi Barik who is the father of the victim and P.W.3 Tulasi Barik who is the mother of the victim have stated that when they returned

home, P.W.1 disclosed before them about the occurrence. Thus the evidence of the victim gets corroboration from the evidence of P.W.2 and P.W.3.

P.W.2 stated that the F.I.R. was scribed by the Sarpanch. P.W.4 Sunil Kumar Bhoi stated that he scribed the F.I.R. when the victim approached him being accompanied by her father.

The doctor P.W.8 who examined the victim on 07.11.2005 has opined that on examination of hymen, she found tear present but healed up. She found no matting of pubic hair and no bleeding or discharges on the female genital. On pathological examination, the doctor found that the spermatozoa were absent, blood group was ‘A’ positive and V.D.R.L. was non-reactive. She stated that the age of the victim as per ossification test was found to be below sixteen years and there was no sign or symptom of recent sexual intercourse.

The doctor P.W.11 who examined the appellant on 07.11.2005 has opined that he found the appellant capable of committing sexual intercourse. On examination of the clothing of the appellant, he found no semen stain suggesting sexual intercourse. He found no bodily injury suggesting forcible sexual intercourse and no sign and symptoms of recent sexual intercourse.

The chemical analysis report indicates that blood and semen stains could not be detected either in the wearing apparels of the victim or that of the appellant.

9. Mr. Arunendra Mohanty, learned counsel was engaged as Amicus Curiae on behalf of the appellant and he was supplied with the paper book. He placed the evidence of the witnesses as well as the impugned judgment and contended that there is inordinate delay in lodging the First Information Report and the explanation offered by the prosecution is not at all satisfactory. He further contended that it sounds highly improbable that in absence of the parents of the victim, the grandmother who was there in the house would allow the victim to accompany the appellant in the night to visit the opera show. He further contended that in absence of any medical corroboration to the accusation of forcible sexual intercourse, the evidence of the victim cannot be accepted and therefore the appellant should be given benefit of doubt.

Mr. Arupananda Das, learned Additional Government Advocate on the other hand while supporting the impugned judgment and order of conviction submitted that the evidence of the victim is clear, cogent, trustworthy and her evidence gets corroboration from the evidence of her

parents. He further contended that the prosecution has offered explanation for delay in lodging F.I.R. and in such type of cases, delay in lodging F.I.R. is not a factor to throw away the prosecution case when due to helplessness in the absence of her parents, the victim could not lodge the F.I.R. promptly and immediately after her parents returned home, she disclosed about the incident and accordingly the F.I.R. was lodged. The learned counsel further contended that there are ample materials on record to show that the victim was under sixteen years of age at the time of occurrence and due to the unfortunate incident, she became pregnant and delivered a child and therefore there is no illegality or infirmity in the impugned judgment.

10. Adverting to the contentions raised by the learned counsels for the respective parties, since it is a case of rape, the evidence of the victim is of paramount consideration. If her evidence is found to be creditworthy, it can be acted upon without any corroboration in material particulars. The evidence of the victim of rape must be examined as that of an injured witness.

As already discussed, the evidence of the victim appears to be creditworthy and not shaken in the cross-examination.

No doubt the occurrence in question stated to have taken place on 18.10.2005 and the F.I.R. was lodged on 06.11.2005 but from the evidence of the victim and her parents, it is apparent that her parents were not present when the occurrence took place and they had been to the house of the father-in-law of victim's father on the eve of Dussehra Puja festival. The victim narrated the incident before her parents immediately after their return and accordingly the F.I.R. was scribed and presented in the Police Station. The victim of rape and their family members are ordinarily reluctant to approach the police because of family prestige and after making up their mind to fight for the cause of justice, ultimately they decide to take recourse of the law. In view of the explanation offered by the prosecution regarding delay in lodging F.I.R., the prosecution case cannot be doubted.

The age of the victim has been proved to be less than sixteen years at the time of occurrence. The oral evidence of the victim as well as the medical evidence on this aspect has remained unchallenged. In the cross-examination of the doctor who examined the victim, the defence has brought out that the victim was a full grown up lady aged about fourteen to sixteen years. The doctor has denied the suggestion that the victim was aged around twenty years. The doctor found that there is an old tear in the hymen present which was healed. Even though the doctor has not found any other symptoms on the victim but since there was sufficient time gap between the date of occurrence

and the medical examination, the findings of the doctor will no way affect the prosecution case regarding commission of rape on the victim. The statement of the victim that she has delivered a son on account of the forcible sexual intercourse by the appellant also lends support to the prosecution case.

The contentions raised that the grandmother of the victim would not have left her in the company of the appellant to visit the opera show are not acceptable. There is no cross-examination on this aspect regarding the age of the grandmother and whether the victim informed her while going to the opera show. The victim has stated that she used to address the appellant as uncle who belonged to her village. The appellant had given assurance to bear the cost of opera show ticket to the victim and therefore the victim reposed trust on the appellant and accompanied him.

Even though the seized wearing apparels of the victim and the appellant on chemical analysis found not to have contained any blood and semen stain but one should not forget that there was sufficient time gap between the date of occurrence and the seizure and as such washing of the clothes in between is not improbable.

Therefore, I do not find any infirmity or illegality in the impugned judgment and order of conviction of the learned Trial Court and accordingly I am of the view that the leaned Trial Court has rightly found the appellant guilty under section 376 of the Indian Penal Code. The sentence imposed by the learned Trial Court is the minimum sentence prescribed for such offence and though the Court can reduce the sentence of imprisonment for a term less than seven years for any adequate and special reasons to be mentioned in the judgment, no such reasons are available on record or pleaded during arguments. The appellant is a married man having children and he has spoiled the life of a young girl taking advantage of her simplicity. Therefore, the sentence imposed by the learned Trial Court calls for no interference.

Therefore, I am of the view that the impugned judgment and order of conviction of the appellant under section 376 of the Indian Penal Code and sentence of rigorous imprisonment for seven years with payment of fine of Rs.5,000/- (rupees five thousand), in default, to undergo R.I. for six months is legal, proper and justified.

11. The learned Additional Government Advocate submitted on 29.02.2016 that he has written letter to the Inspector-in-Charge, Hemgir Police Station in the district of Sundargarh to make an enquiry with regard to the present status of the victim and her child and whether the victim has married in the meantime or not and whether the child is alive or not. On

instruction, he placed a letter dated 02.03.2016 written by the Inspector-in-Charge, Hemgir Police Station addressed to the learned Advocate General, Odisha, Cuttack wherein it is mentioned that the victim is living in her father's house at Burta with her son Tarjan Barik (date of brith-28.07.2006) and the victim is maintaining her livelihood by working as a daily labourer. It is further mentioned that the victim is still unmarried and her child is studying in Class-IV in a Primary School.

In view of the precarious condition of the victim of rape who is now maintaining herself and her minor son doing labour work and also taking care of the education of her son, it is felt necessary to recommend the case of the victim to the District Legal Services Authority, Sundargarh to examine the case of the victim after conducting necessary enquiry in accordance with law for grant of compensation under the "**The Odisha Victim Compensation Scheme, 2012**". Let a copy of this order be sent to District Legal Services Authority, Sundargarh for compliance.

12. In view of the aforesaid premised reasons, I am of the considered view that the impugned judgment and order of conviction and the sentence passed there under by the learned Trial Court does not suffer from any infirmity and therefore, I am not inclined to interfere with the same.

13. The appellant seems to have initially produced before the Court after arrest during investigation on 08.11.2005 and he was released on bail on 05.05.2006. After the judgment of the learned Trial Court pronounced on 02.03.2009, he was again remanded to custody. He has not been granted bail by this Court in this appeal. Thus the appellant has remained in custody for about seven years and six months. Since the appellant had already undergone the period of sentence as was imposed by the learned Trial Court, he should be set at liberty forthwith, if not already released, if his detention is not otherwise required in any other case.

Lower Court's record with a copy of this judgment be communicated to the learned Trial Court forthwith for information and necessary action.

14. Resultantly, the Jail criminal appeal, being devoid of merit, stands dismissed.

Appeal dismissed.

2016 (II) ILR - CUT- 422

S. N. PRASAD, J.

W.P.(C) NO. 29523 OF 2011

THE EXE. ENGINEER, RIGHT CANAL DIVN. NO. II, RENGALI IRRIGATION PROJECT …….Petitioner

.Vrs.

REGIONAL PROVIDENT FUND COMMISSIONER & ORS. ……..Opp. Parties

EMPLOYEES PROVIDENT FUND AND MISCELLANEOUS PROVISIONS ACT, 1952 – Ss. 2(f), 7A

Whether NMR/DLR employees working under the petitioner-establishment are coming within the purview of "employee" as defined U/s. 2(f) of the Act ? Held, any worker working directly or indirectly for the establishment is said to be an "employee" as defined U/s. 2(f) of this Act – Hence, there is no illegality committed by the authority in deciding the application U/s. 7A of the Act, 1952.

(Paras 10,11,12)

Case Laws Referred to :-

1. AIR 1987 SC 447 : M/s. P.M.Patel & Sons & Ors. -V- Unin of India & Ors.
2. AIR 1978 SC 1478 : Royal Talkies -V- ESIC

For Petitioner : Miss Sanjeebani Mishra, Addl.Standing Counsel
For Opp. Parties : M/s. Prasanna Ku. Parhi & S.S.Mishra, Mr. Samarendra Mohanty, Intervener

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Date of hearing : 05.04.2016
Date of Judgment: 05.04.2016

JUDGMENT

S.N.PRASAD, J.

This writ petition is against the order passed by the EPF Appellate Tribunal, New Delhi dated 27.07.2010 in A.T.A. No.827(10) of 2005 by which the appeal preferred by the petitioner has been dismissed.

2. Facts of the case as has been pleaded by the petitioner in the writ petition is that the Rengali Right Canal Division No.II comes under the control of the Chief Engineer and Basin Manager, which is a division under the Water Resources Department, Government of Orissa and look after the work of Right Canal System of Rengali Irrigation Project under its territorial jurisdiction. This Division has permanent regular employees, temporary

regular employees as well as work charged employees besides NMR/Casual employees. NMR employees are employed by the petitioner establishment according to the workload of the Division.

