SUPREME COURT OF INDIA

J. CHELAMESWAR, J. & A.M.SAPRE, J.

CIVIL APPEAL NO. 7358 OF 2016
(ARISING OUT OF SLP(C) No. 17466 OF 2016)

VIJAY KUMAR MISHRA & ANR. ……...Appellants

.Vrs.

HIGH COURT OF JUDICATURE AT PATNA & ORS. ……Respondents

CONSTITUTION OF INDIA, 1950 – ART. 233(2)

Whether the bar under Article 233(2) is only for the appointment or even for participation in the selection process ?

There is a distinction between selection and appointment in service jurisprudence and the word "appointed" can not be read to include the word "selection", "recruitment" or "recruitment process" – Every person who is successful in the selection process undertaken by the state for the purpose of filling up of certain posts, does not acquire any right to be appointed automatically – Held, Art. 233(2) is couched in negative language prohibiting the appointment of a person as a District Judge, if such person is already in the service of either the union or the State, but it does not prohibit the consideration of the candidature of a person who is in the service of the union or the state.

In this case the petitioners while appearing in the Main examination of the District Judge Entry Level (Direct from Bar) became qualified in Sub-ordinate Judicial Service of the State of Bihar and joined the post – In the meantime result of the main examination of the District Judge published and petitioners became qualified and they received letters to appear for the interview with a condition to obtain "No Objection Certificate" of the employer – Petitioners made representation to the Registrar General, Patna High Court seeking permission to appear in the interview which was rejected in view of Art. 233(2) of the Constitution of India as they are already in the State Sub-ordinate judicial service – However, if they will choose to resign from their post they will be permitted to participate in the interview and once the resignation is tendered, it would not be permitted to be withdrawn – Petitioners challenged such action in writ petition which was dismissed by the High Court – Hence this appeal before the Apex Court – Compelling the petitioners to resign their job even for the purpose of assessing their suitability for appointment as District

Judge is neither permitted by the text of Art. 233(2) nor contemplated under the scheme of the constitution as it would not serve any constitutionally desirable purpose – Moreover denying the petitioners for participating in the selection process by taking recourse to Article 233(2) amounts to violating their right guaranteed under Articles 14 & 16 of the Constitution of India – Held, the impugned judgment passed by the High Court is quashed – Direction issued to the respondents to permit the appellants to participate in the selection process without insisting them to resign from their current employment.

(Paras 7 to13)

Case Laws Referred to :-

1. [4] (1993) Supp (3) SCC 181
2. [5] (1994) 1 SCC 126
3. (1985) 1 SCC 225 : Satya Narain Singh Vs. High Court of Judicature at Allahabad & Ors.
4. (2013) 5 SCC 277 : Deepak Aggarwal Vs. Keshav Kaushik & Ors.

For Appellants : Mr. Ranjan Kumar
For Respondents : M/s. Parekh & Co.

Date of Judgment : 09.08.2016

JUDGMENT

CHELAMESWAR, J.

1. Leave granted.

2. To explore the true purport of Art. 233(2) of the Constitution of India is the task of this Court in this appeal. The facts of the case are very elegantly narrated in the first six paragraphs of the judgment under appeal. They are:

> "The challenge in the present writ application is to the communication, dated 16th of February, 2016, whereby representation of the petitioners to appear in interview for the post of District Judge Entry Level (Direct from Bar) Examination, 2015, was rejected and a condition was imposed that petitioners will have to tender their rejection, first, from the Subordinate Judicial Service of the State of Bihar and only, thereafter, they could appear in the interview.
>
> 2. An Advertisement No. 01/2015 was issued inviting applications from eligible Advocates for direct recruitment in respect of 99 vacancies as on 31st of March, 2015. The cut off date for the eligibility was 5th of

February, 2015. The petitioners appeared in the Preliminary as well as in the Mains Examination pursuant to such advertisement.

3. In the meantime, petitioners qualified for the Subordinate Judicial Service of the State of Bihar in 28th Batch. The petitioners accordingly joined the Subordinate Judicial Service of the State of Bihar in August, 2015.

4. The result of the Mains Examination of the District Judge Entry Level (Direct from Bar) was published on 22nd of January, 2016. Both the petitioners qualified in the Mains Examination.

5. The High Court published the detail of interview schedule and issued Call Letters for the interview to both the petitioners; but one of the conditions in the Interview Letter was 'No-Objection Certificate of the Employer'. Therefore, the petitioners filed their representation before the Registrar General, Patna High Court, Patna, to appear in the interview. The requests were declined on 16th of February, 2016. The communication to one of the petitioners reads as under:-

"To,

The District & Sessions Judge
Siwan
Dated, Patna the 16th February, 2016

Sir,

With reference to your letter no. 80 dated 05.02.2016, I am directed to say that the Court have been pleased to reject the representation dated 05.02.2016 of Sri Vijay Kumar Mishra, Probationary Civil Judge (Junior Division), Siwan with regard to permission to appear in the interview in respect of District Judge Entry Level (Direct from Bar) Examination, 2015, in view of Article 233(2) of the Constitution of India, as he is already in the State Subordinate Judicial Service. However, he may choose to resign before participating in the interview, which resignation, once tendered, would not be permitted to be withdrawn.

The officer concerned may be informed accordingly.

Yours faithfully
Sd/-
Registrar General

> 6. It is the said letter, which is subject matter of challenge in the present writ application, wherein the petitioners claim that since they were eligible on the date of inviting applications, the action of the High Court in not permitting them to appear in the interview is illegal."

The High Court repelled the challenge holding that to permit the appellant to participate in the interview would be breaching the mandate of Art. 233(2).

> "11….. Since before the date of interview, the petitioners joined the Judicial Service, the petitioners, cannot, in terms of Clause (2) of Article 233 of the Constitution, be permitted to continue with the selection process for District Judge Entry Level (Direct from Bar) as they are, now, members of the Judicial Service. Therefore, the petitioners have rightly not called for interview."

Hence the appeal.

3. Unfortunately, it was neither argued nor did the High Court examine the true meaning and purport of Article 233(2). The appellants' argument before the High Court appears to be that notwithstanding the fact that they are the members of the judicial service, the eligibility for competing for the post of District Judges should be considered on the basis of the facts as they existed on the "cut off date", and the subsequent events are not be taken into consideration for determining the question whether the appellants are barred from appearing in the interview.

> "…intervening fact of the petitioners joining the Judicial Service will not act as bar for their appearance in the interview."[1]

We are afraid that the entire enquiry before the High Court was misdirected. The real question which arises in the case on hand is whether the bar under Article 233(2) is only for the appointment or even for the participation in the selection process.

4. The High Court believed in its administrative facet that Article 233(2) would not permit the participation of the appellant in the selection process because of his existing employment. The High Court came out with a 'brilliant' solution to the problem of the appellant i.e., the appellant may resign his membership of the subordinate judicial service if he aspires to become a district judge. But the trouble is the tantalizing caveat. If the

appellant tenders resignation, he would not be permitted to withdraw the same at a later stage.

1 See Para 9 of the Judgment under appeal

5. For any youngster the choice must appear very cruel, to give up the existing employment for the uncertain possibility of securing a better employment. If the appellant accepted the advice of the High Court but eventually failed to get selected and appointed as a District Judge, he might have to regret his choice for the rest of his life. Unless providence comes to the help of the appellant to secure better employment elsewhere or become a successful lawyer, if he chooses to practice thereafter the choice is bound to ruin the appellant. The High Court we are sure did not intend any such unwholesome consequences. The advice emanated from the High Court's understanding of the purport of Art. 233(2). Our assay is whether the High Court's understanding is right.

6. Article 233(1) stipulates that appointment of District Judges be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. However, Article 233(2) declares that only a person not already in the service of either the Union or of the State shall be eligible to be appointed as District Judges. The said article is couched in negative language creating a bar for the appointment of certain class of persons described therein. It does not prescribe any qualification. It only prescribes a disqualification.

7. It is well settled in service law that there is a distinction between selection and appointment.[4] Every person who is successful in the selection process undertaken by the State for the purpose of filling up of certain posts under the State does not acquire any right to be appointed automatically.[5] Textually, Article 233(2) only prohibits the appointment of a person who is already in the service of the Union or the State, but not the selection of such a person. The right of such a person to participate in the selection process undertaken by the State for appointment to any post in public service (subject to other rational prescriptions regarding the eligibility for participating in the selection process such as age, educational qualification etc.) and be considered is guaranteed under Art. 14 and 16 of the Constitution.

8. The text of Article 233(2) only prohibits the appointment of a person as a District Judge, if such person is already in the service of either the Union or the State. It does not prohibit the consideration of the candidature of a

person who is in the service of the Union or the State. A person who is in the service of either of the Union or the State would still have the option, if selected to join the service as a District Judge or continue with his existing employment. Compelling a person to resign his job even for the purpose of assessing his suitability for appointment as a District Judge, in our opinion, is not permitted either by the text of Art. 233(2) nor contemplated under the scheme of the constitution as it would not serve any constitutionally desirable purpose.

9. The respondents relied upon two judgments of this Court in a bid to sustain the judgment under appeal, ***Satya Narain Singh Vs. High Court of Judicature at Allahabad and Others*** (1985) 1 SCC 225 and ***Deepak Aggarwal Vs. Keshav Kaushik and Others (2013) 5 SCC 277***.

10. In first of the above-mentioned judgments, the petitioners/appellants before this Court were members of the Uttar Pradesh Judicial Service. In response to an advertisement by the High Court, they applied to be appointed by direct recruitment to the Uttar Pradesh Higher Judicial Service (District Judges).

It appears from the judgment "as there was a question about the eligibility of the members of the Uttar Pradesh Judicial Service to appointment by direct recruitment to the higher judicial service……", some of them approached the High Court by way of writ petitions which were dismissed and therefore, they approached this Court. It is not very clear from the judgment, as to how the question about their eligibility arose and at what stage it arose. But the fact remains, by virtue of an interim order of this Court, they were allowed to appear in the examination. The argument before this Court was that all the petitioners had practiced for a period of seven years before their joining the subordinate judicial service, and therefore, they are entitled to be considered for appointment as District Judges notwithstanding the fact that they were already in the judicial service.

It appears from the reading of the judgment that the case of the petitioners was that their claims for appointment to the post of District Judges be considered under the category of members of the Bar who had completed seven years of practice ignoring the fact that they were already in the judicial service. The said fact operates as a bar undoubtedly under Article 233(2) for their **appointment** to the higher judicial service. It is in this context this Court rejected their claim. The question whether at what stage the bar comes

into operation was not in issue before the Court nor did this Court go into that question.

11. In the case of Deepak Aggarwal (supra), the question before this Court was;

> "52. The question that has been raised before us is whether a Public Prosecutor/Assistant Public Prosecutor/District Attorney/Assistant District Attorney/Deputy Advocate General, who is in full-time employment of the Government, ceases to be an advocate or pleader within the meaning of Article 233(2) of the Constitution."

On an elaborate examination of the various aspects of the legal profession, the provisions of the Bar Council Act etc., this Court concluded that public prosecutors etc. did not cease to be advocates, and therefore, they could not be considered to be in the service of the Union or the State within the meaning of Article 232.

> "101. ….In our view, none of the Attorney/Public Prosecutor/Deputy Advocate General, ceased to be "advocate" and since each one of them continued to be "advocate", they cannot be considered to be in the service of the Union or the State within the meaning of Article 233(2). The view of the Division Bench is clearly erroneous and cannot be sustained." and finally held that they are not debarred under Article 233. A judgment which has no relevance to the issue before us

12. We are of the opinion that neither of the cases really dealt with the issue on hand. Therefore, in our opinion, neither of the above two judgments is an authority governing the issue before us.

13. For the above-mentioned reasons, the Appeal is allowed. Consequently, the Writ Petition (CWJC No. 3504 of 2016) filed by the appellants also stands allowed directing the respondents to permit the appellants to participate in the selection process without insisting upon their resigning from their current employment. If the appellants are found suitable, it is open to the appellants to resign their current employment and opt for the post of District Judge, if they so choose.

ABHAY MANOHAR SAPRE, J.

1) I have had the advantage of going through the elaborate, well considered and scholarly draft judgment proposed by my esteemed Brother Jasti Chelameswar J. I entirely agree with the reasoning and the conclusion, which my erudite Brother has drawn, which are based on remarkably

articulate process of reasoning. However, having regard to the issues involved, which were ably argued by learned counsel appearing in the case, I wish to add few lines of concurrence.

2) I need not set out the facts, which are not in dispute and set out in the order proposed by my learned Brother.

3) The short question, which arises for consideration in this appeal, is what is the true object, purport and scope of Article 233 (2) of the Constitution of India and, in particular, the words **"eligible to be appointed as district judge**" occurring in the Article?

4) Chapter VI of the Constitution of India deals with the **subordinate courts** in the State. Articles 233 and 236, which are part of Chapter VI, read as under:

> "233. Appointment of district judges. – (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.
>
> (2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.
>
> 236. Interpretation. – In this Chapter-
>
> (a) The expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;
>
> (b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge."

5) Article 233 deals with appointment, posting and promotion of the district judges in the State. Clause (1) provides that appointment, posting and promotion of the district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

6) Clause (2) of Article 233 with which we are concerned here provides that a person not already in service of the Union or of the State shall only be eligible to be appointed as a district judge if he has been for not less than 7 years as an advocate or a pleader and is recommended by the High Court for appointment.

7) Article 236 (a) defines the word **"district judge**" occurring in Chapter VI.

8) Reading of clause (2) of Article 233 shows that the **"eligibility"** of a person applying for the post of district judge has to be seen in the context of his appointment. A fortiori, the eligibility of a person as to whether he is in the service of Union or State is required to be seen at the time of his appointment for such post and not prior to it.

9) Mr. Ranjit Kumar, Solicitor General of India appearing for the respondent (High Court), however, contended that the word **"appointed"** occurring in Article 233(2) of the Constitution should necessarily include the entire selection process starting from the date of submitting an application by the person concerned till the date of his appointment. It was his submission that if any such person is found to be in service of Union or State, as the case may be, on the date when he has applied then such person would suffer disqualification prescribed in clause (2) of Article 233 and would neither be eligible to apply nor be eligible for appointment to the post of district judge.

10) This submission though look attractive is not acceptable. Neither the text of Article and nor the words occurring in Article 233(2) suggest such interpretation. Indeed, if his argument is accepted, it would be against the spirit of Article 233(2). My learned Brother for rejecting this argument has narrated the consequences, which are likely to arise in the event of accepting such argument and I agree with what he has narrated.

11) In my view, there lies a subtle distinction between the words **"selection**" and **"appointment"** in service jurisprudence. (See : **Prafulla Kumar Swain vs. Prakash Chandra Misra & Ors.,** (1993) Supp. (3) SCC 181). When the framers of the Constitution have used the word **"appointed"** in clause (2) of Article 233 for determining the eligibility of a person with reference to his service then it is not possible to read the word **"selection"** or "**recruitment"** in its place. In other words, the word "appointed" cannot be read to include the word "selection", "recruitment" or "recruitment process".

12) In my opinion, there is no bar for a person to apply for the post of district judge, if he otherwise, satisfies the qualifications prescribed for the

post while remaining in service of Union/State. It is only at the time of his appointment (if occasion so arises) the question of his eligibility arises. Denying such person to apply for participating in selection process when he otherwise fulfills all conditions prescribed in the advertisement by taking recourse to clause (2) of Article 233 would, in my opinion, amount to violating his right guaranteed under Articles 14 and 16 of the Constitution of India.

13) It is a settled principle of rule of interpretation that one must have regard to subject and the object for which the Act is enacted. To interpret a Statue in a 17 Page 18 reasonable manner, the Court must place itself in a chair of reasonable legislator/author. So done, the rules of purposive construction have to be resorted to so that the object of the Act is fulfilled. Similarly, it is also a recognized rule of interpretation of Statutes that expressions used therein should ordinarily be understood in the sense in which they best harmonize with the object of the Statute and which effectuate the object of the legislature. (See-**Interpretation of Statues 12th Edition, pages 119 and 127 by G.P.Singh**). The aforesaid principle, in my opinion, equally applies while interpreting the provisions of Article 233(2) of the Constitution.

14) With these few words of mine, I agree with the reasoning and the conclusion arrived at by my learned Brother.

Appeal allowed.

2016 (II) ILR - CUT- 470

SUPREME COURT OF INDIA

DIPAK MISRA, J & ROHINTON F. NARIMAN, J.

SPECIAL LEAVE PETITION (C) CC NO. 14061 OF 2016
CONVERTED TO SLP(C) NO. 22628 OF 2016

GAYATHRI ……..Petitioner

.Vrs.

M.GIRISH ……Respondent

(A) CIVIL PROCEDURE CODE, 1908 – O-17, R-1 & 2

Adjournment – Suit for recovery of possession and damages – Though suit instituted in 2007, cross-examination of the plaintiff could not be completed by 2015 as the defendant-petitioner went on filing marathon of interlocutory applications seeking adjournment after adjournment, compelling the witness who is a septuagenarian to come to the court on number of occasions – The learned trial judge was under total illusion and granted adjournments with costs without understanding the evil design of the defendant – Lastly on 03.10.2015, though the witness was present for cross-examination, neither the defendant nor her counsel turned up – So the learned trial court posted the suit for defendant's evidence – Defendant again filed another application on 22.02.2016 seeking further cross-examination of the plaintiff – Trial court rejected the application with cost of Rs. 1000/- - Order challenged before High Court but rejected – Hence the matter before this Court.

In this case, the defendant-petitioner has acted in a manner to cause colossal insult to justice and to the concept of speedy disposal of civil litigation – Due to his action the proceedings in the suit got seized as if "time" had been arrested and the abuse of the process of the court got fortified – This court deprecated such practice – Held, Special Leave Petition filed by the defendant-petitioner is dismissed with cost of Rs. 50,000/- which shall be paid to the State Legal Services Authority Karnataka – If the amount will not be deposited the right of defence to examine its witnesses shall stand foreclosed.

(Paras 9 to14)

(B) CIVIL PROCEDURE CODE, 1908 – O-17, R-1 & 2

Adjournment – When to be entertained – Applications for adjournments etc. being for interim measures could, as far as possible, be avoided and only in compelling and acceptable reasons those applications are to be considered – It is also desirable by Courts that the recording of evidence should be continuous, followed by arguments and decision thereon, within a reasonable time and without any gap and they should constantly endeavour to follow such a time schedule so that the purpose of amendments brought in the Code of Civil Procedure are not defeated – Moreover the counsel appearing for a litigant must have institutional responsibility and he is not supposed to seek adjournments in a brazen and obtrusive manner which is against professional ethics and against the majesty of law – This court when constrained to say that the virus of seeking

adjournment has to be controlled, quoted the saying of Gita "Awake! Arise! Oh Partha" for the guidance of trial Courts. (Paras 9 to14)

(C) CIVIL PROCEDURE CODE, 1908 – O-18, R-17

Court may recall and examine witness – Purpose – This provision primarily enables the Court to clarify any issue or doubt by recalling any witness either suo-motu or at the request of any party so that the Court itself can put questions and elicit answers – However such power is not intended to be used routinely, merely for the asking, to fill up omissions in the evidence of a witness who has already been examined. (Para 6)

(D) CIVIL PROCEDURE CODE, 1908 – O-18, R-17

Additional evidence – When can be entertained – Where the application is found to be bonafide and when the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice and the court is satisfied that non-production of such evidence earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witness or permit fresh evidence but if it does so, it should ensure that the process does not become a protracting tactic – However, the Court should firstly award appropriate costs to the other party to compensate for the delay – Secondly the court should take up and complete the case within a fixed time schedule in order to avoid delay and thirdly, if the application is found to be mischievous or frivolous or to cover up negligence or lacunae, it should be rejected with heavy costs.

(Para 6)

Case Laws Referred to :-

1. (2009) 4 SCC 410 : Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate
2. (2013) 14 SCC 1 : Bagai Construction Through its proprietor Lalit Bagai v. Gupta Building Material Store
3. (2011) 9 SCC 678 : Shiv Cotex v. Tirgun Auto Plast (P) Ltd.,
4. (2013) 5 SCC 202 : Noor Mohammed v. Jethanand.

For Petitioner : Mrs. S.Usha Reddy
For Respondent : …

Date of Judgment : 27.07.2016

JUDGMENT

DIPAK MISRA, J.

If a case ever exposed the maladroit efforts of a litigant to indulge in abuse of the process of Court, the present one is a resplendent example. The

factual narration, to which we shall advert to immediately hereinafter, would limpidly show that the defendant-petitioner has endeavoured very hard to master the art of adjournment and on occasions having been successful become quite ambitious. And the ambition had no bounds; it could reach the Everestine heights or put it differently, could engulf the entire Pacific Ocean.

2. The factual exposea as is evincible from the impugned orders, the respondent filed OS No.1712 of 2007 for recovery of possession and damages. The general power of attorney holder through which the plaintiff prosecuted the litigation was examined on 13.1.2009 in chief and it was completed on 12.9.2012. It is worthy to note here that for examination-in-chief, the witness was constrained to come to court on seven occasions. Thereafter, the defendant filed an interlocutory application under Order XVII Rules 1 and 2 of the Code of Civil Procedure seeking adjournment of the matter for one month on the ground that the mother of the senior counsel was unwell. The matter stood adjourned. As the facts would further unfold, the defendant filed I.A. No.9 under the very same provision seeking adjournment on the ground that the counsel engaged by him was not keeping well. I.A. No.10 was filed seeking adjournment for one month on the ground that the senior counsel was out of station. I.A. No.11 was filed on the plea that the defendant was unable to get certified copies of 'P' series documents. The fifth application, i.e., IA No.12 was filed on the similar ground. The incurable habit continued and I.A. no.13 was filed seeking adjournment on the ground that the counsel was busy in the marriage ceremony of a relative. And, the matter stood adjourned. The proceedings in the suit got arrested as if "time" had been arrested. Despite filing of so many interlocutory applications, the defendant remained indefatigable with obsessed consistency and again filed I.A. No.14 on the ground that certified copies were required by her. Thereafter, I.A. No.15 was preferred to recall PW-1 for cross-examination on the foundation that on the previous occasion, the senior counsel who was engaged by the defendant was busy in some other court. The learned trial Judge, hoping that all his owe would be over and the disease of adjournment affecting the marrows of litigation would be kept at bay, allowed the said application on 27.5.2013 subject to payment of costs of Rs.800/-.

3. We must state here that the learned trial Judge was in total illusion, for the defendant-petitioner had some other design in mind. We are prompted to say so, had the story ended there, possibly the trial Court's assessment of phenomenon would have been correct and the matter would not have travelled to this Court. But it was not to be so. In spite of the court granting

adjournment subject to payment of costs, the defendant chose not to cross-examine the witness and continued filing interlocutory applications forming the subject matters of I.A. Nos.16, 17, 19, 20 and 21 and the ordeal of the plaintiff, a septuagenarian, continued. The difficulties faced by an old man when he is compelled to come to Court so many times to give evidence can be well imagined. In spite of this, the trial court adjourned the matter to 3.10.2015. Notwithstanding the unwarranted indulgence shown, the defendant remained adamant and thought it wise not to participate in the suit. On 3.10.2015, though the witness was present, neither the defendant nor her counsel turned up. The trial Court posted the suit for defendant's evidence and adjourned the matter. After the aforesaid order came to be passed, on 22.2.2016 IA No.22 of 2016 was filed seeking further cross-examination of the plaintiff. The said prayer was declined by the trial court with costs of Rs.1,000/-.

4. Grieved by the aforesaid order passed by the learned trial Judge, the defendant preferred, W.P. No.36022 of 2016 (GM-CPC) before the High Court of Karnataka at Bangalore and the learned Single Judge, vide order dated 14.07.2016 recorded the facts, placed reliance on K.K. Velusamy v. N. Palanisamy,(2011) 11 SCC 275 and held as follows :-

> 6. The impugned order is a narration of classic case of abuse of process of law. Trial Court has rejected the said application by narrating in detail the conduct of petitioner - defendant . Hence, there is no error in the order passed by the Trial Court".

Eventually, the High Court dismissed the writ petition without imposition of any costs.

5. We have heard, Mr. Ashwin K. Kotemath, learned counsel for the petitioner. We have narrated the facts in great detail so that what we have said in the beginning with regard to the abuse of the process of court gets fortified.

6. In **K.K. Velusamy**(supra), while dealing with the power of the Court under Order XVIII Rule 17, this Court held that:-

> "9. Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court

to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. [Vide **Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate- (2009) 4 SCC 410].**

10. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in- chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either *suo moto*, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

And again:-

19. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be *bona fide* and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.

x x x x x

21. Ideally, the recording of evidence should be continuous, followed by arguments, without any gap. Courts should constantly endeavour to follow such a time schedule. The amended Code

> expects them to do so. If that is done, applications for adjournments, re-opening, recalling, or interim measures could be avoided. The more the period of pendency, the more the number of interlocutory applications which in turn add to the period of pendency.

7. We have referred to the said paragraphs to show the purpose of filing an application under Order XVIII Rule 17 of the Code. We may add that though in the said decision this Court allowed the appeals in part, the fact situation, the conduct of the party and the grievance agitated were different. The Court also thought it apposite to add a word of caution and also laid down that if the application is mischievous or frivolous, it is desirable to reject the application with costs.

8. In this context, we may fruitfully refer to **Bagai Construction Through its proprietor Lalit Bagai v. Gupta Building Material Store,** (2013) 14 SCC 1 In the said case the Court had expressed its concern about the order passed by the High Court whereby it had allowed the application preferred under Order XVIII Rule 17 that was rejected by the trial court on the ground that there was no acceptable reason to entertain the prayer. Be it stated, this Court set aside the order passed by the High Court.

9. In the said case, it has also been held that it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. That apart, it has also been held that the Courts should constantly endeavour to follow such a time schedule so that the purpose of amendments brought in the Code of Civil Procedure are not defeated. Painfully, the Court observed:-

> **"…….** In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial Court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in

> order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC."

10. In the case at hand, as we have stated hereinbefore, the examination-in-chief continued for long and the matter was adjourned seven times. The defendant sought adjournment after adjournment for cross-examination on some pretext or the other which are really not entertainable in law. But the trial Court eventually granted permission subject to payment of costs. Regardless of the allowance extended, the defendant stood embedded on his adamantine platform and prayed for adjournment as if it was his right to seek adjournment on any ground whatsoever and on any circumstance. The non-concern of the defendant-petitioner shown towards the proceedings of the Court is absolutely manifest. The disregard shown to the plaintiffs age is also visible from the marathon of interlocutory applications filed. A counsel appearing for a litigant has to have institutional responsibility. The Code of Civil Procedure so command. Applications are not to be filed on the grounds which we have referred to hereinabove and that too in such a brazen and obtrusive manner. It is wholly reprehensible. The law does not countenance it and, if we permit ourselves to say so, the professional ethics decries such practice. It is because such acts are against the majesty of law.

11. In this context, we may profitable reproduce a passage from **Shiv Cotex v. Tirgun Auto Plast (P) Ltd., (2011) 9 SCC 678** wherein it has been stated that it is sad, but true, that the litigants seek and the courts grant adjournments at the drop of a hat. In the cases where the Judges are little proactive and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. The court has further laid down that it is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further.

12. In **Noor Mohammed v. Jethanand,(2013) 5 SCC 202** commenting on the delay caused due to dilatory tactics adopted by the parties, the Court was compelled to say:-

> "In a democratic set-up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith in the system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect-potentiality to bring in a state of

> cataclysm where justice may become a casualty. A litigant expects a reasoned verdict from a temperate Judge but does not intend to and, rightly so, to guillotine much of time at the altar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right. This right can be fully ripened by the requisite commitment of all concerned with the system. It cannot be regarded as a facet of Utopianism because such a thought is likely to make the right a mirage losing the centrality of purpose. Therefore, whoever has a role to play in the justice-dispensation system cannot be allowed to remotely conceive of a casual approach."
>
> And, again:-
>
> "Thus, from the aforesaid, it is clear as day that everyone involved in the system of dispensation of justice has to inspire the confidence of the common man in the effectiveness of the judicial system. Sustenance of faith has to be treated as spinal sans sympathy or indulgence. If someone considers the task to be Herculean, the same has to be performed with solemnity, for faith is the "elan vital" of our system."

13. In the case at hand, it can indubitably be stated that the defendant-petitioner has acted in a manner to cause colossal insult to justice and to the concept of speedy disposal of civil litigation. We are constrained to say the virus of seeking adjournment has to be controlled. The saying of Gita "Awake! Arise! Oh Partha" is apt here to be stated for guidance of trial courts.

14. In view of the aforesaid analysis, we decline to entertain the special leave petition and dismiss it with costs which is assessed at Rs.50,000/- (Rupees fifty thousand only). The costs shall be paid to the State Legal Services Authority, Karnataka. The said amount shall be deposited before the trial Court within eight weeks hence, which shall do the needful to transfer it to the State Legal Services Authority. If the amount is not deposited, the right of defence to examine its witnesses shall stand foreclosed.

SLP dismissed.

2016 (II) ILR - CUT- 479

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

W.P.(C) NO. 10063 OF 2015

THE MANAGEMENT OF
M/S PARADEEP PHOSPHATES LTD. .....Petitioner

.Vrs.

GOVT. OF INDIA & ORS. .....Opp. Parties

CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970 –S.10

Abolition of contract labour – It is within the exclusive domain of the appropriate Government – Such Government may after "Consultation" with the central Board or state Board, as the case may be, Prohibit employment of contract labour in any establishment by notification in the official Gazette – However, the "consultation" must be conscious, effective and the notification is to be issued when conditions required U/s. 10(1) & (2) are satisfied.

In this case the Petitioner-Company challenged the notification Dt. 20.04.2015 of the State Government for abolition of contract labour in fifteen specified areas of the petitioner-company in the absence of recommendation by the State Board – Earlier recommendation made by the State Board Dt. 29.07.1997 for abolition of contract labour in sixteen specified areas of the petitioner-company wherein the State Government vide notification Dt. 28.04.2000 abolished contract labour in one of the sixteen areas cannot be treated as consultation with the State Board prior to passing of the impugned notification Dt. 20.04.2015 and the State Government ought to have consulted the State Board afresh – There is also no indication in the impugned notification/order that factors required U/s. 10(2) of the Act was considered by the State Government before issuance of the said notification – Held, the impugned notification Dt. 20.04.2015 has not been issued in accordance with law, hence quashed – Matter is remanded to the State Government to pass fresh order in accordance with law. (Paras 16 to 22)

Case Laws Referred to :-

1. AIR 1991 SC 672 : Orient Paper and Industries Ltd. V. State of Orissa.
2. AIR 1991 SC 558 : Narcotics Control Bureau v. Kishan Lal.
3. (2005) 2 SCC 145 : In Iridium India Telecom Ltd. V. Motorola Inc.
4. AIR 2001 SC 2856 : Satyanarayan Sharma v. State of Rajasthan
5. (2008) 7 SCC 203 : Andhra Bank v. Andhra Bank Officers.

6. (2003) 4 SCC 239 : High Court of Judicature for Rajasthan v. P.P. Singh
7. (2002) 8 SCC 1 : Justice K.P. Mohapatra v. Sri Ram Chandra Nayak
8. (2001) 3 SCC 170 : L & T McNeil Ltd. V. Govt. of T.N.,

For Petitioners : M/s. Narendra Kishore Mishra, Sr. Advocate
N.K.Mishra,A.K.Ray,A.Mishra,
P.Dash and S.Pradhan, Advocates.

For Opp.Parties : Mr. Aurovinda Mohanty, C.G.C.
Ms. Savitri Ratho, Addl. Govt. Adv.
M/s S.K. Mishra and S.S. Sahoo,

Date of Judgment : 20.07.2016

JUDGMENT

VINEET SARAN, C.J.

The only question involved in this writ petition is with regard to abolition of contract labour in fifteen specified areas of functioning by the petitioner company, Paradeep Phosphates Limited (PPL).

2. This case has a chequered history. Very briefly, the facts are that the petitioner company was established in the year 1981 as a joint venture company of Government of India and Government of Nauru. In 1990, the company came to be fully owned by the Government of India. Thereafter in the year 2002, the Government of India disinvested 74% of shares and consequently the company was privatized.

3. The question of abolition of contract labour started in the year 1997, when on 29.07.1997, a report regarding the same was submitted by the State Advisory Contract Labour Board (for short "State Board") recommending prohibition of contract labour in sixteen specified areas of functioning by the petitioner establishment. By notification dated 28.04.2000, the State Government abolished contract labour in one of the sixteen areas, i.e., DAP plant of the petitioner company, and did not exercise its power of abolishing contract labour in the remaining specified fifteen areas.

The abolition of contract labour in DAP plant was challenged by the petitioner company, and the act of the State-opposite parties in not abolishing the contract labour in other fifteen specified areas was challenged by the Mazdoor Union, before this Court by filing separate writ petitions. The writ petition of the petitioner company for quashing the notification dated 28.04.2000, was dismissed, which order was affirmed by the Supreme Court.

The matter regarding not notifying abolition of contract labour in fifteen specified areas was remanded to the State Government by the common judgment dated 24.06.2003 of the High Court passed in OJC No. 2751 of 2000 and 7382 of 2001. Subsequently, another notification dated 05.11.2004 was issued by the State Government refusing to abolish contract labour system in the fifteen left out areas of the petitioner company. Challenging the same, the Mazdoor Union filed W.P.(C) No. 13791 of 2005, and a Division Bench of this Court, while allowing the writ petition, by order dated 05.07.2012, quashed the said notification dated 05.11.2004, and remanded the matter back to the State Government to take a fresh decision as per the observations made in the said order, by ignoring the report submitted by the extra-legal committee constituted by the State Government, and by giving due weightage to the recommendation made by the State Board. The said order was challenged by the petitioner company in S.L.P.(C) No. 31360 of 2012, which was finally dismissed by the Apex Court on 15.07.2014.

Thereafter, on 20.04.2015, another notification (Annexure-10) has been issued by the State Government providing for abolition/prohibition of contract labour in the jobs/processes in the fifteen specified areas of the petitioner company which, though recommended by the State Board, had not been notified earlier. Challenging the said notification, this writ petition has been filed.

4. We have heard Sri Narendra Kishore Mishra, learned Sr. Counsel along with Sri Nitish Kumar Mishra, learned counsel appearing for the petitioner company, as well as Ms. Savitri Ratho, learned Addl. Govt. Advocate appearing for the State opposite parties and Sri Sanjay Kumar Mishra, learned counsel appearing for opposite party no.5-Paradeep Phosphates Mazdoor Union, and perused the records. Pleadings between the parties having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

5. For proper appraisal of the issues involved in this case, we would like to extract the impugned notification/order as well as relevant Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 (for short "Act 1970").

The notification dated 20.04.2015 issued by the Govt. of Odisha in Labour & ESI Department reads thus:

"GOVERNMENT OF ODISHA
LABOUR & E.S.I. DEPARTMENT

***

NOTIFICATION

Bhubaneswar dated 20th April, 2015

No. LL-II-CHL-2/13 3464/LESI, in exercise of the powers conferred by sub-section (1) of section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 (37 of 1970), the State Government after consultation with the State Advisory Contract Labour Board having regard the conditions of work and benefits provided for and other relevant factors in relation to the contract labour in the establishment mentioned in column (2) of the Schedule below, do hereby prohibit the employment of contract labour in the jobs and processes specified against such establishment in column (3) thereof.

Schedule

Sl. No.	Name of the Establishment	Name of the Jobs/Processes
(1)	(2)	(3)
1.	M/s. Paradeep Phosphate Limited, Paradeep	1. Bagging, stitching, counting and dispatch of packets by the rake including loading of fertilizer packets, platform tally work and staking in the bagging plant. 2. Opening and closing of valves in Off-site Plant. 3. Cleaning, House keeping, Draining in inside the Sulphuric Acid Plant(SAP) 4. Cleaning in Phosphoric Acid Plant (PAP) 5. Maintenance in Sewerage Treatment Plant (STP) 6. Railway Track Maintenance work 7. Di-Ammonia Phosphates (DAP) Spillage and material feeding works. 8. Port operation Reclaiming and stacking work 9. Sulphuric Acid Plant (SAP), Di-Ammonia Phosphates (DAP), Spillage Shifting works. 10. Sweeping and Cleaning inside the factory premises. 11. Drain Cleaning work. 12. Mechanical Maintenance work. 13. Instrument maintenance including repair of broken/damaged tools. 14. Water Treatment Plant (WTP) Painting, Air conditioner work, Plumbing works and mechanical work. 15. Fire and Safety Services.

By order of the Governor
Sd/-
Principal Secretary to Government"

Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 is quoted hereunder:

> "**10. Prohibition of employment of contract labour** –(1) Notwithstanding anything contained in this Act, the appropriate Government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit, by notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment.
>
> (2) Before issuing any notification under sub-section(1) in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors, such as –
>
> (a) whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment;
>
> (b) whether it is of perennial nature, that is to say, it is of sufficient duration, having regard to the nature of industry, trade business, manufacture or occupation carried on in that establishment;
>
> (c) whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto;
>
> (d) whether it is sufficient to employ considerable number of whole time workmen.
>
> *Explanation* – If a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate Government thereon shall be final."

6. Mr.Narendra Kishore Mishra, learned Senior Counsel, appearing for the petitioner company, has submitted that the impugned notification dated 20.04.2015 is liable to be quashed for the following reasons:-

1). Impugned notification is devoid of reasons;

2). Petitioner was not afforded opportunity before issuance of notification;

3). There was no consultation with the State Board prior to issuance of the notification;

4). Directives issued by the Division Bench of this Court vide its order dated 05.07.2012 in W.P.(C) No. 13791 of 2005 have not been followed; and

5). Provisions of Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 have not been followed.

7. Ms. Savitri Ratho, learned Addl. Govt. Advocate appearing for the State opposite parties, as well as Sri S.K. Mishra, learned counsel appearing for the Mazdoor Union-opposite party no.5, have, however, submitted that while issuing the impugned notification, no reasons were required to be given, as the same would be contained in the records of the State Government. As regards opportunity of hearing to be provided to the petitioner, it is submitted that law does not require so. It is, however, submitted that notice was issued to the petitioner by the Labour Department on 31.10.2012, to which a reply was given by the petitioner on 20.12.2012 and, as such, there was sufficient compliance of the principles of natural justice. As regards non-consultation of the State Board prior to issuance of the impugned notification, it is submitted that there was no necessity for fresh consultation with the State Board, as the report of the State Board dated 29.07.1999 was already on record. Their further submission is that the directives of the High Court vide order dated 05.07.2012 as well as the provisions of Section 10 of the Act, 1970 have been complied with and, as such, according to the learned counsel for the opposite parties, this writ petition deserves to be dismissed.

8. Sub-section (1) of section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 begins with a *non obstante clause* -"notwithstanding anything contained in this Act". Such clause beginning with "notwithstanding anything contained in this Act" is appended to a section in the beginning, with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision of the Act. The interpretation of *non obstante clause* has been considered by the apex Court in **Orient Paper and Industries Ltd. V. State of Orissa,** AIR 1991 SC 672 and **Narcotics Control Bureau v. Kishan Lal,** AIR 1991 SC 558.

In **Iridium India Telecom Ltd. V. Motorola Inc,** (2005) 2 SCC 145, the apex Court held that the expression *non obstante clause* is equivalent to saying that in spite of the provision or Act mentioned in the said clause, the enactment following it will have its full operation or that the provisions embraced in the *non obstante clause* will not be an impediment for the operation of the enactment.

In **Satyanarayan Sharma v. State of Rajasthan,** AIR 2001 SC 2856, the apex Court held that "notwithstanding anything contained in this

Act" may be construed to take away the effect of any provision of the Act in which the section occurs but it cannot take away the effect of any other law.

9. Regulation or Abolition of Contract labour is governed by the Contract Labour (Regulation and Abolition) Act, 1970, which is a complete code in itself. The question as to whether the contract labour should be abolished or not, is within the exclusive domain of the appropriate government as provided under Section 10 of the Act. Therefore, the appropriate Government may, after **consultation** with the Central Board or, as the case may be, a State Board, prohibit, by notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment.

In **Andhra Bank v. Andhra Bank Officers,** (2008) 7 SCC 203, the apex Court held that "consultation" has to be meaningful. It must be conscious and effective consultation.

In **High Court of Judicature for Rajasthan v. P.P. Singh,** (2003) 4 SCC 239, the apex Court considered the meaning of Consultation as follows:

> "*The Terminology "consultation" used in Rule 15 having regard to the purport and object thereof must be given its ordinary meaning. In* ***Words and Phrases*** *(Permanent Edition, 1960, Vol.9 p.3) to "consult" is defined as "to discuss something together, to deliberate".* ***Corpus Juris Secundum*** *(Vol. 16-A, 1956 Edn., p. 1242) also says that the word "consult" is frequently defined as meaning "to discuss something together, or to deliberate". By giving an opportunity to consultation or deliberation the purpose thereof is to enable the Judges to make their respective points of view known to the others and discuss and examine the relative merits of their view. It is neither in doubt nor in dispute that the Judges present in the meeting of the Full Court were supplied with all the requisite documents and had full opportunity to deliberate upon the agenda in question."*

While interpreting the provisions contained under Section 3(1)(a) of the Orissa Lokpal and Lokayuktas Act, 1995 in **Justice K.P. Mohapatra v. Sri Ram Chandra Nayak,** (2002) 8 SCC 1, the apex Court held as follows:

> *"(1) Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the*

proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the in the Contract Labour (Regulation and Abolition) Act, 1970 ended purpose. Prior consultation in that behalf is mandatory."

In **L & T McNeil Ltd. V. Govt. of T.N.,** (2001) 3 SCC 170, the word "consultation", used under Section10(1) of the Contract Labour (Regulation and Abolition) Act, 1970, came up for consideration by the apex Court and it was held as follows:

"Consultation" does not mean concurrence. Where on the question of prohibition of employment of contract Labour the State Board recorded diverse views of the representatives of various interests but without reaching any decision recommended that the Government should take a decision in the matter, held, the requirement of consultation stood satisfied.

Consultation does not mean concurrence and the views of the Board are ascertained for the purpose of assisting the Government in reaching its conclusion on the matter one way or the other. In the present case, although no definite view was expressed by the Board, the fact that the Board had been consulted in the matter is indisputable."

10. In view of the meaning attached to "consultation" used under Section 10(1) of the Act of 1970, it does not need to be read as "concurrence". Therefore, in the context of the present case, where the question of prohibition of employment of contract labour is under consideration, the appropriate government has to make consultation with the State Board and then a decision has to be taken, then only the requirement of consultation would stand satisfied. However, to make the consultation purposeful and relevant, the same should be just before the decision is taken by the State Government.

11. Further as per sub-section (2) of Section 10 of the Act, the appropriate Government has to take into consideration the relevant factors as enumerated in clause (a) to clause (d) of the said sub-section. Notification is to be issued only when the conditions required under Section 10(1) and 10(2) of the Act, 1970 are satisfied. However, any notification issued contrary to the same, cannot be sustained in the eye of law.

12. As we have already indicated, the earlier recommendation made by the State Board on 29.07.1999 was duly considered by the State Government immediately thereafter on 28.04.2000, and instead of sixteen specified areas, for which recommendation was made by the State Board for abolition of contract labour, the State Government, vide notification dated 28.04.2000, accepted the recommendation for only one area, i.e., DAP plant of the petitioner, and impliedly rejected the recommendation of the State Board for the remaining areas.

13. Then, vide order dated 05.11.2004, the recommendation for abolition of contract labour with regard to fifteen specified areas was rejected by the State Government by giving reasons for the same. What we notice is that by the impugned notification dated 20.04.2015, no reason whatsoever has been given, and all that is mentioned is that the order has been issued after the consultation with the State Board, without there being any fresh consultation with the State Board after 29.07.1999.

14. In our view, when once the State Government had already rejected the recommendation dated 29.07.1999 made by the State Board by giving specific reasons vide order dated 05.11.2004, then if the said recommendation of the State Board was to be reconsidered and accepted, then the least that was required is that adequate reasons should have been given to counter the reasons given in the order dated 05.11.2004 whereby recommendation of the State Board had been rejected. The same are patently lacking in the present case. The submission of the opposite parties that the reasons would be in the records of the Government, is not worthy of acceptance, as the opposite parties had sufficient opportunity to place the same, either by way of annexing the relevant documents along with the counter affidavit, or by producing the records, which both have not been done.

15. The next issue relates to providing of opportunity to the petitioner before passing of the impugned order/ notification. What we notice is that the communication dated 31.10.2012 issued by the State Government was merely a query which was made to the petitioner, to which a reply was given on 20.12.2012. However, it does not appear that any specific opportunity was given to the petitioner as to why the contract labour should be abolished in the fifteen specified areas of its establishment. While passing the order dated 05.07.2012, a Division Bench of this Court had specifically observed that the earlier notification was bad as the Mazdoor Union was not given opportunity prior to the issuance of that notification. If the Mazdoor Union

was to be given opportunity before issuance of the notification, then, as a natural consequence, the employer also ought to be given adequate opportunity, which apparently has not been afforded in the present case.

16. Regarding the question of consultation with the State Board prior to passing of the impugned notification, though it has been argued that the earlier recommendation of the State Board dated 29.07.1999 was sufficient for the State Government to issue the notification, however, in the present context, where the notification was being issued sixteen years after the recommendation was made by the State Board, which had already been rejected by the State Government on 05.11.2004, then fresh consultation, even if it may not be mandated by law, ought to have been made with the State Board, as circumstances and facts would have changed during the period of sixteen years, which would necessarily be required to be considered by the State Government while taking a fresh decision in the matter before reviewing/reconsidering its earlier decision dated 05.11.2004.

17. With regard to the question as to whether, after the judgment of the Division Bench of this Court dated 05.07.2012 and before issuance of the notification dated 20.04.2015, any meeting of the State Board was held or not, a query was made by the petitioner from the office of the Labour Commissioner, who is the Chairman of the State Board, and in response to such query made under the Right to Information Act, a reply was given on 05.08.2015 to the effect *"No meeting of Contract Labour Advisory Board was held during the period from 5.7.2012 to 20.04.2015. As such, notes of the proceeding of the Contract Labour Advisory Board during the aforesaid period is not available in this office"*. As such, it is evident that there was no consultation with the State Board prior to passing of the impugned notification/order dated 20.04.2015.

18. The directives of the High Court in its judgment dated 05.07.2012, as well as the provisions of Section 10 of the Act, 1970 are now required to be considered. The High Court, by order dated 05.07.2012, had only directed for a fresh decision in accordance with law, ignoring the report of the extra-legal committee, which had been considered while quashing the earlier order dated 05.11.2004, and the recommendation made by the State Board was also to be considered.

19. As we have already opined above, consultation with the State Board made in the year 1999 would not be sufficient in the context of the present case and the State Government ought to have consulted the State Board

afresh, as more than a decade and half had passed since the last consultation was made. Section 10 of the Act, 1970 specifically provides for certain factors to be considered, four of which have been mentioned in sub-section (2) of the said section extracted above. There is no indication in the impugned notification/order or in the counter affidavit of the State Government, that any of these factors was considered by the State Government before issuance of the said notification. The Division Bench of this Court, by order dated 05.07.2012, had also provided for certain directions to be complied with, as would be borne out from paragraphs 9 and 10 thereof, which also do not seem to have been complied.

20. In view of the reasons given hereinabove, we are of the view that the impugned notification dated 20.04.2015 has not been issued in accordance with law, which is liable to be quashed.

21. Ms. Savitri Ratho, learned Addl. Govt. Advocate appearing for the State-opposite parties has, at this stage, brought to our notice a judgment dated 26.08.2014 of the apex Court passed in Civil Appeals No. 8151 and 8152 of 2014. The said judgment relates to the notification dated 28.04.2000, whereby the abolition of contract labour was accepted in the area of DAP plant of the petitioner company The same, being different on facts, would not be relevant for the purpose of deciding the issues involved in the present case.

22. In the above conspectus, the writ petition stands allowed by quashing the notification dated 20.04.2015 (Annexure-10) and remanding the matter to the State Government for passing fresh order in accordance with law, and in the light of observations made herein above, as expeditiously as possible, preferably within a period of six months hence. There would be no order as to cost.

Writ petiton allowed.

2016 (II) ILR - CUT- 490

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

W.P.(C) NO. 5008 OF 2016

M/S. ESSEL MINING & INDUSTRIES LTD., BARBIL ……..Petitioner

.Vrs.

UNION OF INDIA & ORS. ……..Opp. Parties

(A) MINES AND MINERALS (DEVELOPMENT AND REGULATION) ACT, 1957 – S.4-A(4) r/w Rule 28(1) of the Mineral Concession Rules, 1960

Whether the orders passed by the Revisional Authority and the State Government with regard to automatic lapsing of the mining lease of the petitioner U/s. 4-A(4) of the Act 1957, read with Rule 28(1) of the Rules 1960 are justified ?

There can not be a deeming provision for automatic lapsing of lease, as the lease holder could have valid reasons for discontinuance, which could be because of an order passed by an authority or any other legal compulsion – Moreover the order of lapsing should not have been passed without giving an opportunity of hearing to the lease holder for compliance of the principles of natural justice.

In the present case an order of automatic lapsing of petitioner's lease passed on 20.08.2015 much after expiry of the period of two years of discontinuance of his mining lease i.e Dt. 22.11.2012, even though his application Dt. 06.05.2015 was pending before the State Government explaining the reasons for discontinuance of mining operation for the above period of two years with a prayer for revival of mining lease – Held, the impugned orders passed by the Revisional Authority Dt. 29.02.2016 and State Government Dt. 20.08.2015 are quashed, leaving it open to the State Government to pass necessary orders after giving opportunity of hearing to the petitioner.

(Paras 12 to 17)

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

Order passed by statutory authority – How to judge its validity – When a statutory authority makes an order based on certain grounds, its validity must be judged basing on the reasons assigned in the order itself, which can not be supplemented by fresh reasons in the shape of affidavit or otherwise.

In this case an order of automatic lapsing of petitioner's lease passed by the authority on 20.08.2015 without explaining the reasons therein – Held, subsequent explanation given by the authority in the

counter affidavit justifying the order Dt. 20.08.2015 cannot sustain in the eye of law. (Para 14)

Case Laws Referred to :-

1. AIR (39) 1952 SC 16 : Commissioner of Police, Bombay v. Gordhandas Bhanji.
2. AIR 1978 SC 851 : Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others.

For Petitioner : Mr. P. Chidambaram, Senior Advocate,
Mr. L.N. Rao, Senior Advocate,
Mr. Manas Mohapatra, Senior Advocate,
M/s.V.Narasingh, S.Das & S.Devi

For Opp. Parties : Ms. S. Ratho, Addl. Govt. Advocate
Mr. Debendra Kumar Sahoo.

Date of Judgment : 05.08.2016

JUDGMENT

VINEET SARAN, CJ.

By means of this writ petition the petitioner, which is a company carrying on mining operations, has assailed the order dated 29.02.2016 passed by the Revisional Authority under Section 30 of the Mines and Minerals (Development and Regulation) Act, 1957 [for short, "Act 1957"] read with Rule 55 of the Mineral Concessions Rules, 1960 [for short, "Rules 1960"] whereby the order dated 20.08.2015 passed by the State Government, declaring the mining lease of the petitioner to have lapsed under Rule 28(1) of the Rules 1960, has been affirmed.

2. The brief facts of the case are that the petitioner was initially granted mining lease on 14.09.1955 for a period of 30 years, which was valid upto 13.09.1985. Prior to expiry of the period of thirty years, the petitioner had applied for renewal of its lease in accordance with the provisions of the Act and Rules, which was renewed for a period of 20 years, i.e., from 14.09.1985 to 13.09.2005. Although there is said to be some dispute with regard to reduction of mining area, but since it is not an issue in this petition, we are not considering the same. Prior to one year of expiry of the period of renewal, which was up to 13.09.2005, the petitioner had applied for second renewal on 02.09.2004, which application remained pending, and by virtue of the provisions of Rule 24-A(6) of the Rules 1960, the lease was deemed to have been renewed as no order was passed by the State Government on the pending renewal application.

3. In view of the said position of law, it is not disputed that the petitioner continued its mining operation on the basis of its pending application for renewal of lease, till 22.11.2012, on which date the Divisional Forest Officer, Keonjhar, directed for suspension of mining operations. For the aforesaid reason, the mining operations of the petitioner remained suspended/ discontinued for over two years. Rule 28(1) of the Rules 1960 provides that on discontinuance of mining operations by a lease holder for a period exceeding two years, the State Government shall declare the mining lease as lapsed.

4. After two years of discontinuance of mining operations from 22.11.2012, even though no order of lapsing had been passed by the State Government, the petitioner, on 06.05.2015, filed an application under Rule 28-A of the Rules 1960 for revival of the lease, giving reasons for discontinuance of mining operations for over two years. Although such application remained pending, the State Government on 20.08.2015 passed an order declaring lapsing of the mining lease of the petitioner, retrospectively with effect from 22.11.2014, i.e. immediately after two years of the suspension of the mining operations, which was on 22.11.2012. Aggrieved by the said order, the petitioner filed a Revision under Section 30 of Act 1957 within the stipulated time. Since the same was not being decided because the Revisional Authority was not functioning, the petitioner filed a writ petition before the Delhi High Court, wherein a direction was given to dispose of the revision within a stipulated time. Pursuant thereto, by order dated 29.02.2016, the Revisional Authority passed an order affirming the order of the State Government dated 20.08.2015. Challenging the said orders, this writ petition has been preferred.

5. We have heard Shri P. Chidambaram, learned Senior Counsel appearing along with Shri V. Narasingh, learned counsel for the petitioner, as well as Miss Savitri Ratho, learned Addl. Government Advocate appearing for the contesting opp. party no.3 – State of Odisha and Shri D.K. Sahoo, learned counsel for the Union of India-opp. parties 1 and 2, and with consent of the learned counsel for the parties, this writ petition is being disposed of at the stage of admission.

6. The brief submission of the learned Senior Counsel appearing for the petitioner, is that in view of the judgment of the Apex Court dated 04.04.2016 in the case of ***Common Cause v. Union of India*** passed in Writ Petition (Civil) Nos.114 of 2014, there cannot be an automatic lapsing of a

mining lease. It is contended that prior to passing of an order under Section 4-A(4) of the Act 1957, read with Rule 28(1) of the Rules 1960, the petitioner ought to have been given opportunity, and the order of lapsing should not have been passed without complying with the principles of natural justice, which has not been done in the present case. It has also been submitted, that in view of the fact that the order of automatic lapsing of lease was passed on 20.08.2015, which was after the petitioner had filed an application dated 06.05.2015 for revival of its lease, the State Government ought to have considered the reasons given therein for non-operation of the mining, prior to declaring the lease to have lapsed automatically under Rule 28(1) of the Rules 1960 with retrospective effect from 22.11.2014.

7. *Per contra*, learned Addl. Govt. Advocate appearing for the State has submitted, that the question of granting any opportunity of hearing would arise only when an application had been filed by the petitioner under Section 4-A(4) of the Act 1957 read with Rule 28(2) of the Rules 1960 and, according to the learned counsel, in the facts of the present case, since it is not disputed that mining operation had been discontinued for over two years, the same had automatically lapsed by virtue of law, immediately after the period of two years of discontinuance. As regards the application dated 06.05.2015 filed by the petitioner under Rule 28-A of the Rules 1960, it has been contended that the same was to be considered only after the order of lapsing had been passed, as the question of revival would arise only thereafter and, as such, the said application was not to be considered while passing of the order dated 20.08.2015.

8. For proper appraisal of the case, the relevant provisions of the Act 1957 and the Rules 1960 are reproduced below:

> ***Act of 1957:***
> *"**Section 4-A**: Termination of prospecting licences or mining leases.*
>
> *(1) xx xx xx*
> *(2) xx xx xx*
> *(3) xx xx xx*
>
> ***(4)** Where the holder of a mining lease fails to undertake mining operations for a period of [two years] after the date of execution of the lease or, having commenced mining operations, has discontinued the same for a period of [two years], the lease shall lapse on the expiry of the period of [two years] from the date of execution of the lease or, as the case may be, discontinuance of the mining operations:*

Provided that the State Government may, on an application made by the holder of such lease before it lapses and on being satisfied that it will not be possible for the holder of the lease to undertake mining operations or to continue such operations for reasons beyond his control, make an order, within a period of three months from the date of receiving of such application, subject to such conditions as may be prescribed, to the effect that such lease shall not lapse:

Provided further that such lease shall lapse on failure to undertake mining operations or inability to continue the same before the end of a period of six months from the date of the order of the State Government:

Provided also that the State Government may, on an application made by the holder of a lease submitted within a period of six months from the date of its lapse and on being satisfied that such non-commencement or discontinuance was due to reasons beyond the control of the holder of the lease, revive the lease within a period of three months from the date of receiving the application from such prospective or retrospective date as it thinks fit but not earlier than the date of lapse of the lease:

Provided also that no lease shall be revived under the third proviso for more than twice during the entire period of the lease."

xx xx xx

Rules 1960:

*"**Rule 24-A**: Renewal of mining lease.—*

(1) xx xx xx
(2) xx xx xx
(3) xx xx xx
(4) xx xx xx
(5) xx xx xx

***(6)** If an application for first renewal of a mining lease made within the time referred to in sub-rule (1) is not disposed of by the State Government before the date of expiry of the lease, the period of that lease shall be deemed to have been extended by a further period of two years or till the State Government passes order thereon, whichever is earlier:*
Provided that the leases where applications for first renewal of mining lease have bee n made to the State Government and which

have not been disposed of by the State Government before the date of expiry of lease and are pending for disposal as on the date of the notification of this amendment, shall be deemed to have been extended by a further period of two years from the date of coming into force of this amendment or till the State Government passes order thereon or the date of expiry of the maximum period allowed for first renewal, whichever is the earliest:

Provided further that the provisions of this sub-rule shall not apply to renewal under sub-section (3) of Section 8 of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957)"

(7) xx xx xx
(8) xx xx xx
(9) xx xx xx
(10) xx xx xx

Rule 28: *Lapsing of leases :- (1) Subject to the other conditions of this rule where mining operations are not commenced within a period of one year (sic two years) from the date of execution of the lease, or is discontinued for a continuous period of one year (sic two years) after commencement of such operations, the State Government shall, by an order, declare the mining lease as lapsed and communicate the declaration to the lessee.*

(2) Where a lessee is unable to commence the mining operation within a period of one year (sic two years) from the date of execution of the mining lease, or discontinues mining operations for a period exceeding one year (sic two years) for reasons beyond his control, he may submit an application to the State Government, explaining the reasons for the same, at least three months before the expiry of such period.

(3) xx xx xx

(4) (to be reproduced here)

S.28-A(1): *Where a lessee is unable to commence the mining operations within a period of two years from the date of execution of the mining lease, or discontinues mining operations for a period of exceeding two years for reasons beyond his control, he may submit an application to the State Government explaining the reasons for the same at least within six months from the date of its lapse:*

Provided that the lease has not been revived under this provision for more than twice during the entire period of the lease.

(2) Every application under sub-rule (1) shall be accompanied by a fee of rupees 500.

(3) The State Government on receipt of an application made under sub-rule (1) and on being satisfied about the adequacy and genuineness of the reasons for non-commencement of mining operations or discontinuance thereof taking into consideration the matters specified in the Explanation to rule 28, pass an order reviving the lease."

9. As we have noticed above, the only question to be considered by this Court is the correctness of the orders passed by the Revisional Authority and the State Government with regard to automatic lapsing of the mining lease under Section 4-A(4) of the Act 1957, read with Rule 28(1) of the Rules 1960.

10. On a plain reading of sub-rule (1) of Rule 28, it could be understood that the lapsing of the mining lease would be automatic after discontinuance of the mining operation for a period of more than two years. However, the Hon'ble Supreme Court in the case of ***Common Cause*** (supra) has considered the question at length as to whether prior to passing of the order under Rule 28(1), the affected party is to be given opportunity or not. While considering the same, the Apex Court in paragraphs-29, 30 and 31 of the said judgment, has held as under:

"29. According to learned counsel, the only remedy available to such a leaseholder, to prevent the lease from lapsing is, to move an application, either prior to the expiry of the period of two years (of non-mining operations), or thereafter. The State Government on being satisfied, that mining operations were not discontinued as expressed above, for the reasons beyond the control of the leaseholder, could make an order, in the first contingency, that the lease would not lapse. And in the second contingency, that the lease would rematerialize.

30. It is not possible for us to accept, that vital vested rights in a leaseholder, can be curtailed without affording him an opportunity to repudiate the impression(s) of the competent authority, namely, that the leaseholder could not have (or had actually not) carried out mining operations, for a continuous period of two years. Our instant

contemplation, stands affirmed through Rule 28 of the Mineral Concession Rules. The same is reproduced below: "28. Lapsing of leases – (1) Subject to the other conditions of this rule where mining operations are not commenced within a period of one year (sic. two years) from the date of execution of the lease, or is discontinued for a continuous period of one year (sic. two years) after commencement of such operations, the State Government shall, by an order, declare the mining lease as lapsed and communicate the declaration to the lessee. (2) Where a lessee is unable to commence the mining operation within a period of one year (sic. two years) from the date of execution of the mining lease, or discontinues mining operations for a period exceeding one year (sic. two years) for reasons beyond his control, he may submit an application to the State Government, explaining the reasons for the same, at least three months before the expiry of such period. (3) Every application under sub-rule (2) shall be accompanied by a fee of Rs.200. (4) The State Government may on receipt of an application made under sub-rule (2) and on being satisfied about the adequacy and genuineness of the reasons for the non-commencement of mining operations or discontinuance thereof, pass an order before the date on which the lease would have otherwise lapsed, extending or refusing to extend the period of the lease: Provided that where the State Government on receipt of an application under sub-rule (2) does not pass an order before the expiry of the date on which the lease would have otherwise lapsed, the lease shall be deemed to have been extended until the order is passed by the State Government or until a period of two years, whichever is earlier. Explanation 1. - Where the non-commencement of the mining operations within a period of two years from the date of execution of mining lease is on account of – (a) delay in acquisition of surface rights; or (b) delay in getting the possession of the leased area; or (c) delay in supply or installation of machinery; or (d) delay in getting financial assistance from banks, or any financial institutions; or (e) ensuring supply of the mineral in an industry of which the lessee is the owner or in which he holds not less than 50% of the controlling interest, and the lessee is able to furnish documentary evidence supported by a duly sworn affidavit, the State Government may consider if there are sufficient reasons for non-commencement of operations for a continuous period of more than one year (sic. two years). Explanation 2. - Where the discontinuance

of mining operations for a continuous period of two years after the commencement of such operations is on account of – (a) orders passed by any statutory or judicial authority; or (b) operations becoming highly uneconomical; or (c) strike or lockout, and the lessee is able to furnish documentary evidence supported by a duly sworn affidavit, the State Government may consider if there are sufficient reasons for discontinuance of operations for a continuous period of more than one year (sic. two years). Explanation 3. - In case of mining lessee who has undertaken reconnaissance operations or in case of mining lessee whose capital investment in mine development is planned to be in excess of Rs. 200 crores and where the mine development is likely to take more than two years, the State Government shall consider it to be sufficient reason for non-commencement of mining operations for a continuous period of more than two years." (emphasis is ours) It is apparent from a perusal of sub-rule (1) extracted above, that the State Government is mandated to pass an order, and thereby, declare that a mining lease had lapsed. It is also the mandate of sub-rule (1) aforesaid, that such an order passed by the State Government, must be communicated to the leaseholder. On a conjoint reading of Section 4A(4) and Rule 28(1), we are satisfied to hold, that a mining lease under Section 4A(4) would not be deemed to have lapsed, till the State Government passes an order, declaring the mining lease to have lapsed, and further communicates the same to the leaseholder.

31 Rule 28(4) of the Mineral Concession Rules, caters to a situation wherein a leaseholder has moved an application, that his lease be permitted to continue even though mining operations could not be carried on (or had actually not been carried on) for a continuous period of two years. The proviso under Rule 28(4) is clear and categoric to the effect, that in cases where the State Government, on receipt of such application, does not pass an order, the lease would be deemed to have been extended, until an order was actually passed by the State Government. This further affirms, that lapse of a mining lease is not automatic. Despite non-operation of a mining lease under Rule 28(2), in case the leaseholder has moved an application for extension, on account of no commencement of mining operations, or on account of discontinuation of mining operations, the lease period shall be deemed to have continued till the date of passing the order,

or for a period of two years beyond the contemplated lease period (in case such an order is not passed). The above conclusions, rule out the submissions advanced on behalf of the non-applicant – petitioner and the Union of India, that lapse (contemplated under Section 4A(4) of the MMDR Act) is automatic, and that, for a lease to lapse, no express order needs to be passed."

11. While concluding, the Apex Court summarized the matter. The relevant Clause (vii) of the summary is also reproduced below:

"(vii) Based on the interpretation placed by us on Section 4A(4) of the MMDR Act, and Rule 28 of the Mineral Concession Rules, we can draw the following conclusions. Firstly, unless an order is passed by the State Government declaring, that a mining lease has lapsed, the mining lease would be deemed to be subsisting, up to the date of expiry of the lease period provided by the lease document. Secondly, in situations wherein an application has been filed by a leaseholder, when he is not in a position to (or for actually not) carrying on mining operations, for a continuous period of two years, the lease period will not be deemed to have lapsed, till an order is passed by the State Government on such application. Where no order has been passed, the lease shall be deemed to have been extended beyond the original lease period, for a further period of two years. Thirdly, a leaseholder having suffered a lapse, is disentitled to any benefit of the amended MMDR Act, because of the express exclusion contemplated under Section 8A(9) of the amended MMDR Act."

12. The Apex Court has considered the question of automatic lapsing at length, and has concluded that there cannot be a deeming provision for automatic lapsing of lease, as the lease holder could have valid reasons for discontinuance, which could be because of an order passed by an authority, or any other legal c ompulsion. In the facts of the present case, an order of automatic lapsing has been passed on 20.08.2015, much after expiry of the period of two years of discontinuance of mining lease (which was on 22.11.2014), and even after an application dated 06.05.2015 was pending before the State Government explaining the reasons for discontinuance of mining operation for the aforesaid period of two years, with the prayer for revival of mining lease of the petitioner.

13. The date, which has been taken into consideration for mining lease as non-operational, is 22.11.2012. The same was because of the reason that the D.F.O. had passed an order of suspension of mining operations. Considering

two years from that date and by merely stating in the impugned order dated 20.8.2015 that the mining lease lapses on expiry of 2 years, on 21.11.2014, without considering that the same was absolutely beyond the control of the petitioner, cannot be a valid ground for declaring the lease to have lapsed under Rule 28(1) of the Rules 1960. Instead of justifying the action on the basis of the order dated 20.08.2015 on the face of the documents itself, learned counsel for the opp. parties relies on the detailed explanation given in the counter affidavit, which is not the contents of the said order, that has been communicated to the petitioner.

14. The Apex Court in **Commissioner of Police, Bombay v. Gordhandas Bhanji,** AIR (39) 1952 SC 16 has held as follows:

> *"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."*

In **Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others,** AIR 1978 SC 851, the apex Court held as follows:

> *"When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."*

In view of the law laid down by the apex Court, as mentioned supra, subsequent explanation given in the counter affidavit justifying the order date 20.08.2015 passed in Annexure-1 cannot sustain in the eye of law, reason being the order impugned has to be adjudged on the basis of the reason assigned therein. No subsequent explanation by way of an affidavit filed by the opposite party should be taken into consideration to supplant the reasons for passing of such order.

15. Even if, for a moment, we assume that the show cause notice was not to be given (as has not been given in the present case), then too the explanation of the petitioner given in the application dated 06.05.2015 for discontinuance of mining operations after 22.11.2012 was well on record, which ought to have been considered, but has not been done so while passing the order dated 20.08.2015.