In order to regulate the service condition of the work charged employees rules have been framed but no rule has been framed governing service condition of NMR employees. A notice under section 7A of the Employees Provident Fund and Miscellaneous Provisions Act,1952 has been issued by the Regional Fund Commissioner, Bhubaneswar (hereinafter referred to as 'the Act,1952') directing the petitioner-establishment to show cause as to why legal action should not be initiated against the petitioner-establishment for contravening the provisions of the Act for not depositing the EPF dues for the NMR employees of the division for the period from 11/1980 to 2/1996.

The petitioner in terms of the show cause notice had appeared before the Regional Provident Fund Commissioner and submitted reply stating therein that the provisions of the Act,1952 is not applicable to the NMR/casual employees of the petitioner-establishment because there was no notification to bring the establishment/Division of the Executive Engineer within the ambit of the Act as required under section 1(3) of the Act,1952.

It has been contended that that their daily wages workers are getting fixed amount as contemplated under the act, but the opposite party no.1 without considering the point raised, has adjudicated applicability of the Act bringing the petitioner-establishment within the purview of the act with a direction to pay contribution amount on different heads vide order dated 6.8.1996, accordingly notice of demand was issued on 7.8.1996 demanding amount of Rs.17,21,327/-.

3. The State Government being aggrieved filed writ petition before this Court being O.J.C. No.9764 of 1997 and this Court vide order dated 06.08.1996 permitted the petitioner to withdraw the writ petition to prefer an appeal under section 7A of the Act,1952, petitioner had preferred appeal bearing No.ATA/193(10) of 2000 before the EPF Appellate Tribunal, New Delhi and the Appellate Tribunal decided the case vide order dated 14.12.2000 and the Appellate Tribunal remitted the matter before the original authority to determine the dues as per the guideline. In view thereof the Regional Provident Fund Commissioner initiated a fresh proceeding on the premises that the Act is applicable and amount to be paid was only to be calculated and thereafter final order was passed calculating the dues. Petitioner again approached this Court vide W.P.(C) No.12940 of 2003

challenging the order dated 14.12.2000 and the notice dated 15.4.2002 but again this Court has given liberty to the petitioner-establishment to file appeal before the Appellate Forum as provided under section 7(1) of the Act and accordingly appeal was preferred which was dismissed vide order dated 27.07.2010 which is challenged in this writ petition.

4. Ground taken by the petitioner assailing the order passed by the Appellate Authority is that the Act,1952 is not applicable and the establishment is not coming under the purview of the EPF Act, there is no notification as required under section 1(3) of the Act,1952, as such it was contended before the Appellate Authority that when applicability of the Act itself was disputed petitioner-establishment is not liable to deposit statutory amount, hence not committed any offence contrary to the Act,1952.

Learned counsel for the petitioner has submitted that he has not been provided with adequate opportunity of being heard and to demonstrate this argument Annexure-2 has been referred to.

5. Although notice has been issued to the parties but no counter affidavit has been filed. But however, it has been submitted on behalf of learned counsel representing the opposite parties that the NMR/DLR employees are coming under the purview of the definition of as provided under section 2(f) of the Act,1952. It has been stated that since the Act,1952 is Social Welfare Legislation which has been made to protect interest of poor workers and provide them the Employees Pension/Providetn Fund and of the miscellaneous benefits to the employees who are working in the unorganized sectors, hence Welfare Legislation is to be liberally constituted.

Petitioner has preferred an appeal before the Appellate Tribunal and the matter has been remitted before the original authority to decide the dues and accordingly the original authority has adjudicated the dispute and quantified the dues which the petitioner-establishment is liable to pay against the statutory deposit as required for the period in question.

It has been contended that the NMR/DLR workers are engaged by this establishment to perform duties and such establishment is under coming under the purview of the Act,1952.

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

7. Specific case of the petitioner is that the petitioner-establishment is not amenable to the jurisdiction of the Act,1952 and as such petitioner-establishment is not liable to make any statutory contribution or deposit in terms of the Act,1952.

8. In order to substantiate this argument it has been contended by learned counsel for the petitioner that NMR/DLR employees working under the petitioner-establishment is not coming under the purview of the Act,1952, hence the proceeding initiated under section 7A of the Act,1952 is without any jurisdiction.

It has further been contended that there is no notification as required under section 1(3) of the Act,1952. In order to substantiate the argument it is necessary to see the provisions as contained in Section 1(3) which is being reproduced hereinbelow.

"Subject to the provisions contained in Section 16, it applies-

(a) to every establishment which is a factory engaged in any industry specified in Schedule-I and in which twenty or more persons are employed, and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification."

From perusal of the statutory provisions it is apparent that subject to the provisions contained in section 16, the Act will be applicable to every establishment which is a factory engaged in any industry specified in Schedule-I and in which twenty or more persons are employed and to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf.

9. Provisions of Section 16 of the Act,1952 is also needs to be referred which provides non-applicability of the Act to certain establishment is being reproduced hereinbelow.

"Act not to apply to certain establishments- (1) This act shall not apply-

(a) to any establishment registered under the Cooperative Societies Act,1912 (2 of 1992), or under any other law for the time being in force in any State relating to cooperative societies, employing less than fifty persons and working without the aid of power; or

(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits; or

(c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits.

(2) If the Central Government is of opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient so to do, it may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt whether prospectively or retrospectively, that class establishment from the operation of this Act for such period as may be specified in the notification."

From perusal of the provisions of section 16 it is apparent that the petitioner-establishment is not coming under the parameter of the provisions of section 16 of the Act,1952 as because it is admitted case of the petitioner that the petitioner-establishment being Water Resources Department of the State Government is meant for construction work, implied meaning would be that the department has been established by the State Government for construction purposes.

10. Provision of Section 2(f) of the Act,1952 which defines 'employee' which needs to be referred to which is being reproduced hereinbelow.

"Employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets, his wages directly or indirectly from the employer, and includes any person,-

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act,1961 (52 of 1961), or under the standing orders of the establishment."

From perusal of the definition 'employee' it is evident that employee has been defined that a person who is employed for wages in any kind of

work, manual or otherwise, in or in connection with the work of an establishment and who get his wages directly or indirectly from the employer in connection with the work of the establishment. At this juncture, it needs to be referred to the definition of 'exempted employee' as provided under Section 2(ff) which implies that an employee to whom a Scheme or the Insurance Scheme, as the case may be, would, but for the exemption granted under section 17, have applied, but it is specific case of the petitioner-establishment that NMR/DLR who are being engaged in the department for construction work being not a regular employee or the work charge employee, hence NMR/DLR employees will not come under the definition of section 2(ff) of the Act,1952.

The Act also provides giving therein the list as contained in Section 1(3)(b) bringing the factory/establishment under the purview of the Act, to that effect the Central Government has also issued notification on 31.10.1980 being the building and construction work under the purview of the Schedule-I.

In this connection, judgment referred by the Hon'ble Apex Court in the case of **M/s P.M.Patel & sons and others, –v- Union of India and others** reported in AIR 1987 S.C. 447 needs to be referred to wherein their Lordships of the Hon'ble Apex Court while interpreting definition of 'employee' has been pleased to hold at paragraph-8, relevant part is being quoted.

> "The real question is whether the home workers are entitled to that benefit. Clause (f) of S.2 of that Act defines an "employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets, his wages directly or indirectly from the employer, and includes any person, employed by or through a contractor in or in connection with the work of the establishment." It will be noticed that the terms of the definition are wide. They include not only persons employed directly by the employer but also persons employed through a contractor. Moreover, they include not only persons employed in the factory but also persons employed in connection with the work of the factory. It seems to us that a home worker, by virtue of the fact that he rolls beedis, is involved in an activity connected with the work of the factory. We are unable to accept the narrow construction sought by the petitioners that the words "in connection with" in the definition of 'employee' must be confined to work performed in the factory itself as a part of the total process of the manufacture."

Thus there may be dispute about the fact by taking into consideration the definition of employee under Schedule-1 containing construction work by virtue of notification issued by the Central Government under section 1(3)(b) of the Act,1952 that NMR/DLR employee is employee within the meaning of the Act,1952.

11. So far as the contention of the petitioner that there is no enquiry having been conducted under section 1(3)(a) of the Act,1952 is concerned, there is no force in this argument for the reason that the Central Government has issued notification bringing the establishment under the purview of Schedule-I as per the notification dated 31.10.1980 by which building construction has been brought under the purview of Schedule-I as per Section 1(3)(a) of the Act,1952 and since the petitioner-establishment being a Government department established for construction work for irrigation and other things hence it will be covered under this notification, hence there is no need to take any further enquiry in view of the statutory provision contained in Section 1(3)(a) which stipulates that every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed and as per the provision of Section 16 of the Act,1952 the petitioner-establishment is not coming under Section 16 of the Act,1952.

12. In view of the specific definition of 'employee' given U/s.2(f) of the Act, 1952 it is evident that any worker working directly or indirectly for the establishment is said to be an employee. The learned Tribunal after taking into consideration this aspect of the matter and also considering the nature of the work performed by the NMR employees and comparing it with the definition of the 'employee' given under the statute has come to a definite finding that if the work is being discharged by a worker in connection to the work of the establishment which means that there must be nexus between the establishment and the work of the employee which should be relevant for the purpose of establishment though it may be loose connection.

Learned Tribunal after taking into consideration the judgment rendered in case of **Royal Talkies Vrs. ESIC reported in AIR 1978 SC 1478** wherein it has not been disputed that the NMR were working in connection with the work of the establishment so they are the employees of the establishment.

Learned Tribunal has also taken into consideration regarding the statutory provision as contained in Sec.1 Clause 4 which required issuance of

notification to cover an establishment relates to voluntary coverage. But this is not a case of voluntary coverage and as such Sec.1(4) is not applicable.