16. The order dated 29.02.2016 was passed by the Revisional Authority prior to passing of the judgment of the Apex Court in the case of ***Common Cause*** (supra). However, after the said judgment was brought to the notice of the same Revisional Authority in 56 other similar revisions pending before it, the Revisional Authority, in compliance with the aforesaid judgment in the case of ***Common Cause*** (supra), allowed the revisions and remanded the matter to the State Government for fresh decision. The operative portion of the order dated 11.05.2016 of the Revisional Authority, passed in 56 other similar revisions, is reproduced below:

> *"6. Notwithstanding the perceived understanding on lapsing provisions, with the Apex Court judgment, on the issue there is clarity on the lapsing framework and related process. In accordance with Apex court direction now it is clear position that lapsing is not an automatic provision and cause of discontinuation of mining operation has to be preceded by scrutiny and steps fulfilling the maxim of natural justice. In view of above discussion, the Impugned Orders listed in Annexure-A, need reconsideration to follow the directions provided in the said Apex court judgment. Therefore, all the Impugned Orders as list in Annexure-A are set aside herewith and remanded back to the State Government for suitable reconsideration in-line with the Hon'ble Apex court's direction on the provisions of lapsing expeditiously."*

17. In view of the aforesaid facts, and keeping in view the judgment of the Apex Court in the case of ***Common Cause*** (supra), we allow the writ petition and quash the order dated 29.02.2016 passed by the Revisional Authority, as well as the order dated 20.08.2015 passed by the State Government, leaving it open to the State Government to pass necessary orders after giving opportunity of hearing to the petitioner, and in the light of the judgment of the Apex Court in the case of ***Common Cause*** (supra). No order as to costs.

Writ petition allowed.

2016 (II) ILR - CUT- 502

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

W.P.(C) NO. 4895 OF 2016

KAKINADA SEAPORTS LTD. & ORS. .....Petitioners

.Vrs.

UNION OF INDIA & ORS. .....Opp. Parties

TENDER – Paradip Port Trust (PPT) invited tender for operating a berth of the Paradip Port – Both petitioners and O.P.Nos. 5 & 6 being consortium companies applied for the bid – Company of O.P.Nos. 5 & 6, "JSW Infrastructure Ltd. became the highest bidder and the contract awarded in their favour but the petitioners company "Kakinada Seaports Ltd." being the second highest bidder challenged the bid on the ground that O.P.Nos. 5 & 6 are not eligible for grant of such contract as they were already allotted a berth of the same "Dry Bulk" cargo in the immediate previous auction held on 29.05.2015 in view of paragraph 2.26 of the bid document and policy Dt. 02.08.2010 issued by the Government of India, preventing private sector monopoly in the major Ports – Interference with the policy of the Government is not within the domain of the Court unless the same is illegal, malafide or contrary to law – However, the restriction provided for in this case, is clear that one private berth operator in a port for a specified cargo will not be permitted to bid for the next (successive) berth for handling the same specified cargo in the same port – Held, acceptance of the bid of the opposite party-JSW Infrastructure Ltd. Dt. 29.02.2016 as well as the Letter of Intent issued in its favour by the PPT on the same date and agreement, if any, executed in pursuance there of, are quashed – PPT shall be at liberty to either accept the single remaining bid of the petitioner-Kakinada Seaports Ltd., after negotiating the price, which should not be less than the price offered by opposite party-JSW Infrastructure Ltd., or invite fresh bids for the berth in question, in accordance with law – The opposite party-JSW Infrastructure Ltd. Shall be entitled for refund of any amount deposited by it for participating in the tender process. (Paras 25 to28)

Case Laws Referred to :-

1. (2009) 7 SCC 651 : Villianur v. U.O.I.
2. (2009) AIR SCW 6985: State of Maharashtra v. Prakash Prahlad Patil.
3. (2002) 2 SCC 333 : Balco Employees Union v. Union of India.
4. AIR 2008 SC (Supp) 502 : Jayant Achyut Sathe v. Joseph Bain D'Souza.
5. 1994 AIR SCW 2048 : Premium Granites v. State of T.N.
6. (2016) 6 SCC 408 : Centre for Public Interest Litigation v.

Union of India.
7. AIR 2002 SC 1117 : Joseph Joseph v. State of Kerala.
8. AIR 2001 SC 3868 : Commissioner of Income-tax v. Anjuman M.H. Ghaswala.
9. AIR 2001 SC 3580 : Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal & Co.
10. (1998) 6 SCC 299 : Durga Oil Company v. State of Uttar Pradesh.
11. AIR 1994 SC 120 : Forest Range Officer v. P. Mohammed Ali.
12. (2007) 6 SCC 8 : Bharat Petroleum Corporation Ltd. v. Maddula Ratnavalli.
13. AIR 2007 SC 1971 : Oriental Insurance Co. Ltd. v. Brij Mohan.
14. (2008) 3 SCC 279 : New India Assurance Co. Ltd. v. Nusli Neville Wadia.
15. (2012) 1 SCC 762 : Ramesh Rout v. Rabindra Nath Rout.
16. 1993 Supp (3) SCC 97 : Saru Smelting (P) Ltd. V. CST .
17. (1993) 3 SCC 499 : Union of India vs. Hindustan Development Corporation.

For Petitioners : Mr. R.K.Rath, Sr. Adv.
Mr. Jaydeep Pal, B.K.Mishra, A.Dash & L.Dash

For Opp. Parties :Mr. R.K.Mohanty, Sr. Adv.
Mr. Partha Mukherjee, M.Chatterjee
Mr. Sanjit Mohanty, Sr. Adv.
Mr. I.A.Acharya, A.Dash, Mohit Agarwal.

Date of Judgment : 14.07.2016

JUDGMENT

VINEET SARAN, C.J.

This is a petition filed by a consortium of companies formed by the petitioners, which had jointly made a bid for operating a berth of the Paradip Port. On the Opposite parties No.5 and 6, which also formed a consortium of companies, having been found to be the highest bidder and Letter of Intent having been issued in their favour, the petitioners have approached this Court challenging the same, primarily on the ground that the consortium of companies of opposite parties No.5 and 6 was not eligible for grant of such contract.

2. Admitted facts of the case, on the basis of the pleadings of the parties, are that the opposite party-Paradip Port Trust (PPT) invited tenders for *"Mechanization of EQ-1, EQ-2 and EQ-3 berths at Paradip Port of 30 MTPA Capacity on BOT basis under PPP mode"* for a concession period of

Thirty (30) years. The operators eligible to bid, could be an individual company or a consortium of companies. In the present case, one consortium of companies is of petitioners no. 1,2 and 3 (herein after referred to as "Kakinada Seaports Ltd") and the other consortium of companies is of opposite parties no. 5 and 6 (hereinafter referred to as "JSW Infrastructure Ltd."). It is not disputed that paragraph – 2.26 of the bid document, i.e. Request for Qualification (RFQ) dated 31.10.2015 provided for *"Prevention of Private Sector Monopoly in Major Ports"*. The said para-2.26 of the RFQ states that policy dated 2nd August, 2010 relating to *"Policy for Preventing Private Sector Monopoly in the Major Ports"* would be applicable.

According to the petitioners, the opposite party - JSW Infrastructure Ltd. would not be eligible for participation in the bid/tender process for the berth in question of Paradip Port on account of the fact that their consortium company had successfully participated and were allotted a berth for the same 'Dry Bulk' Cargo in the immediate previous auction held on 29.05.2015.

3. Para-2.26 of the Request for Qualification dated 31.10.2015, as well as the relevant para-2 of the Policy for Preventing Private Sector Monopoly in Major Ports, dated 2nd August, 2010 are reproduced below:

RFQ dated 31.10.2015

"2.26 - ***Prevention of Private Sector Monopoly in Major Ports***

*Ministry of Shipping, Government of India vide its letter No.PD-24018/8/2009-PD.III dated 2nd August, 2010 has issued the policy (see Appendix VIII) to be followed by all Major Ports while awarding projects to private parties through Public Private Partnership (PPP) route so as to avoid private sector monopoly in the Major Ports. The aforesaid policy or any other, [*Issued by the Ministry of Shipping to avoid private sector monopoly in the Major Ports], applicable policy shall apply mutatis and mutandis to this Bidding Process and the authority shall be entitled to disqualify any bidder in accordance with the aforementioned policy."*

Anti Monopoly Policy dated 2.8.2010

"2. ***Policy***

If there is only one private terminal/berth operator in a port for a specific cargo, the operator of that berth or his associates shall not be allowed to bid for the next terminal/berth for handling the same cargo in the same port.

For the purpose of this policy, the terms

(i) ***"Operator"*** *includes consortium members of the bidder:*

(ii) "Associates" means, in relation to the Applicant/Consortium member, a person who controls, is controlled by, or is under common control with such Applicant/Consortium member (the Associate). As used in the definition, the expression "control" means, with respect to a person which is a company or corporation, the ownership, directly or indirectly or more than 50% (fifty percent) of the voting shares of such person and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person by operation of law.

(iii) "Berth" shall have the same meaning as "Wharf" given in Section 2 (za) of the MPT Act, 1963.

*(iv) "**Specific Cargo**" means (i) containers, (ii) liquid bulk, (iii) **dry bulk** or (iv) multipurpose/other general cargo.*

3. The policy shall be applicable with immediate effect and shall apply to Request for Qualification (RFQs) issued on or after this date.

4. It is also directed that the above provisions may be incorporated by the Major Ports in the Request for Qualification and Request for Proposal to give effect to the policy in relevant cases.

5. This issues with the concurrence of the Ministry of Law and Justice, Department of Legal Affairs and approval of Hon'ble Ministry Shipping."

(emphasis supplied)

4. In the light of the aforesaid policy, we have to examine the facts of the present case. It is not disputed that Paradip Port has 16 berths, out of which 13 are for Dry Bulk cargo and 3 for other specified cargoes. It is also not disputed that out of these 13 berths, 12 are operational or under construction which are already allotted, and the 13th one, which has now been put to auction, is the one in question. It is also admitted that out of 12 berths of dry bulk cargo, which have already been auctioned and settled, 7 are being operated by Paradip Port Trust itself, and the remaining five by the private operators, namely, Paradip Phosphates Ltd., IFFCO, ESSAR Bulk Terminal Paradip Pvt. Ltd., Essar Paradip Terminals Ltd. and JSW Paradip

Terminal Pvt. Ltd. The last one operator is of the same consortium of companies as the opposite party consortium.

5. In response to the Tender Call Notice in question and the RFQ dated 31.10.2015, four operators had participated, including the petitioner-Kakinada Seaports Ltd. and the opposite party-JSW Infrastructure Ltd. All the four operators qualified in the technical bid, but the other two did not give their financial bid and thus, it was the petitioner-Kakinada Seaports Ltd. and opposite party-JSW Infrastructure Ltd which had given their financial bid and were the only ones to be considered for being awarded the contract. The financial bids were opened on 25.2.2016, whereafter it was found that the opposite party-JSW Infrastructure Ltd had offered 31.7% revenue sharing, whereas the petitioner had offered 28.7% revenue sharing. The tender of opposite party-JSW Infrastructure Ltd., being for higher price, was accepted on 29.02.2016 and Letter of Intent (LOI) issued on the same date.

6. The case of the petitioner-Kakinada Seaports Ltd. is that it was for the first time on 25.02.2016 that they learnt that the opposite party-JSW Infrastructure Ltd. was participating in the tender process, and according to the petitioner-Kakinada Seaports Ltd., opposite party-JSW Infrastructure Ltd. was not qualified, as its consortium company had got the immediate last contract for the Dry Bulk berth. The petitioner-Kakinada Seaports Ltd. thus orally objected to the eligibility of opposite party- JSW Infrastructure Ltd. on the day of opening of financial bids. The written objection was submitted by the petitioners on 27.02.2016, on which, according to the petitioner-Kakinada Seaports Ltd., no orders were passed and, even then, the bid of the opposite party-JSW Infrastructure Ltd. was accepted on 29.02.2016.

7. In the backdrop of the aforesaid facts, we have now to consider the question of eligibility of opposite party-JSW Infrastructure Ltd. in participating in the tender process. It is not disputed by the parties that the opposite party-JSW Infrastructure Ltd. is a consortium belonging to the same consortium as JSW Paradip Terminal Private Ltd. and as such, for the purpose of this case, they are to be considered as one consortium of companies. It is also admitted that the immediate earlier tender, invited for Dry Bulk berths, was finalized on 29.5.2015 in favour of JSW Paradip Terminal, which is of the same group of consortium of companies, i.e. opposite party-JSW Infrastructure Ltd. The question to be considered by us is that in such facts, could the opposite party-JSW Infrastructure Ltd. participate in the tender process for operating the Dry Bulk berth in question,

when in the just earlier tender called for Dry Bulk berth, it was a successful bidder and contract has already been awarded in its favour.

8. We have heard Sri R.K. Rath, learned Senior Counsel appearing along with Mr. J. Pal, learned counsel for the petitioners as well as Sri A.K. Bose, learned Asst. Solicitor General of India for the formal opposite party No.1-Union of India, Sri R.K. Mohanty, learned Senior Counsel along with Mr. P. Mukherjee, for the contesting opposite parties No.2, 3 and 4-Paradip Port Trust and Mr. Sanjit Mohanty, learned Senior Counsel appearing along with Mr. I.A. Acharya, learned counsel for the private opposite parties No.5 and 6, and perused the record. Pleadings between the parties have been exchanged, and with consent of learned counsel for the parties, this writ petition is being disposed of finally at this stage.

9. On the basis of the above pleadings, this Court has to first consider the policy for preventing private sector monopoly in Major Ports, issued by the Government of India, Ministry of Shipping dated 2nd August, 2010, as the crux of the matter revolves around the said policy. The question of interfering with the policy is not within the domain of the Court. In **Villianur v. U.O.I.** (2009) 7 SCC 651, the apex Court held that unless any illegality is committed in execution of the policy or the same is contrary to law or mala fide, a decision bringing about change in the policy with a change in Government, cannot per se be interfered with by the Court.

In **State of Maharashtra v. Prakash Prahlad Patil,** (2009) AIR SCW 6985, the apex Court held that the Courts cannot be called upon to undertake governmental duties and functions. Courts should not ordinarily interfere with a policy decision of the State. While exercising power of judicial review, the Court is more concerned with the decision making process than the merit of the decision itself. Similar view has also been taken in **Balco Employees Union v. Union of India** (2002) 2 SCC 333.

In **Jayant Achyut Sathe v. Joseph Bain D'Souza,** AIR 2008 SC (Supp) 502, the apex Court held that no interference is called for unless policy is contrary to law or mala fide or illegality is committed in its execution.

In **Premium Granites v. State of T.N.**, 1994 AIR SCW 2048, while considering the Court's power in interfering with the policy decision, the apex Court observed:

> "It is not the domain of the Court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular

> public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be.
>
> In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the court."

Similar view has been taken by the apex Court in its recent decision in the case of **Centre for Public Interest Litigation v. Union of India,** (2016) 6 SCC 408.

10. In view of the aforesaid, this Court considers it just and proper to take a decision on the basis of the policy as evolved by the Government, on its plain reading, giving a purposive interpretation, so that the aims and objects of the authority, which have been reflected in the policy, are achieved.

11. In **Joseph Joseph v. State of Kerala,** AIR 2002 SC 1117, **Commissioner of Income-tax v. Anjuman M.H. Ghaswala,** AIR 2001 SC 3868, **Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal & Co.,** AIR 2001 SC 3580 as well as in other plethora of decisions, the apex Court held that Rules of interpretation require that construction, which carries on objectives of the Statute, protects interest of the party and keeps the remedy alive, should be preferred, looking into the text and context of the Statute. It must be so as to further the ends of justice and not to frustrate the same. Construction given by the Court must promote the object of the Statute and serve the purpose, for which it has been enacted, and should not efface its very purpose.

In **Durga Oil Company v. State of Uttar Pradesh,** (1998) 6 SCC 299, the apex Court held that while interpreting the provisions of a statute or Rules, the purposive interpretation should always be borne in mind. Similar view has also been taken by the in **Forest Range Officer v. P. Mohammed Ali,** AIR 1994 SC 120.

In **Bharat Petroleum Corporation Ltd. v. Maddula Ratnavalli,** (2007) 6 SCC 8, **Oriental Insurance Co. Ltd. v. Brij Mohan,** AIR 2007 SC 1971 and **New India Assurance Co. Ltd. v. Nusli Neville Wadia,** (2008) 3 SCC 279, the apex Court held that the purpose of doctrine of purposive

construction may be taken recourse to for giving effect in full to the statutory provisions.

12. In view of the above, taking into consideration the policy for preventing private sector monopoly in Major Ports dated 2nd August, 2010 issued by the Government of India, Ministry of Shipping, this Court has not to examine the merits and demerits of the policy laid down by the Rule making body, rather, applying the principle of purposive construction to the same, has to give interpretation to the words employed to achieve the purpose of the policy itself, knowing fully well its power of judicial review to interfere with the policy decision framed by the Government.

13. We have already extracted the relevant para-2 of the policy dated 2nd August, 2010. In terms of the said policy, the petitioner-Kakinada Seaports Ltd. contends that the opposite party-JSW Infrastructure Ltd. would not be eligible to participate in the tender process in question. The first part of para-2 of the said policy, in clearer terms, relevant for the purpose of this case, could be read as: ***"If there is only one private berth operator in a port for dry bulk cargo, the operator of that berth cannot be allowed to bid for the next berth for handling the dry bulk cargo in the same port."***

14. As we have already mentioned above, there is no dispute about the fact that JSW Infrastructure Ltd. has participated in the bid/tender for the very next berth for handling Dry Bulk cargo in the same port, i.e., PPT. According to the petitioner-Kakinada Seaports Ltd., the anti monopoly policy has been framed by the Government of India to place a restriction on the allocation of berths in a port in favour of private operators. It is their case that, permitting one particular private operator to participate in the successive bid for the berth for the same Dry Bulk cargo in the same port, would amount to creation of monopoly and thus, the policy has to be interpreted to mean that no operator can be permitted to participate in the very next tender for operating the berth for handling Dry Bulk cargo. According to Sri Rath, learned Senior Counsel, monopoly would not mean exclusive rights, but substantial control over the berths of the Port for a specific cargo.

15. Per contra, Sri R.K. Mohanty and Sri Sanjit Mohanty, learned Senior Counsel representing the contesting opposite parties-Paradip Port Trust and JSW Infrastructure Ltd. respectively, have strenuously contended that the policy in question would apply only when there is *'only one private berth operator'* for the Dry Bulk cargo, whereas in the present case, there are

already four other private operators for Dry Bulk cargo at Paradip Port. It has been contended that monopoly would be there only when one company or private operator is permitted to operate the berth for a specific cargo and not when other private operators are already operating other berths for the same cargo. The contention is that the word 'only' in the first part of the policy has to be strictly considered to mean that when there is only one private berth operator in the port, then alone the second contract for the same type of berth cannot be awarded to such operator. According to learned counsel, the sentence starts with the word 'if', which would create a condition precedent for qualifying the phrase "only one private berth operator in the Port". His submission thus is that when there is a specific policy for awarding contract to operate a berth for a specific cargo, then the same should be strictly construed and complied, and that it would not be permissible to enlarge its scope, or giving it a different meaning.

16. In the light of the aforesaid submission made by the learned counsel for the parties, we have now to consider the interpretation of the words '***monopoly***', '***only***' and '***next***' in the context of this case.

17. In the strict sense, meaning of **monopoly**, as per the Oxford Dictionary would be "*the exclusive possession or control of the supply of or trade in a commodity or service*." As per the Collins Cobuild English Dictionary for *Advanced Learners, 'monopoly' would mean "(i) if a company, person, or state has a monopoly on something such as an industry, they have complete control over it, so that it is impossible for others to become involved in it. (ii) A monopoly is a company which is the only one providing a particular product or service.*" The Apex Court in the case of ***Union of India vs. Hindustan Development Corporation, (1993) 3 SCC 499*** has held that monopoly is the power to control prices or exclude competition from any part of the trade or commerce among the producers.

18. Thus, strictly speaking, there should be exclusivity for there to be monopoly. However, the same has to be interpreted in the facts and context of this case while considering the Policy of the Government of India dated 2.8.2010, to give it a purposive construction which fulfils the object of the policy.

19. The bid document, i.e., Request for Qualification speaks about preventing private sector monopoly in Major Ports. In the context of this case, monopoly, in our view, would not mean exclusivity but would be restrictive, so that no one operator gets an occasion to operate majority of the

Dry Bulk berth for the specific cargo. If the idea of the policy was to permit only one private operator to operate one berth, then in plain and simple words the policy would have said that no private operator would be permitted to operate another berth for the specified cargo in a port. Such is not the term laid down in the policy. However, it is also not stated in the policy that all berths of a specified cargo will not be given to one private operator. The restriction in the policy is that one private operator would not be allowed to participate in the next contract for a berth for handling the same cargo.

20. The submission of learned counsel for the opposite parties is that when there is **only** one private berth operator for a specified cargo then alone the private berth operator will not be permitted to participate in the **next** tender process. Such interpretation, if accepted, would, in our opinion, defeat the object and purpose of the policy.

In **Ramesh Rout v. Rabindra Nath Rout,** (2012) 1 SCC 762, the apex Court observed that the word "only" is ordinarily used as an exclusionary term and in ascertaining its meaning its placement is material, as also context in which the word is used.

In **Saru Smelting (P) Ltd. V. CST,** 1993 Supp (3) SCC 97, the apex Court explained that the expression "only" is very material for understanding the meaning of the entry.

21. The use of word "**next**" in the policy under consideration is also very material and has to be given a purposive meaning. The word "next" has been considered in **P. Ramanatha Aiyar's Advanced Law Lexicon,** 4th Edition at page 3240 as follows:

"The word "next" means nearest; closest; immediately following."

If the restriction in the policy was not for a private operator from being permitted to bid for the **next** berth for the same specified cargo, then it could have been simply mentioned that if there were more than one private operators for the same cargo in a port, then there would be no restriction for the private operators to bid for as many number of berths for the same cargo in a port. But such is not the language of the policy. Hence this Court is of the opinion that giving the word **next** a purposive meaning in the policy, restriction would be for one private operator from being allowed to bid for the next berth of the same cargo.

22. In our view, every policy has to be given a purposeful meaning in the context of the case. From a complete reading of the Policy in question, we can conclude that it is not exclusivity which is the purpose, but the intention is that there should be restriction in the allotment of berths for one specific cargo so that one operator may not get majority of the berths in a port.

23. We may explain the situation by way of an example. Say for instance, there are 15 berths of specific cargo in a port and are to be given to private operators in successive auctions. If the first berth is given to 'X', then as per the Policy, in the next auction for the second berth of the same cargo 'X' will not be permitted to participate. If we assume 'Y' gets the second berth, then as per the submission of the learned counsel for the opposite parties, the first operator i.e. 'X' would be eligible to participate in all other auctions for remaining 13 berths and could hypothetically operate the remaining 13 berths also, meaning thereby that out of 15 berths, the first operator 'X' could operate 14 berths in a port, which would come to 93% of the berths being operated by one operator.

24. The heading of the Policy may have mentioned **'monopoly'**, but in the body, said expression has not been used. Restriction for awarding berths of one specified cargo in a port has been provided for in the opening part of para-2 of the Policy which has to be interpreted by this Court. The essence of the Policy is to prevent any one private operator to monopolize the operations of the berths available at the Port. In the strict sense of the word 'monopoly' may mean exclusivity. However, what we find is that though the word 'monopoly' may have been used in the heading, but not in the Policy, and as such it would be a restrictive policy and for that reason, it has been provided that one operator of a berth shall not be allowed to bid for the next berth for handling the same cargo in the same port.

25. Applying the said meaning to para-2 of the policy, dated 2nd August, 2010, it is clear that it puts a restriction on the berth operators to bid for the immediately following berth for the same specified cargo. Therefore, it is clear that policy does not provide that one operator cannot get a second or more berths, but the only restriction provided for is that one operator cannot participate in successive auctions. As such, we are of the opinion, that the strict interpretation of the word 'monopoly' is not required to be given for the present Policy dated 2.8.2010. If such interpretation is given, it would make the said Policy unworkable and not further the ends of justice, and on the contrary it would defeat the object and purpose of the policy. We are also of the opinion that if two interpretations of the contents of a Policy are possible,

then one which makes the Policy effective and promotes the object of the Policy, should be accepted. We have already opined that the above Policy can be effective only if it is treated as restrictive policy and not taken as a Policy to do away the monopoly of any operator in the strict sense of the word.

26. In a similar case of ***ABG – LDA Bulk Handling Pvt. Ltd. v. Union of India*** (Writ Appeal (MD) No.1543 of 2011) decided on 12.01.2012, a Division Bench of the Madras High Court, while considering the same policy dated 2.8.2010, has held as follows:

> *"14. Learned Senior Counsel appearing for the appellant laid great emphasis on the words "next terminal / berth" signifying the point of time when RFQ would be called for, for the same cargo. According to him, "next terminal" does not mean the geographical position, but the point of time at which the bid is called for. We do not think such reasoning of the appellant / petitioner could find support either in the policy laid down by the Government of India as a general policy allowing private participation, or in the specific policy dated 02.08.2010. The anti-monopoly circular dated 02.08.2010, defines "specific cargo" to mean (1) container (2) liquid bulk (3) dry bulk or (4) multipurpose/other general cargo. In the context of the definition given to "specific cargo", a reading of the policy along with the definition of "specific cargo" thus, makes it clear that a private operator of a berth, handling specific goods, is not allowed to bid for the terminal handling the "same cargo" in the same port, meaning thereby that if there are more than one berth which are to deal with a particular cargo which is falling under a particular sub- heading under the definition of "specific cargo", the terminal or berth operator or his associate shall not have the chance to bid for the immediate next terminal handling the same cargo. As already pointed out in the preceding paragraphs, given the fact that the policy aims at promoting competitiveness to give better services to the users, monopolisation on the construction or the operation of a particular terminal handling the same cargo was rightly looked at as having a hampering effect on the good intention of liberalisation or private participation. Thus, justifiably, the respondents took the stand that the emphasis herein is on the handling of specific cargo. In the circumstances, if one reads the policies and definition of "specific cargo" and the reasoning given by the learned single Judge, we have*

no hesitation in confirming the said view that the emphasis is more on the location of the berth handling the specific cargo and not as to the point of time at which the next terminal is taken up for a bid or RFQ.

xx *xx* *xx*

20. As far as the present appellant's case before this Court is concerned, as the Apex Court pointed out, the claim of the appellant has to be tested necessarily with reference to the object of the policy of the Government, which, in clear terms, point out that an operator of the berth/terminal in the specific cargo shall not be allowed to bid for the next terminal/berth for handling the same cargo in the same port. If the contention of the appellant that the emphasis to be given to the "same" "specific cargo" has to be with reference to the sequential bid alone, then, the very idea of prevention of monopolisation would practically make the policy intent a paper ideology, which we do not think, goes with the object of bringing in such a policy. In the context of the clear terms of the policy, we have no hesitation in accepting the contention of the respondents that the policy being supreme, the understanding of the same has to go by the plain words used in the policy as disclosed in the policy declaration dated 02.08.2010. Thus we have no hesitation in accepting the plea of the respondents herein that the emphasis in the matter of considering the grant of bid, has to be looked at from the angle of specific goods and not from the point of what the next bid was. Consequently, we have no hesitation in confirming the view of the learned single Judge."

27. In view of the aforesaid discussion, we may conclude that giving purposive construction/interpretation to the terms of the policy in question (dated 2.8.2010), the restriction provided for is clearly that one private berth operator in a port for a specified cargo will not be permitted to bid for the next (successive) berth for handling the same specified cargo in the same port.

28. Accordingly, the writ petition stands allowed to the extent that acceptance of the bid of the opposite party-JSW Infrastructure Ltd. on 29.02.2016, as well as the Letter of Intent issued in its favour by the Paradip Port Trust on the same date and agreement, if any, executed in pursuance thereof, are quashed. The opposite party-Paradip Port Trust shall be at liberty to either accept the single remaining bid of the petitioner-Kakinada Seaports

Ltd., after negotiating the price, which should not be less than the price offered by opposite party-JSW Infrastructure Ltd., or invite fresh bids for the berth in question, in accordance with law. The opposite party-JSW Infrastructure Ltd. shall be entitled for refund of any amount deposited by it for participating in the tender process. No order as to costs.

Writ petition allowed.

2016 (II) ILR - CUT- 515

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

W.P.(C) NO. 4011 OF 2016

M/S. D.K. ENGINEERING & CONSTRUCTION .....Petitioner

.Vrs.

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

TENDER – After opening of both technical and financial bids petitioner became the lowest bidder – Instead of issuing work order, Tender Inviting Authority called for a report from the concerned Executive Engineer on the past performance of the petitioner, who submitted report as "poor and unsatisfactory" – Tender Committee in its proceeding Dt. 15.02.2016 disqualified the petitioner and decided to call for the second lowest bidder – Hence the writ petition – Calling for a report by the authority after the petitioner was found to be the lowest bidder, without giving a notice to him is arbitrary – Moreover once the authority permitted the petitioner to execute the work within the extended time and made payment after completion of the work, how the selfsame authority now say that the performance of the petitioner was poor and debarred him to get the contract – Such action of the authority is arbitrary and with a purpose to show favour to the second highest bidder, hence the same is violative of Article 14 of the Constitution of India – Held, the impugned decision of the tender committee Dt. 15.02.2016, so also the decision to call for the second lowest bidder by reducing his rate at par with the rate quoted by the first lowest bidder, are quashed. (Paras 9 to7)

Case Laws Referred to :-

1. (2007) 14 SCC 517: Jagdish Mandal v. State of Orissa and others.
2. AIR 1975 SC 266 : Erussion Equipment & Chemicals Ltd. v. State of W.B

3. AIR 1979 SC 1628 : Ramana Dayaram Shetty v. I.A. Authority of India.
4. AIR 1993 SC 1601 : Food Corporation of India v. Kamdhenu Cattle Feed Industries.
5. (2005) 6 SCC 138 : Master Marine Service (P) Ltd. v. Metcafe & Hodgkinson (P) Ltd.

For Petitioner : M/s. S.K.Sanganeria, S.Nath & S.Rout
For Opp. Parties : Shri P.K.Muduli, Addl. Standing Counsel

Date of Judgment : 22.07.2016

JUDGMENT

Dr. B.R. SARANGI,J.

Chief Engineer (Buildings), Works Department, Government of Odisha, Office of the Engineer in-Chief (Civil), Odisha, Bhubaneswar issued Invitation For Bids (IFB) on 05.11.2014 for the work "Construction of 300 seated Girls Hostel Building at Women's College, Koraput G Plus 2". The last date of submission of bid was 02.12.2015 and the date of opening of technical bid was fixed to 07.12.2015. Pursuant to such Invitation For Bids (IFB), four bidders, namely, Damodar Engineers Pvt. Ltd., D.K. Engineering, Damodar Patnaik and PKP Buildcon Pvt. Ltd, submitted their bids. The technical bids were opened on the date fixed and all the four were declared technically qualified. The financial bids of the four bidders were opened on 30.12.2015, in which the petitioner was the lowest one on the basis of the documents produced by it. Even though the petitioner was the lowest bidder, since no work order was issued in its favour, the petitioner approached this Court by filing this writ petition seeking for direction to accept its lowest and valid tender and award the work in question in its favour.

2. Mr. S.K. Sanganeria, learned counsel appearing for the petitioner states that the nature of work has been indicated in the Invitation For Bids (IFB) dated 05.11.2014 as building work (composite work). As the petitioner has got the experience of executing similar nature of work and having quoted lowest price was declared as L-1 and is also otherwise eligible, the work order should have been issued in its favour. But, the Tender Committee in its proceedings held on 15.02.2016 disqualified the petitioner as per Clause-3.4(b) of Instructions To Bidder (for short "ITB") and Clause-108(b) & (d) of Detailed Tender Call Notice (for short "DTCN") and such decision having been taken without issuing any notice to the petitioner or affording any

opportunity of hearing, there is gross violation of principles of natural justice. Therefore, the petitioner seeks for interference of this Court in the present writ petition.

3. Mr. P.K. Muduli, learned Additional Standing Counsel appearing for the opposite parties states that in view of the provisions contained in Clause-108(b) & (d) of the DTCN, a bidder can be disqualified for past record of poor performance and inordinate delay in completion of the work, even though it qualified the criteria, and, similarly as per Clause-3.4 (b) of the ITB, a bidder can be subjected to disqualification if it has record of poor performance, such as, abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history or financial failures etc. In the instant case, even though the petitioner had qualified the criteria, it was found disqualified due to the provisions of Clause-108(b) and (d) as well as Clause-3.4(b). Due to such disqualification, the authority has not committed any illegality or irregularity. He strenuously urges that in view of the provisions contained in para-3.5.14 of the Orissa Public Works Department Code Volume-1 read with Clause 3.4(b) of the ITB and Clause-108(b) & (d) of DTCN, even though the petitioner is the lowest bidder, by taking into consideration its past experience the authority has got power not to accept its bid, thereby no illegality or irregularity has been committed. He further states that the provisions for compliance of the principles of natural justice, in contractual matters, are not required. To substantiate his contention, he has relied upon ***Jagdish Mandal v. State of Orissa and others,*** (2007) 14 SCC 517.

4. In view of the aforesaid contentions raised by the learned counsel for the parties and on perusal of the records, since the pleadings have been exchanged between the parties, with their consent the matter has been taken up for final disposal at the stage of admission.

5. The undisputed fact is that pursuant to E-tender notice published on 05.11.2014, the petitioner along with three others had submitted their bids and all of them having been qualified in technically bids, in financial bids, which were opened on 30.12.2015, the petitioner being the lowest one, the work order ought to have been issued in favour of the petitioner for execution of the work. But, on 29.01.2016, a report was called for by the Tender Inviting Authority from the Executive Engineer, Kalahandi (R&B) Division, Bhawanipatna on the performance of the petitioner, who submitted his report on 30.01.2016, which is evident from record at page 207 in Annexure-E to the counter affidavit filed by the opposite parties. In the

performance report of ongoing works of the petitioner, it is stated "*the performance of the contractor is unsatisfactory and poor*". Therefore, in the proceedings of the Tender Committee meeting held on 15.02.2016 vide Annexure-F at page-209 of the brief it is observed as follows:

> "The L1 bidder D.K. Engineering & Construction (Super Class Contractor) has disqualified as per ITB Clause-3.4(b) & clause 108 (b) & (d) of DTCN for past record of poor performance & inordinate delays in completion of previous works entrusted to them as per report of Executive Engineer, Kalahandi (R&B) Divn. Vide Lt. No.1074 dated 30.01.2016".

6. For better appreciation, Clause 3.4(b) of the Instructions To Bidders and Clause 108(b) & (d) of DTCN are quoted below:

> "3.4 (b)-Record of poor performance such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history, or financial failures etc;"
>
> "108(b)-Past record of poor performance
>
> (d) Past record of inordinate delay in completion of the work."

Para 3.5.14 of the Orissa Public Works Department Code Volume-1, which is also relevant for the purpose of the case, is extracted hereunder:

> "Normally in selecting the tenders other conditions being equal, the lowest valid tender should be accepted. The financial status of the tenders, their capability, their classification, the security offered by them, their previous records of execution of works in the State and their dealings with the Department should be taken into consideration while accepting a tender. While this procedure should as a rule be observed in the case of public works, the acceptance of the lowest tender on a price basis alone in the case of tenders for electrical and mechanical stores and equipment may not always be safe. If the best value is to be obtained then the lowest valid tender should be accepted provided that all other things are equal. Due regard must therefore be given to the following criteria in addition to the tendered price efficiency, running cost, durability of materials, reliability of guarantees, necessity for repairs and attention, saving in spare parts due to standardization, suitability for the purposes in view and technical qualifications and financial standing of the contractor. (See Note (II) below para 3-5-18."

7. As is borne out from the record, after the petitioner was found suitable, being the lowest bidder, on the basis of technical and financial evaluation made by the Tender Inviting Authority, subsequently, a report was called for from the Executive Engineer, Kalahandi (R&B) Division, Bhawanipatna with regard to the performance of the petitioner and on that basis it was decided not to entrust the work to the petitioner. The said inquiry could have been done prior to opening of the financial bid. Once, the financial bid was opened and known to everybody, that the petitioner was the lowest one, the Tender Inviting Authority could not have taken a decision to call for a report in order to disqualify the petitioner on the ground of past performance. Such action of the Tender Inviting Authority is also not correct otherwise, as the petitioner had submitted the details of the work awarded to it and executed by it under the Executive Engineer, Kalhandi (R&B) Division, Bhawanipatna on the basis of the agreements executed in the years 2009-10 and 2011-12. The contention raised by the learned Additional Standing Counsel, that past performance of the petitioner was poor, is belied by the documents available on the record to the effect that the petitioner has successfully executed the works and ongoing works within the extended period granted by the authority and, as such, neither any penalty has been imposed nor the work allotted in its favour has ever been cancelled, and payments in respect of work done have been made by the authority without any objection. In such view of the matter, the contention so raised that the petitioner had got poor performance in its past record cannot sustain in the eye of law.

8. Furthermore, as would be evident from the records, before taking the impugned decision by the Tender Inviting Authority, no opportunity has been given to the petitioner and such decision has been taken only on the basis of the report furnished by the Executive Engineer, Kalhandi (R&B) Division, Bhawanipatna. Even copy of such report was not supplied to the petitioner nor it was called upon to offer its explanation on such report and behind its back such decision has been taken by the Tender Committee, which amounts to gross violation of the principles of natural justice.

It is pertinent to mention here that the petitioner, per contra, has furnished the documents (Annexure-8 series to its rejoinder affidavit) indicating various works completed by the petitioner and that are in progress as well as the certificate issued by the very same Engineer, from which it is manifest that at no point of time either for delayed execution of work or incompletion of work, neither any penalty has been imposed on the

petitioner nor its payment has been stopped by the authority. Once the authority has permitted the petitioner to execute the work within the extended time and such work having been completed and payment made, now, it cannot be said by the selfsame authority that performance of the petitioner was poor and on that ground debar the petitioner from getting the work, even though it is L-1 in the financial bid. The petitioner in para-5 of its rejoinder affidavit specifically indicated as follows:

> "5. That, the allegations and averments made in para-9 of the counter affidavit are totally baseless and hence denied. Clause 108 of the DTCN is not at all applicable nor Para 3.5.14 of the Odisha PWD Code Volume-1 is attracted and applicable in the present case. The documents annexed to the counter affidavit as Annexure-B has been also presented in a misleading manner, particularly "Construction of Academic-cum-Administrative Block of Government College of Agriculture, Bhawanipatna in the district of Kalahandi". The building was completed and thereafter the College is functioning there and the students are prosecuting their academic session. In respect of other two works it has been clearly spelt that the works have been completed. Prior to this stated the opposite parties never issued any show cause. So far relating to item no.2 "Construction of 367 seated Boys Hostel Building No.1 of Government College of Engineering, Kalahandi-Bhawanipatna", "Construction of 367 Seated Boys Hostel Building No.2 of Government College of Engineering, Kalahandi-Bhawanipatna", Construction of 367 Seated Girls Hostel Building of Government College of Engineering, Kalahandi-Bhawanipatna", "Construction of Workshop Building of Government College of Engineering, Kalahandi-Bhawanipatna", "Construction of Government of Engineering, Kalahandi-Bhawanipatna (Administrative Block)", "Construction of District Court Building at Nuapada" is in progress very fastly, and in none of these cases there were allegations and averments that the petitioner's work performance was poor and his contract was terminated and when there is no such allegation of termination of contract, the poor performance of contract does not arise. This is an afterthought, mischievous and mala fide attempt made by the opposite parties just to debar the petitioner from future tender bringing within the ambit of Clause 108 of DTCN."

9. In ***Jagadish Mandal*** (supra), on which reliance has been placed by the learned Addl. Standing Counsel, the Apex Court in paragraph-22 thereof observed as follows:

> "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:
>
> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;
>
> Or
>
> Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";
>
> (ii) Whether public interest is affected.

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

On the basis of the question formulated by the apex Court in the aforementioned judgment, an analysis has been made that the process adopted or decision made by the authority is intended to favour one Damodar Engineer Private Ltd. (super class contractor), the second highest bidder and, while examining the matter it appeared that the process of decision taken was arbitrary and irrational, as a result the decision so taken should not have been taken by a responsible authority acting reasonably in accordance with relevant law. As such, since no work has been awarded in favour of the second lowest bidder, no public interest has been affected.

10. The freedom of Government/authority to enter into contracts is not uncanalised or unrestricted, it is subject to the golden Rule under Article 14 of the Constitution of India. The Government has to act impartially and in accordance with the terms and conditions of the tender. In accepting the contract, it is not always necessary to accept the highest offer. The choice of the person to whom the contract is granted has to be dictated by public interest and must not be unreasoned or unprincipled. The choice cannot be arbitrary or fanciful.

11. In ***Erussion Equipment and Chemicals Ltd. v. State of West Bengal***, AIR 1975 SC 266, the Apex Court held as follows:

> "When the Government is trading with the public, 'the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions'. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure."

12. In ***Ramana Dayaram Shetty v. I.A. Authority of India***, AIR 1979 SC 1628, the Apex Court held as follows :

> "It is true that the Government may enter into a contract with any person but in so doing the State or its instrumentalities cannot act arbitrarily. The tenders were to be adjudged on their own intrinsic

merits in accordance with the terms and conditions of the tender notice."

13. In ***Food Corporation of India v. Kamdhenu Cattle Feed Industries***, AIR 1993 SC 1601, the Apex Court held as follows:

> "In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'."

14. In ***Master Marine Service (P) Ltd. v. Metcafe & Hodgkinson (P) Ltd***, (2005) 6 SCC 138, the apex Court held that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favourtism. However, there are inherent limitations in exercise of that power of judicial review.

15. In view of the aforesaid law laid down by the Apex Court, it can be well deduced that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. The right to refuse the lowest and any other tenderer is always available to the Government, but the principles laid down under Article 14 of the Constitution have to be kept in view while refusing to accept the tender.

16. Applying the above principles to the present context, it appears that the authority having found, after opening of both technical and financial bids, the petitioner being the lowest bidder, subsequently could not have called for a report without giving notice and, as such, on the basis of the report furnished by the Executive Engineer (R&B), Kalahandi, the tender committee could not have taken a decision to disqualify the petitioner as per the ITB Clause 3.4(b) as well as Clause-108(b) and (d) of DTCN for past poor performance and inordinate delay in completion of previous works entrusted to it. Such action of the authority amounts to arbitrary and unreasonable exercise of power and violates Article 14 of the Constitution of India.

17. In view of the aforesaid facts and circumstances, since the action of the authority is arbitrary and unreasonable and violates Article 14 of the Constitution of India, this Court hereby quashes the proceedings of the tender committee meeting held on 15.02.2016 vide Annexure-F to the

counter affidavit, by which the petitioner has been declared disqualified as per ITB Clause 3.4(b) as well as Clause-108(b) and (d) of DTCN for past records of poor performance and inordinate delay in execution of previous works entrusted to it as per the report of the Executive Engineer (R&B), Kalahandi and also quashes the decision to call for the second lowest bidder to reduce his rate at par with the rate quoted by the first lowest bidder, as stipulated in Clause-29.2.

18. The writ petition is accordingly allowed. No order as to cost.

Writ petition allowed.

2016 (II) ILR - CUT- 524

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

W.P.(C) NOS. 10620 & 10872 OF 2016

JITENDRA KISHORE SAHOO .....Petitioner

.Vrs.

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

CONTROL OF NATIONAL HIGHWAYS (LAND AND TRAFFIC) ACT, 2002 – S.38

Tender notice issued by Puri Municipality to establish vending zone by the side of the "Bada Danda" at Puri – "Bada Danda" Puri has been declared as National Highway No. 203 which is to be used for the purpose of Car Festival of "Lord Jagannath" – Executive Officer Puri Municipality has no authority in law to issue tender notice without prior written permission of the Highway Administration in order to use the Highway for the purpose other than for which it has been constructed – Writ petition disposed of as Puri Municipal Authorities submitted undertaking not to go for any vending zone on the "Bada Danda".

(Paras 11,12,13)

Case Laws Referred to :-

1. AIR 1986 SC 842 : Bharat Singh -V- Management of New Delhi Tuberculosis Centre, New Delhi
2. (2003) 2 SCC 593 : Dayal Singh -V- Union of India
3. (2005) 5 SCC 363 : PUCL -V- Union of India

For Petitioner : M/s. P.K.Rath, R.N.Parija, A.K.Rout, S.K.Singh,S.K.Pattnaik, A.Behera,

P.K.Sahoo, P.K.Samantray

For Opp. Parties : Mr. S.P.Mishra, Advocate General,
Mr. P.K.Muduli, Addl.Standing Counsel
Mr. P.K.Mohanty, Sr. Counsel, Abhijit Das
Mr. Amitabh Das, Dr.A.K.Mohapatra, Sr.Counsel,
S.P.Mangaraj & S.Mohapatra

Date of Judgment: 30.06.2016

JUDGMENT

DR. B.R.SARANGI, J.

Jitendra Kumar Sahoo claiming to be a public spirited person has filed both the writ petitions in the nature public interest litigation. He filed W.P.(C) No. 10620 of 2016 to quash the notice dated 13.05.2016 under Annexure-3 issued by the Executive Engineer, Puri Municipality inviting applications for rehabilitation of the businessmen by establishing vending zone by the side of the "Bada Danda" at Puri. In W.P.(C) No. 10872 of 2016 he seeks to quash the tender process pursuant to notice dated 21.06.2016 under Annexure-1 issued by Executive Officer, Puri Municipality by which applications have been invited for allotment of cabins over the National Highway, "Bada Danda" from "Saradhabali", i.e., "Bada Sankha" up to "Gundicha Temple" and further seeks for a direction to the opposite parties to keep the entire "Bada Danda" clean, free from all kind of commercial activities.

Both the writ petitions, having been filed by the same petitioner for similar cause of action, are heard together and disposed of by a common judgment with the consent of the parties.

2. Heard Mr. P.K. Rath, learned counsel for the petitioner, Mr. S.P. Mishra, learned Advocate General appearing for the opposite party-State, Mr. P.K. Mohanty, learned Sr. Counsel along with advocate Mr. A. Das, appearing for the Puri Municipality, Mr. Amitabh Das, learned counsel for the National Highways Authority of India (NHAI) and Dr. A.K. Mohapatra, learned Sr. Counsel along with advocate Mr. S.P. Mangaraj as well as Mr. S.S. Mohapatra, learned counsel for the intervenors.

3. W.P.(C) No.10620 of 2016 was listed on 29.06.2016 and considering the gravity of the case due to ensuing car festival, which is scheduled to be held on 06.07.2016, instructions were sought for from the learned Advocate General and notices were issued to the counsel appearing for the Puri Municipality and National Highways Authority calling upon them to obtain

necessary instructions, and the matters were directed to be listed today, i.e., 30.06.2016. All the counsel having entered appearance, with their consent the writ petitions are being disposed of at the stage of admission, without calling for any counter affidavit.

4. Mr. P.K. Rath, learned counsel for the petitioner strenuously urged that "Bada Danda" at Puri has its cultural heritage for the purpose of car festival of "Lord Jagannath". In the "Bada Danda", the chariots of "Lord Balabhadra", "Maa Subhadra" and "Lord Jagannath" are pulled by lakhs of devotees. "Bada Danda" has been declared as National Highway No.203 by the National Highways Authority having its specifications. But, Executive Officer, Puri Municipality having no authority of law has issued tender notice to have the vending zone and for grant of temporary license for carrying on business on the said road. Thereby, they are violating the provisions contained in the National Highways Act, 1956 and Rules framed thereunder.

5. Mr. S.P. Mishra, learned Advocate General states that the "Bada Danda" is to be used as a road, no shops can be established on the said road. In any case, since the municipal authorities have issued notice inviting applications for establishment of vending zone as well as for grant of temporary license for shops, it is the municipal authorities, who have to explain under what circumstances such notifications have been issued.

6. Mr. P.K. Mohanty, learned Sr. Counsel appearing along with Mr. A. Das, learned counsel for the Puri Municipality states that neither vending zone nor shops will be established on the National Highway declared by the National Highways Authority. It is submitted that the notification has been issued inviting applications for establishment of vending zone and grant of licence for opening of shops on the area, which is beyond the National Highway. Therefore, he candidly states and undertakes that no license would be granted and no vending zone would be established on the area earmarked by the National Highways Authority to be used as "Bada Danda" for the purpose of car festival.

7. Considering the above contentions raised by the counsel for the parties and after going through the records, it appears that the National Highways Authority has declared the "Bada Danda" as National Highway No.203 and as such vide letter dated 22.07.2002 (Annexure-2 to W.P.(C) No. 10872 of 2016) the Engineer in chief-cum-Secretary to Government communicated to the Chief Engineer D.P.I. & Roads, Odisha, Bhubaneswar requesting the Executive Engineer, Puri R & B Division to transfer the said

road to the Executive Engineer, National Highways, Bhubaneswar. Consequent thereto, charges of handing over and taking over of road, namely "Bada Danda" Puri from Puri R & B Division No.1 to Executive Engineer, N.H. Division, Bhubaneswar has been done on 17.04.2002. Pursuant to the said handing over and taking over of road, the "Bada Danda" at Puri has become National Highway and is within the control of Executive Engineer, National Highways Division, Bhubaneswar. The "Bada Danda" continues from "Singhadwara" of "Lord Jagannath Temple" to "Gundicha Temple" from R.D. 0.00 Km. to 2.5 Km. As per the index map, "Bada Danda" (from "Lord Jagannath Temple" to "Gundicha Temple") specified with the area, having width varying from 39 metres to 41 metres, has been handed over to National Highway Authorities.

8. As it appears from the index map under Annexure-1 (to W.P.(C) No. 10620 of 2016), at "Lord Jagannath Temple", the width of the road is 39 metres, whereas at "Badasankha" it is 41 metres and that continues upto "Gundicha Temple". There is no dispute with regard to handing over and taking over of road by Executive Engineer, R & B Division No. 1 to Executive Engineer, N.H. Division, Bhubaneswar.

9. Section 38 of Chapter VI of "The Control of National Highways (Land and Traffic) Act 2002", which deals with "Construction on highway land" clearly specifies that no person can construct, install, shift, repair, alter or carry any poles, pillars, advertisement towers, transformers, etc. on the highway land or across, under or over any Highway without prior written permission of the Highway administration.

10. In **Bharat Singh v. Managment of New Delhi Tuberculosis Centre, New Delhi,** AIR 1986 SC 842 the apex Court held that it is rule of construction of statute that in the first instance the grammatical sense of the words is to be adhered to. The words of a statute must prima facie be given their ordinary meaning. In **Dayal Singh v. Union of India,** (2003) 2 SCC 593, the apex Court held where the grammatical construction is clear and manifest and without doubt, that construction ought to prevail unless there be some strong and obvious reason to the contrary. Similar view has also been taken in **PUCL v. Union of India,** (2005) 5 SCC 363.

Therefore, it is an elementary principle of the construction of statute that the words have to be read in their literal sense. Thus, generally speaking, words and expressions would be given their plain and ordinary meaning which cannot be cut down of curtailed unless they in themselves are clearly restrictive. If the words of the statute are clear and unambiguous, it is the

plainest duty of the Court to give effect to the natural meaning of the words used in provisions. The courts are enjoined to take the words as used by the legislature and to give them the meaning which naturally implies. To ascertain the literal meaning, it is equally necessary, first to ascertain the juxtaposition in which the rule is placed, secondly, the purpose for which it is enacted, thirdly, the object which it is required to subserve, and fourthly, the authority by which the rule is framed.

11. Applying the aforesaid statutory interpretation to the present context, it appears that prior written permission from the Highway Administration is required to use the high way for purpose other than for which it has been constructed. Nothing has been placed on record to indicate, nor any submission has been made by any of the counsel, that any permission has been obtained by the Puri Municipality from Highway Administration for installation of any vending zone or shop on the National Highway earmarked as per the maps as at Annexure-1. In such view of the matter, the Municipality cannot issue any notice for construction of such vending zone or grant temporary license to shops to be established on the earmarked area of the National Highway as per the map enclosed.

12. In course of hearing Mr. P.K.Mohanty, learned Senior Counsel appearing along with advocate Mr. A. Das for Puri Municipality, on instruction, undertakes that the municipal authority will not go for construction of any vending zone or grant any temporary or permanent license in favour of any person to have their shops on “Bada Danda”, which has been declared as National Highway No. 203 from “Sri Jagannath Temple” to “Gundicha Temple” as per Annexure-1 (to W.P.(C) No.10620 of 2016).

13. In view of the aforesaid undertaking, since the municipal authorities are not going to have any vending zone or grant license either permanent or temporary for construction of any shop room on “ Bada Danda”, which has been declared as the national highway, this Court is of the considered view that the undertaking so given shall be given effect to. With the above observations and directions, both the writ applications stand disposed of.

Writ applications disposed of.

2016 (II) ILR - CUT-529

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

W.P.(C) (PIL) NO. 11701 OF 2015

HARI HARA PANIGRAHY .....Petitioner

.Vrs.

BHUBANESWAR MUNICIPAL CORPORATION & ORS. .....Opp. Parties

ODISHA HINDU MARRIAGES REGISTRATION RULES, 1960 – RULE 12
(As amended in 2006)

Registration of marriages – Bhubaneswar Municipal Corporation Collects Rs. 1000/- "towards maintenance of heritage buildings in Bhubaneswar city" at the time of registration of marriages from the married couples, in excess of registration fees prescribed under Rule 12 of the Rules, 1960 – Hence this P.I.L. – Held, except fees prescribed for registration of marriages as per Rule 12 of the Rules 1960, compulsory collection of Rs. 1000/- at the time of marriages is arbitrary, unreasonable and contrary to the provisions of law – Recommendation made by the standing committee of Taxation, Finance and Accounts Dt. 18.10.2006 for collection of Rs. 1000/- and acceptance there of by the Corporation vide Resolution No. 4(1) Dt. 30.10.2006, having not been sustained in the eye of law, are quashed. (Para 18)

Case Laws Referred to :-

1. (1982) 138 ITR 604 : Nirmala Kesharlal v. CED.
2. AIR 1976 SC 140 : E.T. Commissioner v. P.V.G. Raju.
3. AIR 1975 P & H 29, 31 : Issah Das v. State of Haryana
4. AIR 1979 SC 607 : Gestetner Duplicators Pvt. Ltd. V. Commissioner of Income Tax, West Bengal.

For Petitioner : Mr. Hari Hara Panigrahy (In person)
For Opp. Parties : M/s. Mrs. Mrinalini Padhi, A.Das & B.Panigrahi.
Miss S.Ratho, Addl. Govt.Advocate.

Decided on : 28.07.2016

JUDGMENT

Dr. B.R. SARANGI,J.

The petitioner, who is stated to be a public spirited person and a practicing advocate, has filed this writ petition in the nature of public interest litigation challenging collection of fees of Rs.1,000/- by Bhubaneswar

Municipal Corporation, Bhubaneswar under the head "towards maintenance of heritage buildings in Bhubaneswar city" from the newly wedded couples, who approach the Registrar of Hindu Marriages for registration of their marriages under the Odisha Hindu Marriages Registration Rules, 1960 (for short "Rules, 1960) framed under Section 8 of the Hindu Marriage Act, 1955.

2. Mr. H. Panigrahy, the petitioner urges that as per the provisions contained in the Odisha Hindu Marriages Registration Rules, 1960, the married couples are only liable to pay fees of Rs.2/- and Rs.5/- fixed for registration and obtaining certified copy for an entry made in the Register respectively. Except such statutory dues, the opposite party-Bhubaneswar Municipal Corporation cannot levy any fee in the name of donation for grant of such marriage certificate, as the said donation/fee is beyond the purview of the provisions of Rules 1960. The website of Bhubaneswar Municipal Corporation indicates that, for registration of marriages, within one month of marriage, besides Rs.16/- in shape of treasury challan, a sum of Rs.1000/- is required to be deposited at Bhubaneswar Municipal Corporation towards maintenance of heritage buildings in Bhubaneswar city. The collection of fees/donation of Rs.1,000/- towards maintenance of heritage buildings in excess of the registration cost are made on the basis of the recommendation made by the Taxation, Finance and Accounts Standing Committee on 18.10.2006 to the Corporation, which was accepted vide resolution no.4 dated 30.10.2006 authorizing the Municipal Commissioner to invoke power under Section 478(1) of the Odisha Municipal Corporation Act, 2003 for such purpose. It is urged that such power, which has been invoked by the Municipal Corporation, is arbitrary, unreasonable and contrary to the provisions of law.

3. Mrs. Mrinalini Padhi, learned counsel appearing for the Bhubaneswar Municipal Corporation urges that in view of sub-Section (v) of Section-657 of the Orissa Municipal Corporation Act, 2003, power has been vested with Corporation to make bye-law for registration of births, deaths and marriages. As per Orissa Municipal Corporation Rules, 2004, the Standing Committee for Taxation, Finance and Accounts is being constituted and the said Committee on 18.10.2006 has recommended that as per Section 478 (1) of Orissa Municipal Corporation Act, 2003, the Municipal Corporation can collect donation for maintenance of heritage buildings. The recommendations so made have been accepted by the Corporation in its meeting held on 30.10.2006 and as per resolution no.4(1) decision was taken to accept Rs.1,000/- as donation from the applicants of the marriage

registration. Therefore, no illegality or irregularities have been committed by issuing intimation in the website indicating for registration of marriage, within one month of marriage, besides Rs.16/- in shape of treasury challan, a sum of Rs.1000/- are required to be collected by Bhubaneswar Municipal Corporation towards maintenance of heritage buildings in Bhubaneswar city. It is urged that though the deposit of Rs.1,000/- towards maintenance of heritage buildings in Bhubaneswar city should not have been reflected in the website for registration of marriage, the same having been done inadvertently, has been withdrawn by opposite party no.1. Learned counsel, however, further urged that leviability of Rs.1,000/- towards donation is justified in view of the provisions indicated above.

4. Having heard the petitioner in person, Mrs. M. Padhi, learned counsel appearing for the Bhubaneswar Municipal Corporation and Miss S. Ratho, learned Additional Government Advocate for the State and as the pleadings have been exchanged, with the consent of the parties, this writ petition is disposed of finally at the stage of admission.

5. Section 8 of Hindu Marriage Act, 1955 postulates Registration of Hindu Marriages which reads as follows:

> *"**Registration of Hindu Marriages**.-(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such condition as may be prescribed in a Hindu Marriage Register kept for the purpose.*
>
> *(2) Notwithstanding anything contained in sub-section (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified and where any such direction has been issued, and person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.*
>
> *(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.*
>
> *(4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall,*

on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry."

On perusal of the aforementioned provisions, it appears that sub-section (2) of Section 8 of the Hindu Marriages Act, 1955 authorizes the State Government to make the registration of Hindu Marriages compulsory in a state. Contravention thereof is punishable with fine which may extend to Rs.25/-. To give effect the provision of Section-8 of the Hindu Marriages Act, 1955, the Odisha Hindu Marriages Registration Rules, 1960 was framed. Rule-4 of the Rules, 1960 has undergone amendment by virtue of Odisha Hindu Marriages Registration (Amendment) Rules, 2006, by which registration of all Hindu marriages have been made compulsory in the state of Odisha. The amended rules have come into force with effect from 15th of July, 2006, the day on which the same has been published in the Odisha Extraordinary Gazette.

6. Rule-4 of Odisha Hindu Marriages Registration Rules, 1960 is as follows:

"4. The parties to the marriage duly solemnized in accordance with the provisions of the Act shall within a period of 30 days from the date of solemnization of the marriage compulsorily submit the application in Form B before the Registrar for registration of the marriage".

Rule 4-A inserted by the said Amendment Rules of 2006 is also extracted below:

"4-A. Any party to the marriage who contravening the provision of Rule 4, shall be punishable with fine which may extend to Rs. 25 (Rupees twenty five) only".

7. Rule-12 of the Rules, 1960, by which fees can be chargeable for the purpose of registration of marriage is as follows:

"12(1) Fees shall be charged by the Registration for the purpose and at the rate as specified below

(i) For registration of a marriage Rs.2

(ii) For obtaining a certified copy of an entry made in the Register Rs.5

(2) All such fees shall be credited to the State revenue under the head "0070-Other Administrative services -60- Other Services -108- Marriages Fees -0135- Registration Fees-01050- Fees for Registration of marriage and for obtaining certified copy of an entry made in the Marriage Register."

As per the said rule, if any person contravenes this provision by failing to register the marriage as required under section-8 of the Hindu Marriages Act, 1955 read with the Rules of 1960 within 30 days of the solemnization of the marriage, he will be punished with fine which may extend to Rs.25. In view of such position, non-registration of Hindu marriages makes both the spouses punishable under the law. Save and except the statutory dues, which are required to be deposited by a person within 30 days of his marriage for the purpose of registration, no other fee/donation is chargeable.

8. It appears that the website of the Bhubaneswar Municipal Corporation indicates the following payment for registration of marriages.

- "Within one month of marriage, treasury challan of Rs.16.
- Rs.1000/- deposit at BMC towards maintenance of heritage building in Bhubaneswar city."

The demand for deposit of Rs.1,000/- towards maintenance of heritage buildings in Bhubaneswar city is being made in excess of registration fees prescribed under the statute. Such demand is made on the basis of the recommendation of the Taxation, Finance and Accounts Standing Committee meeting held on 18.10.2006, which is as follows:

" Proposal 4 : The Government in Department has issued Notification No. 8992 dated 11.06.2006 in which the Deputy Commissioner and in his absence x x x

As per Section 478(1) of OMC Act, 2003, the Municipal Commission can collect donation for maintenance of Heritage building. In this respect, this proposal to accept donation of Rs. 1,000/- (Rupees one thousand only) for registration of each marriage, is recommended by the Committee for consideration of the Mayer."

The recommendation dated 18.10.2006 of the Taxation, Finance & Accounts Standing Committee was considered by the Corporation in its meeting dated 30.10.2006 and an extract of the resolution no.4(1) of the Corporation Resolution is translated and quoted herein below:

> " 4(1) On perusal of the minutes of the meetings dated 26.01.2006 and 18.10.2006 of the Standing Committee for Taxation, Finance and Account and Accounts, it was approved that a sum of Rs. 1,000/- (Rupees One Thousand) only per marriage shall be accepted as donation from the applicants of marriage registration as per Proposal No.3 of the minutes dated 18.10.2006."

The Municipal Corporation undertakes to preserve and conserve Heritage Building. The Corporation may receive contributions towards preservation and conservation of heritage building. Section 478(1) of the Odisha Municipal Corporation Act, 2003 provides as follows:

> " 478. Voluntary contribution and agreement with any voluntary organization, person or company:-
>
> (1) The commissioner may receive voluntary contributions towards the cost of maintaining any heritage building and may give order as to the management and application of such contributions for the purpose of preservation and conservation of such heritage buildings."

9. By sub-section (1) of Section 478 of Odisha Municipal Corporation Act, 2003, power has been vested with the Commissioner "to receive" voluntary contributions towards the cost of maintaining any heritage building and he may give order as to the management and application of such contributions for the purpose of preservation and conservation of such heritage buildings. The power of Commissioner cannot be usurped by the Taxation, Finance and Accounts Standing Committee by recommending "to collect" Rs.1,000/- as fee or donation for grant of marriage certificates in accordance with Rules, 1960 and such recommendation of compulsory deposit of Rs.1,000/- and acceptance by the Corporation for grant of marriage certificate is contrary to the provisions contained in the Odisha Hindu Marriages Registration Act, 1955 read with Rules, 1960.

10. The word 'donation' has been explained in P. Ramanatha Aiyar's Advanced Law Lexicon 4th Edition is as follows "

> "The action of donating or giving, presentation; gratuitous transfer of property from one to another, that which is presented; a gift.
>
> Money or other asset given by a person or organization to another person or organization (such as a charity or political party)".

11. While considering Section 9 of Estate Duty Act, 1953 in ***Nirmala Kesharlal v. CED***, (1982) 138 ITR 604 (Bom), Bombay High Court held as follows:

> "The term 'donation' means amounts which are given to charitable or public institutions. It would not amount to gift for the purpose of Section 9 of the Act".

12. Similarly, while considering Section 5(j) of the Expenditure Act, 1958, the apex Court in ***E.T. Commissioner v. P.V.G. Raju***, AIR 1976 SC 140 held as follows:

> "When a person who is the owner of a thing, voluntarily transfers the title and possession of the same from himself to another, without any consideration, it is donation".

Applying the meaning of the word 'donation' to the present context, it appears that the collection of fees of Rs.1000/- in the shape of donation does not amount to voluntarily transferring the same rather the amount in question is being collected under a compulsion, which is not permissible under law, more particularly, the compulsory charging of fees of Rs.1,000/- towards maintenance of heritage buildings is contrary to the provisions contained in Odisha Hindu Marriages Act, 1955 read with Rules, 1960.

Bhubaneswar Municipal Corporation is charging a sum of Rs.1,000/- towards fees for maintenance of heritage buildings in the shape of donation in excess of fees prescribed under Rule 12 of the Rules, 1960, but non-payment of such fee/donation of Rs.1,000/- to the Corporation, the registration of marriage is not being made even though the requirement of Rule 12 of the Rules 1960 has been complied with that itself amounts to arbitrary and unreasonable exercise of power by the authority and cannot sustain in the eye of law.

13. In the counter affidavit filed by Corporation it is stated that as per Section 478 of the Odisha Municipal Corporation Act, 2003 the Municipal Corporation is authorized under law "to collect" voluntary contributions for maintenance of the heritage buildings. But, on perusal of the provisions under Section 478 of the said Act, power has been vested with the Commissioner "to receive" voluntary contributions towards the cost of maintaining any heritage building. Therefore, nowhere power has been vested with the Municipal Corporation "to collect" compulsory contributions for maintenance of heritage buildings. There is difference between the word "to receive" and "to collect". The power "to collect" is not being vested with

the Municipal Corporation under Section 478 of the Act, rather power has been vested with the Commissioner, who may "receive" voluntary contributions towards cost in maintaining heritage buildings. Therefore, voluntary contributions can be received by the Corporation for maintenance of heritage buildings. Nowhere power has been vested with the Municipal Corporation to collect the contributions compulsorily.

14. The word 'contribution' has been mentioned in P. Ramanatha Aiyar's Advanced Law Lexicon 4th Edition as follows:

> "CONTRIBUTION is where everyone pays his share, or contribution against another; one anything. One parcener shall have contribution against another; one heir shall have contribution against another heir, in equal degree, and one purchaser, shall have contribution against another. (*Tomlin*)
>
> Money earned or paid in addition to another sum, often used to describe extra profit that accrues once a product's breakeven point has been reached.
>
> In a popular sense it is "the act of giving to a common stock, or in common with others, that which is given to common stock or purpose."

15. While considering Section 59 (2)(b) of Punjab Co-Operative Sureties Act, the Punjab Haryana High Court in ***Issah Das v. State of Haryana,*** AIR 1975 P & H 29, 31 held as follows:

> "The word 'contribution' includes debts which are recoverable from the members of the Society."

16. Similarly, the apex Court in ***Gestetner Duplicators Pvt. Ltd. V. Commissioner of Income Tax, West Bengal,*** AIR 1979 SC 607 while considering Rule 2(c) of Part A of the Fourth Schedule defined "contribution" as follows:

> "Contribution" as meaning any sum credited by or on behalf of any employee out of his salary, or by an employer out of his own monies, to the individual account of an employee, but does not include any sum credited as interest."