So far as the contention raised by learned counsel for the petitioner that she has not been heard, but the submission is contrary to the material available on record as because the petitioner being appellant before the authority has all along been represented by her counsel and on 27.7.2010 when the case was fixed for order, an application was filed and the same has rightly not been taken into consideration. But from the order it appears that petition for adjournment has been filed on 27.7.2010, the date when the order was passed by the learned Tribunal which suggests that the case was ripe for passing order and as such the learned Tribunal has rightly not given adjournment considering the fact that the matter pertains to the beneficial legislation and also considering the fact that the petitioners are adopting lingering attitude to deprive the benefit of the Act to its beneficiaries.

Learned Tribunal keeping in view of all these aspects of the matter has come to a definite finding that no illegality has been committed by the authority in deciding the application U/s.7-A of the Act, 1952.

In view of the foregoing discussions there is no force in the argument of learned counsel representing the petitioner. Accordingly, the case is dismissed being devoid of merit.

Writ petition dismissed.

2016 (II) ILR - CUT- 429

S. N. PRASAD, J.

W.P.(C) NO. 2582 OF 2011

M/S. RAM CHANDRA OMKARLAL …….Petitioner

.Vrs.

ASSISTANT PROVIDENT FUND COMMISSIONER …….Opp. Party

(A) EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952 – S.2(f)

Definition of "employee" – Any person who is involved in the work of the establishment directly or indirectly and getting wages will be termed as employee – Held, home bidi workers engaged by the

contractors of the principal employer, comes within the meaning of "employee" for the purpose of section 2(f) of the Act, 1952.

(Para 4)

(B) EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952 – S.7A.

Deduction of employees contribution – Action challenged on the ground that the employer has engaged less than four employees so the Act is not attracted – Authorities conducted enquiry by sending two squads and it was detected that the employee strength of the petitioner-establishment was more than 40 – Held, the petitioner-establishment comes under the purview of the Act, 1952.

(Para 5)

Case Laws Referred to :-

1. AIR 1974 Supreme Court 1832 : M. G. Beedi Workers Vrs. Union of India.
2. AIR 1987 Supreme Court 447 : M/s. P.M. Patel & Sons Vrs. Union of India
3. AIR 2001 Supreme Court 850 : M/s. S. K. Nasiruddin Beedi Merchant Ltd. Vrs. Central P.F. Commissioner

For Petitioner : M/s. J.N.Rath, S.K.Jethy, S.K.Mishra & B.Barik

For Opp. Party : M/s. Gitimoy Mishra, B.N.Mohapatra, S.K.Gupta, S.K.Nanda & P.Panda

Date of hearing and : 12.05.2016
Date of judgement : 12.05.2016

JUDGMENT

S.N. PRASAD, J.

This writ petition is against the order as contained in Annexure-5 which is an order passed by the authority U/s.7A of the Employees' Provident Fund & Miscellaneous Provision Act, 1952 dtd.11.12.2003 and the order as contained in Annexure-7 which is an order passed by the Appellate Authority in A.T.A. No.28(10) of 2004 dtd.12.10.2010.

2. The brief fact of the case of the petitioner is that the petitioner being an establishment was registered for the purpose of manufacturer of excisable goods particularly for sale of Tamakhu, purchase of raw bidi and sale of finished bidi. After purchase of bidis, same are levelled and branded in the petitioner's establishment. The petitioner unit from the very beginning was continuing with two to three employees which was subsequently enhanced to four employees maximum. In the year 1998 the enforcement officer of the Provident Fund Department made a survey under section 13(2) of the Employees Provident Fund and Miscellaneous

Provisions Act, 1952 (hereinafter referred to as 'the Act') in respect of the petitioner's establishment. After verification of the records of the establishment from 7/95 to 9/98 an inspection report was submitted clearly indicating that the strength of the establishment as on 10.10.1998 comes to two permanent employees and some ad hoc employees utilized on some occasions and the activities of the establishment was purely purchase of un-branded bidi and sale of Tamakhu and branded bidi only. The Provident Fund authorities have accepted the report but remained silent for long one year and after one year, one another enforcement officer was deputed who visited the establishment officer for the purpose of inspection of the records and in course of inspection of records the enforcement officer had prepared one another investigation proforma indicating therein that three persons with their pay particulars and asked the proprietor of the establishment to put his signature down below on the investigation proforma.

The enforcement officer gave the petitioner impression that the proceeding would be dropped as he was not having 20 or more than 20 employees, however, no copy of the said report was supplied to the petitioner. When a proceeding U/s.7-A was initiated the second report of enforcement officer was placed showing therein that the petitioner – establishment has 37 part time employees and accordingly the assessment has been made U/s.7A of the Act, 1952 quantifying the amount to be paid by the petitioner – establishment. The petitioner being aggrieved with the order passed U/s.7A has filed an appeal before the Appellate Tribunal and the Appellate Tribunal in a very mechanical manner has dismissed the appeal and affirmed the order passed U/s.7A of the Act, 1952.

The order passed U/s.7A and 7I of the Act, 1952 has been challenged by the petitioner on the grounds that the authority while deciding the proceeding U/s7A has not provided an opportunity of being heard, the establishment is not having more than two or three employees and the enforcement officer has misled the authority by submitting report to the extent that the petitioner – establishment is having 37 employees working. Likewise the order of the Appellate Authority is also been challenged stating therein that the Appellate Authority has not applied its mind as an Appellate Forum and passed the order in mechanical manner.

3. Counter affidavit has been filed by the opposite party, inter alia therein it has been stated that there is no infirmity in the order passed U/s.7A since the authority who has decided the proceeding U/s.7A of the Act, 1952 has provided ample opportunity to the petitioner but it never turned up and as such the final order was passed on 11.12.2003. The petitioner has failed to produce relevant reply. It has been stated that the petitioner has not disclosed the details of the workers to whom the wages was determined as per RG-12A register during the 7A proceeding.

It has been contended that the petitioner – establishment deals with manufacturing of the bidi or even its brand, then also the workers are being engaged and as per definition of the employees given u/s.2(f) of the Act, 1952 the work of any person who is engaged fo r any kind of work, manual or otherwise or in

connection with the owrk of an establishment who gets wages directly or indirectly from the employer will be said to be an employee of the establishment and as such after taking into consideration all these aspects of the matter order has been passed U/s.7A of the Act, 1952.

It has been contended that the petitioner has filed an appeal before the Appellate Tribunal and the Appellate Tribunal after taking into consideration the reasoning given by the authority U/s.7A of the Act, 1952 and placing reliance upon the judgment rendered by Hon'ble Apex Court has affirmed the order passed U/s.7A, hence there is no infirmity in the same.

4. Heard the learned counsels for the parties and perused the documents available on record.

The sole dispute raised by the petitioner is that the petitioner – establishment is not an establishment to be taken under the purview of the Act, 1952.

In order to appreciate this argument it would be relevant to quote the relevant provisions of law and the relevant provisions for consideration are Sec.1, Sec.2(f) and Sec.7A of the Act, 1952 which are being reproduced herein below:-

> **"1. Short title, extent and application**.- (1) This Act may be called the Employees" Provident Funds and Miscellaneous Provisions Act,1952.
>
> (2) It extends to the whole of India except the State of Jammu and Kashmir.
>
> (3) Subject to the provisions contained in section 16, it applies –
>
> (a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed and
>
> (b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify, in this behalf: xxxxxxxxxxxxxxxxxx"
>
> 'Employee' has been defined U/s.2(f) of the Act, 1952 which speaks as follows:
>
> "2.(f) "employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets, his wages directly or indirectly from the employer, and includes any person,-
>
> (i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment;]"

Section 7A speaks regarding determination of money dues from the employees which is being reproduced herein below:-

"[**7A. Determination of moneys due from employers.** –[(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,-

(a) In a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) Determine the amount due from any employer under any provision of this Act, the Scheme or the [Pension] Scheme or the Insurance Scheme, as the case may be,

And for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.]

(2) The officer conducting the inquiry under sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), for trying a suit in respect of the following matters, namely:-

(a) enforcing the attendance of any person or examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavit;
(d) issuing commissions for the examination of witnesses,

and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 if 1860).

(3) No order shall be made under sub-section (1), unless [the employer concerned] is given a reasonable opportunity of representing his case.

[(3A) Where the employer, employee or any other person required to attend the inquiry under sub-section (1) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.]

[(4) Where an order under sub-section (1) is passed against an employer ex-parte, he may, within three months from the date of communication of such

order, apply to the officer for setting aside such order and if he satisfies the officer that the show-cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting asked his earlier order and shall appoint a date of proceeding with the inquiry:

Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show-cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

Explanation.- Where an appeal has been preferred under this Act against an order passed ex parte and such appeal has been disposed of otherwise than on the ground that the appellant has withdrawn the appeal, no application shall lie under this sub-section for setting aside the ex parte order.

(5) No order passed under this section shall be set aside on any application under sub-section (4) unless notice thereof has been served on the opposite party.]]"

Thus it is evident that any establishment whose strength of workmen is more than 20 will come under the purview of the Act, 1952.

It is further evident that any person who is involved in the work of the establishment directly or indirectly and getting wages will be termed as an employee.

Apart from the statutory provision, it is relevant to refer the judgments which are necessary for adjudication of the issue involved in this case. These are the judgments of Hon'ble Apex Court in the case of **M. G. Beedi Workers Vrs. Union of India, AIR 1974 Supreme Court 1832**, **M/s. P.M. Patel & Sons Vrs. Union of India, AIR 1987 Supreme Court 447** and **M/s. S. K. Nasiruddin Beedi Merchant Ltd. Vrs. Central P.F. Commissioner, AIR 2001 Supreme Court 850**.

In the case of M.G. Beedi Workers Vrs. Union of India their Lordships have been pleased to hold that the Act would be applicable even in respect of home workers engaged through contractors.

In the case of M/s. P. M. Patel & Sons Vrs. Union of India their lordships have been pleased to hold that the home bidi workers would come within the purview of the definition of 'employee'.

In the case of M/s.S. K. Nasiruddin Beedi Merchant Ltd. Vrs. Central P.F. Commissioner their lordships have been pleased to hold that "It is open for the petitioner to call up the names of the bidi workers who worked for them or the contractors and furnish names of all the workers to the Provident Fund Commissioner."

Now there is no dispute about the proposition of law that home bidi workers are within the meaning of employees for the purpose of Sec.2(f) of the Act, 1952.