17. Applying the said meaning to the present context, it appears that the statement made that the Taxation, Finance and Accounts Standing Committee recommending for collection of fees and in response to same resolution was passed to approve such recommendation in the shape of

"Daan" i.e. 'contribution' is far from the meaning attached to the word 'contribution' and more particularly, it cannot be construed that it is voluntary contribution by the persons. Rather the said amount of Rs.1,000/- is being collected on compulsory basis for registration of the marriages, which is not permissible under law.

18. In the aforesaid facts and circumstances, we are of the considered opinion that except fees prescribed for registration of marriages as per Rule 12 of the Rules 1960, the compulsory collection of Rs.1,000/- towards maintenance of heritage buildings under the Bhubaneswar Municipal Corporation at the time registration of marriages is arbitrary, unreasonable and contrary to the provisions of law. Therefore, the recommendations dated 18.10.2006 made by the Standing Committee of Taxation, Finance and Accounts and acceptance thereof by the Corporation in Resolution No.4(1) of the Municipal Corporation dated 30.10.2006 cannot sustain in the eye of law. Accordingly, the same are hereby quashed. The writ petition is allowed to the extent indicated above. No order as to cost.

Writ petition allowed.

2016 (II) ILR - CUT-538

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

W.P.(C) NO. 5938 OF 2016

HIMANISH MOHAPATRA ……..Petitioner

.Vrs.

THE V.C., SIKSHA'O' ANUSANDHAN UNIVERSITY AND ORS. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART.226

Rustication of the Petitioner from University – Authorities have neither issued show cause notice nor given him a personal hearing before passing such order – Violation of principles of natural justice – Held, impugned order of rustication is quashed – Direction issued to the opposite parties to allow the petitioner to appear at the special examination to clear up the back papers on certain conditions imposed by this Court. (Paras 19, 20)

Case Laws Referred to :-

1. 1995) 5 SCC 482 : LIC of India & anr. v. Consumer Education & Research Centre & Ors.
2. 1998) 8 SCC 194 : Basudeo Tiwary v. SIDO Kanhu University & Ors.
3. 2006 (4) SCALE 154 : Ranjit Singh v. Union of India & Ors.
4. A.I.R. 2006 SC 2064 : (P.D. Agrawal Vs. State Bank of India & Ors)
5. 1915) AC 120 (138) : HL, Local Government Board v. Arlidge, Viscount Haldane.

For Petitioner : M/s. A.K.Mohapatra, B.Panda, A.Mohapatra, S.Samal,T.Dash, S.Nath, A.Barik, S.Barik & S.P.Mangaraj

For Opp. Parties : Mr. S.K.Dash, A.K.Otta, Mrs.A.Dhalasamanta, B.P.Dhal & S.Das.

Date of hearing : 12. 05.2016
Date of Judgment: 20.05. 2016

JUDGMENT

DR. D.P. CHOUDHURY, J.

Challenge has been made to the arbitrary action of the opposite parties by passing the order of rustication against the petitioner on 13.1.2016.

FACTS

2. The factual matrix leading to the case of the petitioner is that petitioner has completed four years course of B. Tech in Electrical and Electronics Engineering under the Institute of Technical Education and Research, Bhubaneswar (ITER) under the control of Siksha 'O' Anusandhan University, a deemed University under UGC Act. After completion of 3rd year in B. Tech. course petitioner had to face unwarranted situation for which he has approached this Hon'ble Court in W.P.(C) No.20240 of 2013 which was withdrawn on 19.6.2014, W.P.(C) No.12392 of 2014 disposed of on 21.10.2014, W.P.(C) No.21262 of 2014 disposed of on 27.11.2014 and lastly W.P.(C) No.24487 of 2014 disposed of on 27.2.2015. By virtue of the order of the Court he had completed the course and appeared the back papers.

3. It is stated in the petition that on 9.1.2016 while the petitioner was appearing back papers, he came about 10 to 15 minutes later to the schedule time because of heavy traffic jam but he was not allowed to appear in the examination. It is alleged, inter alia, that petitioner was harassed in the examination hall and he could not appear at the examination as the examination papers were snatched and on tussle with the invigilator, the examination paper was torn away. Petitioner had to leave the examination hall with a shocking mind. All on a sudden on 13.1.2016 petitioner was communicated by the Registrar of the Deemed University rusticating him which is illegal and arbitrary manner because no show cause notice was issued to him and no enquiry was held to find out his guilt.

4. After receiving the order dated 13.1.2016 the petitioner made representation on 31.3.2016 to the opposite parties. But the opposite parties did not pay any response to his representation. Petitioner was harassed while appearing the back papers and such harassment was due to personal grudge of 2/3 staff of the College. Petitioner tried his best to settle the matter amicably but due to inaction on the part of the opposite parties he was compelled to file the present case. It is alleged that natural justice has been violated by not giving the petitioner an opportunity of hearing before passing the order of rustication on 13.1.2016. So, the petitioner was compelled to approach this Court for quashing of the order of rustication as well as with a direction to allow him to appear in the back paper examination which would commence very shortly.

5. Per contra, the Registrar of the opposite party University filed the counter admitting that the order of rustication was passed on 13.1.2016 for the following reasons:

"(a) Outraging the modesty of women faculty member on invigilation duty, using slang and making obnoxious statements about her family;

(b) being under influence of alcohol;

(c) behaving violently with lady faculty members;

(d) damaging University property (Examination sheets, etc.)"

(e) damaging the property (Mobile phones) belonging to other students.

6. It is the case of the opposite parties that in obedience to the order of the Court the petitioner was allowed to appear in the examination on 9.1.2016 to clear the back papers but he reached the examination hall 10 to 15 minutes later. The opposite parties do not admit any sort of keeping previous grudge and mala fide intention to harass the petitioner. They also refuted the allegation of snatching examination papers and made tussle at the instance of the invigilator.

7. It is stated in the counter that the lady Invigilator submitted a report revealing the allegation against the petitioner to the effect that the petitioner being in drunken state reported late and entered inside the hall and clicked photograph of the answer script. Due to objection by the Invigilator, the petitioner torn his question paper and answer script. It is alleged that the mother of the petitioner also entered in the Examination hall and petitioner was so violent, he not only attempted physical assault to the two lady invigilators, one staff but threw the mobile phones of others and tore the answer scripts of other candidates. An F.I.R. was lodged by the University against this incident. Due to such ugly incident, a decision was taken to rusticate the petitioner from appearing the examination on subsequent papers for the interest of the students and faculty members. Although the opposite parties refuted the allegations of the petitioner but the fact remains that the University has obeyed the order of the Court by allowing the petitioner to appear the back paper examination along with another student who also by virtue of order of the Court appeared at the Examination without any sort of disturbance. It is also submitted in the counter that if there is any occasion for allowing the petitioner to appear at the Examination, it is most desirable to make an alternative arrangement for the petitioner to protect and secure conducive atmosphere in the examination hall for other candidates and if necessary to take Police assistance as well.

8. The petitioner filed rejoinder to the counter filed by the opposite parties stating that the order of rustication dated 13.1.2016 was passed in violation of Academic Regulations of B. Tech in the University in question for which principles of natural justice has been violated. It is also stated that the report of the Invigilator is baseless and the order of rustication dated 13.1.2016 against the petitioner is illegal, void and cannot be sustained in law and the same is liable to be quashed.

SUBMISSIONS

9. It is submitted by Dr. A.K. Mohapatra, learned Senior Advocate that the order of rustication passed on 13.1.2016 by the opposite parties is illegal, improper and same violates the natural justice of the petitioner. He further submitted that the authorities before passing the order of rustication had to give notice to the petitioner to hear him. But in the instant case, without observing such principle of natural justice, the opposite parties have acted aggressively in passing the order of rustication. It is further submitted by the learned counsel for the petitioner that no Regulation of the University has been followed in this case while passing the order of rustication. According to him, the order of rustication is absolutely showing miscarriage of justice when no opportunity was given to the petitioner of being heard before passing such harsh order for the petitioner. He further submitted that the opposite parties have erred in law by passing the order of rustication without following the Regulation of the University. He further submitted that the opposite parties are only showing their anxiety for compliance of the order of this Court passed in the earlier writ petitions but actually they are harassing the petitioner. So, he submitted to allow the writ petition with cost.

10. Mr. S.K. Das, learned counsel for the University submitted that the action of the petitioner in the Examination Hall of the College was very much unbecoming and disturbing for other students. He also submitted that no natural justice has been violated in this case for which he submitted to reject the writ petition.

11. Points for consideration:-

The main point for consideration of the case is -

(i) Whether there is violation of natural justice by the opposite parties.

DISCUSSIONS
POINT NO.(i) :

12. It is admitted fact that the petitioner was a student of ITER College and prosecuting Engineering course. It is also admitted fact that due to some unavoidable circumstances the petitioner had to file writ petitions before this Court as stated above and in those cases petitioner was allowed to appear in back papers. It is also undisputed fact that petitioner appeared in the Examination but due to some actions of the College authorities he has to leave the place of Examination. It is admitted fact that rustication order was passed on 13.1.2016 by debarring the petitioner to show cause and of being heard.

13. The word natural justice is very wide term and it has been interpreted by the Hon'ble Apex Court at various times and in different context.

It is 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."

14. 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***).

15. In the case reported in ***2006 (4) SCALE 154*** (Ranjit Singh v. Union of India & others) where Their Lordships have observed at para-22:-

> "In view of the aforementioned decisions of this Court, it is now well settled that the principles of natural justice were required to be complied with by the Disciplinary Authority. He was also required to apply his mind to the materials on record. The Enquiry Officer arrived at findings which were in favour of the Appellant. Such findings were required to be over turned by the Disciplinary Authority. It is in that view of the matter, the power sought to be exercised by the Disciplinary Authority, although not as that of an appellate authority, but akin thereto."

In ***A.I.R. 2006 SC 2064*** (P.D. Agrawal Vs. State Bank of India & Ors) Their Lordships have taken same view as has been taken in the case of Ranjit Singh v. Union of India & others (supra).

16. With due respect to the decision, it is found in the aforesaid case the Hon'ble Apex Court was considering the role of the Disciplinary Authority in a Disciplinary Proceeding. The Disciplinary Authority has to apply his mind to the materials on record and take a decision. Now adverting to the present case the action of the opposite parties has been taken only basing on the report of the Invigilator as available from counter and no enquiry appears to have been held. So, the natural justice in this case is also otherwise not followed by the opposite parties.

17. 'Natural Justice' is an expression of English common law. In one of the English decisions, reported in ***(1915) AC 120 (138) HL***, Local Government Board v. Arlidge, Viscount Haldane observed, "… those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice."

18. From the aforesaid discussion, it is crystal clear that Hon'ble Apex Court and Common Law have interpreted the natural justice to the extent that any notice to the person concerned and based on principle of *audi alteram*

partem giving chance to the affected party excludes the arbitrariness and illegality attached to the order or the judgment. On the other hand, if a statutory notice or any notice is not issued to the person affected to hear him before awarding punishment that amounts to violation of natural justice.

19. In the instant case, Annexure-2 which is the impugned order passed by the opposite parties is described hereunder:

SIKSHA "O" ANUSANDHAN UNIVERSITY
(A Deemed University Declared U/S 3 of the UGC Act, 1956)
Accredited by NAAC of UGC with 'A' Grade

OFFICE ORDER
No.(Estt.) Regr /128/SOAU
Dated the 13th January, 2016

Sri Himanish Mohapatra, Regn. No.1141014120, EEE student, Institute of Technical Education & Research (ITER) who while appearing as per Court's orders at the special examination in the Institute on 9th January, 2016, having committed serious acts of indiscipline and grievous offences of-

- outraging the modesty of women (lady faculty member) on invigilation duty, using slang and making obnoxious statements about her family;
- being under the influence of alcohol;
- behaving violently with lady faculty members;
- damaging University property (Examination sheets, etc)
- damaging the property (Mobile phones) belonging to other students;

is permanently rusticated from the Institute (ITER)/University with immediate effect. Consequently Sri Mohapatra is debarred from entering into the premises of the Institute/University.

By order of the Vice-Chancellor
Sd/-
REGISTRAR"

From the aforesaid office order, it appears that serious allegations have been made by the opposite parties against the petitioner. It is clear from the aforesaid order that petitioner was permanently rusticated from the Institute on such serious allegations and all the allegations pertain to the special examination held on 9.1.2016 when petitioner was appearing in the examination. It is revealed from the petition that on 31.3.2016 petitioner has made representation countering the allegations for which he was rusticated by

the opposite parties. From his representation it appears that he has all respect for the lady Invigilator who is of the age of his mother. He has also taken plea that he is suffering from nervous disorder (Bells Apsy) and was being treated in Bangalore and also in AMRI Hospital, Bhubaneswar. On going through the representation of the petitioner, we are of the view that due to serious nervousness and psychological pressure, he has failed to appear in the Examination under the circumstances stated therein. In spite of the circumstances, no order appears to have been passed by the opposite parties to revoke the rustication order. Learned counsel for the opposite parties clearly admitted that before rustication order was issued no opportunity was given to the petitioner of being heard. We are not entering into any sort of adjudication of the facts raised by both the parties but we are shocked to find out that the opposite parties have passed the rustication order on 13.1.2016 without issuing notice to the petitioner or without giving the petitioner of being heard resulting violation of the natural justice which is the parameter for enforcing Articles 14, 19 and 21 of the Constitution. So, in the facts and circumstances of the case, we are of the view that the impugned order dated 13.1.2016 has been passed in violation of the Natural justice. Point No.(i) is answered accordingly.

CONCLUSION

20. Since natural justice has been violated in this case, we have no hesitation to hold that the impugned order suffers from illegality. Since the principle of *audi alteram partem* has not been followed in this case by the opposite parties, the office order of rustication dated 13.1.2016 is liable to be quashed. We have no hesitation to quash the same and accordingly we order so. When the rustication order dated 13.1.2016 is quashed, the petitioner should be given chance of clearing the back papers when admittedly he has completed four years Degree course. We, therefore, direct the opposite parties to allow the petitioner to appear at the special Examination to clear up the back papers on following conditions:

(1) While he will appear the back papers he is to be escorted by his mother or father to the Examination Hall since he has got nervous disorder as found from his representation and his parents will remain present during examination in the Hall.

(2) He will appear the Examination alone in a room so as to avoid disturbance to other students and the Opposite Parties shall arrange security personnel outside the Examination Hall while he will appear at the Examination.

21. Necessary compliance of the order made by the opposite parties be filed within a period of two months and list the matter before this Court on 28.7.2016. The writ petition is disposed of accordingly.

Writ petition disposed of.

2016 (II) ILR - CUT- 546

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

W.P.(C) No. 25227 OF 2012

Sk. NIZAMUDDIN .....Petitioner

.Vrs.

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

ODISHA CIVIL SERVICES (Pension) Rules, 1992 – RULES 32, 47 (2) (b), 114

Petitioner got appointment as direct candidate in the post of public prosecutor on 13. 07. 2001 and retired on 31.07.2009 – with the aid of Rule 32 his qualifying service became 9 years, 10 months and 15 days , falling short of 45 days to complete 10 years to get pension under Rule 47 (2)(b) of the Rules – Prior to the above job he was in legal practice since 1973 and was Asst. public prosecutor twice i.e in 1990 and 1995 – Whether the petitioner is entitled to 10 years of qualifying service to get pension ? – Under Rule 114 of the Rules His Excellency the Governor has the power to relax Rule 47 (2) (b) to award pension to the petitioner with prior consultation of the finance department – In view of the long experience of the petitioner as an advocate as well as Asst. Public Prosecutor, there is "undue hardship" on the part of the petitioner for which there is necessity to exercise power under Rule 114 to relax Rule 47 (2) (b) of the Rules – Held, direction issued to the State Government to place the matter before His Excellency the Governor for relaxation of Rule 47(2)(b) of the Rules,1992. (Paras 17,18)

Case Laws Referred to :-

1. AIR 1975 SC 415: Sterling General Insurance Co. Ltd. V. Planters Airways Pvt. Ltd.
2. 1994 SC 923; S. : Vasudeva v. State of Karnataka and others
3. (2016) 6 SCC 1 : State of Punjab and another Vs. Brijeshwar Singh Chahal & anr.

For Petitioner : M/s. K.P. Mishra, S. Mohapatra,T.P. Tripathy

& L.P. Dwivedy.

For Opp. Parties : Mr. M. Sahoo, A.G.A.

Date of Argument: 16.07. 2016
Date of Judgment: 01.08.2016

JUDGMENT

DR. D.P. CHOUDHURY, J.

Challenge has been made to the order dated 18.5.2012 passed by the learned Odisha Administrative Tribunal, Cuttack Bench, Cuttack (hereinafter called 'the Tribunal') in O.A. No. 805(C) of 2011 in not granting pensionary benefit under the Orissa Pension Rules, 1992 (hereinafter called 'the Rules').

2. The backdrop of the case of the petitioner is that the petitioner is an advocate since 1973. In 1990 he was appointed as an Asst. Public Prosecutor under the Law Officers Rules, 1971 (hereinafter called 'the Rules, 1971'). Moreover, he was also appointed as Asst. Public Prosecutor in 1995 and worked as such under the aforesaid Rules. Orissa State Prosecution Rules, 1997 came into force on 7.3.1998 (hereinafter called 'the Rules, 1997'). Accordingly, the petitioner was duly appointed as direct candidate to the post of Public Prosecutor and joined his duty on 13.7.2001.

3. According to the petitioner he was appointed to the post of Public Prosecutor at the age of 50 years and he got superannuation in the year 2001, (sic 2009) but unfortunately due to want of 10 years of qualifying service, he was deprived of getting the pension.

4. Under Rule 47(2)(a) of the Rules of the Rules the Government servant shall be entitled to receive full pension after completion of 33 years of qualifying service, but under Rule 47(2)(b) of the Rules only after 10 years he is entitled to receive pension proportionately. The petitioner while retired has only got 7 years, 10 months and 25 days of service in his credit. By virtue of Rule-32, 1/4th of his qualifying service has been added it became 9 years, 10 months and 15 days and as such, falls short of 45 days of qualifying service. But if the practice of petitioner as advocate is taken into consideration definitely he would complete 10 years of required experience to claim pension. Besides, if the services of Asst. Public Prosecutor for the year 1990 and 1995 are included, he is entitled to service of more than 10 years.

5. It is also stated that the petitioner due to shortage of 45 days of qualifying service is deprived of getting pension and in such case the State

Government in Finance Department is to come to rescue to count his qualifying service beyond 10 years by relaxing provisions under Rule 114 of the Rules in view of his hardship and to award proportionate pension. Claiming such benefit the petitioner filed the Original Application before the Tribunal and the Tribunal after hearing failed to consider his case accordingly, the petitioner being aggrieved by the direction of the Tribunal preferred the present writ application on the ground that 9 years, 10 months and 15 days should be counted as 10 years and accordingly the tribunal ought to have given direction to the opp. Parties to release the pensionary benefit to the petitioner instead of directing the op. parties to consider the case of the petitioner.

6. Opp. Parties 1 to 3 filed counter affidavit stating that the petitioner is not entitled to the pension although he has worked for 9 years, 10 months and 15 days inasmuch as 10 years is required as qualifying service under the Rules. The contesting opp. Parties admitted that the petitioner was Asst. Public Prosecutor in the year 1990 and 1995 under Rules, 1971. It is stated that Rule-32 of the Rules prescribes three alternatives to add certain period of qualifying service of Government servant and the period which is least has to be applied for extension of qualifying service to receive pension. Those alternatives are as follows:-

(a) a period not exceeding one-fourth of the length of service or;

(b) the actual period by which age at the time of recruitment exceeds thirty two years or;

(c) a period of five years whichever is least.

7. According to the opp. Parties, the petitioner had served for 7 years, 9 months and 25 days as Government Officer and retired on 31.7.2009. It is stated that in view of the aforesaid provision the petitioner is lawfully entitled only 1/4th period of his service as qualifying service to which it be added to the length of his service, on fair calculation of his qualifying service become 9 years, 10 months and 15 days giving short of 45 days to complete 10 years of service so as to get his pension under Rule-42(2)(b) of the Rules. However, under one time relaxation as per the Rules, the Government may relax, but the stipulation of 10 years as appears in Rule-32 of the Rules cannot be reduced to below 10 years which is minimum service required to get proportionate pension. It is also revealed from the counter affidavit that Sri K.C. Pattnaik, a special Public Prosecutor has got 10 years of qualifying service, for which he could be get pension, but his case cannot be compared

with the case of the petitioner because Sri Pattnaik had come to claim during his career, whereas the present petitioner filed the request after his superannuation. So, he supports the order of the Tribunal, but prayed to dismiss the writ petition.

8. The main point for consideration is whether the petitioner is entitled to 10 years of qualifying service to get pension?

DISCUSSION:

9. It is the admitted fact that the petitioner after 15 years of legal practice had joined the post of Public Prosecutor under Rules, 1997. Before emerging of Rules, 1997, Rule 1971 was working in 1990 and 1995 when the petitioner had served as Asst. Public Prosecutor in some Courts. It is also the admitted fact that the petitioner was duly selected at the age of 50 years and worked up to 2001 when he was superannuated. For better clarification Rule-47(2)(a) and (b) of the Pension Rules is quoted below:-

> "47. **Amount of pension-** The amount of pension that may be granted shall be determined by the length of completed six monthly periods of service rendered by the retired Government servant.
>
> (2)(a) In the case of a Government servant retiring in accordance with the provisions of the these rules after completing qualifying service of not less than thirty-three years, the amount of pension shall be calculated at 50 percent of the emoluments last drawn preceding to retirement.
>
> (b) In the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of thirty-three years, but after completing qualifying service of ten years, the amount of pension shall be proportionate to the amount of pension admissible under Clause (1) and in no case amount of pension shall be less than the minimum amount of pension admissible."

From the aforesaid provision it is clear that for full pension 33 years of qualifying service is necessary, but in the event of retirement after completion of 10 years before completion of 33 years the amount of pension would be made available in proportionate subject to minimum amount of pension admissible.

10. Rule-32 of the Rules enshrines that in exceptional circumstances the qualifying service can be enhanced to certain extent. Sub-Rule (1) of Rule-32 is placed below for better appreciation:

> "32. **Additional to qualifying service in exceptional circumstances**- (1) The State Government may, in exceptional circumstances as noted hereunder add to the service of a Government servant for qualifying superannuation pension only not exceeding onefourth of the length of his service or the actual period by which his age at the time of recruitment exceeds thirty-two years or a period of five years whichever is least;
>
> (a) the service or post for which post-graduate research or specialist qualification or experience in scientific, technological or professional filed is essential; and
>
> (b) to which candidates of more than thirty-two years of age are normally recruited;
>
> Provided that this concession shall not be admissible to a Government servant unless his actual qualifying service at the time he quits Government service is not less than ten years."

From the aforesaid provision it is clear that either 1/4th of the service rendered by the petitioner or actual period by which his age at the time of recruitment above 32 years or a period of 5 years whichever is least will be added as qualifying service. In the instant case minimum of service period was added as two years plus some months, but still the minimum pension period falls short of 45 days.

11. It is the admitted fact that the petitioner was appointed as Public Prosecutor having 20 years of experience in the Bar as legal practitioner. Not only this, but also he has experience as Asst. Public Prosecutor in 1990 and 1995. When after rendering the service to people a Public Prosecutor goes without pension because of technicality, the same can be construed as hardship for the petitioner being deprived receiving minimum pension. Rule-114 of the Rules is quoted below:-

> "114. **Power to relax**- Where the Governor is satisfied that the operation of any of the provisions of these Rules causes undue hardship in any particular case, he may, by order, for reasons to be recorded in writing, dispense with or relax the requirements of the said provision to such extent and subject to such conditions as he may

consider necessary for dealing with the case in a just and equitable manner;

Provided that no such order of relaxation shall be made except with the prior consultation of the Finance Department."

12. In the case of **Sterling General Insurance Co. Ltd. V. Planters Airways Pvt. Ltd.;** AIR 1975 SC 415 Their Lordships have observed as follows:-

"10. The English courts originally took a very strict and narrow view of the words "undue hardship". In **Steamship Co. of 1912 etc. v. Indlo-American Grain Co. (1958) 2 Lloyd's Rep. 341** Lord Parkar, C.J. said :

"It has been said, over and over again by this Court, that there must be very special circumstances for extending the time. Of course, if a valid claim is barred, there is hardship, but that is not what is provided for by the clause, and before this Court can extend the time they must be satisfied that the hardship amounts in the particular case to undue hardship....."

In **Watney, Comba, Raid & Co. v. E. Al. Dower & Co. Ltd. (1956) 2 Lloyd's Rep 129** at p.131 Lord Goddard, C.J. said :

"I desire to say in the clearest possible terms that the mere fact that the claimant is barred cannot be held to be an undue hardship, which is what the section requires to be found by the court before it extends the time. The section does not mean that this Court can take out of the contract the provision which will bar the claim if it is not pursued in time. They have no power to do that. The only thing they have power to do is to extend the time if undue hardship is caused. One can visualise certain cases of undue hardship."

11. In **F. E. Hookway & Co. Ltd. v. H. W. H. Hopper & Co.(1950) 2 ALL ER 842** where the buyers made an application for extension of time under S. 16(6) of the English Act of 1934, Denning, L.J. observed that the extent of delay is a relevant circumstance to be considered, that if the delay is not on account of the fault of the buyer, it would no doubt, be an undue hardship on him to hold the clause against him but, if the delay is his own fault, the hardship may not be undue as it may be a hardship which it is due and proper that he should bear. He further said that another relevant circumstance was whether there was evidence of any loss on

any sub-contracts and claims by sub-buyers or any complaints by them and if there was evidence of such loss or claims, then the court would take a lenient view of the delay and hold that, notwithstanding it, there was undue hardship on the buyer.

12. In **Stanhope Steamship Co. Ltd. v. British Phosphate Commissioners (1956) 2, Llyod's Rep,** Singleton. J., in delivering the judgment said:

"What, then, is the meaning of "undue hardship" ? "Undue", it is said by Mr. McCrindle, means something which is not merited by the conduct of the claimant. That may be right. If the result of claimant's being perhaps a day late is so oppressive, so burdensome, as to be altogether out of proportion to the fault, I am inclined to think that one may well say that there is undue hardship. Both the amount at stake and the reasons for the delay are material considerations."

13. In **Librarian Shipping etc. v. A King & Sons (1967) 1, ALL ER 934** the facts were these. A vessel was let on a voyage charter party in Centrocon from containing an arbitration clause under which any claim had to be made in writing and the claimant's arbitrator had to be appointed within three months of final discharge. A fire occurred on board the vessel during loading. Both the owners and the charterers had claims against each other. The time limit was to expire on June 26, 1966. The parties were negotiating and, after considerable correspondence, a meeting between both parties was arranged for June 27, 1966 with a view to settlement. The meeting did not result in a settlement. The charterers first realised that time had expired when the owners sought an extension of it by consent, nine days after the expiry. The charterers had not contributed to the delay on the part of the owners in relation to the arbitration clause. The charterers did not consent to the time being extended. The owners applied under s. 27 of the Arbitration Act, 1950, for an extension of time on the ground that "undue hardship" would otherwise be caused to them. Their claim amounted to about £33.000. The master granted an extension of time, but on appeal the judge refused it. On further appeal the court by a majority said that if the time were not extended undue hardship would be caused to the owners since they would be deprived of what might be a valid claim for £ 33,000 by a delay of only a few days due to excusable

inadvertence, that the charterers would not in any way be prejudiced by time being extended and so the court would exercise the discretion conferred by s. 27 of the Arbitration Act, 1950, and would extend the time. In the course of his judgment Lord Denning, M. R. observed that in the past the courts had been inclined to emphasize the word "undue" and to say that if a man does not read the contract and is a day or two late, it is a "hardship": but it is not an "undue hardship", because, it is his own fault but that the interpretation was narrow. He said that these time- limit clauses used to operate most unjustly on claimants for, they found their claim barred by some oversight and it was to avoid that injustice the legislature intervened so as to enable the courts to extend the time whenever "in the circumstances of the case undue hardship would otherwise be caused". He also said that the word "undue" in the context simply means excessive hardship greater than the circumstances warrant and that even if a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault. He further stated that even if a claimant makes a mistake which is excusable, and is in consequence a few days out of time, then if there is no prejudice to the other side, it would be altogether too harsh to deprive him of all chance for ever of coming and making his claim and that is all the more so, if the mistake is contributed or shared by the other side. He, then observed:

"It was said that this was a matter for the Judge's discretion. True enough. We have, however, said time and again that we will interfere with a Judge's discretion if satisfied that the discretion was wrongly exercised. In any case the judge was not exercising an unfettered discretion. He felt himself fettered by the trend of the authorities to give the words "undue hardship" a narrow meaning. I think that we should reverse that trend and give the words their ordinary meaning, as Parliament intended. It would be "undue hardship" on the owners to hold them barred by the clause."

In the same case, Salmon, L.J. said that the arbitration clause put it out of the power of the court to grant any relief to a claimant who had allowed a few days to run beyond the period specified in the clause even although the delay could have caused no conceivable harm to the other side. He said that it would be hard and unjust if a man with a perfectly good claim for thousands of pounds worth of damage for

breach of contract inadvertently allowed a day or two to go by was deprived of the right to be compensated for the loss which he had suffered, even though the other party had not been in any way affected by the delay and might perhaps have been guilty of a deliberate breach of contract and that it was to remedy this hardship and injustice that the legislature intervened to alter the Law. He further said

"This enactment was a beneficent reform, liberalising the law in an admittedly narrow sector of the commercial field. I have heard it said that when people have spent their lives in chains and the shackles are eventually struck off, they cannot believe that their claims are no longer there. They still feel bound by the shackles to which they have so long been accustomed. To my mind, that factor may explain the court's approach in some of the cases to the problem with which we are now faced.

He then summed up his conclusion as follows:

"In considering this question the court must take all the relevant circumstances of the case into account; the degree of blameworthiness of the claimants in failing to appoint an arbitrator within the time; the amount at stake, the length of the delay; whether the claimants have been misled, whether through some circumstances beyond their control it was impossible for them to appoint an arbitrator in time. In the last two circumstances which I have mentioned, which do not arise here, it is obvious that normally the power would be exercised; but those are not the only circumstances and they are not, to my mind, necessary circumstances for the exercise of the power to extend time.

I do not intend to catalogue the circumstances to be taken into account, but one very important circumstance is whether there is any possibility of the other side having been prejudiced by the delay. Of course, if there is such a possibility, it might be said that it is no undue hardship on the owners to refuse an extension of time because, if the hardship is lifted from their shoulders, some hardship will fall on the shoulders of the charterers, and after all, the delay is the owners' fault.

14. Therefore, we will have to take a liberal view of the meaning of the words "undue hardship." "Undue" must mean something which

is not merited by the conduct of the claimant, or is very much disproportionate to it.

15. Keeping in view these principles, it has to be seen whether in the facts and circumstances of this case, there was reasonable and sufficient ground for not preferring the claim to arbitration within the time specified in clause 12 of the policy and whether there would be "undue hardship" to the respondent if time is not extended."

13. In the aforesaid decision the English Courts as well as the Hon'ble Apex Court have been pleased to observe that 'undue' means which is not merited, but hardship where the person is so burdensome or onerous to meet such merit. Therefore, the liberal view of the meaning of word 'undue hardship' has to be taken and it will depend on the facts and circumstances of the case. It is reported in AIR 1994 SC 923; **S. Vasudeva v. State of Karnataka and others** at page 943 where Their Lordships observed as follows:-

"Under Indian conditions the expression "undue hardship" is normally related to economic hardship. That is why from time to time many holders of lands in excess of the ceiling limit, while claiming exemption under clause (b) put forth their bad economic condition and indebtedness to claim exemption along with permission to sell such excess lands……."

xx xx xx xx xx

"22. In view of our conclusion as above, it is not necessary to go into the further question, viz., if the State Government has such power, in which circumstances it can be exercised and whether financial hardship such as the indebtedness of the land-holder is sufficient to warrant such exemption or not and with respect to which date such indebtedness is to be assessed and in what manner, and whether in the present case, the said aspects of the indebtedness were investigated or properly investigated or not. For this very reason, we also do not propose to go into the other question regarding the mala fides on the part of the authorities while granting permission to the firm to sell the land to the builders in question."

With due respect to the aforesaid decision, we are of the view that in the above cited decision the Urban Land(Ceiling Regulation) Act was analyzed with regard to Section 20(1)(b) of the said Act. In the said decision the factual matrix are that the land holder claims to retain the excess land on

the ground of 'undue hardship'. There the Hon'ble Apex Court interpreted 'undue hardship' purportedly that undue hardship must be read while evaluating the object of the statute. If 'undue hardship' in a statute like Urban Land (Ceiling Regulation) Act, 1976 is obstructed by showing the financial difficulty or indebtedness of the land holder, then the purpose of the Act will not be fulfilled. But at the same time Their Lordships have clearly observed that 'undue hardship' is a ground for exemption of retaining excess land so as to meet the debts incurred or fetch money by sale of same. So, the Hon'ble Apex Court observed that 'undue hardship' relates to financial liability, but it must be read with the object and reason of the statute in which it occurs to construe liberally. So the word 'undue hardship' is to be interpreted by taking into consideration the facts and circumstances of each case and there is no straight jacket formulae to construe the 'undue hardship'.

14. Now adverting to the present case. Under Rule 114 of the Rules the power lies with His Excellency the Governor to relax any provision with prior consultation of the Finance Department. Here the fact and circumstances of the case are clear that only for 45 days short from 10 years the petitioner is deprived of receiving pension under Rule 47(2)(b) of the Rules. But it must be remembered that the petitioner was appointed at the age of 50 years and the fact that he was working in1990 and 1995 as Asst. Public Prosecutor. Not only this, but also 20 years of the legal practice of the petitioner must be taken into consideration to relax Rule 47(2)(b) of the Rules so as to award pension to the petitioner. The object of this Rule is to award pension to the employees of the State Government and if at all for the technicalities the provisions are not relaxed, that will not sub-serve justice with proper perspective. If the petitioner would not be allowed to relax the provisions of the Rules, he will go without any pension being received and there would be financial hardship for him to carry on day to day affair. On the other hand the person who has worked for an organization should not be deprived of getting pension on mere shortage of 45 days. It is apt to cite the decision reported in ***State of Punjab and another Vs. Brijeshwar Singh Chahal and another: (2016) 6 SCC 1*** where Their Lordships observed as follows:-

> "49. The question is what should be the mechanism for such consideration. There are in that regard two major aspects that need to be kept in mind.