The petitioner's main dispute is that the establishment is having less than four employees and as the establishment is not involved in the manufacturing process, as such the Act is not amenable to the petitioner – establishment, but on critical analysis of the order passed U/s.7A it is evident that the authority while deciding the application u/s.7A had conducted detail enquiry and a squad of two enforcement officers, i.e. Sri T.K. Panda and S.K. Rath were formed, the squad had submitted its report on 25.4.2001 in which it was ascertained from the workers Sri Dhirajlal Biswal and Hem Prasad Deep that the four aforesaid suppliers are manufacturers of bidis and sell branded bidis to M/s.Ram Chandra Omkarlal and after processing unbranded bidis the owner of M/s.Ram Chandra Omkarlal used to sell branded bidis with brand name "Fatphati Chhap". The squad further reported on verification of the stock book that 907.4 kg of tobacco was available as on 11.2.2001.

It has further been reported by the squad that from the stock of the Tamaku in the premises of the establishment that the employer have supplied the raw materials to the manufacturers / contractors and also to the home bidi rollers as advance and getting the unbranded bidis in return through purchases adjusting the advances cost towards supply of raw materials.

The second squad has reported after visiting the office of the petitioner – establishment that on verification of the stock book it was found that 26 nos. of bags containing 6,24,000 labelled bidis were there and all those bidis were Asli bidi of Omkar brand. It has also found one stock of unbranded bidis, Asli bidis and Chhat bidis. Accordingly report was submitted that the principal employer M/s.Ram Chandra Omkarlal have more than 40 employment strength and therefore, Act is applicable to the establishment.

After holding the Act applicable, summons were issued to the suppliers of bidi as also to the witnesses but seeing the contradictions in the statement of the witnesses the relevant record of the excise duty has been directed to be produced but the records have not been produced. The employer has filed written document and on perusal of the written document the report of the enforcement officer and the rolled bidis the authority has come to a finding that M/s.Ram Chandra Omkarlal is the principal employer and the four so called suppliers are the contractors. Home bidi rollers were engaged by those contractors as contract employees of the principal employer and on the basis of this factual aspect and taking into consideration the rule laid down by the Hon'ble Apex Court in the case of M/s. P. M. Patel & Sons Vrs. Union of India (supra) the authorities have come to a definite finding that the Act is applicable on the strength of the number of employees and accordingly the amount has been assessed U/s.7A and 7Q.

5. From perusal of the order passed U/s.7A it is further evident that in spite of several opportunities having been given to the petitioner – establishment not turned up, but the authorities on perusal of the inspection report and on conducting an enquiry and also taking into consideration the other documents like RG-12 register has passed the order U/s.7A. The petitioner has filed an appeal before the Tribunal in exercise of power U/s.7I of the Act, 1952. The learned Tribunal after appreciating the order passed U/s.7A, has declined to interfere with the finding.

Learned Tribunal has also relied upon the other aspects of the matter like the worker strength of the establishment, the scope of the statute, the definition of employee and its applicability on the basis of the judgment rendered by the Hon'ble Apex Court in the case of M/s. P. M. Patel & Sons Vrs. Union of India (supra), M.G. Beedi Workers Vrs. Union of India (supra) and M/s.S. K. Nasiruddin Beedi Merchant Ltd. Vrs. Central P.F. Commissioner (supra) has rejected the appeal.

After taking into consideration the order passed U/s.7A and 7I, in my considered view there is no infirmity in the orders for the following reasons:-

(i) The power u/s.7A has been vested with the authority to conduct enquiry regarding the liability.

(ii) The authorities have initiated the proceeding, issued notice to the petitioner on several occasions, but the petitioner did not turn up, accordingly, the authorities have constituted the inspecting team to inspect the office premises to get the records verified and on the basis of that direction two squad were constituted both of them have given reports, on the basis of the strength of the said report, the authorities have came to a conscious finding that the worker strength of the petitioner – establishment was more than 40, hence the very Act is applicable.

Thus the petitioner has been given all opportunity of being heard but he has not availed that opportunity and now he is assailing the order by saying that the very Act is not applicable. But from perusal of the document which has been annexed by him and submitted before the authority which is at annexure-2, i.e. the investigation proforma where the disclosure has been given with respect to the detail particulars of employees which is more than 40, likewise the other documents has been annexed which were also been produced before the authorities which is at page 20 of the writ petition in which also the reference of 40 nos. of employees have been given.

Thus it is own document of the petitioner – establishment it is evident that the contention raised by the petitioner that the number of employees are less than 4 is contrary and hence the same is rejected and taking into consideration the order passed U/s.7A based upon the relevant documents it is held that the Act is applicable.

The authorities after appreciating all these aspects of the matter and going through the relevant records of the RD-12 register has assessed the amount u/s.7A and 7Q and this has been tested even by the Appellate Authority who has declined to interfere with the same.

It is settled that High Court sitting under Art.226 of the Constitution of India cannot assume the power of 2nd Appeal in order to disturb the fact finding by re-appreciating the finding based upon various facts.

This court in exercise of power of judicial review is only required to see whether the decision making process is proper or not and not to decide correctness of demand in the nature of appeal. In view of this settled proposition, no interference can be shown by this court. Accordingly, the case is dismissed.

Writ petition dismissd.

2016 (II) ILR – CUT- 437

K. R. MOHAPATRA, J.

FAO NO. 254 OF 2014

ANIL KU. PRADHAN & ORS. ……..Appellants

.Vrs.

SMT. MADHABI PRADHAN ……..Respondent

GUARDIANS AND WARDS ACT, 1890 – S.25

Custody of child – How to determine – "Welfare" of the child should be paramount consideration – Broadly the following questions shall be considered for determining "welfare of the child" – Those are

(a) Who would have the better care and better consideration for the welfare of the minor;

(b) Where he or she is likely to be happier;

(c) By whom mental and physical development and comfort of the child can be better looked after;

(d) Who has not only the desire but a determination, not only in concept but also capacity to provide for a better education and medical facility as well as uninterrupted nourishment of the child; And

(e) Who would be available by the side of the child at the time of his/her need for mental as well as physical support and can provide proper care, counseling and give love and affection as well as protection and patting up;

In this case the child is staying at Keonjhar with the appellant No.1-father and prosecuting her studies where the District Headquarters Hospital is at a stone throwing distance – Moreover there are three adult female members in the family including the father, grand father and uncle of the child to look after her – Where as the respondent-mother lives with her parents in a remote village where there is no good School and basic medical facilities – The respondent mother neither disputes the facility available at Keonjhar not complained any ill-treatment or negligence of the appellants in taking care of the child – Moreover the child stayed at Keonjhar for more than 4 years and has compatible to the surroundings and situations and dislocation of the child from the place where she has grown up would not only impede her Schooling but also cause emotional strain and depression on her – Held, the impugned order handing over the custody of the minor girl to her mother is set aside – Welfare of the child would be best served if she continues to stay in the custody of the father – No fruitful purpose will be served by giving custody of the child with the mother only for the reason that section 6 of the Hindu Minority and Guardianship Act, 1956 gives her a legal right to be the custodian of the child as the child has not attained the age of five years – However if the mother desires, she may visit the child without disturbing the Schooling and normal routine of the child.

(Paras 13 to15)

Case Laws Referred to :-

1. (2005) 5 SCC 359 : Rajesh Kumar Gupta -v- Ram Gopala Agarwal.
2. AIR 1985 Orissa 65 : Smt. Meera Dei -v- Shyamsundar Agrawalla.
3. 2011 (II) ILR- CUT- 806 : Shyama Prasad Tripathy & Ors.-v- Aishwarya Satpathy.
4. AIR 2008 SC 2262 : Mausami Moitra Ganguli –v- Jayanti Ganguli.
5. AIR 2009 SC 557 : Gaurav Nagpal Vs. Sumedha Nagpal.

For Appellant : M/s. S.K.Nayak-2, & S.K.Nayak
For Respondents : M/s. Basudev Pujari & B.K.Nayak

Date of Judgment:15.10.2015

JUDGMENT

K.R. MOHAPATRA, J.

Order dated 25.4.2014 passed by the learned Civil Judge (Senior Division), Champua in Guardian Petition No.2 of 2013, allowing the petition under Section 25 of the Guardians and Wards Act, 1890 to hand over the custody of the minor girl to her mother, is under challenge in this appeal.

2. Briefly stated the petitioner-respondent (mother of the child) filed a petition under Section 25 of the Guardians and Wards Act, 1890 for custody of her minor daughter, namely, Poonam Pradhan, alleging that she got married to the opposite party-appellant no. 1, namely, Anil Kumar Pradhan, on 03.07.2010. After their marriage, the petitioner-respondent stayed in her in-laws house at village Balibandha in the district of Keonjhar. Out of their wedlock, Poonam was born on 7.7.2011. However, there was a break down in the marital life as the in-laws of the petitioner-respondent ill-treated her and did not provide the basic necessities for her sustenance and her minor daughter. On 17.4.2012, the petitioner-respondent was driven out from her in-laws house forcibly removing the custody of the minor daughter from her. However, due to intervention of the parents and relatives of the petitioner-respondent, she returned back to her in-laws house. Again on 5.1.2013, the opposite party-appellant nos. 1, 2 and 4 forcibly administered poison to the petitioner-respondent for which she was hospitalized in Jhumpura C.H.C. and was discharged on the next day, i.e. on 6.1.2013. Learning about the incident, the father of petitioner-respondent came and took her back to his house, but her in-laws did not allow to take the minor daughter (Poonam) with her. The father of petitioner-respondent lodged an F.I.R. at Jhumpura P.S. which was registered as Jhumpura P.S. Case No. 3 of 2013 under Sections 498-A/323/307/34 I.P.C. read with Section 4 of the D.P. Act. The petitioner-respondent claimed that as Poonam is a breast feeding child, the opposite parties-appellants could not take proper care of her and she would be deprived of proper nourishment and affection of her mother. Hence, she filed the petition for the aforesaid relief.