49.1 The first is the need for assessment and requirement of the State Governments having regard to the workload in different courts. As noticed earlier, appointments appear to have been made without any realistic assessment of the need for State counsel at different levels. Absence of a proper assessment of the requirement for State counsel leads to situations that have been adversely commented upon by the CAG in his report to which we have made a reference in the earlier part of this judgment. The problem gets compounded by those in power adding to the strength of government advocates not because they are required but because such appointments serve the object of appeasement or private benevolence shown to those who qualify for the same. The CAG has in that view rightly observed that there ought to be a proper assessment of the need before such appointments are made.

49.2. The second aspect is about the process of selection and assessment of merit of the candidates by a credible process. This process can be primarily left to the State Government who can appoint a Committee of officers to carry out the same. It will be useful if the Committee of officers has the Secretary to Government, Law Department, who is generally a judicial officer on deputation with the Government as its Member- Secretary. The Committee can even invite applications from eligible candidates for different positions. The conditions of eligibility for appointment can be left to the Government or the Committee depending upon the nature and the extent of work which the appointees may be effected to handle. The process and selection of appointment would be fair and reasonable, transparent and credible if the Government or the Committee as the case may be also stipulates the norms for assessment of merit and suitability.

50. The third stage of the process of selection and appointment shall in the absence of any statutory provisions regulating such appointments involve consultation with the District & Sessions Judge if the appointment is at the district level and the High Court if the appointment is for cases conducted before the High Court. It would, in our opinion, be appropriate and in keeping with the demands of transparency, objectivity and fairness if after assessment and finalisation of the selection process a panel is sent to the Chief Justice of the High Court concerned for his views on the subject. The Chief

> Justice could constitute a Committee of Judges to review the names recommended for appointment and offer his views in regard to professional competence and suitability of candidates for such appointments. Appointments made after such a consultative process would inspire confidence and prevent any arbitrariness. The same procedure could be followed where candidates are granted extension in their terms of appointment in which case the Committee appointed by the Government and that constituted by the Chief Justice could also look into the performance of the candidates during the period they have worked as State Counsel".

15. With due respect to the said decision, it is made clear that the appointment of the Government Counsel including the Public Prosecutor should be fair, transparent and rigorous so that the objectivity of the prosecution system of State would be more achieved. On the other hand, the service condition of the Prosecutor or the Government Counsel as the case may be should be more alluring so that the meritorious and intelligent people would apply and in a fair manner their selection could be made. If a Prosecutor after entering to the Government service at the age of 35 years or above will have no retiral benefits, then competent Advocates will not apply for selection so as to allow the selection process to be more fair and transparent. In order to attract the meritorious and competent candidates to the post of Assistant Public Prosecutor, Additional Public Prosecutor, Public Prosecutor, Government Pleader or Additional Government Pleader as the case may be, the rules governing their recruitment and service condition must be attractive and comfortable so that they will defend the State in proper befitting manner. In the OSPS Rules there is direct recruitment to the cadre of Prosecutors after the age of 35 years or 45 years as the case may be but there is no any Pension Scheme so as to attract such service for the competent persons who are esteemed very high in the society and their role also is equally important in justice delivery system. Keeping in mind of the importance of the job, we hope and trust that State Government should take steps to amend the OSPS Rule so as to keep the pensionary provisions in the Rule so that the prosecutors will not face problem because of their short span of service in the cadre. At the same time, we also request the State Government to consider if the age of superannuation of the Public Prosecutors is raised to 65 years so that the term of minimum 10 years to get minimum pension would not arise and the Prosecutors when getting more experience could be able to deliver excellent service by participating in the

justice delivery system. It is, of course, the State Government to consider such matters seriously keeping in view that the Advocates are entering to the prosecution service as a professional person like doctors whose age has been also increased to 65 years because of their profession. We do not mean to compare service conditions of each cadre but keeping in mind of the professional efficiency and requirement of the State for better improvement in the justice delivery system, the Prosecutors role should be equally magnified. Of course, as long as the OSPS Rule has not been amended, the Odisha Pension Rules would apply but the relaxation under Rule 114 should be liberal keeping in mind the importance of the service of Government Counsel or the Prosecutor as enumerated by Hon'ble Apex Court and the years of legal profession they have already rendered before coming into service.

16. Relevant portions of the impugned order are as follows:-

> "5. Heard learned standing counsel. He bases his case on the counter and submits that even if Rule32 of the OCS (Pension) Rules, 1992 is applied, the applicant will not be eligible for pension as he does not complete the prescribed minimum ten years qualifying service for being eligible for pension as he falls short of such ten years qualifying service by 45 days. He also submits that Rule 114 of the OCS (Pension) Rules, 1992 is an exceptional clause to be applied in cases which result in undue hardship and in case of the applicant no such undue hardship of the applicant has been brought on record. As regards reappointment of Special Public Prosecutor. Vigilance, Learned standing counsel has no instructions.
>
> 6. After hearing both parties, it is apparent that as per Rule 32 and Rule-114 and Rule 47 the applicant cannot be entitled to pension as he has not completed the prescribed ten years of minimum qualifying service and no undue hardship is apparent. However, the Government i.e., Respondent no.1, is at liberty to make such provision for pension by reducing the period of the minimum qualifying service for allowing such pension to members of the Orissa State Prosecution Service created in 1997 to ensure high level of integrity and competence among such personnel who are recruited after a rigorous screening process by the OPSC after a number of years of practice at the bar. Such decisions, if any be taken within a period of six months from the date of filing of this case."

17. In terms of our observation in the above paragraphs there is 'undue hardship' on the part of the petitioner for which there is necessity to exercise the power under Rule 114 of the Rules to relax Rule 47(2)(b) of the Rules. On the other hand the Tribunal failed to understand real import of Rule-114 of the Rules. The Tribunal has only suggested that the service of the Public Prosecutor being in high esteem, the year of service to receive minimum pension should be reduced is meaningless unless the petitioner is awarded justice accordingly. We are, therefore, of the view that it is a fit case where considering the 'undue hardship' the case of the petitioner should be resolved by relaxing the provisions of the Rules as per Rule-114 of the Rules. The point for consideration is disposed of accordingly.

CONCLUSION:

18. From the foregoing discussions we are of the view that Rule-47(2)(b) of the Rules entitling the pensioner to receive pension if he works for 10 years be relaxed in the present facts and circumstances of the case where the past experience of the petitioner as Asst. Public Prosecutor and legal practitioner should be added to fill up the gap of 45 days short of 10 years required to get minimum pension. We, therefore, direct the State Government to place the matter before His Excellency the Governor for consideration of relaxation of Rule-47(2)(b) as per Rule-114 of the Rules. We hope and trust that the concerned authorities would consider the undue hardship for compliance of the provisions of the aforesaid Rules, particularly Rule-47(2)(b) of the Rules and direct the Finance Department to opine accordingly when consultation would be made by His Excellency, the Governor with the Finance Department. The exercise should be made within a period of four weeks from today. The order of the Tribunal is liable to be quashed and we do so. The writ application is disposed of accordingly.

Writ petition disposed of.

2016 (II) ILR - CUT- 561

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

W.A. NO. 250 OF 2014

MAHANADI COALFIELDS LTD. & ORS. .....Appellants

.Vrs.

DHIRA KUMAR PARIDA .....Respondent

(A) SERVICE LAW – Compassionate appointment – Respondent filed writ petition in the year 2005, though his father expired on 30.01.1992 – Purpose of the scheme is to enable the family to get over sudden financial crisis on the death of the bread earner – It is not a vested right which can be exercised at any time in future – Learned single judge without any explanation has ignored such long delay of 13 years – He has also failed to consider that the father of the respondent was a Badli Loader and has not completed required days of work per year to be treated as a workman – Since the family of the respondent survived inspite of the death of the worker in the year 1992, there is no need to make appointment on compassionate ground at the cost of the interest of several others, ignoring the mandate of Article 14 of the constitution of India – Held, the sudden suffering of the family is to be alleviated within a reasonable short period – Compassionate employment can not be granted after lapse of 24 years form the date of death – Impugned order passed by the learned single judge is setaside. (Para 13,14,15)

(B) LIMITATION ACT , 1963 – Sec. 5

Condonation of delay – Delay of 150 days in filing the writ appeal by the appellant-Company – Matter involving public money – Delay in filing the appeal is condoned. (Para 4)

Case Law Relied on :-

1. AIR 2014 SC 2307 : State of Assam & Ors. Vs. Susrita Holdings Pvt. Ltd.

Case Laws Referred to :-

1. AIR 2000 SC 1596 : Balbir Kaur and another Vs. Steel Authority of India Ltd., & Ors.
2. (1994) 4 SCC 138 : Umesh Kumar Nagpal Vs State of Haryana & Ors.
3. 2008 (Supp.-II) OLR 814 : Safi Akhtar Khan Vs. Union of India & Ors.
4. (2006) 5 SCC 766 : State of J & K and others Vs. Sajad Ahmed Mir.
5. AIR 2009 SC 2534 : M/s Eastern Coalfields Ltd., Vs. Anil Badyakar & Ors.
6. AIR 2000 SC 1596 : Balbir Kaur and another Vs. Steel Authority of India Ltd., & Ors.
7. (2012) 9 SCC 545 : State of Gujarat and others Vs. Arvindkumar T.

Tiwari & anr.
8. AIR 2011 SC 1880 : Local Administration Department and another Vs. M.Selvanayagam @ Kumaravelu.

For Appellants : M/s. S.D.Das & S.S.Kanungo
For Respondent : M/s. B.S.Tripathy-1

Date of Judgment : 10.08.2016

JUDGMENT

S.PANDA, J.

This Writ Appeal has been filed by the appellants challenging the judgment dated 11.4.2014 passed by the Hon'ble Single Judge in W.P.(C) No.1608 of 2005

2. Learned counsel for the appellants submitted that the plea of the appellants that the respondent had resorted to the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India at a very belated stage i.e. after long lapse of 13 years was not considered by the Hon'ble Single Judge. The delay and laches can be a ground to decline to exercise the discretion however, the Hon'ble Single Judge completely overlooked the same. The Hon'ble Single Judge failed to appreciate that the appellants being the employer had issued National Coal Wage Agreement-VI (NCWA-VI), which is a settlement and the policy decision with regard to implementation of the said settlement remains within the domain of the appellants, who are the employer. Hence the impugned judgment needs to be interfered with. In support of his contention he has relied on the decision of the Apex Court reported in **AIR 2014 SC 2307, 2008 (Supp.-II) OLR 814, AIR 2009 SC 2534, (2006) 5 SCC 766, (2012) 9 SCC 545, AIR 2011 SC 1880** and **(1994) 4 SCC 138.**

3. Learned counsel for the respondent however, supported the decision of the Hon'ble Single Judge passed in W.P.(C) No.1608 of 2005 and submitted that taking into consideration the fact that the workman died after rendering a long span of service period in the Colliery, the case of his successor should have been considered for compassionate appointment, however, the authorities rejected the same illegally. He further submitted that there was a delay of 150 days in filing the Writ Appeal, as such the same is liable to be dismissed on the ground of limitation.

4. Law is well settled by the Apex Court in the case of **State of Assam and others Vs. Susrita Holdings Pvt. Ltd.** reported in **AIR 2014 SC 2307** that delay by Government in filing Writ Appeal and matter involving public money is liable to be condoned in the larger interest of public. In view of the aforesaid settled position of law, the delay in filing the Writ Appeal is condoned.

5. From the records, it appears that the respondent had filed W.P.(C) No.1608 of 2005 challenging the order dated 17.8.2002 passed by the Project Officer, Deulbera Colliery, Angul – appellant no.3 refusing to grant compassionate appointment as per Clause-9.3.2 of National Coal Wage Agreement-VI on the ground that the deceased Dama Parida, father of the respondent, was a 'Badli Loader', and the dependant of Casual/temporary/badli workers are not entitled to avail the benefit under the said Clause. The respondent's father late Dama Parida was initially appointed as a 'Loader' in the establishment of Deulbera Colliery Organization on 10.1.1965 and continued thereon for a period of eleven years. He was issued with an Identity Card by the Central Coalfields Ltd, Ranchi indicating the Employee's Code No., Unit in which he was working, designation and date of issue. The father of the respondent discontinued his service for a temporary period as he was seriously ill and unable to discharge his duties. Subsequently he was taken back into service in November, 1985. Being an employee, he was contributing to the Coal Men's Provident Fund (CMPF) having CMPF Account No.A/330430. He died in harness on 30.1.1992 leaving behind his legal heirs including the present respondent. Prior to the death of the father of the respondent, the mother of the respondent Ujala Parida, who was the nominee under the CMPF/Gratuity of the South Eastern Coalfields Ltd., Deulbera Colliery had also died. The wage structure, conditions of service and other fringe benefits of the employees of the Coal Industries are being governed by National Coal Wage Agreement. Clause 9.3.2 of NCWA-VI provides for grant of employment to one of the dependents of the worker who dies while in service. In view of such provision, the respondent who was well within the qualifying age of getting service in place of his deceased father, represented on 16.6.2002 for the said benefit. On consideration of his representation, the Project Officer – appellant no.3 without referring the matter to the General Manager passed an order on 17.8.2002 declining to entertain the said representation on the ground that his father was a Badli Worker and is not entitled to the benefit under Clause 9.3.2 of NCWA-VI.

6. In the Writ Petition the appellants had filed a counter affidavit contending *inter alia* that deceased father of the respondent being a Badli Worker, the benefit claimed by the respondent is not available and therefore, the respondent is not entitled to get an employment under the said provision.

7. The Hon'ble Single Judge after hearing the parties, going through the materials available on record and relying on the decision of the Apex Court in the case of **Balbir Kaur and another Vs. Steel Authority of India Ltd., and others** reported in **AIR 2000 SC 1596** held that the respondent could not have been denied the benefit of compassionate appointment to mitigate the sudden jerk in the family by reason of the death of bread earner by taking some plea or other to deprive the legitimate claim for providing compassionate appointment. The authorities could not have taken a plea that the respondent's father being working as a 'Badli Loader' is not coming within the purview of compassionate appointment in terms of Clause 9.3.2 of NCWA-VI. Being a model employer, it should have taken into consideration the sufferings of the family because of the death of the bread earner. The father of the respondent was a 'workman' within the meaning of Section 2 (s) of the Industrial Disputes Act irrespective of whether he was discharging his duties as a 'Loader' or 'Badli Loader'.

8. The Apex Court in the case of **Umesh Kumar Nagpal Vs State of Haryana and others** reported in **(1994) 4 SCC 138** held that the object of compassionate employment is to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner. It cannot be claimed and offered whatever the lapse of time and after the crisis is over. This Court in the case of **Safi Akhtar Khan Vs. Union of India and others** reported in **2008 (Supp.-II) OLR 814** held that the purpose of providing compassionate appointment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner. We do not think that at this stage, that is after a lapse of ten years from the death of the father of the petitioner the object underlying the rules for providing compassionate appointment is still subsisting.

9. In the case of **State of J & K and others Vs. Sajad Ahmed Mir** reported in **(2006) 5 SCC 766** the Apex Court held that compassionate appointment is an exception to general rule and that appointment to public office should be made on the basis of competitive merits. Once it is proved that in spite of the death of the breadwinner, the family survived and substantial period is over, there is no need to make appointment on compassionate ground at the cost of the interests of several others ignoring

the mandate of Article 14 of the Constitution. The above principle has been reiterated by the Apex Court in the case of **M/s Eastern Coalfields Ltd., Vs. Anil Badyakar and others** reported in **AIR 2009 SC 2534** wherein it was held that the compassionate appointment is not a vested right which can be exercised at any time in future. The compassionate employment cannot be claimed and offered long after death of employee in harness.

10. In the case of **Local Administration Department and another Vs. M.Selvanayagam @ Kumaravelu** reported in **AIR 2011 SC 1880** the Apex Court held that object of compassionate appointment is to grant immediate succor to family of deceased employee and allowing appointment to the son of deceased employee, who had applied after 7 ½ years after death of his father cannot be said to sub-serve the basis object and purpose of scheme. The Apex Court in the case of **State of Gujarat and others Vs. Arvindkumar T.Tiwari and another** reported in (**2012) 9 SCC 545** also held that Compassionate appointment cannot be claimed as a matter of right and is not another method of recruitment. Compassionate appointment should be made strictly in accordance with the rules, regulations or administrative instructions governing the subject, taking into consideration the financial condition of the family of deceased.

11. In view of rival submission made by learned counsel for the parties and after perusal of the materials available on record, it reveals from the counter affidavit filed by the appellants to the Writ Petition under Annexure-C series that the deceased Dama Parida, father of the respondent engaged as Badli Loader on 14.11.1985 at Grade-B Pit of Deulbera Colliery. He worked only 99 days in the year 1986, 72 days in the year 1987, 54 days in the year 1988, 87 days in the year 1989, 80 days in the year 1990, 45 days in the year 1991 and died on 30.1.1992 as reveals from Annexure-A. The respondent after long lapse of ten years, attaining the age of majority and obtaining no objection from his other brothers made a representation to the Project Officer, Deulbera Colliery on 10.6.2002 for compassionate appointment, which was rejected vide letter dated 17.8.2002 with a finding that the father of the respondent being a Badli leader, the dependant of Casual/temporary/badli workers are not entitled to avail the benefit under Clause 9.3.2 of NCWA-VI. The Writ Petition was filed on 02.2.2005 i.e. after lapse of three years from the date of rejection of the representation. At that time, the respondent was aged about 27 years. These are admitted and undisputed facts.

12. Clause 9.3.1 and 9.3.2 of Implementation Instruction No.8 of N.C.W.A (VI) provides that 'Employment would be provided to one dependant of workers, who are disabled permanently and also those who die while in service. The standing order duly certified by the Chief Labour Commissioner on 05.11.1992 defines 'workman' as follows:-

> a) Apprentice, b) Badli or substitute, c) Casual, d) Permanent, e) Probationer and f) Temporary.

13. Clause 9.3.1 of N.C.W.A (VI) read with standing order clearly shows that a workman is entitled to get benefit under Clause 9.3.1, if he is a permanent workman under Category-d and so far as Badli or substitute worker is concerned he has to complete a continuous period of service (190 days of attendance in underground mining or 240 days of attendance in case of Surface worker in a calendar year). Thus the aforesaid standing order and Clause 9.3.1 and Clause 9.3.2 of N.C.W.A (VI) have been misread and misinterpreted by the Hon'ble Single Judge as such the findings are not sustainable. The brother of the respondent applied for compassionate appointment in December, 1992. Knowing fully well the above facts, the respondent after becoming major has not applied for engagement under compassionate ground. The Hon'ble Single Judge completely ignored such delay and laches on the part of the respondent and a reasonable explanation was not furnished to that effect. The documents furnished by the present appellants in their counter affidavit to the Writ Petition under Annexure-C series, it was reflected that the deceased Dama Parida was a Badli Loader and has not completed the required days of work per year, was also not taken note of in the decision rendered. Thus the deceased cannot be treated as a workman and entitled to get benefit under N.C.W.A (VI). In Annexure-A it was categorically stated the number of days worked by the father of the respondent in different years. The Hon'ble Single Judge having ignored the materials available on record, the conclusions arrived to the effect that the respondent is entitled to get compassionate appointment is not sustainable. Further the findings of the Hon'ble Single Judge that due to inaction of the authorities it cannot be construed that there is delay and laches on the part of the respondent is not tenable.

14. The Apex Court in the case of **State of J & K and others** (supra) considering the fact that the Writ Petition was filed after more than 12 years of death, dismissed the Writ Petition on the ground of delay and laches and set aside the Division Bench decision, which decided the matter more than fifteen years from the date of death of the father of the applicant and the

family survived in spite of the death of the employee. In the present case, the elder brother of the respondent filed a representation for compassionate appointment in the year 1992. Thereafter the respondent has filed an application in the year 2002 i.e. after ten years from the date of death of his father. The family survived in spite of death of the worker in the year 1992. The Hon'ble Single Judge has not considered the fact that the respondent had approached this Court at a belated stage i.e. after long lapse of 13 years. In the decisions cited by the appellants the Apex Court also held that compassionate employment cannot be granted after lapse of a reasonable period and such appointment is not a vested right which can be exercised at any time.

15. The Dictionary meaning of the word "Compassion" is as follows:-

"*feeling of sorrow or pity for the suffering of another, with a desire to alleviate it.*"

The sudden suffering of the family is to be alleviated in a reasonable short period. Compassionate employment cannot be granted after a lapse of 24 years from the date of death as such employment is not a vested right which can be exercised at any time in future. In view of the discussions made hereinabove, this Court sets aside the impugned judgment. The Writ Appeal is accordingly disposed of.

Writ appeal deposed of.

2016 (II) ILR - CUT- 567

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

W.P.(C) NO. 9167 OF 2016

M/S. HINDUSTAN UNILEVER LTD. & ANR. ……..Petitioners

.Vrs.

PRESIDING OFFICER & ANR. ……...Opp. Parties

INDUSTRIAL DISPUTES ACT, 1947 – S.10(4)

Reference – Application to decide the status of the workman as preliminary issue – Application rejected by the Labour Court – Hence the Writ Petition – Tribunal and Courts who are requested to decide preliminary issues must ask themselves, whether such part adjudication is really necessary and whether it will not lead to other

woeful consequences – Moreover, since only final orders passed in the reference are challenged in the writ petition but not interim orders, the present writ petition is not maintainable – Furthermore as the parties in this case have already adduced evidence before the Labour Court and it is the duty of the said Court to decide the special kind of the disputes expeditiously, this Court is not inclined to interfere with the proceeding at this State – Held, there is no infirmity or illegality in the impugned order for interference by this Court. (Paras 4,5)

Case Laws Referred to :-

1. AIR 2001 SC 3290 : Hussaan Mithu Mhasvadkar v. Bombay iron & Steel Labour Board & anr.
2. 2012 (II) LLJ 139 : Nashik Merchants' Co-Operative Bank Ltd., Vrs. Madhukar Bhaurao Hingmire.
3. 2015 LLR 599 : Dharambir Singh Vs. Hindustan Unilever Limited & Ors.
4. 2015 (4) LLJ 599 : Sailendra Kumar Vs. the Secretary (Labour) and Ors.
5. AIR 1984 SC 153 : D.P. Maheshwari Vs. Delhi Administration and Ors.
6. (1996) 3 SCC 206 : National Council for Cements Buildings Materials v. State of Haryana & Ors.
7. 2012 LLR 115 : Dena Bank v. D.V. Kundia

For Petitioners : M/s. Sumit Lal, D.P. Nanda & B.P. Panda
For Opp. Parties : M/s. Satyabrata Mohanty, S.Mohapatra, S.K. Das, P.K. Das & A.D. Rath

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Date of Hearing : 12. 07. 2016
Date of Judgment: 21.07. 2016

JUDGMENT

S. PANDA, J.

The petitioners in this writ petition assail the order dated 04.04.2016 passed by the Presiding Officer, Labour Court, Bhubaneswar in I.D. Case No.67 of 2015 rejecting the applications to decide the preliminary issues regarding the status of the disputant employee and the question of jurisdiction, for maintainability of the case.

2. Learned counsel for the petitioners submitted that opposite party No.2 was engaged as a Trainee Territory Sales In-charge in the year 2005 subject to the terms and conditions stipulated in the said appointment order. The termination letter was issued to him on 26.03.2014 while he was working as Territory Sales Officer with C.S.D. team of the Company at Tezpur. After receiving the said termination letter, he submitted his complaint before the District Labour Officer, Bhadrak on 14.11.2014. The Conciliation Officer

issued summons to the petitioners.After receiving such notice, the petitioners' management raised the question of maintainability and merits of the complaint. Without waiting for discussion before the District Labour Officer, Bhadrak, opposite party No.2-Workman raised an industrial dispute under Section 2(A) (2) of the Industrial Dispute Act, 1947. In the said dispute, he has raised the question as follows:-

> "Whether the action of Management of M/s. Hindustan Unilever Ltd., Mumbai in terminating the service of Sri Subash Chandra Kar, Territory Sales Officer w.e.f., 1.4.2014 is legal and/or justified? If not to what relief the workman Sri Kar is entitled to?".

He has prayed for re-instatement with back wages before the concerned Authority. No notice was communicated to the 1st party management, while it was added as the proforma opposite party No.3 in the said dispute. The management after receiving the notice in the aforesaid Industrial Dispute Case filed their written statement along with two applications as aforesaid. The court below without considering the applications on its proper perspective rejected the same by the impugned order. Since the maintainability question was raised by the Management as well as the jurisdiction, the Court should have considered the same as preliminary issues. Non-consideration of the same without applying its judicial mind is illegal, arbitrary and is liable to be interfered with.

In support of his contention, learned counsel for the petitioners relied on the decisions of the Apex Court as well as decision of this Courts and other High Courts i.e., ***Hussaan Mithu Mhasvadkar v. Bombay iron & Steel Labour Board and another****, reported in* ***AIR 2001 SC 3290****,* ***W.P.(C) No. 20947 of 2012 (Menaka Mallick Vs. The E.D., SAIL & Anr),*** ***Nashik Merchants' Co-Operative Bank Ltd., Vrs. Madhukar Bhaurao Hingmire*** *reported in* ***2012 (II) LLJ 139 , Dharambir Singh Vs. Hindustan Unilever Limited & Ors*** *reported in* ***2015 LLR 599, Sailendra Kumar Vs. the Secretary (Labour) and others,*** *reported in* ***2015 (4) LLJ 599 and W.P.(C) No.11213 of 2012 (Zydus Pharmaceuticals Ltd. Vs. Sri B. Raja Ram Patra).***

3. Learned counsel appearing for the Workman supported the impugned order and submitted that the appointment letter under Annexure-1 was served to the workman at his native place at Bhadrak. The question of maintainability and the preliminary issues as raised by the Management are to be considered in the facts and law and rightly the court has passed the impugned order rejecting the same. In the meantime the parties have

adduced their evidence before the Labour Court. The impugned order being an interim order, the same need not be interfered with to stall the proceeding, which amounts to harassment to the workman.

In support of his contention, he has cited a decision of the Apex Court in the case of ***D.P. Maheshwari Vs. Delhi Administration and others****, reported in* ***AIR 1984 SC 153, National Council for Cements Buildings Materials v. State of Haryana & others*** *reported in* ***(1996) 3 SCC 206, Dena Bank v. D.V. Kundia,*** *reported in* ***2012 LLR 115 and Management of M/s. MI v. P.O., Industrial Tribunal*** *(W.P.(C) No.18342 of 2013 decided on 13th August, 2013).*

4. Considering the aforesaid rival contentions raised by the parties and after going through the records, it indicates that there is contentious issues between the parties as regards to the maintainability of the complaint and the cause of action arose. Admittedly the parties have adduced their evidence before the Labour Court.

The Hon'ble Apex Court in the case of **D.P. Maheshwari** (supra) held as follows:-

> "We think it is better that tribunals, particularly those entrusted with the task of adjudicating labour disputes where delay may lead to misery and jeopardise industrial peace, should decide all issues in dispute at the same time without trying some of them as preliminary issues. Nor should High Courts in the exercise of their jurisdiction under Art. 226 of the Constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them. Neither the jurisdiction of the High Court under Art. 226 of the Constitution nor the jurisdiction of this Court under Art. 136 may be allowed to be exploited by those who can well afford to wait to the detriment of those who can ill afford to wait by dragging the latter from Court to Court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Art. 226 and Art.136 are not meant to be used to break the resistance of workmen in this fashion. Tribunals and Courts who are requested to decide preliminary questions must therefore ask themselves whether such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences. After all tribunals like Industrial Tribunals are constituted to decide expeditiously special kinds of disputes and their jurisdiction to so decide is not to be stifled by all manner of

> preliminary objections and journeyings up and down. It is also worth while remembering that the nature of the jurisdiction under Art. 226 is supervisory and not appellate while that under Art. 136 is primarily supervisory but the Court may exercise all necessary appellate powers to do substantial justice. In the exercise of such jurisdiction neither the High Court nor this Court is required to be too astute to interfere with the exercise of jurisdiction by special tribunals at interlocutory stages and on preliminary issues".

The aforesaid decision of the Apex Court still holds the field. In the case of **Dena Bank** (supra), it was held that the interim orders passed by the Tribunal cannot be challenged in the Writ Petitions and final award can be challenged as the reference was not decided by the interim order.

5. In view of the above settled position of law, since the parties have already adduced evidence in support of their respective contentions, this Court is not inclined to interfere with the proceeding at this stage. The Tribunal has rightly held that it is not possible to come to a conclusion whether the 2nd party has raised the industrial dispute before the appropriate Conciliation Officer or not at that stage. Hence, there is no infirmity or illegality in the impugned order so as to warrant any interference with the same by this Court. Accordingly, the Writ Petition stands dismissed.

Writ Petition dismissed.

2016 (II) ILR - CUT-571

S. C. PARIJA, J.

W.P.(C) NO. 7108 OF 2015

PURNA CHANDRA BARIK ……..Petitioner

.Vrs.

THE GENERAL MANAGER, UCO BANK, KOLKATA & ANR. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 - ART.226

Request for voluntary retirement on health grounds – By the date of application petitioner-employee had already completed 30 years of qualifying service in the Bank – His prayers to get pension under Bank's circular Dt- 20.08.2010 was rejected on the ground that he had

used the word "quit" in his application Dt- 28.03.2009 and as such he had resigned from service and not in service on the date of the circular – Hence the writ petition – Petitioner-employee submitted his application with the subject for "voluntary retirement" and merely because he had used the word "quit" in the body of his application, the same would not tantamount to a resignation simpliciter – Held, the petitioner is entitled to the benefit of pension as per the circular of the Bank Dt. 20. 08. 2010. (Para15,16,17)

Case Laws Referred to :-

1. AIR 2015 SCCourt 2434 : Shashikala Devi v. Central Bank of India & Ors.
2. AIR 1984 SC 1064 : Sudhir Chandra Sarkar v. Tata Iron and Steel Company Ltd. and Ors.
3. (2011) 12 SCC 197 : Sheel Kumar Jain v. New India Assurance Company Limited & Ors.

For Petitioner : Shri S.N. Panda & P. Swain
For Opp. Parties : Shri C.N. Murty.

Date of Judgment: 26.07.2016

JUDGMENT

S.C. PARIJA, J.

This writ petition has been filed challenging the action of the opposite parties-Bank in rejecting the petitioner's application opting for pension under its Circular dated 20.8.2010.

2. The brief facts of the case is that the petitioner was appointed as Asst. Cashier-cum-Godown Keeper on 31.3.1979 at Daspalla Branch of UCO Bank. Subsequently, he was promoted and posted as a Head Cashier at Puri Temple Branch of the Bank. In the year 2005, the petitioner suffered from acute back pain and was forced to avail sick leave w.e.f. 11.6.2008. The condition of the petitioner did not improve inspite of surgical intervention and he was confined to bed and needed constant medical attention. As it was not physically possible for him to attend to his official duties due to his poor health condition, the petitioner vide his letter dated 28.3.2009, requested the Bank for voluntary retirement from service on medical grounds, which reads as under:

"To

The Branch Manager,
UCO Bank,
Sri Jagannath Temple Puri.

Sub- Application for voluntary retirement.

Sir,

I have been suffering from back pain since 2005 for which I was on leave from 11.6.08. On the advice of doctors I underwent a spinal surgery in a private nursing home at Cuttack. This resulted in permanent loss of movement of my body below the waist. Since last 8 months I am virtually bedridden with no movement of lower limbs though I am getting myself treated by various doctors there has been little improvement in my condition. Any hope of recovery in near future is very remote.

Under these circumstances I am left with no other option than quiting my service. Hence I request you to recommend my request before the authorities so that I will be allowed by the bank to quit my job. Kindly forward my application to your authorities and apprise me of any development when it comes. Thanking you.

Permanent address	Yours faithfully.
	Sd/-
Purna Chandra Barik	Mr.Purna Chandra Barik
At/Po-Nuasantha,	P.F.No:-24465
Via-Balanga	
Dt.-Puri	
D.28-3-2009"	

3. On receipt of the letter of the petitioner seeking voluntary retirement on medical grounds, the Bank accepted the same and vide its letter dated 29.6.2009, released the Gratuity dues of the petitioner amounting to Rs.3,50,000/-. Subsequently, the Bank vide its letter dated 09.7.2009 also released the petitioner's contribution to Provident Fund amounting to Rs.4,56,472.21, as well as the Bank's contribution of Rs.5,48,684.89.

4. While the matter stood thus, the Bank vide its Circular dated 20.8.2010, came out with a scheme providing one more option for pension to its employees who were in service of the Bank prior to 29th September, 1995 and could not opt for pension earlier. The gist of the Circular reads as under:

"G I S T

* One more option for pension, in lieu of Contributory Provident Fund, is extended to Bank employees in consequence of industry level settlement/understanding reached between IBA and various unions and associations.

* All those workmen/officer employees (hereinafter referred as employees) in service prior to 29th September 1995 but did not opt for pension earlier and are still in service are eligible to opt.
* Those who were in service prior to 29th September 1995 but did not opt for pension and retired subsequently.
* Eligible family members of those employees who were in service prior to 29th September 1995 and could not opt for pension and retired and subsequently expired can also opt for family pension.
* Eligible family members of those employees who were in service prior to 29th September 1995 and could not opt for pension and subsequently expired while in service can also opt for family pension.
* Employees who ceased to be in-service under VRS-2000 can also opt for pension as per the terms and conditions applicable to retirees.
* 30% of the additional cost of pension as codified in settlement/joint note to be borne by the new optees so willing to join the pension scheme now.
* Option closes on 18th October 2010 the 60th day from the date of this circular."

5. Pursuant to such Circular of the Bank providing one more option for pension to its employees who were in service prior to 29th September, 1995, the petitioner submitted his application in the prescribed form on 06.10.2010 for availing pension, as per the said Circular of the Bank. After repeated reminders, the Bank vide its letter dated 28.5.2014, intimated the petitioner that as per the Circular dated 20.8.2010, only those employees who were in service prior to 29th September, 1995, but did not opt for pension earlier and are still in service and those, who were in service prior to 29th September, 1995, but did not opt for pension and retired subsequently, are only eligible to opt for pension. As the petitioner had resigned from the Bank's service and was not in service of the Bank on the date of the said Circular, his claim for pension cannot be considered.

6. Being aggrieved by the said letter of the Bank dated 28.5.2014, the petitioner submitted his representation before the Chairman & Managing Director, UCO Bank, dated 30.6.2014, bringing it to the notice of the authority that he had applied for voluntary retirement on medical grounds, as he was suffering from serious spinal problem and was unable to work. The Bank having accepted such voluntary retirement, the petitioner cannot be deprived of his right to opt for pension under the Circular dated 20.8.2010.

7. In response to the said representation of the petitioner, the Bank vide its letter dated 08.7.2014, referring to Regulation 22 of UCO Bank (Employee's) Pension Regulations, 1995, reiterated its stand that since the petitioner had resigned from Bank's service and was not in service on the date of the Circular, his representation cannot be considered.

Regulation 22 of UCO Bank (Employee's) Pension Regulations, 1995 provides that resignation or dismissal or removal or termination of an employee from the service of the Bank shall entail forfeiture of his entire past service and consequently shall not qualify for pensionary benefits.

8. Learned counsel for the petitioner submits that as the petitioner had sought for voluntary retirement on medical grounds, as would be evident from his letter dated 28.3.2009 detailed above, the action of the Bank in refusing to allow him to avail the benefit of pension under the Circular dated 20.8.2010, on the plea that the petitioner had resigned from the Bank's service, is wholly improper and illegal. It is submitted that as the petitioner was unable to continue in Bank's service due to his poor health condition and he had sought for voluntary retirement on medical grounds, the Bank was not justified in considering the same to be a resignation simpliciter and deny him the benefit of pension. In this regard, learned counsel for the petitioner has relied upon a decision of the apex Court in ***Shashikala Devi v. Central Bank of India & Ors.,*** AIR 2015 Supreme Court 2434, in support of his contention that the petitioner having applied for voluntary retirement from the service of the Bank on medical grounds, the same could not have been treated as a resignation from the Bank, so as to deprive him of his right to opt for pension.

9. Learned counsel for the opposite parties-Bank with reference to the counter affidavit submits that the petitioner had submitted his application expressing his precarious health condition and desired to quit the job. Nowhere, he had mentioned that he intended to take voluntary retirement for which three months notice period is required. As the petitioner intended to quit the job, the inference is that he was intending to resign. Accordingly, the Bank accepted the resignation of the petitioner and settled the terminal benefits payable to him. It is further submitted that the Circular dated 20.8.2010 provided one more opportunity to opt for pension to only those employees who were in service prior to 29th September, 1995, and could not opt for pension earlier and have attained superannuation or have opted for voluntary retirement. The said Circular is not applicable to the petitioner, as he had resigned from the Bank's service.

In the further affidavit filed by the Bank, while reiterating that the petitioner had resigned from Bank's service and had not availed voluntary retirement, the letter of the Bank dated 26.5.2009, accepting the petitioner's resignation has been annexed, to show that his resignation has been accepted by the Bank w.e.f. 28.5.2009.

10. Learned counsel for the Bank accordingly submits that as the petitioner had decided to quit his job and had resigned from Bank's service, the 2nd option for pension as per Circular dated 20.8.2010 is not applicable to him. It is further submitted that after acceptance of his resignation by the Bank, the terminal benefits of the petitioner like Gratuity and Provident Fund have already been paid to him.

11. The short question which falls for consideration in this case is whether the letter of the petitioner dated 28.3.2009, as detailed above, was in essence a letter seeking voluntary retirement from Bank's service on medical grounds or the same was in fact a letter of resignation simpliciter.

12. Similar question came up for consideration before the apex Court in ***Sudhir Chandra Sarkar v. Tata Iron and Steel Company Ltd. and Ors.,*** AIR 1984 SC 1064, where a permanent employee of the Company after serving for 29 years had tendered his resignation, which the employer Company had accepted unconditionally. The Company's Retiring Gratuity Rules did not provide for payment of gratuity to employees who resigned from service. Hon'ble Court while reversing the view taken by the High Court, held that the termination of service by resignation tantamounts to retirement by resignation, entitling the employee to retiral benefits.

13. In ***Sheel Kumar Jain v. New India Assurance Company Limited and Ors.,*** (2011) 12 SCC 197, the facts were somewhat similar to the case at hand. The appellant in that case was an employee of an Insurance Company governed by a Pension Scheme which provided as in the case at hand, forfeiture of the entire past service of an employee, should he resign from his employment. The appellant-employee submitted a letter of resignation which resulted in denial of his service benefits under the aforesaid Pension Scheme. Hon'ble Court, however, held that since the employee had completed the qualifying service and was entitled to seek voluntary retirement under the Scheme, he could not be said to have resigned so as to lose his pension.

14. In *Shashikala Devi* (supra), identical issue came up for consideration before the apex Court, as to whether the letter of the concerned employee tendering his resignation is in essence a letter seeking pre-mature retirement

on medical grounds or is a resignation simpliciter. The Hon'ble Court, while referring to the Regulations of the Bank has come to find that the expression "resignation" is not conclusive. Whether or not a given communication is a letter of resignation simpliciter or can as well be treated to be a request for voluntary retirement, will always depend upon facts and circumstances of each case and the provisions of the Rules/Regulations applicable. Referring to its various earlier decisions on the point, Hon'ble Court has come to hold as under:

> "15. It is, in our opinion, abundantly clear that the beneficial provisions of a Pension Scheme or Pension Regulations have been interpreted rather liberally so as to promote the object underlying the same rather than denying benefits due to beneficiaries under such provisions. In cases where an employee has the requisite years of qualifying service for grant of pension, and where he could under the service conditions applicable seek voluntary retirement, the benefit of pension has been allowed by treating the purported resignation to be a request for voluntary retirement. We see no compelling reasons for doing so even in the present case, which in our opinion is in essence a case of the deceased employee seeking voluntary retirement rather than resigning."

Accordingly, the Hon'ble Court has proceeded to hold that the concerned employee having completed 20 years of qualifying service and having given notice in writing to the appointing authority of his intension to leave the service on medical grounds and the appointing authority having accepted the same and relieved the employee of his service, the employee is entitled to the pension under the 1995 Pension Scheme, even though the employee had used the word "resign" in his said letter.

15. From the discussions made above, the legal position which emanates is that the words "resignation" and "retirement" convey different connotations in service jurisprudence. Resignation can be tendered by an employee at any point of time, irrespective of his length of service. Whereas, in the case of voluntary retirement, the employee has to complete the prescribed period of qualifying service for being eligible for pensionary benefits. Moreover, resignation brings about a complete cessation of master and servant relationship whereas, voluntary retirement maintains the relationship for the purposes of grant of retiral benefits like pension, in view of the past service. Therefore, if the resignation was not punitive and was voluntary and such

employee had to his credit the requisite years of qualifying service for grant of pension and was otherwise eligible to seek voluntary retirement under the service conditions applicable, he cannot be denied the pensionary benefit.

16. There is no dispute that the petitioner had put in almost 30 years of qualifying service in the Bank, when he applied for voluntary retirement on medical grounds on 28.3.2009. The subject of his application was for voluntary retirement and not unilateral resignation from the service of the Bank, as would be evident from his application detailed above. Merely because the petitioner had used the expression "quit" in his said application, the same would not tantamount to a resignation simpliciter. This is more so, as the petitioner had sought for voluntary retirement on medical grounds, due to his physical incapacity to continue in the service of the Bank.

17. Applying the principles of law as discussed above to the facts of the present case, the conclusion is irresistible that the application of the petitioner was for voluntary retirement on medical grounds and not a resignation simpliciter and therefore, the petitioner is entitled to the benefit of pension as per the Circular of the Bank dated 20.8.2010.

18. Accordingly, the Bank is directed to extend the benefit of pension to the petitioner as per its Circular dated 20.8.2010, subject to the fulfillment of the conditions for exercising the option, as enumerated therein. The writ petition is accordingly allowed.

Writ petition allowed.

2016 (II) ILR - CUT-578

B. K. NAYAK, J.

CRLMC NO. 583 OF 2016

STATE OF ODISHA ……..Petitioner

.Vrs.

SUSHANT KU. DHALASAMANT & ORS. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – ARTS. 21, 14, 19

Prayer for handcuffing of the O.Ps.-accused persons while taking them to different places during police remand – Magistrate

rejected the prayer made by the Investigating Officer – Hence this application – No material before this court to suggest that the accused persons were attempting to escape from custody or creating situations either by themselves or through their supporters to escape from custody – Held, no general direction can be issued at present for handcuffing the opposite parties. (Para 8)

Case Laws Referred to :-

1. (1980) 3 SCC 526 : Prem Shankar Shukla -V- Delhi Administration
2. (1995) 3 SCC 743 : Citizens for Democracy Thoughts -V- State of Assam & Ors.

For Petitioner : Mr. Patnaik, Addl. Govt. Adv.
For Opp. Parties : Mr. S.Mohapatra

Date of Order : 22.02.1016

ORDER

B.K.NAYAK, J.

Mr. Patnaik, learned Additional Government Advocate for the petitioner-State and Mr. S. Mohapatra, learned counsel for opposite parties.

2. In this application under Section 482, Cr.P.C., the petitioner prays for quashing the order dated 16.02.2016 passed by the learned S.D.J.M. (S), Cuttack in G.R. Case No.228 of 2016 rejecting the petitioner's application for permitting the Investigating Officer to use handcuffs while taking the accused persons to different places during police remand.

3. The opposite parties have been implicated in several cases including commission of serious offences and they had managed to escape arrest since long. Now they have been arrested and taken on police remand for the purpose of investigation in several cases. One of such case is Chauliaganj P.S. Case No.29 dated 09.02.2016 registered under Section 364/302/201/120-B/34 of the I.P.C. read with Sections 25 and 27 of the Arms Act. In the said case on 16.01.2016 the Investigating Officer filed a petition before the learned S.D.J.M (S), Cuttack for passing necessary orders for handcuffing the opposite parties-accused persons during police remand. It is stated in the petition that opposite parties have a long criminal history and they are habitual offenders involved in abduction, murder, extortion etc. and opposite party no.1-Susant Kumar Dhalasamant was absconding since last sixteen years to evade police arrest in five murder cases and previously he had also been booked under N.S.A.Opp.party no.2 has past history of trying to escape

in Airfield P.S. Case No.227 of 2009. It is further alleged that during their police remand earlier in Chauliaganj P.S. Case No.12 of 2016, both opposite party nos.1 and 2 became violent and there was huge congregation of people as well as their supporters at the time of their production in the court and while taking them to different scenes of crime resulting in escort problem. It is lastly stated that during their current police remand they have to be taken to the States of Jharkhand and Andhra Pradesh for visiting different scenes of crime and in this process there is possibility of the accused persons escaping while attending the call of nature on the way during journey.

4. The said petition of the Investigating Officer was rejected by the learned S.D.J.M(S), Cuttack on the ground that the reasons assigned by the Investigating Officer for his apprehension does not appear to be cogent one, because the I.O. may intimate his higher authority for deployment of more police guards to avert any untoward situation.

5. The learned counsel for the opposite parties have filed show cause affidavit and has stated that neither the past conduct of the abscondance of the opposite parties, nor their conduct after the present arrest does justify their handcuffing. It is also stated that even though opposite party nos.1 and 2 have been taken on police remand on three occasions in different cases after their recent arrest, they have never tried to escape or shown any violent conduct and therefore, there is no need to handcuff them.

6. It has been held by the Hon'ble apex Court in the case of ***Prem Shankar Shukla v. Delhi Administration : (1980) 3 SCC 526*** that to be consistent with Articles 14 and 19 handcuffs must be last refuge as there are other ways for ensuring security. No prisoner shall be handcuffed or fettered routinely or merely for the convenience of the custodian or escort. Functional compulsions of security must reach that dismal degree where no alternative will work except manacles. There must be material, sufficiently stringent, to satisfy a reasonable mind that there is clear and present danger of escape of the prisoner who is being transported by breaking out of the police control and further that by adding to the escort part or other strategy, he cannot be kept under control. The onus of proof in this regard is on him who puts the person under irons.

It is further observed that the belief that the prisoner is likely to break out of custody or play the vanishing trick must be based on antecedents which must be recorded and proneness to violence must be authentic. Vague

surmises or general averments that the under trial is a crook or desperado, rowdy or maniac cannot suffice.

Even where in extreme circumstances, handcuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reasons for doing so.

It is also held that the authority responsible for the prisoner's custody, should consider the case of each prisoner individually and decide whether the prisoner is a person who having regard to his circumstances, general conduct, behaviour and character will attempt to escape or disturb the peace by becoming violent. That is the basic criterion, and all provisions relating to the imposition of restraint must be guided by it. Whether handcuffs or other restraint should be imposed on a prisoner is primarily a matter for the decision of the authority responsible for his custody and not of any other. It is a judgment to be exercised with reference to each individual case. The matter is one where the circumstances may change from one moment to another, and inevitably in some cases it may fall to the decision for the escorting authority midway to decide on imposing a restraint on the prisoner. Any prior decision of external authority cannot be reasonably imposed on the exercise of that power.

7. In the case of ***Citizens for Democracy Throughts v. State of Assam and others : (1995) 3 SCC 743***, the apex Court held as follows :

> "**16.** We declare, direct and lay down as a rule that handcuffs or other fetters shall not be forced on a prisoner-convicted or under trial-while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to court and back. The police and the jail authorities, on their own, shall have no authority to direct the handcuffing or any inmate of a jail in the country or during transport from one jail to another or from jail to court and back.
>
> **17.** Where the police or the jail authorities have well-grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said Magistrate. Save in rare cases of concrete proof regarding proneness of the prisoner to violence, his tendency to escape, he being so dangerous/desperate and the finding that no other practical way of

forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner."

8. Coming to the case in hand, though it is alleged that the opposite parties are involved in several crimes from time to time and that opposite party nos.1 and 2 had successfully evaded arrest in the past, there is no material before this court to suggest that they were attempting to escape from custody or creating situation either by themselves or through their supporters or henchmen to escape from custody. Therefore, no general direction can be issued at present for handcuffing the opposite parties while taking them to different places for the purpose of investigation. As the learned S.D.J.M. has stated in the impugned order, the Investigating Officer may make arrangements for better escort and security. It is however, open to the Investigating Officer to handcuff the opposite parties, if the situation so demands during their journey to different places for the purpose of investigation and such action shall have to be justified later before the learned S.D.J.M.(S), Cuttack. Accordingly, the CRLMC is disposed of.

Application disposed of.

2016 (II) ILR - CUT- 582

B. K. NAYAK, J.

CRLMC NO. 21 OF 2013

M.D., ORES ISPAT (P) LTD., UDITNAGAR ……..Petitioner

.Vrs.

SRI DUSMANT KAR ……..Opp. Party

NEGOTIABLE INSTRUMENTS ACT, 1881 – Ss. 138, 141

Cheque in question issued for discharge of the debt of Ores Ispat (P) Ltd., Uditnagar, Rourkela, a registered company which was dishonoured – The complainant, while filing complaint petition had only added the M.D. of the company as an accused without impleading the company as an accused being a juristic person, which is mandatory in nature – Held, the complaint petition is not maintainable and consequently the impugned order taking cognizance against the petitioner is vitiated, hence quashed. (Paras 5, 6)

Case Laws Referred to :-

1. (2012) 5 SCC 661 : Aneeta Hada -V- Godfather Travels & Tours Pvt. Ltd.

For Petitioner : M/s. Prasanta Ku. Satapathy
For Opp. Party: Mr. Jagajit Panda

Date of Order: 29.06.2016

ORDER

Heard learned counsel for the parties.

2. In this application under section 482 Cr.P.C., the petitioner prays for quashing the order dated 10.07.2009 passed by the learned J.M.F.C., Angul in C.T. Case no.1338 of 2009 taking cognizance of offence under section 138 of the Negotiable Instruments Act and issuing process to the petitioner.

3. The only contention raised by the learned counsel for the petitioner is that since the averments in the complaint petition go to show that the cheque in question was issued towards discharge of liability by a registered company of which the petitioner was the Managing Director, without the company being impleaded or arrayed as an accused, the complaint petition was not maintainable and therefore, the order of cognizance is vitiated.

4. Learned counsel appearing for the opposite party-complainant submits that the petitioner was not named, but was impleaded in his official capacity as Managing Director of the accused-company and therefore, the principle that in absence of the company as an accused the person in charge of management of the company cannot be held liable is not applicable.

5. There is no dispute over the proposition, as has been held by the Hon'ble apex Court in the decision reported in **(2012) 5 Supreme Court Cases 661 : Aneeta Hada-vrs. Godfather Travels and Tours Pvt. Ltd**. that in terms of Section 141 of the Negotiable Instruments Act it is imperative that the company as well as the officers of the company responsible for the management or authorized to issue cheque are to be arrayed as accused for prosecution under the Act. Admittedly the company, Ores Ispat (P) Ltd., Uditnagar, Rourkela is a registered company and the cheque was issued for discharge of debt of the company which was dishonoured. The only accused arrayed in the complaint petition is the present petitioner, who is the Managing Director of the said company. The company, which is a juristic person, has not been separately arrayed as an accused.

Learned counsel for the opposite party-complainant has not been able to bring to the notice of this Court any authority to the effect that where the Managing Director alone has been arrayed as an accused in the complaint in his official capacity and not by his name, there is no necessity of impleading the complainant itself as an accused.

6. Therefore, the company being not made an accused in the complaint petition, the complaint is not maintainable and consequently the impugned order taking cognizance is vitiated.

I allow the CRLMC and quash the said order of cognizance dated 10.07.2009 passed in C.T.Case No.1338 of 2009 by the learned J.M.F.C., Angul.

Application allowed.

2016 (II) ILR - CUT- 584

DR. A.K.RATH, J.

W.P.(C) NO. 17211 OF 2009

SUBASH CHANDRA MOHAPATRA ……..Petitioner

.Vrs.

AMITA PANDA & ORS. ……Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O 18,R-17

Recall of witness for further cross-examination – Scope – The main purpose of the provision is to enable the Court to clear any doubt or ambiguity that may have arisen during the course of his examination – However such provision should not be invoked to fill up any lacuna or omission in the evidence of a witness, already examined – In the present case, there is no such situation, as P.W.1 was subjected to extensive cross-examination by the defendant No.1 and so far as D.W.1 is concerned, she was also subjected to lengthy cross examination by defendant No. 1 on two dates – Held, since the petitions have been filed to fill up lacuna, the impugned order passed by the learned trial Court can not be said to be perfunctory, warranting interference by this Court. (Paras 7, 8)

For Petitioner : Mr. Rabindra Ku. Prusty
For Opp. Parties : Mr. Niranjan Panda & S.K.Acharya

Date of hearing : 27.07.2016
Date of judgment : 01.08.2016

JUDGMENT

DR. A.K.RATH, J.

This petition challenges the order dated 19.9.2009 passed by the learned Civil Judge (Senior Division), Balasore in C.S. No.341/437 of 2000-I/2004; whereby and whereunder the learned trial court rejected two petitions of the defendant no.1-petitoner to recall P.W 1 and D.W.1 for further cross-examination.

2. Opposite party no.1 as plaintiff instituted the suit for partition impleading the petitioner and opposite parties 2 to 8 as defendants. Pursuant to issuance of summons, the petitioner who was defendant no.1 entered appearance and filed written statement stating therein that the suit schedule property has already been partitioned by means of a partition deed dated 18.8.1984. Defendant-opposite party no.3 filed a written statement stating that the suit schedule property has not been partitioned. To prove the case, the plaintiff examined herself as P.W.1 and Defendant no.3 examined herself as D.W.1. Both the witnesses have been cross-examined by defendant no.1. While the matter stood thus, two petitions had been filed by defendant no.1 under Order 18 Rule 17 CPC to allow defendant no.1 for further cross-examination of P.W.1 and D.W.1. It is stated that on the day of cross-examination of P.W.1 by the advocate for defendant no.1, the defendant no.1 was absent. Due to lack of instruction by defendant no.1, some material questions could not be put to P.W.1. Those questions are necessary to be asked through further cross-examination of P.W.1. The same plea was taken in the second petition filed to recall D.W.1. Learned trial court came to hold that the plea taken by defendant no.1 that on the date of cross-examination, defendant no.1 was absent in the court for which proper instruction was not given to the advocate, can hardly be believed and accepted, since the learned advocate for the defendant no.1 did not raise any objection at the time of cross-examination of D.W.1. He further held that on perusal of the schedule of questions mentioned in the petition, it transpires that they are not very much essential for just decision of the suit. Held so, learned trial court rejected two petitions filed by defendant no.1 for further cross-examination of P.W.1 and D.W.1.

3. Heard Mr.Prusty, learned counsel for the petitioner and Mr.Panda, leaned counsel for the opposite party no.1.

4. Mr. Prusty, learned counsel for the petitioner, submitted that on the date of cross-examination of P.W.1 and D.W.1, some material questions could not be put to the witnesses. In view of the fact that defendant no.1 was absent, a further chance should be given to her for cross-examination of P.W.1 and D.W.1.

5. Per contra, Mr. Panda, learned counsel for the opposite party no.1, submitted that the application has been filed to patch up the lacuna and is a ruse.

6. Order 18 Rule 17 CPC provides that the Court may recall and examine the witness. The same is quoted below;

> "**17. Court may recall and examine witness**.- The Court may at any stage of suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit."

7. The apex Court in the case of Vadiraj Naggappa Vernekar (Dead) Through LRs v. Sharadchandra Prabhakar Gogate, (2009) 4 SCC 410 had an occasion to consider same claim, particularly, application filed under Order 18 Rule 17 CPC. The apex Court held that though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC. The power to recall any witness under Order 18 Rule 17 CPC can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit. But then such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination. If the evidence on re-examination of a witness has a bearing on the ultimate decision of the suit, it is always within the discretion of the

trial court to permit recall of such a witness for re-examination-in-chief with permission to the defendants to cross-examine the witness thereafter. There is nothing to indicate that such is the situation in the present case. It was further held that some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the Court's discretion, if it deems fit, to allow such an application.

8. In course of hearing, Mr. Panda, learned counsel for the opposite party no.1, filed the photostat copies of the deposition of P.W.1 and D.W.1. On perusal of the same, it is evident that P.W. 1 was subjected to extensive cross-examination by defendant no.1. So far as D.W.1 is concerned, she was also subjected to extensive cross-examination by defendant no.1 on two dates. The power under 18 Rule 17 CPC is to be exercised sparingly. The power of the Court cannot be invoked to fill up the lacunae in the evidence, which has already been recorded, but to clear any ambiguity that may have arisen during the course of his examination. The petitions have been filed to fill up the lacuna. The order of the learned trial court cannot be said to be perfunctory or flawed warranting interference of this Court under Article 227 of the Constitution. The petition, sans merit, is dismissed. No costs.

Writ petition dismissed.

2016 (II) ILR - CUT-587

DR. A.K.RATH, J.

W.P.(C) NO. 12562 OF 2013

DR. RAGHUNATH MEHER ……..Petitioner

.Vrs.

UNIVERSITY GRANTS COMMISSION & ORS. ……..Opp. Parties

SERVICE LAW – Appointment of O.P.No.4 for the post of Associate Professor in Oriya challenged – Whether a candidate is fit for a particular post or not has to be decided by the duly constituted selection committee which has the expertise on the subject and it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates as it has no such expertise – However, the decision of the

selection committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the committee or its procedure vitiating the selection, or proved malafides affecting the selection.

In this case the selection committee had been constituted by the University consisting of subject experts – There was no change of criteria of selection after advertisement – Held, there being no illegality or patent material irregularity in the constitution of the selection committee or its procedure vitiating the selection or proved malafides affecting the selection process, this Court is not inclined to interfere with the selection of O.P.No. 4 for the post. (Paras 10 to14)

Case Laws Referred to :-

1. (2011) 3 SCC 436 : State of Orissa and another v. Mamata Mohanty.
2. AIR 2014 SC 1570 : Bishnu Biswas and others v. Union of India & Ors.
3. AIR 1990 SC 434 : Dalpat Abasaheb Solunke, etc. etc. v. Dr. B.S. Mahajan etc. etc.
4. (2010) 8 SCC 372 : Basavaiah (Dr.) v. Dr. H.L. Ramesh & Ors.

For Petitioners : Mr. Aditya Mishra
For Opp. Parties : Mr. J.K.Mishra, Senior Advocate
Mr. Sanjeev Udgata,
Mr. K.K.Das

Date of hearing : 03.08.2016
Date of judgment: 10.08.2016

JUDGMENT

DR. A.K.RATH, J

By this application Article 226 of the Constitution of India, the petitioner has prayed, inter alia, to quash the offer of appointment of opposite party no.4 in the post of Associate Professor in Oriya in Central University of Orissa.

2. Adumbrated in brief, the case of the petitioner is that the Registrar, Central University of Orissa, opposite party no.3, issued an advertisement, vide Annexure-1, in the local newspaper for filling up various teaching posts. In the advertisement, it was specifically stated that the selection shall be made as per the minimum qualifications and API score as per UGC norms. The petitioner, who was otherwise eligible, applied for the post of Associate Professor in Oriya. He has 30 years of experience as a faculty in Oriya at

different Colleges and Universities. He is an eminent scholar. He has been awarded Ph.D in 1986. He is engaged in research work till date. Under his guidance, 12 scholars have been awarded Ph.D. On 8.11.2012, a call letter was issued to him to appear before the Selection Board on 10.12.2012 along with certain documents for verification. Apart from the petitioner, two other candidates including opposite party no.4 had been called for the interview. Since the result as not published, he engaged an advocate to obtain information under the Right to Information Act, 2005. While the matter stood thus, he came across news item published in the local newspaper that the opposite party no.4 has claimed that she has been selected in the interview. Opposite party no.4 has less experience and API score. She even does not possess minimum eligibility criteria. But then, she was selected. Alleging unfairness and prejudice, he made several representations. He obtained the copy of the appointment letter of the opposite party no.4, vide Anneuxre-5. It is further stated that after the recruitment process started, the selection process and procedure has been changed from time to time as per the whim and caprice of the opposite parties. The process of selection was not transparent. With this factual scenario, this writ petition has been filed.

3. Pursuant to issuance of notice, a counter affidavit has been filed by the University Grants Commission, opposite party no.1. The sum and substance of the case of the opposite party no.1 is that the University Grants Commission (hereinafter referred to as "the UGC") has been constituted under the provisions of the University Grants Commission Act, 1956 (hereinafter referred to as "the Act"). The Act was enacted to make provisions for coordination and determination of standards in the Universities. The Commission has been entrusted with the duty to take such steps as it thinks fit for the promotion and coordination of University education and determination and maintenance of standards of teaching. For the said purpose, the Commission has been vested with the power to recommend any University the measures necessary for the improvement of university education and advice the Universities upon the action to be taken for the purpose of implementation of such recommendation. Referring to various provisions of the Act, it is stated that the Commission has issued regulation prescribing the qualification for the post of teaching staff of a University and the institutions affiliated to it from time to time.

4. A counter affidavit has been filed by the opposite parties 2 and 3. It is stated that the advertisement was issued for the post of Associate Professor in Oriya along with other vacancies. The post was reserved for Scheduled Tribe.

The candidates, who had been called for the interview, belong to Scheduled Tribe community. Pursuant to the advertisement, four applications had been received. The petitioner was one of the applicants. The University constituted a committee for screening of the applications with Ex. Head of the Department (Oriya), Utkal University, Vani Vihar, Bhubaneswar; Department of Oriya, Utkal University, Vani Vihar, Bhubaneswar and Department of Oriya, Berhampur University, Berhampur. The committee evaluated four applications and recommended the name of three candidates for the interview including the petitioner. Since one candidate did not possess the required criteria, he was not called for the interview. Three candidates had been called for the interview on 10.12.2012. The selection committee consisting of subject experts, representatives from the Ministry, UGC and EC Members evaluated the performance of the candidates basing on the performance in the interview, in addition to the educational qualification and experience. The rules and regulations stipulated by the UGC from time to time had been strictly adhered to. The selection process was completed on the day of the interview. Basing on the recommendation of the selection committee, the file was processed for the approval of the competent authority. The opposite party no.4 was selected in the interview. Thereafter, appointment letter was issued to her. During intervening period, the petitioner had made wild allegations. The information sought for by the petitioner under the RTI Act was supplied to him. It is further stated that the selection process is confidential. The University publishes the result of the entrance test as per the practice. The assertion of the petitioner that the selection process was revised to suit a particular candidate has been specifically denied. Opposite party no.4 was selected on merit. She has possessed the requisite qualification. No relaxation of qualification was given to any of the candidates including the selectee in the process of screening, selection and appointment. The assessment made by the petitioner to be more qualified and more suitable for the post is self-acclaimed.

5. Heard Mr.Aditya Mishra, learned counsel for the petitioner, Mr. J.K. Mishra, learned Senior Advocate for the opposite party no.1, Mr. Sanjeev Udgata, learned counsel for the opposite parties 2 and 3 and Mr. K.K. Das, learned counsel for the opposite party no.4.

6. Mr.Aditya Mishra, learned counsel for the petitioner, submitted that the petitioner has a brilliant academic record. He is a Ph.D holder. He has 30 years of experience as a faculty in Oriya in different Colleges and Universities in the State of Orissa. To his credit, the petitioner has various

publications in the national level research paper. Under the guidance of the petitioner, 12 scholars have submitted their thesis. Four scholars are continuing their work. The petitioner did well in the interview. But then he was not selected. He further submitted that the opposite party no.4 did not have the minimum qualification for the post of Associate Professor in Oriya. But then she was selected. The process of selection has been changed after advertisement issued. Referring to the comparative chart in para-15 of the writ application, he submitted that the opposite party no.4 did not have the minimum eligibility for the post. To buttress his submissions, he cited the decisions of the apex Court in the case of State of Orissa and another v. Mamata Mohanty, (2011) 3 SCC 436 and Bishnu Biswas and others v. Union of India and others, AIR 2014 SC 1570.

7. Per contra Mr. J.K. Mishra, learned Senior Advocate for the opposite party no.1, submitted that the UGC issued a regulation from time to time with regard to appointment of teaching staff. The same has to be strictly adhered to by the Central University.

8. Mr. Sanjeev Udgata, learned counsel for the opposite parties 2 and 3, submitted that the petitioner has made wild and reckless allegation against the University without any basis. He submitted that the University constituted a screening committee of three eminent professors of the State of Orissa for scrutinizing the applications of the candidates. The said committee evaluated four applications and recommended the University in respect of three candidates, i.e., petitioner, opposite party no.4 and one Dr. Nawa Hanshadh. Since one of the candidates did not have requisite qualification, he was not called for the interview. The selection committee consisting of subject experts, representatives from the Ministry, UGC and EC Members conducted the interview on 10.12.2012. There were seven members in the committee, out of which two were the Vice-Chancellor & Pro Chancellor of the University and three Professors of the subject. The visitors' nominee is an eminent Oriya writer and Jnanpith awardee. Basing on the recommendation of the selection committee, the competent authority approved the selection of opposite party no.4 and accordingly, issued appointment letter to her. He emphatically submitted that the criteria of selection have not been changed. He cited the decisions of the apex Court in the case of Dalpat Abasaheb Solunke, etc. etc. v. Dr. B.S. Mahajan etc. etc., AIR 1990 SC 434 and Basavaiah (Dr.) v. Dr. H.L. Ramesh & others, (2010) 8 SCC 372.

9. In Maharashtra State Road Transport Corporation and others v. Rajendra Bhimrao Mandve and others, AIR 2002 SC 224, the apex Court

held that the rules of the game, meaning thereby, that the criteria for selection cannot be altered by the authorities concerned in the middle or after the process of selection has commenced. The same view was reiterated in Bishnu Biswas (supra).

10. Though learned counsel for the petitioner argued with vehemence that the criteria of selection have been changed after the advertisement issued, but on an anatomy of the pleadings it is evident that the same is without any foundational facts. The specific stand of the University is that the criteria of selection have not been changed. The Rules and Regulation prescribed by the UGC had been strictly followed. Thus the submissions have no legs to stand.

11. In Dalpat Abasaheb Solunke, the apex Court held that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The Court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the Constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection. In Basavaiah (supra), the apex Court held that courts have to show deference and consideration to the recommendation of an Expert Committee consisting of distinguished experts in the field. The decision in the case of Mamata Mohanty (supra) is distinguishable on facts.

12. On the anvil of the decisions cited supra, the case of the petitioner may be examined.

13. The University constituted a three member committee with Ex. Head of the Department (Oriya), Utkal University, Vani Vihar, Bhubaneswar; Department of Oriya, Utkal University, Vani Vihar, Bhubaneswar and Department of Oriya, Berhampur University, Berhampur for screening of the applications. After scrutinizing the four applications, the committee recommended the names of three candidates i.e. petitioner, opposite party no.4 and one Dr. Nawa Hanshadh. The selection committee had been constituted by the University consisting of subject experts, representatives from the Ministry, UGC and EC Members. The minutes of the selection committee, vide Annexure C/2, shows that the selection committee consists of seven persons. The visitor's nominee is an eminent Oriya writer and a Jnanpith awardee. The others are Vice-Chancellor, Pro Vice-Chancellor,

Professor, Former Professors of Oriya of different Universities of Orissa. The selection committee scrutinized the merits of the candidates and recommended the name of the opposite party no.4. Thereafter, the order of appointment was issued to the oppositeparty no.4.