3. The opposite parties-appellants filed their show cause admitting the marriage, relationship and custody of the child with them, but they denied all other allegations made in the petition. They contended that the petitioner-respondent never behaved properly with her elders and she was not looking after the child properly and abandoning the child, she left the in-laws house. However, the opposite party-appellant no. 1 after much persuasion brought her back for the welfare of the child. The petitioner-respondent was of unpredictable temperament and short-tempered. She used to loose her temper on trivial issues and used to be violent and was always threatening to commit suicide. She used to remain shabby and unclean. She was neither taking care of herself nor her child. Suspecting the petitioner-respondent to be suffering from mental illness, the opposite party-appellant no.1 took her to the District Headquarters Hospital at Keonjhar, where she was examined by one Dr. Majhi, who was a Neuro-psychiatrist. Dr. Majhi on examination

diagnosed that the petitioner-respondent was suffering from bipolar disorder i.e. a kind of mental illness, and advised her to be treated at Ranchi for advance treatment, but she resisted the same. They further contended that the allegation of administration of poison is cooked up. In fact, she locked the door of her room from inside and did not open the same. The opposite parties-appellants with much difficulty broke upon the door and found that she herself had consumed poison and thereafter, she was admitted at Jhumpura C.H.C. When the parents of the petitioner-respondent took back her on 6.1.2013, neither the petitioner-respondent nor her parents had ever asked for the child 'Poonam' and to take her with them.

4. It was their further case that the opposite party-appellant no. 4, the parental grandmother of Poonam, is taking care of her in the best possible manner. The petitioner-respondent wanted a son and instead was blessed with a female child for which she deserted the child and refused to take care of her. In the circumstances, if the custody of Poonam would be given to the petitioner-respondent, her mental and physical growth would be seriously affected. Therefore, they prayed for dismissal of the petition and to allow them the custody of the child.

5. The learned trial court considering the materials on record allowed the prayer of the petitioner-respondent directing the opposite party-appellant No.1 to handover the minor daughter (Poonam Pradhan) to her mother (petitioner-respondent) within fifteen days failing which the petitioner-respondent can take custody of the child as per law. It was further directed that the opposite party-appellant no. 1 can meet the child on every alternative Sunday in the house of the petitioner-respondent's father at Jayantigarh in between 9.00 A.M. to 5.00 P.M. Assailing the said order, the opposite parties-appellants have filed this appeal.

Before delving into the rival contentions of the learned counsel for the parties, it would be proper to take note of relevant provisions of law, i.e., Sections 2, 6 and 13 of the Hindu Minority and Guardianship Act, 1956 (in short 'the Act, 1956') as well as Section 25 of the Guardians and Wards Act, 1890 (in short 'the Act, 1890') which are reproduced hereunder:

> "2. Act to be supplemental to Act 8 of 1890.—The provision of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardian and Wards Act, 1890 (8 of 1890).
>
> xx xx xx

6. Natural guardians of a Hindu minor.—The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;
(c) in the case of a married girl—the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.— In this section, the expression "father" and "mother" do not include a step-father and a step-mother;

xx xx xxx

13. Welfare of minor to be paramount consideration.—
(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.
(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

Section 25 of the Guardians and Wards Act, 1890 provides as under:

"25. Title of guardian to custody of ward-
(1) If a ward leaves or is removed from the custody of a guardian of his person, the court, if it is of opinion that it will be for the welfare of the ward to return to the custody of the guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882)16.

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

Thus, it is in the light of the aforesaid provisions of law, the rival contentions of the parties are to be considered.

6. Mr. S.K. Nayak, learned counsel for the appellants with vehemence submitted that though the welfare of the child is the paramount consideration, the pleadings made in the petition by the petitioner-respondent for custody of the child do not spell out a single sentence with regard to the welfare of the child. The petitioner-respondent only described about the alleged disturbances in her marital life and the alleged ill-treatment by her husband and in-laws. It appears from the pleadings that she wanted the custody of the child as of right since the child (Poonam) was of one and half years and was breast feeding child and she could not leave without breast feeding her child. It was pleaded that she was an educated woman and conscious about welfare of the child. But, the pleadings are conspicuously silent about how the welfare of the child (Poonam), lies in keeping her in the custody of her mother (respondent). Mr. Nayak further submitted that the petitioner-respondent did not have slightest love for the child and she refused to breast feed her when she was in matrimonial home. She was a self-centered lady and did not care for the welfare of the child. She deserted her daughter as she wanted a son. It was the petitioner-respondent who left the child with her in-laws. The opposite parties-appellants have another house at Keonjhar Town since last 25 years. For proper nourishment, the child was under the proper care of opposite party-appellant nos. 2 to 4 at Keonjhar. She is now studying in a public school at Keonjhar. The District Headquarter Hospital at Keonjhar has well trained pediatricians. On the other hand, the petitioner-respondent leaves in a remote village in the State of Jharkhand having no access to the basic amenities including medical facilities. The grandmother of the child (opposite party-appellant no. 4) is taking personal care of the child. Hence, her mental and physical growth is best looked after by the appellants. If the custody of the child is given to the petitioner-respondent, the mental and physical growth of the child would be seriously affected. Hence, they prayed to set aside the impugned order.

8. Mr. B.K. Nayak, learned counsel for the respondent supporting the impugned order submitted that ordinarily the mother is the custodian of a minor child who is less than five years. When the child was taken out of the custody of the petitioner-respondent, she was a breast feeding child and was aged about only one and half years. He further contended that the Doctor (O.P.W.4), who diagnosed the petitioner-respondent for having bipolar disease (mental disorder) advised to consult Nuero Psycatrics. Exts. A and B go to show that O.P.W. 4 had only examined the petitioner-respondent once on 25.7.2012 and there is no subsequent material to show that she was suffering from any kind of mental illness. Taking into consideration the decision of the Hon'ble Supreme Court in the case of ***Rajesh Kumar Gupta –v- Ram Gopala Agarwal***, reported in (2005) 5 SCC 359, learned trial court has rightly rejected the plea of mental illness of the petitioner-respondent. He further submitted that even if the financial condition of opposite parties-appellants is better than the petitioner-respondent, the same should not be a ground to refuse the custody of the child to the petitioner-respondent as it is always the duty of the father to maintain the legitimate child. Though the father of the child deposed in his evidence that his mother was taking care of the child but his mother who is opposite party-appellant no. 4 was not examined in support of the case. Further it was his contention that the appeal contains only general allegations and no specific ground is made out to assail the order impugned. The impugned order was passed taking into consideration the pleadings, evidence and settled law with regard to custody of the child and hence, the same needs no interference. Thus, he prayed for dismissal of the appeal and to confirm the impugned order.

9. Before hearing of the appeal, an attempt was made for conciliation between the parties by this Court and the parties were directed to appear before this Court in person with the child. However, by order dated 25.3.2015, this Court observing that attempt of settlement having been failed directed for hearing of the appeal on merit.

10. Section 6 of the Act, 1956 provides that the natural guardian of a Hindu minor, in respect of minor's person as well as in respect of minor's property, in case of a Boy or an unmarried girl, shall be the father, and after him, the mother, provided that the custody of the minor who has not completed the age of five years shall ordinarily be with the mother.

It is not disputed that marriage between the appellant no. 1 and respondent was solemnized on 3.7.2010 and Poonam was born out of their wedlock on 7.7.2011. Thus, the legitimacy of the child is not in question. At

the time of filing of the petition under Section 25 of the Act, 1890, the child (Poonam) was only of one and half years old. At the time of adjudication of the petition, she was three years old and at present, she is four and half years old. Keeping in view the aforesaid legal position and the materials available on record, it has to be determined whether the petitioner-respondent is entitled to the custody of the child.

In order to consider the legality and propriety of the impugned order, this Court feels it proper to go through the pleadings of the parties at the outset to determine in whose custody the welfare of the child can be best achieved, which is the paramount consideration for determining the custody of the child. The petitioner-respondent had stated in para-8 of her petition that the opposite parties-appellants by showing physical force took away the child (Poonam) from her. She also pleaded in para-9 of her petition that Poonam Pradhan is aged about 1½ years and is a breast feeding child and she (the mother) cannot leave without her breast feeding child. The opposite parties-appellants could not take proper care of her daughter and if her minor daughter will continue to stay with the opposite parties-appellants, she will be deprived of proper nourishment and mother's affection. She also pleaded that she is an educated woman and is very much conscious about the welfare of her child. In reply, the opposite parties-appellants stated in para-5 of their show cause that neither the petitioner-respondent nor her parents asked for the child when the petitioner-respondent left the matrimonial home, as they considered the baby daughter to be a burden on them. The child being neglected by her mother, the opposite party-appellant no. 4 (grandmother of the child) has been fostering and nourishing the child and all the opposite parties-appellants are deeply concerned about the well being of the child. The opposite parties-appellants had also stated in para-6 of their show cause that the petitioner-respondent has no slightest love for the child and she resented to breast feed the child when she was in the matrimonial home. She being a self-centered lady did not care for the welfare of the child. The opposite parties-appellants have another house at Keonjhar Town since last 25 years. In order to avoid family bickering and unusual behavior of petitioner-respondent, the opposite parties-appellant nos. 2 to 4 lived at Keonjhar and the child was with them all throughout. Keonjhar has District Headquarter Hospital and private Hospitals with well trained and foreign qualified pediatricians. On the other hand, the petitioner-respondent lives in a remote village in the State of Jharkhand having no access to basic amenities and medical facilities. The infant daughter (Poonam) is being well

looked after by the opposite parties-appellants, who are conscious about the nutritional values of food she takes and from time to time, they consult the Child Specialist about the well being of the child. They further stated that if the child is left with the custody of her mother, her mental and physical growth would be seriously affected. They also pleaded that Poonam has been living happily and comfortably in the care and custody of the opposite parties-appellants and is bound to rot and suffer in the hands of the petitioner-respondent and her parents.

12. With regard to the welfare of the child, reiterating the pleadings in her deposition, the petitioner-respondent (P.W.1) deposed that the opposite parties-appellants did not allow her to take Poonam and in para-9 of her deposition, she stated that Poonam will be better with her. Beyond that, she has not stated a single word as to how could she take care of the child, if the child (Poonam) stays in her custody. Except the above, the petitioner-respondent in her petition as well as the deposition has only alleged against her in-laws and disturbance in her marital life and tried to assert her right for the custody of the child. Of course, she denied to the suggestion put to her that she never breast fed the child and she could not take care of the child. P.W. 2, who is the father of petitioner-respondent, in his evidence stated in para-6 that Madhabi (petitioner-respondent) is an educated woman and is very much conscious about the welfare of the child (Poonam). He also deposed that her custody should be given to Madhabi for her proper care and nourishment. In para-12 of the cross-examination, he denied the suggestion that Poonam is quite well with the opposite parties-appellants. On the other hand, O.P.W. 1 (brother of appellant no. 1) in his evidence at para-8 deposed that the petitioner-respondent was very much indifferent towards her daughter, grossly neglected her, strongly protested and objected to breast feed her. In para-10 of his evidence, he deposed that they are quite resourceful to up-bring the child in a befitting manner and the family of petitioner-respondent has no sufficient means to look after the child. In para-11 of his evidence, he had categorically stated that the custody of the minor at the hands of petitioner-respondent would have devastating effect on her mental and physical growth. In cross-examination, he deposed at para-17 that Sub-Divisional Hospital of Champua is at a distance of about 4 to 5 K.Ms. from the father's house of petitioner-respondent. He further categorically stated that Poonam, at present, is in custody of his mother, his wife, the wife of his younger brother and other family members. He also denied to the suggestion that Poonam is forcibly separated from the

petitioner-respondent. In para-9 of his deposition, O.P.W.1 categorically stated that the baby daughter is being properly nourished in consultation with a Child Specialist and Dietician at Keonjhar Town and is growing fast in physical and mental activities. He further categorically stated that Poonam would be deprived of basic facilities and proper medical care in the custody of petitioner-respondent. In a tiny village where the petitioner-respondent resides, there is dearth of facilities of education, medical care etc. and the child would ultimately languish in the custody of petitioner-respondent and her relations, and her mental and physical growth would be stalled. The statements of O.P.W. 1 have not been disturbed in the cross-examination and almost remained unchallenged more particularly with regard to medical and educational facilities available to the child. O.P.W. 2, who is the father of the child and husband of petitioner-respondent, in his deposition at para-2 deposed that after delivery of their daughter, namely, Poonam, the petitioner-respondent being allergic towards the child refused to breast feed her. At his insistence to breast feed the child, she used to pick up quarrels with him and did not take care of the daughter. She even in a fit of tamper once left for her parental home abandoning the child and after much persuasion, she came back after one and half months. The O.P.W. 2 categorically deposed in para-7 that after birth of his daughter, the petitioner-respondent grossly neglected her and never tried to breast feed the child. On the other hand, his (O.P.W.2's) mother (appellant no. 4) has been taking utmost care of the child. He further deposed that the Baby under the care of the opposite parties-appellants and consultation by Child Specialist and Dietician at Keonjhar Town is growing fast and she would be deprived of the basic facilities and proper medical care and educational facilities in the custody of the petitioner-respondent. In the village of petitioner-respondent, which is far from educational and medical facilities, the child would languish in her custody. He further deposed at para-8 that he is running his own business in Keonjhar Town and residing at Keionjhar with his family and his daughter. In the company of his family members and under their care and custody, his daughter (Poonam) is growing both mentally and physically very fast. In case the custody of his daughter (Poonam) is given to the petitioner-respondent, her future prospect would be bleak and would have devastating effect on her growth and well being. In cross-examination, not a single question with regard to care, nourishment and welfare of the child was put to O.P.W. 2, who is none other than the father of minor child. Thus, his statements with regard to care, nourishment and welfare of the child remained uncontroverted. Only formal suggestion was put to O.P.W. 2 to the

effect that he had forcibly taken the child from the petitioner-respondent and compelled the petitioner-respondent to leave his house, to which the O.P.W. 2 denied. He also denied to the suggestion that because of him, Poonam is debarred from the love of her mother. The O.P.W. 3, who is the father-in-law of petitioner-respondent and grandfather of the child, also stated in his deposition at para-3 that his daughter in law was allergic to the child and refused to take care of the Baby and breastfeed her. Corroborating the statement of O.P.W. 3, he also deposed that because of behavior of petitioner-respondent, the opposite parties-appellants decided that the appellant no. 4, who is the grandmother of the child, would stay with them at Balibandh residence for better nourishment and proper care of new born. In spite of ill-treatment at the hands of petitioner-respondent, she remained there and took utmost care of the new born. She also corroborated the statements of O.P.Ws. 1 and 2 to the effect that the child (Poonam) under their care and consultation with Child Specialist and Dietician at Keonhar is growing fast both mentally and physically. There is no facility of education and health care in the village of petitioner-respondent and as such, the child would languish in the custody of petitioner-respondent, if the custody of the child is given to her. Such statements on oath were also not disturbed in the cross-examination. Learned trial court completely ignored to consider the aforesaid evidence with regard to care, nourishment and welfare of the child and in fact there is no finding on the welfare of the child in the impugned order, which is the paramount consideration to determine the custody of the child.

13. The learned trial court while adjudicating the petition of the petitioner-respondent for custody of the child had discussed a lot about the mental health of the petitioner-respondent. The opposite parties-appellants in their show cause have contended that the petitioner-respondent is suffering from bipolar disorder, a kind of mental illness and incapable of taking care of the child. The petitioner-respondent, in fact, was diagnosed bipolar disorder by O.P.W.4, who was working as Assistant Surgeon of District Headquarters Hospital at Keonjhar and was also a Consultant Neuro Psychiatrist. In support of their case, the opposite parties-appellants had filed documents, i.e., Ext. A-Outdoor Medical Ticket dated 25.7.2012 and Ext. B-Medicine Prescription of O.P.W. 4 granted on 25.7.2012. These documents were never challenged or denied by the petitioner-respondent. On the other hand, the petitioner-respondent in her deposition has categorically admitted that she had been to O.P.W. 4 who diagnosed bipolar disorder. The evidence of

OPW-4 was not relied upon on the ground that diagnosis of mental condition of petitioner-respondent was provisional, differential, suspected and probable. Thus, the same was not conclusive. Moreover, the learned trial court held that there is nothing to show that the petitioner-respondent is recently suffering from any kind of mental illness. To this, it can only be said that the petitioner-respondent was diagnosed bipolar disorder, a kind of mental illness by a Consultant of Neuro Psychiatrist who advised to take the petitioner-respondent to Ranchi for better treatment. It is the specific case of the opposite parties-appellants that she resisted to go to Ranchi for better treatment which she never denied. Moreover, there is nothing on record to disbelieve the opinion given by a Doctor who has been examined as O.P.W.4. The same was also not challenged. The decision of Hon'ble Supreme Court in the case of *Rajesh Kumar (supra)* is distinguishable for the reason that the Hon'ble Supreme Court has dealt with an issue of personality disorder with no medical problem. But, in the case at hand, the petitioner-respondents is suffering from bipolar disorder, a kind of mental disease. Hence, the finding of the learned trial court with regard to mental health of the petitioner-respondent is vulnerable.

The second contention of the opposite parties-appellants was that the petitioner-respondent is living in a remote village at Pattajayanti in the State of Jharkhand and the opposite parties-appellants are living at District Headquarter at Keonjhar which has better avenues compared to Pattajayanti. However, while discussing the same, the learned trial court misdirected himself and concentrated only on the question with regard to financial condition of petitioner-respondent vis-à-vis the opposite parties-appellants, which is insignificant for determining the custody of the child Thereafter, it relied on various case laws and legal provisions but failed to discuss as to how ratio decided in the said cases are relevant to the case at hand. The financial condition of the mother cannot be a ground to refuse custody of the child to her. Because, it is the duty of the father to maintain his legitimate child. He has to provide maintenance for the child. As stated earlier, there is no finding with regard to the welfare of the child.

At this stage, it is profitable to adopt the language of Section 17 of the Guardians and Wards Act, 1890 for determination of the question of 'welfare' of the minor, which reads as follows:

> "17. **Matter to be considered by the Court in appointing guardian.-**(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by

what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Courts shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

xx xx xx

(5) The Court shall not appoint or declare any person to be a guardian against his will."

Sub-section (2) of Section 17 provides that Court while considering the question of 'welfare' of the child shall have regard to the age, sex and religion of the minor, so also the character and capacity of the proposed guardian and his nearness of kin to the minor etc. The same is also the consideration while determining the question of 'welfare' for custody of the child. Thus, broadly the following questions shall be considered along with others for determining 'welfare' of the child. Those are:

a) Who would have the better care and better consideration for the welfare of the minor;

b) Where he or she is likely to be happier;

c) By whom mental and physical development and comfort of the child can be better looked after;

d) Who has not only the desire but a determination, not only in concept but also capacity to provide for a better education and medical facility as well as uninterrupted nourishment of the child; And

e) Who would be available by the side of the child at the time of his/her need for mental as well as physical support and can provide proper care, counseling and give love and affection as well as protection and patting up;

In the case of ***Smt. Meera Dei -v- Shyamsundar Agrawalla***, reported in AIR 1985 Orissa 65, this Court held as follows:

"10. Some arguments were advanced from both the sides regarding power and jurisdiction of the Court to pass orders regarding

education and spending holidays etc. by the minor while deciding an application under Section 25 of the Guardians and Wards Act Whatever doubt on these questions might have been there previously the same has been set at rest by the Supreme Court, in the case of Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka AIR 1982 SC 1276 wherein it has been held that while considering an application under Section 25 of the Act it is open to the Court to make any arrangement relating to the minor which he considers to be in the best interest of minor and in such a case it is the welfare of the minor which alone is the foremost consideration and not the rights of the parents. Neither the father nor the mother has an indefeasible right to have custody of the minor or to decide his future as he or she likes. The Court's duty in this regard is onerous and the Court is required to discharge the same to the best of its ability in the interest of minor."

Following the ratio decided in the aforesaid case, this Court in the case of ***Shyama Prasad Tripathy & ors.-v- Aishwarya Satpathy***, reported in 2011 (II) ILR- CUT- 806 held as follows:

"15 ….This past conduct though is not the sole criteria to determine the attitude of the respondent towards her family, but is indicative of her attitude towards rising a family. Furthermore, when she was residing at Chennai alone, the child was less than three years of age and she admitted him to a Play School, which does not appear to be reasonable to us. Admittedly, we find that the child is with the appellants for the last two years, at Bhubaneswar and, therefore, it can safely be presumed that he has accustomed with the life style of Bhubaneswar with his father and grandparents and at this juncture passing an order to remove him from Bhubaneswar to Bangalore will have an adverse psychological impact on the minor child…."

These are vital aspects to be considered while determining the 'welfare' of the child for custody. Admittedly, learned Civil Judge did not at all consider these vital aspects for determining the custody of child and delved into less important aspects, which have already been discussed above.

14. Admittedly, the child, namely, Poonam, is staying at Keonjhar and is prosecuting her studies as revealed from the pleadings and oral testimony of the parties. The petitioner-respondent is staying with her parents, whereas there are three adult female members in the family of opposite parties-

appellants to look after the child including other members, namely, the father, grandfather and uncle of the child. The child is at present staying at District Headquarter at Keonjhar where better amenities and facilities with regard to education and health care are available in comparison to that of village Pattajayanti. The Sub-Divisional Hospital at Champua is about 4 to 5 K.Ms. away from the village where the petitioner-respondent resides, whereas the child is at present staying at Keonjhar where the District Headquarter Hospital situates at a stone throw distance. The petitioner-respondent never disputes the aforesaid fact nor does she complain of any ill-treatment or negligence on the part of the appellants in taking care, nourishment and welfare of the child. Admittedly, the child has stayed with her father and other family members for more than four years and has become compatible to the surroundings and situations. The Hon'ble Supreme Court in the case of ***Mausami Moitra Ganguli –v- Jayanti Ganguli***, reported in AIR 2008 SC 2262, held that dislocation of the child from place where he has grown-up would not only impede his schooling, but also cause emotional strain and depression on him.

Hon'ble Supreme Court in the case of ***Gaurav Nagpal Vs. Sumedha Nagpal***, reported in AIR 2009 SC 557 held as follows:-

> "42. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

43. The word `welfare' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases."

15. In view of the discussions made above and the submissions of the learned counsel for the parties, this Court while setting aside the impugned order feels it proper that welfare of the child would be best served, if she continuous to stay in custody of her father. No fruitful purpose will be served by giving custody of the child to the mother only for the reason that Section 6 of the Act, 1956 gives her a legal right to be the custodian of the child as the child has not attained the age of five years. It is further directed that the petitioner-respondent as and when desires may visit the child at the place where the child resides without disturbing the schooling and normal routine of the child.

16. Accordingly, the appeal is allowed, but in the circumstances, there shall be no order as to costs.

Appeal allowed.

2016 (II) ILR – CUT- 452

J. P. DAS, J.

CRLA NO. 21 OF 2016

NRUSINGH CHARAN SAHOO ……..Appellant

.Vrs.

STATE OF ODISHA (VIGILANCE) ……..Respondent

PREVENTION OF CORRUPTION ACT, 1988 – Ss. 13(2), 13(1)(e)

Disproportionate assets of 10% or less of the total income can be ignored in view of the sound principle that calculations made and values assessed of the transaction and properties over a period of time can never be accurate and possibilities of human errors in such assessments can never be ruled out.

In this case during the check period, the total income of the appellant is taken to be Rs. 35,23,679/- and expenditure was Rs. 16,10,299/-, leaving surplus of Rs. 19,13,380/- – The assets shown to have been acquired by the appellant was worth Rs. 22,03,843/-, So he had a disproportionate assets of Rs. 2,90,463/- which is little more than 8% of his total income during the relevant period – In view of the above position of law as enunciated by the Apex Court, that exonerates the appellant from the above charge – Held, the impugned conviction and sentence of the appellant for accumulation of disproportionate assets is set aside. (Paras16,17)

Case Laws Relied on :-

1. AIR 1977 SC 796 : Krishnanada -V- State of Madhya Pradesh
2. 1977 (I) SCC 816: Krishnananda Vrs. State of Madhya Pradesh

For Appellant : M/s. Shakti Prasad Panda, D.Pr.Das & Amrita Panda Geeta Luthra
For Respondent : Mr. Sanjaya Ku. Das-1, Standing Counsel (Vigiliance)

Date of Hearing :26.06.2016
Date of Judgment:16.07.2016

JUDGMENT

J.P.DAS, J.

The appellant being convicted in T.R.Case No.1 of 2014 (T.R. 50 of 2011) under Section 13 (2) read with Section 13 (1)(e) of Prevention of Corruption Act,1988 and sentenced to undergo rigorous imprisonment for 30 (thirty) months and to pay a fine of Rs.2,00,000/- (two lakhs), in default, to undergo further rigorous imprisonment for one year in the judgment and order dated 21.12.2015 passed by the learned Special Judge, Special Court, Bhubaneswar has assailed the said judgment in the present appeal.

2. Prosecution case was that while the appellant was working as Deputy General Manager (Mining), Orissa Mining Corporation, Bhubaneswar, the Vigilance Department getting some information regarding accumulation of disproportionate assets by the accused-appellant conducted simultaneous search and raid in respect of the residential house, office, parental house and the house in occupation of the brothers of the appellant on 12.06.2007 on the strength of search warrant obtained from the learned Special C.J.M, Bhubaneswar. Pursuant to the materials and documents recovered in course of search, F.I.R was drawn up by the then Inspector, Vigilance Squad, Khurda on 22.12.2008 and Vigilance P.S. Case No. 50 of 2008 was registered under Section 13(2) read with Section (1)(e) of the Prevention of Corruption Act (in short, “P.C.Act”) against the accused and the investigation was taken up by the then Deputy Superintendent of Police, Vigilance, Bhubaneswar Division. The check period was taken from 01.01.1994 to 12.06.2007 for the purpose of investigation. In course of investigation, different witnesses were examined, relevant informations and documents were collected from different quarters and it was ultimately found out that the total income of the appellant during the check period was

Rs.30,16,708/- from all known sources and he has made expenditure of Rs.22,39,810/-, thus left with a surplus of Rs.7,97,384/-. But, he was found to have acquired assets worth of Rs.22,19,324/- and hence, he was allegedly having disproportionate assets to the tune of Rs.14,42,426/-. Accordingly, the charge sheet was placed against the accused appellant to face his trial in the court of law.

3. While denying the charge, the accused-appellant took the plea that the Investigating Agency has not taken into consideration all his income from different sources and has exaggerated the expenditure during the check period besides showing the value of the assets at an inflated rate by arbitrary computation.

4. In course of trial the prosecution examined fourteen witnesses as against two witnesses examined on behalf of the defence. Fifty documents were exhibited on behalf of the prosecution as against thirteen documents on behalf of the defence.

5. The learned trial court considering the oral as well as documentary evidence placed before it, made certain changes in the amounts of income, expenditure as well as of the assets and ultimately held that the accused was in possession of the disproportionate assets worth of Rs.5,10,463/- for which the accused failed to account for satisfactorily. Accordingly, the accused-appellant was held guilty for the alleged offences and was awarded with the impugned conviction and sentence.

6. It has been submitted in the appeal that the learned trial court besides committing some arithmetical errors apparent on the face of the record, also did not take into consideration certain incomes of the appellant besides calculating expenditure and the cost of the assets in a wrongful manner. As against it, the learned counsel appearing for the State, Vigilance, supporting the impugned judgment would submit that all the material aspects as placed during trial, have been duly considered by the learned trial court and further the accused-appellant has also been given with some benefits by the learned trial court disagreeing with the amounts placed on behalf of the prosecution and that the contentions as raised presently in the appeal, are not tenable in law. Thus, it was submitted that the findings and conclusions reached by the learned trial court in the impugned judgment are not liable to be interfered with.

7. At the outset, it was submitted on behalf of the appellant that the learned trial court calculated the income of the appellant in Paragraph-6. 21 of the impugned judgment as Rs.34,03,679/- but, in the conclusion in

Paragraph-9 of the judgment, mentioned it to be Rs.33,03,679/- which was an arithmetical error apparent on the face of the record whereby the income of the appellant was reduced by Rs.1,00,000/-. This position was fairly conceded to by the learned counsel for the State Vigilance. Thus, it was submitted that even accepting the impugned judgment on its face value, the worth of disproportionate assets comes to Rs.4,10,463/- which was mere 12% of the total income of the appellant during the check period.

Referring to a decision of the Hon'ble Apex Court Reported in ***AIR 1977 SC 796 (Krishnanada vrs. State of Madhya Pradesh)*** it was submitted that disproportionate assets less than 10% of the total income is to be ignored and in the present case deducting the permissible 10% of the total income, the balance surplus remains only 2% of the income which is Rs.70,300/- only. Hence, it was submitted that a lenient view may be taken since undisputedly the appellant had put in about twenty five years of unblemished service by the time the case was registered and investigation was taken up.

8. Per contra, it was submitted by the learned counsel for the State, Vigilance that the appellant being a public servant is liable to explain every rupee of his excess assets as against his income from all known sources. It was submitted that cases of corruption in public service never deserve any leniency and should be dealt with iron hands.

9. It has been submitted on behalf of the appellant that the aforesaid contention was merely for the sake of argument conceding the impugned judgment on its face value but it would be established that the learned trial court has ignored certain incomes of the appellant illegally and has used guess work to make certain assessments, which if considered in proper perspective, would reduce the worth of disproportionate assets to much less than permissible 10%. In this regard, learned counsel appearing on behalf of the appellant made submission on some specific points in respect of the income, expenditure and the value of assets in relation to findings reached by the learned trial court. Those need to be considered in detail.

10. The first contention was advanced that the appellant obtained certain informations under the R.T.I. Act and produced before the trial court vide Exhibit-K series showing that he received certain amounts during the check period from the Oriental Bank of Commerce as the maturity value of different deposits made in the name of his wife, who was a house wife having no independent source of income. It was submitted that although the details thereof have been reflected in the impugned judgment in Paragraph-6.14

showing a total receipt Rs.3,48, 907/- still the learned trial court has made an observation in the said paragraph that he was constrained to resort to a guess work to assess the net income from the said source at Rs.1,00,000/- only. The learned trial court has observed that all the thirteen deposits excepting the one at Sl. No.1 have been tagged with the year of opening of investment and maturity value have been received by the appellant in the year 2004. Out of thirteen deposits, Serial No.1 has no year of deposit; Serial Nos. 2, 3 and 4 deposits were in the year 2000; Serial Nos.5 to 11 were in the year 2003; Serial No.12 was in the year 2004 and Serial No. 13 was in the year 2001. It was observed by the learned trial court that although the accused wanted to take the benefit of the said receipts, still he did not produce any material to show as to what was the amount he invested since all the investments were obviously within the check period. The argument advanced on behalf of the defence that it was the duty of the prosecution to find out the materials was held as untenable by the learned trial court with the observation that the accused could not be given with the benefit by placing half truth before the court. Thus, on a guess work, the learned trial court added an amount of Rs.1,00,000/- to the income of the appellant from the aforesaid source. Of course, it was the duty of the appellant to justify the deposits by placing the amount invested so as to take the benefit of the net income, especially, when the materials were placed in course of trial but the accused-appellant had not done so. However, it is seen that the amount at Serial No.1 was Rs.91,053/- without showing the year of investment and all the rest receipts were within Rs.20,000/- out of which three were in the year 2000, seven were in the year 2003. But, the amounts received at Serial Nos.12 and 13 were Rs.45,420/- and Rs.50,566/- showing the deposits to have been made in the year 2004 and 2001 respectively. Considering these positions, I feel since the learned trial court has used a guess work by giving benefit of Rs.1,00,000/- to the appellant another Rs.20,000/- can be added thereto on a fair concession considering the periods of deposit.

11. The next contention on behalf of the appellant was relating to the income obtained by him from agricultural sources. It is submitted that the appellant claimed an income of Rs.1,31,949/-as agricultural income from his ancestral landed property of ten acres, out of which, the appellant had one-third share. It was submitted that the Investigating Officer issued requisition and obtained specific information from the Assistant Director, Statistics vide Exhibit-26 as to the rate of yield and average sale price of the crops of the

area of the landed property but, did not add anything to the income of the appellant from such source. It was further submitted that both the Investigating Officer as well as learned trial Court refused to accept the contention regarding such income of the appellant on the ground that the appellant did not show his such income in his income tax returns during the relevant period. It was submitted by the learned counsel for the appellant that it remained admitted by the Investigating Officer as well as on record that the appellant had one-third share in ten acres of landed property and the report of the Statistical Officer, showed the rate of yield and average sale price of the crops of the said area during the relevant period. The appellant also proved his property statement submitted to his authority vide Exhibits.22/3 and 22/4 submitted for the year 1994 and 2006 respectively mentioning that the appellant had derived income from ten acres of landed property, his share being limited to one-third of the total income therefrom. Of course, no specific amount of income was mentioned therein. It was submitted that the check period was from 1994-2006 and the appellant claimed only a meager amount of Rs. 1,31, 949/- as his income from agricultural sources during the period of twelve years. But, the learned trial court refused to accept the same on the solitary ground that the appellant had not shown such income in his Income Tax Returns. It was submitted that the income from agricultural resources is not taxable as per law, and hence, the appellant was not required to show it in his Income Tax Returns. The learned trial court has discussed this point and has observed that even though agricultural income is not taxable, still there is a column in the 'Tax Returns Form' to show the agricultural income, which the appellant did not show. Hence, the learned trial court has refused to take into consideration the said income of the appellant. However, the fact remains admitted that the appellant had one-third share in ten acres of landed property and the statistical report vide Exhibit-26 showed sufficient rate of yield and the value of the crops. Thus, in my considered opinion in the given circumstances to ignore the entire income from the agricultural resources for the appellant would not be justified. Accordingly, in absence of specific calculation, a benefit of income of Rs.1,00,000/- under the head of agricultural income can be given to the appellant. Thus, on the income side differing from the views taken by the learned trial court, I am inclined to give a benefit of Rs.20,000/- towards the bank deposits and Rs.1,00,000/- towards agricultural income. Thus, the total income during the check period of the appellant comes to Rs.34,03,679/-(as held by the trial court) + Rs.1,20,000/- = Rs.35,23,679/-.

12. Now, coming to the expenditure side, it was submitted on behalf of the appellant that the learned trial court has accepted the expenditure of Rs.1,59,250/- towards the rental expenditure incurred by the appellant for the house at Bhubaneswar wherein his family members were staying. This amount included rent and maintenance expenses to be paid to the society. It was submitted that P.W.8 the land-lady categorically admitted that she had not received any rent from the accused or his wife and it was the case of the appellant that the said house was taken on rent by his mother-in-law and she was staying in the house, where she also performed the marriage of her children. The learned trial court has discussed in detail the contentions made on behalf of the accused-appellant and taking into consideration the admitted facts that for different official correspondences and the admission of the children of the appellant, the said rented house was given as the mailing/correspondence address of the appellant, the learned trial court has refused to accept the argument advanced on behalf of the appellant that he was not paying the rent for the house. Going through the detailed discussions made by the learned trial court, I do not find any infirmity therein to take a different view.

13. Similarly, the appellant has challenged the expenditure of Rs.52,000/- shown towards the telephone expenses incurred by him. It was submitted that the Investigating Officer obtained Exhibit-38 series from the telephone authorities regarding the said payment, but, the said document was not proved before the court according to law. It was submitted that the authenticity or the correctness of the contents of the said information vide Exhibit-38 was not proved by the Accounts Officer who prepared the same since he was not examined before the court. Further the P.W.12 who was examined on behalf of the prosecution to prove Exhibit-38 series, stated that he could not certify the correctness of the information written on Exhibit-38. It was not disputed that the telephone connection was given in the year 2001 in the name of the wife of the appellant and the amount of Rs.1,12,378/- was shown to have been paid towards the telephone charges from the date of its installation till 17.08.2007. Since the defence plea was accepted by the learned trial court that after the appellant joined at the Head Office in Bhubaneswar in the month of June, 2004, his telephone bills were borne by the Orissa Mining Corporation, the amount of Rs.52,000/- including the initial deposit of Rs.3000/- has been calculated as telephone expenses borne by the appellant. True, the Exhibit-38 was not proved by the author himself but, it being an official correspondence prepared in course of performance of official duty has been proved by another Officer of the said department and I

find no cogent reason to disbelieve the information. Further the telephone connection having remained admitted, no material has been placed on behalf of the appellant to show as to what amount was actually paid by him.

14. The next contention was regarding the expenditure borne by the appellant towards education of his children. It was submitted that no credible evidence was placed nor any material witness was examined to prove such allegations of the prosecution regarding the educational expenses. The learned trial court has discussed in detail taking into account all the relevant materials in respect of this contention in Paragraph-7.15 to 7.23 and has also made certain deductions in respect of certain items, which it found unacceptable. Hence, I find absolutely no reason to take a different view from what has been taken regarding the expenditure under this head incurred by the appellant.

15. The next contention was regarding the assets acquired by the appellant during the relevant period. It was submitted by the learned counsel for the petitioner that the calculation of assets of the appellant based on an inventory list prepared by one Sridhar Samantaray who was shown as charge-sheeted witness no.24. But, the said author of the list has not been examined by the prosecution and the inventory list has been proved as Exhibit-28 by P.W.5 who was an Assistant Engineer (Estimator) and was a witness to the inventory as well as a signatory therein. Similar contentions were advanced citing certain case laws that in absence of examination of the author of the document, the contents of the document should not have been accepted by the learned trial court. The case laws as cited were also placed before the trial court and have been discussed in detail and the learned trial court on discussion of the position of law and the specific evidence of P.W.5 has accepted the inventory list to have been prepared on behalf of the prosecution. That apart, as mentioned in the impugned judgment, the accused-appellant in course of his examination under Section 313 Cr.P.C. has admitted the fact of search of his house and the inventory and the household articles, documents, cash, ornaments and vehicles etc. as enlisted in the Exhibits 28 and 29. The accused-appellant was also a signatory to the inventory list. After detailed discussion of the evidence placed on behalf of the prosecution and the contentions advanced on behalf of the defence, the learned trial court has deducted certain amounts towards the value of assets shown to have been acquired prior to the check period and accordingly has reached the conclusion that the value of the total assets possessed by the petitioner at the time of detection was Rs.22,03,843/-. Some contentions were

advanced by the learned counsel for the appellant regarding the value of the house on the submission that he had acquired a house at a cost of Rs.12,00,000/- but the learned trial court has wrongly mentioned it to be Rs.17,75,000/-. Prosecution has assessed the value of the house including addition and the renovation undertaken subsequent thereto as Rs.15,61,520/- and the same has been accepted by the learned trial court. The learned trial court has discussed this contention of the appellant in detail and I find no persuading reason to take a different view. Other findings of the learned trial court have not been assailed.

16. Accordingly, in view of my above discussions and findings, it is seen that during the check period, the total income of the appellant is taken to be Rs.35,23,679/- and the expenditure was Rs.16,10,299/-, thus, leaving surplus of Rs.19,13,380/-. The assets shown to have been acquired by the appellant was worth Rs.22,03,843/-. Hence, he had a disproportionate assets of Rs.2,90,463/- which is little more than 8% of his total income during the relevant period. As per the settled position of law, disproportionate assets of 10% or less of the total income can be ignored as per the decision of the Hon'ble Apex Court reported in ***1977 (I) SCC 816 (Krishnananda Vrs. State of Madhya Pradesh)*** which still holds good. That exonerates the accused from the charges of acquiring disproportionate assets to be taken cognizance of and to be punished. Obviously, the position of law based on the sound principle that calculations made and values assessed of the transactions and properties over a period of time can never be accurate. Possibilities of human errors in such assessments can never be ruled out.

17. In the result of my aforesaid findings, the appeal is allowed. The impugned judgment of conviction and sentence passed by the learned Special Judge, Special Court, Bhubaneswar in T.R.Case No.1 of 2014 (T.R. 50 of 2011) is set aside and the accused-appellant being held not guilty of the offence punishable under Section 13 (2) read with Section 13 (1)(e) of Prevention of Corruption Act is set at liberty.

Appeal allowed.