14. There being no illegality or patent material irregularity in the constitution of the selection committee or its procedure vitiating the selection or proved mala fides affecting the selection process, this Court is not inclined to interfere with the selection of opposite party no.4 for the post of Associate Professor in Oriya in Central University of Orissa.

15. In the ultimate analysis, the petition, sans any merit, deserves dismissal. Accordingly, the same is dismissed. No costs.

Writ petition dismissed.

2016 (II) ILR - CUT- 593

DR. A.K.RATH, J.

W.P.(C) NO. 18735 OF 2009

GORAMANI GOUDA & ORS. .....Petitioners

.Vrs.

C.E.O, SOUTHCO ELECTRICAL DIVISION BERHAMPUR & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1980 – ART. 226

Electrocution death – Whether a writ petition under Article 226 of the Constitution of India is maintainable for payment of compensation when death is caused due to electrocution ? Power conferred upon the High Courts under Article 226 of the Constitution is wide enough to reach injustice wherever it is found – So, when there is negligence on the part of the opposite parties and there is infringement of Article 21 of the Constitution of India, there should not be any bar to proceed under Article 226 of the Constitution – Writ petition for payment of compensation for the death of a person in electrocution is maintainable when the undisputed facts clearly reveal the same.

In this case immediately after the occurrence the matter was reported to the police, U.D. Case was registered and after enquiry Police submitted report that the cause of death was due to accidental

electrocution – The deceased was a labourer and aged about 42 years – Held, there being clinching materials on record and the conclusion is irresistible that the deceased died due to electrocution, this court directs the opposite parties to pay compensation of Rs. 1,50,000/- to the petitioners within two months. (Paras 6, 7)

Case Law Relied on :-

2015(I) OLR-637: T.Bimala v. Cuttack Municipal Corporation, Cuttack & Ors.

For Petitioners : Mr. G.N.Mishra
For Opp. Parties : Mr. A.K.Mishra

Date of Hearing :29.07.2016
Date of Judgment :10.08.2016

JUDGMENT

DR.A.K.RATH, J.

In this writ petition under Article 226 of the Constitution of India, the petitioners have prayed, inter alia, for a direction to the opposite parties to pay an amount of Rs.1,50,000/- towards compensation for the death of Somanath Gouda, the husband of petitioner no.1 and son of petitioner nos. 2 and 3, in electrocution.

2. Shorn of unnecessary details, the short facts of the case of the petitioners are that on 7.5.2008 while Somanath Gouda was returning from the paddy field, the 11 K.V. line detached from the pole and fell on him, as a result of which, he died on the spot. One Siva Gouda reported the matter before the I.I.C., Tikiri Police Station, whereafter U.D.Case No.4 of 2008 was registered. The police rushed to the spot. Thereafter, the dead body, on completion of inquest, was sent to the Medical Officer, Tikiri P.H.C.(New) for autopsy. On the requisition of the police, the doctor, who conducted the postmortem, submitted the report stating that the cause of death may be due to accidental electrocution. The deceased was a labourer and the only earning member of the family. He was 42 years at the time of accident. With this factual scenario, this writ petition has been filed for compensation.

3. Pursuant to issuance of notice, a counter affidavit has been filed by the opposite parties stating therein that the writ petition is not maintainable as the same involves adjudication of disputed question of facts. There was absolutely no negligence on its part in managing the over-head supply line in the locality. Death of Somanath Gouda is not attributable to the negligence of the opposite parties. It is further stated that on the enquiry it was

ascertained that the contractor M/s. Maruti Associates was entrusted with the construction of a new line. It unauthorisedly kept charged the electric line without electrical inception and without knowledge of the concerned Junior Engineer and the Lineman. The line was not handed over to SOUTHCO. The investigation conducted by the police is not a conclusive proof. Further, the petitioners had never made any representation to the opposite parties at any point of time for compensation.

4. Heard Mr.G.N.Mishra, learned counsel for the petitioners and Mr.A.K.Mishra, learned counsel for the opposite party no.3.

5. Really two points arise for consideration of this Court ;

(1) Whether a writ application under Article 226 of the Constitution of India is maintainable for payment of compensation when death is caused due to electrocution ?

(2) Whether opposite parties can deny the liability on the ground that the death of Somanath Gouda was due to act of a third party ?

Point Nos.1 and 2.

6. An identical matter came up for consideration before a Division Bench of this Court in the case of *T. Bimala v. Cuttack Municipal Corporation, Cuttack and others, 2015(I) OLR-637.* It was held as follows:-

"9. The language of Article 226 of the Constitution does not admit of any limitation on the powers of the High Court for the exercise of jurisdiction thereunder. The power conferred upon the High Courts under Article 226 of the Constitution is wide enough to reach injustice wherever it is found. The apex Court in catena of the decisions laid down certain guidelines and self-imposed limitations have been put there subject to which the High Courts would exercise jurisdiction. Those guidelines cannot be mandatory in all circumstances. When a citizen approaches the High Court in writ petition that a wrong is caused, the High Court will step into protect him, whether that wrong was done by the State or an instrumentality of the State. The High Court cannot pull down the shutters.

10. In *M.S. Grewal v. Deep Chand Sood,* (2001) 8 SCC 151, the apex Court observed as under :

"Next is the issue of "maintainability of the writ petition" before the High Court under Article 226 of the Constitution. The appellants though initially very strongly contended that while the negligence

aspect has been dealt with under penal laws already, the claim for compensation cannot but be left to be adjudicated by the civil laws and thus the Civil Court's jurisdiction ought to have been invoked rather than by way of a writ petition under Article 226 of the Constitution. This plea of non-maintainability of the writ petition though advanced at the initial stage of the submissions but subsequently the same was not pressed and as such we need not detain ourselves on that score, excepting however recording that the law Courts exist for the society and they have an obligation to meet the social aspirations of citizens since law Courts must also respond to the needs of the people. In this context, reference may be made to two decisions of this Court : the first in line is the decision in Nilabati Behera v. State of Orissa, (AIR 1993 SC 1960) wherein this Court relying upon the decision in Rudal Sah (Rudal Sah v. State of Bihar), (AIR 1983 SC 1086) decried the illegality and impropriety in awarding compensation in a proceeding in which the Court's power under Articles 32 and 226 of the Constitution stands involved and thus observed that it was a clear case for award of compensation to the petitioner for custodial death of her son. It is undoubtedly true, however, that in the present context, there is no infringement of the State's obligation, unless of course the State can also be termed to be joint tortfeasor, but since the case of the parties stands restricted and without imparting any liability on the State, we do not deem it expedient to deal with the issue any further except noting the two decisions of this Court as above and without expression of any opinion in regard thereto."

11. In this connection, we would like to profitably quote a paragraph from a decision of Madhya Pradesh High Court in the case of *Ramesh Singh Pawar v. Madhya Pradesh Electricity Board and others,* AIR 2005 MP 2. It is held as follows:

"Currently judicial attitude has taken a shift from the old doctrine concept and the traditional jurisprudentia system – affection of the people has been taken note of rather serious and the judicial concern thus stands on a footing to provide expeditious relief to an individual when needed rather than taking recourse to the old conservative doctrine of the Civil Court's obligation to award damages. As a matter of fact the decision in D.K. Basu has not only dealt with the issue in a manner apposite to the social need of the "Country but the

learned Judge with his usual felicity of expression firmly established the current trend of justice-oriented approach". Law Courts will lose their efficacy if they cannot possibly respond to the need of the society – technicalities their might be many but the justice-oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice."

12**.** Thus we hold that a writ application for payment of compensation for the death of a person in electrocution is maintainable when the undisputed facts clearly reveal the same.

13. A person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability".

14. The doctrine of strict liability has its origin in English Common Law when it was propounded in the celebrated case of *Rylands v. Fletcher,* 1868 Law Reports (3) HL 330, Justice Blackburn had observed thus:

"The rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does so he is prima facie answerable for all the damage which is the natural consequence of its escape."

15. There are seven exceptions formulated by means of case law to the said doctrine. One of the exceptions is that "Act of stranger i.e. if the escape was caused by the unforeceable act of a stranger, the rule does not apply". (Winfield on Tort, 15th Edn. Page 535).

16. The rule of strict liability has been approved and followed in many subsequent decisions in England and decisions of the apex Court are a legion to that effect. A Constitution Bench of the apex Court in *Charan Lal Sahu v. Union of India,* AIR 1990 SC 1480 and a Division Bench in *Gujarat State Road Transport Corpn. V. Ramanbhai Prabhatbhai,* AIR 1987 SC 1690 had followed with approval the principle in Rylands (supra). The same principle was

reiterated in *Kaushnuma Begum v. New India Assurance Co. Ltd.,* AIR 2001 SC 485.

17. Sukamani Das (supra), Timudu Oram (supra) on which reliance has been placed, the question of a strict liability was not taken up in those cases.

18. Sukamani cannot be understood as laying a law that in every case of tortious liability recourse must be had to a suit. When there is negligence on the face of it and infringement of Article 21 is there, it cannot be said that there will be any bar to proceed under Article 226 of the Constitution, since right of life is one the basic human rights guaranteed under Article 21 of the Constitution.(emphasis laid)

19. In *M.P. Electricity Board v. Shail Kumar and others,* AIR 2002 SC 551, one Jogendra Singh, a workman in a factory, was returning from his factory on the night of 23.8.1997 riding on a bicycle. There was rain and hence the road was partially inundated with water. The cyclist did not notice the live wire on the road and hence he rode the vehicle over the wire which twitched and snatched him and he was instantaneously electrocuted. He fell down and died within minutes. When the action was brought by his widow and minor son, a plea was taken by the Board that one Hari Gaikwad had taken a wire from the main supply line in order to siphon the energy for his own use and the said act of pilferage was done clandestinely without even the notice of the Board and that the line got unfastened from the hook and it fell on the road over which the cycle ridden by the deceased slided resulting in the instantaneous electrocution. In paragraph 7, the apex Court held as follows:

"It is an admitted fact that the responsibility to supply electric energy in the particular locality was statutorily conferred on the Board. If the energy so transmitted causes injury or death of a human, being, who gets unknowingly trapped into if the primary liability to compensate the sufferer is that of the supplier of the electric energy. So long as the voltage of electricity transmitted through the wires is potentially of dangerous dimension the managers of its supply have the added duty to take all safety measures to prevent escape of such energy or to see that the wire snapped would not remain live on the road as users of such road would be under peril. It is no defence on the part of the management of the Board that somebody committed mischief by

siphoning such energy of his private property and that the electrocution was from such diverted line. It is the look out of the managers of the supply system to prevent such pilferage by installing necessary devices. At any rate, if any live wire got snapped and fell on the public road the electric current thereon should automatically have been disrupted. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps." (emphasis laid)

20. The principle of res ipsa loquitur is well known. It is explained in a very illustrative passage in *Clerk & Lindsell on Torts,* 16th Edn., pp. 568-569, which reads as follows:

"Doctrine of *res ipsa loquitur.* The onus of proof, which lies on a party alleging negligence is, as pointed out, that he should establish his case by a pre-ponderance of probabilities. This he will normally have to do by proving that the other party acted carelessly. Such evidence is not always forthcoming. It is possible, however, in certain cases for him to rely on the mere fact that something happened as affording *prima facie* evidence of want of due care on the other's part: '*res ipsa loquitur* is a principle which helps him to do so'. In effect, therefore, reliance on it is a confession by the plaintiff that he has no affirmative evidence of negligence. The classic statement of the circumstances in which he is able to do so is by *Erle,* C.J.:

'There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.'

It is no more than a rule of evidence and states no principle of law. "This convenient and succinct formula", said *Morris,* L.J., "possesses no magic qualities; nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin". It is only a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. The court hears only the plaintiff's side

> of the story, and if this makes it more probable than not that the occurrence was caused by the negligence of the defendant, the doctrine *res ipsa loquitur* is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability. It is not necessary for *res ipsa loquitur* to be specifically pleaded."

7. On the anvil of the decisions cited supra, the case of the petitioners may be examined. Immediately after the occurrence, the matter was reported to the I.I.C., Tikiri Police Station. Thereafter U.D.Case No.4 of 2008 was registered. After enquiry, the police submitted the report stating that the cause of death was due to accidental electrocution. The postmortem report reveals that the cause of death may be due to accidental electrocution. In view of the clinching material on record, the conclusion is irresistible that husband of petitioner no.1 and son of petitioner nos.2 and 3 died due to electrocution. The submission of the learned counsel for the opposite parties that the construction work was entrusted to the contractor M/s.Maruti Associates, who unauthorisedly charged the electric line and the line was not handed over to SOUTHCO, is difficult to fathom. Suffice it to say that the same is an internal matter between the contractor and the opposite parties. For the negligence of the opposite parties, a third party cannot suffer. A person undertaking an activity involving hazardous or risky exposure to human life is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps. The opposite parties can not shirk their responsibility on trivial grounds. For the lackadaisical attitude exhibited by the opposite parties, a valuable life was lost. The deceased was a labourer. He was the only earning member of the family and 42 years of age at the time of accident. Therefore, this Court directs the opposite parties to pay compensation of Rs.1,50,000/- (One lakh fifty thousand) to the petitioners within two months.

8. The writ petition is allowed. No costs.

Writ petition allowed.

2016 (II) ILR - CUT-601

D. DASH, J.

FAO NOS. 53, 59, 61 & 62 OF 2005

M/S. OCL INDIA LTD., RAJGANGPUR ……..Appellant

.Vrs.

THE REGIONAL DIRECTOR, E.S.I.C., BHUBANESWAR & ANR. ……Respondents

(A) EMPLOYEES' STATE INSURANCE ACT, 1948 – S.2(22)

Whether the remuneration paid to the employees for "overtime work" comes within the scope of "wages" as defined U/s. 2(22) of the Act and the appellant being the employer is liable to pay interest over the amount remaining unpaid for the period prior to the delivery of the judgment Dt. 06.11.1996 by the Apex Court reported in 1997(9) SCC 71 ? – Held, remuneration paid towards "overtime work" is "wages" U/s 2(22) of the ESI Act – So far as payment of "interest" is concerned the employer is liable to pay interest from the very beginning U/s. 39(5) (a) of the ESI Act read with regulation 31 & 31-A of the Employees State Insurance (General) Regulation, 1950 but in the present case since non-payment of contribution by the employer-appellant was on bonafide reasons i.e due to conflicting views of different High Courts whether remuneration for "overtime work" is "wages" or not, the appellant is not liable to pay interest prior to 06.11.1996 when the matter finally settled by the Apex Court. (Paras 12 to18)

(B) EMPLOYEES' STATE INSURANCE ACT, 1948 – S.2(22)

Whether payment of cycle allowance to the employees comes within the definition of "wages" as per section 2(22) of the Act ? Held, the said allowance has to be deemed to have been paid every month so as to attract the meaning of "wages" as defined U/s 2 (22) of the Act. (Para 20)

Case Law Overruled :-

1. (76) 1993 CLT 893 : Regional Director, ESI Corpn. -V- P.B.Gupta

Case Laws Referred to :-

1. 1997(9) SCC 71 : Indian Drugs and Pharmaceuticals Ltd. & Ors. v. Employees State Insurance Corporation & Ors.
2. (1979) LABIC 852 : M/s. Hindusthan Motors Ltd. Vrs. ESI Corporation and Ors.
3. (1990) II LLJ 195 : Hind Arts Press, Mangalore vrs. ESI Corporation& Anr.

4. 1998-I-LLJ-841 : HMT Limited, Watch Factory IV, Tumkur v. Employees' State Insurance Corporation.
5. 1974 Lab (1) C 328 : Shivraj Fine Arts Litho works, Nagpur vrs. Director, Regional Office, Maharastra & Ors.
6. 1977 (II) LLJ 420 : ESIC, New Delhi vrs. Birla Cotton, Spinning and Weaking Mill Ltd.,Delhi
7. 1981 Lab 1C 457 : M/s. The Hydrabad Allwyn Metal Works Ltd. Vrs. Employees State Insurance Corporation.
9. 2004-I-LLJ 272 : Joint Director of ESI Corporation Hubli and another vrs. Ribbhisiddhi and Chemicals Ltd.Gokaka.

For Appellant : M/s. S.P.Sarangi, B.C.Mohanty, P.P.Mohanty, D.K.Dash, P.K.Das, S.Pattnaik & A.K.Kanungo

For Respondents : M/s. P.P.Ray, D.P.Ray, N.C.Pradhan. Mr. S.N.Mohapatra

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Date of hearing : 17.05. 2016
Date of judgment : 01.07. 2016

JUDGMENT

D. DASH, J.

1. The above noted appeals under sub-section 2 of Section 82 of the Employees State Insurance Act, 1948 (hereinafter referred to as "the ESI Act") have been filed calling in question the order dated 24.12.2004 passed by the learned District Judge, Bhuaneswar as the Employees State Insurance Court, Bhubaneswar rejecting the applications filed by the appellant as the petitioner under Section 75 of the ESI Act giving rise to ESI Misc. Case Nos. 267/95 of 2001/1996, 261/351 of 2001/1993, 266/94 of 2001/1996 and 262/352 of 2001/1994.

2. The appellants by presenting the above applications under section 75 of the ESI Act prayed before the ESI Court for quashment of order passed by the Deputy Director, ESI Corporation, Bhubaneswar in raising the demand on account of the non-payment of the contribution as the employer towards overtime wages paid to the employees, the leave travel allowance, the cycle allowance as also the interest.

3. The following table is given for easy reference and to avoid unnecessary lengthy descriptions:-

Sl. No.	Appeal Nos.before this Court	ESI Misc. Case Nos. Before ESI Court	Date of the Order sought to be Quashed before ESI Court	Quantum of Demand	Date of the Order of ESI Court sought to be modified in appeal.	Demanded contribution with reference to component/s
1.	FAO No. 53/2005	Misc. Case no. 267/95 of 2001/1996	27.6.1995	Rs.2,06,883/-	24.12.2004	Remuneration for overtime + Leave Travel Allowance + Cycle Allowance
2.	FAO No. 59/2005	Misc. Case No. 261/351 of 2001/1994	21.3.1991	Rs.1,79,962/-	24.12.2004	do
3.	FAO No. 61/2005	Misc. Case No. 266/94 of 2001/1996	18.7.1995	RS. 4,63,166/-	24.12.2004	do
4.	FAO No. 62/2005	Misc. Case No. 262/352 of 2001/1994	2.11.1993	Rs.3,77,261/-	24.12.2004	do

4. The appeals as mandated under the provision of section 82 of the ESI Act have been admitted on the following substantial questions of law:-

(i) Whether in the facts and circumstances of the case the appellant while being liable to pay its contribution as the employer under the ESI Act towards the remuneration paid to the employees for overtime work as wages in view of the law laid down by the Hon'ble Apex Court by judgment dated the 6th day of November, 1996 in the case of **Indian Drugs and Pharmaceuticals Ltd. & others v. Employees State Insurance Corporation & others**; 1997(9) SCC 71, if is also be liable to pay the interest over the amount remaining unpaid on the above score for the period prior to the delivery of the judgment by the Hon'ble Apex Court in laying down the law by setting at rest several divergent views taken by the High Courts?

(ii) Whether the demand of contribution under the ESI Act towards the "cycle allowance" paid to the employees falls within the definition of 'wages' as defined in section 2(22) of the ESI Act?

The respondents having filed the cross-objection questioning the quashment of demand of contribution towards payment of Leave Travel Allowance, the same has been admitted on the following substantial question of law:-

(iii) Whether the Leave Travel Allowance paid to the employees falls within the definition of 'wages' as contained in section 2 (22) of the ESI Act so as to attract the liability of the appellant for making due contribution under the ESI Act on that component?"

5. The appeals as well as the cross-objections have been heard together in view of involvement of similar substantial questions of law and thus are accordingly taken up for disposal by this common judgment.

6. The High Court of Calcutta and Karnataka in case of **M/s. Hindusthan Motors Ltd. Vrs. ESI Corporation and others;** (1979) LABIC 852 and **Hind Arts Press, Mangalore vrs. ESI Corporation and Another;** (1990) II LLJ 195 respectively as well as this Court (Orissa High Court) in the case of **Regional Director, ESI, Corporation vs. P.B.Gupta**; (76)1993 CLT 893 had negated the contention in favour of the interpretation that the definition of 'wages' as contained in section 2 (22) of the ESI Act does embrace within its sweep the remuneration paid to the employees towards overtime work. The Bombay High Court in case of **Shivraj Fine Arts Litho works, Nagpur vrs. Director, Regional Office, Maharastra and others**; 1974 Lab (1) C 328, the Delhi High Court in case of **ESIC, New Delhi vrs. Birla Cotton, Spinning and Weaking Mills Ltd., Delhi** :1977 (II) LLJ 420 and Andhra Pradesh High Court in case of **M/s. The Hydrabad Allwyn Metal Works Ltd. Vrs. Employees State Insurance Corporation**; 1981 Lab 1C 457 however favoured the interpretation that overtime due is 'wages' as defined in the ESI Act.

The respondent no. 2 being the competent authority demanded the contribution from the appellant employer under the ESI Act towards the remuneration paid to the employees for the overtime work claiming the same to be falling within the purview of the 'wages' as provided under Section 2 (22) of the ESI Act.

7. The Hon'ble Apex Court, in the case of Indian Drugs and Pharmaceuticals Ltd. Etc. (supra), finally laid down the law, that both the remuneration received during the working hours and overtime constitute a composite 'wages' and thereby the remuneration paid towards overtime work is 'wage' coming within the net of the definition of section 2 (22) of the ESI Act and the employer as such has to make the contribution under the ESI Act for that also. The judgment by the Hon'ble Apex Court was delivered on 6th day of November, 1996. Till this judgment of the Hon'ble Apex Court laying down the law in the field covering the particular subject, there were conflicting views of the different High Courts. In the above decision of the Hon'ble Apex Court in case of Indian Drugs and Pharmaceuticals Ltd. (supra), the approach adopted by the Calcutta High Court in "M/s. Hindusthan Motors Pvt. Ltd." (supra) and that of Karnataka High Court in

"Hind Arts Press, Mangalore" (supra) were held to be unsustainable and incorrect whereas the decisions of Bombay High Court, in "Shivraj Fine Art Litho Works" (supra) Delhi High Court in "ESIC, New Delhi" (supra) and Andhra Pradesh High Court in "Hydrabad Allwyn Metal Works Ltd." (supra) were held to have been correctly rendered with correct interpretation. The decision of our High Court in case of Regional Director, ESIC Corporation (supra) thus stood overruled.

8. The appellant now here firstly seeks the relief of non-payment of interest over the contribution under the ESI Act over that remuneration paid towards overtime work that has been paid in view of the judgment of the Hon'ble Apex Court laying down the law. Thus now the matter stands confined on the question of payment of interest as provided under sub-section 5 of section 39 of the ESI Act read with Regulation 31 and 31-A of the Regulations for the period till 5th day of November, 1996 i.e. prior to the date of delivery of the judgment by the Hon'ble Apex Court in case of "Indian Drugs and Pharmaceuticals Ltd." (supra).

9. Mr. Ashok Parija, learned Senior Counsel appearing on behalf of the appellant submits that despite the provision of sub-section 5 of section 39 of the ESI Act in the peculiar facts and circumstances when the legal position stood volatile and the views were divergent till the pronouncement of the judgment of the Hon'ble Apex Court in the case of "Indian Drugs and Pharmaceuticals Ltd." (supra) on 6.11.1996, the non-payment of the contribution under the ESI Act by the employer on account of the overtime wages till then more particularly in view of our High Court's finding in case of Regional Director, ESI, Corporation (supra) can neither be termed as wilful nor will fall within the ambit of delayed payment. It has been argued that said contribution towards overtime wages as demanded after the pronouncement of the judgment of the Hon'ble Apex Court laying down the law to be followed through-out the country if not paid thereafter will certainly carry interest as per section 39 (5) of the ESI Act. However, he vehemently contends that because of the view taken by the Calcutta and Karnataka High Court as also our High Court, since the appellant was having no legal obligation to pay the contribution as the employer towards the overtime wages paid to the employees under the ESI Act, the appellant cannot be saddled with the liability of the payment of interest for the period uptill 5th day of November, 1996. According to him, such non-payment as above, can never attract the penal consequence of running with interest as provided in section 39 (5) of the ESI Act. It is submitted that such imposition

of interest in accordance with the provision is basically there to take care in preventing the delayed payment when contribution has been ascertained and has thus fallen due and in order to ensure timely payment in view of the fact that the legislation is a socio-beneficial one. Here his contention is that although the appellant is liable to pay the interest with effect from 6.11.1996, the date of pronouncement of the judgment of the Hon'ble Apex Court in the case in Indian Drugs and Pharmaceuticals Ltd. (supra) till the date of actual payment of the contribution under the ESI Act towards the overtime wages paid to the employees, yet such interest is not payable for the period that has elapsed prior to said pronouncement of the judgment laying down the law by final interpretation.

He next contends that the demand of the contribution from the appellant under the ESI Act on the component of cycle allowance is untenable as it has not been shown by the respondent that it was being paid at intervals not exceeding two months. So, according to him the order of the ESI Court on that score is bad and liable to be set aside.

Lastly, he contends that the ESI Court has rightly held that the Leave Travel Allowance is excluded from the purview of the definition of 'wages' as defined in section 2 (22) of the ESI Act as it is clearly under the excepted category. Thus he contends that the cross-objections are untenable.

10. Learned Counsel, Mr. S.N.Mohapatra for the ESI Corporation in response contends that the provision of sub-section 5 of the section 39 being very clear and that when read with regulation 31 and 31-A of the Regulations, although the divergent views of different High Courts have been set at rest by the Hon'ble Apex Court on 6.11.1996, yet it would be deemed to have fallen due from the very beginning in view of the interpretation that has been finally made and therefore the liability of payment of interest as provided under section 39 (5) of the ESI Act stands and the appellant has to abide by it in paying the interest over that unpaid contribution towards the remuneration paid for the overtime also for that prior period.

His contention on the score of demand of contribution as regards cycle allowance is that the appellant having failed to show that the same falls beyond the ambit of the definition of 'wages' as defined in section 2(22) of the ESI Act that it was paid at the interval exceeding the period of two months, there is no illegality on the part of the ESI Court in accepting the demand.

He further presses the cross-objections that the Leave Travel Allowance has to be held as 'wage' and the ESI Court's order on that score warrants interference so as to be finally held favouring the demand on that component.

11. In order to address the above submission and find out the answer to the question of law as per the contention of the learned counsel for the respondent in the affirmative whereas in the negative as contended by the learned Senior Counsel for the appellant, it would be proper at the outset to pay attention to the relevant provisions of the ESI Act.

Sub-sections (4), (5)(a) and (5)(b) of Section 39 read as under:-

"39. xxx xxx xxx

"(4) The contributions payable in respect of each wage period shall ordinarily fall due on the last day of the wage period, and where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period, the contributions shall fall due on such days as may be specified in the regulations.

(5)(a) If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the regulations till the date of the actual payment:

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

(b) Any interest recoverable under Clause

(a) may be recovered as an arrear of land revenue or under section 45-C to section 45-I".

In addition to the above, in the Employees State Insurance (General) Regulation, 1950 (hereinafter referred to as the Regulations) made by the Corporation in exercise of the power conferred under Section 97 of the ESI Act, the relevant regulation 31 and 31-A run as under:-

"31. Time for payment of contribution.- An employer who is liable to pay contributions in respect of any employee shall pay those contributions within 21 days of the last day of the calendar month in which the contributions fall due:

Provided that where a factory/establishment is permanently closed, the employer shall pay contribution on the last day of its closure.

Provided xxx xxx xxx (not required for our purpose)

31-A. Interest on contribution due, but not paid in time. An employer who fails to pay contribution within the periods specified in regulation 31, shall be liable to pay interest at the rate of six per cent annum in respect of each day of default or delay in payment of contribution."

'Simple interest at the rate of "fifteen per cent" per annum' by notification dtd. 1.11.94 (w.e.f 1.9.94); "'twelve per cent" by notification dtd. 1.7.2005 (w.e.f. 1.10.2005)

12. Giving a careful reading to the above, it is seen that sub-section 5 of section 39 of the ESI Act and Regulation 31 of the (General) Regulations enjoin upon the appellant to make the payment of the contributions within the time frame. Now the claim of the respondent is the interest for delayed payment within the meaning of section 39 of the Act in respect of the contribution on the component of the remuneration paid to the employees for the overtime work that we may say overtime wages. As provided in sections 39 (5) (a) read with regulation 31-A, when the provision of section 39 (5)(a) attracts the liability of payment of interest if the contribution payable under the ESI Act is **not paid**; the Regulation 31-A provides that where the employer **fails** to pay the contribution. A harmonious reading being given to both the above, it becomes clear that there surfaces an element of default in making the payment within the time frame. Once the default comes, the statutory liability to pay the interest automatically springs up and there arises no scope for escape or waiver under any circumstance.

13. Mr. Parija, learned Senior Counsel in support of his submission has placed reliance on two decisions of the High Court of Karnataka in **HMT Limited, Watch Factory IV, Tumkur v. Employees' State Insurance Corporation:** 1998-I-LLJ-841 and **Joint Director of ESI Corporation Hubli and another vrs. Ribbhisiddhi and Chemicals Ltd.Gokaka:** 2004-I-LLJ 272.

It has been held in case of "HMT Ltd."(supra) that applicability of the provision relating to the payment of interest comes in where the employers fail to pay the contribution. If such failure is on account of circumstances beyond his control or if the circumstances make it impossible for the employer to make contributions even if he wanted to do so unless he risks

being hauled up for the contempt of the Court. It has been held that such failure on the part of the employer in making payment in time cannot be called a failure within the meaning Clause-a of sub-section 5 of Section 39 of the ESI Act so as to warrant levying of interest.

In that case in exercise of the power conferred by Section 2 (9)(iii) (b) of the ESI Act, the State Govt. issued a notification enhancing wage limit coverage of the employees under the ESI Act from Rs.1600/- to Rs.3000/-. This notification was challenged by the Union of Employees of HMT Ltd. The operation of the notification was stayed by the High Court. The parties were directed to forbear from giving effect to the said notification with further direction to the HMT Ltd. not to proceed to deduct contributions towards ESI Scheme from the salary of the employees. At the end, when the matter was disposed of by the learned Single Judge extending the doctrine that the "Act of the Court prejudices none", the ESI Corporation was restrained from recovering the amount from the employers in respect of the employees whose monthly wages were Rs.1600-3000/-, till the date of theorder while saving the recovery already effected in respect of some employees from the net of the said order.

The order of the learned Single Judge was challenged carrying writ appeals before the Division Bench of the Court. The Division Bench while affirming the decision of the learned Single Judge regarding the validity of the concerned notification held the postponement of the said notification as ordered by the learned Single Judge as erroneous and accordingly, the observations in that regard made by the learned Single Judge were held to be of no avail and in- operative. After the learned Single Judge disposed of the writ petition and during the pendency of the appeals before the Bench, the Division Bench had also stayed the operation of the notification. This finally stood vacated when the Division Bench disposed of the writ appeals mentioning therein clearly that the notification has come into effect from the date it was meant to be enforced and not from any posterior date i.e. the date of the order of learned Single Judge. In that factual background when the question of payment of interest came to be decided, it was held that the employer was even having no opportunity to make the contributions till the Division Bench disposed of the appeals.

This being the state of affair on the question of payment of interest which was disputed, finally the view has been taken that such delay in payment for the reasons of which the employer could not be held responsible at all, but on the other hand, since it was impossible on its part to make

payment in the circumstances and thus it cannot be called or taken as wilful non-payment which alone attract the liability of payment of interest in terms of Clause-a of sub-section 5 of section 39 of the ESI Act read with regulation 31 and 31-A of the Regulations.

14. In the other case of "Joint Director of ESI Corporation" (supra) the facts are almost akin to the present case in hand. It was concerning the contribution towards overtime wages. The contribution was not made in view of the Division Bench decision of the Karnataka High Court in case of "Hind Art Press" (supra) disfavouring the interpretation that the remuneration paid to be employee for the overtime work falls within the ambit of the term 'wages' as defined under sub-section 22 of section 2 of the ESI Act. The judgment of the Karnataka High Court in case of "Hind Arts Press" (supra) was overruled by the Apex Court in case of "Indian Drugs and Pharmaceuticals Ltd. and others" (supra) and it was held that the overtime wages are included within the term 'wages' as defined in sub-section 22 of section 2 of the ESI Act.

So the question of payment of interest fell for consideration. The Court was called upon to decide the underlined bit question first as to whether the non-payment of contribution in time in the facts and circumstances was due to the voluntarily act on the part of the employer or on account of its disability suffered in view of the Division Bench ruling of the High Court holding the field till its being overruled by the Apex Court. Reliance for the purpose was then also placed on the decision of the court in case of H.M.T. Pvt. Ltd. (supra). The view at the ultimatum has been taken that the employer could not be held responsible for the delay in payment of contribution on the component of overtime wages in view of law that had been laid down by the Division Bench of the Court. In Case of "Hind Art Press, Mangalore" (supra) until the same came to be overruled by the Apex Court on 6th of November, 1996 and as making the payment by the employer was impossible, it cannot be called wilful non-payment attracting the liability of paying the interest in terms of clause (a) of sub-section (5) of section 39 of the ESI Act. It was however held that the employer cannot certainly contend that no interest is payable at all and he is undoubtedly liable to pay the interest over the contribution on that component on and from 6th of Nov., 1996, the date on which the Apex Court overruled the judgment of the Division Bench of the Court.

15. The word 'fails' as finds mention in regulation 31-A of the Regulation as per the Black's Law Dictionary (10th edition) means to be "deficient or unsuccessful"; to "fall short of achieving something expected or hoped for". In the given case the employer is no doubt expected and hoped to pay the contribution under ESI Act in time and that is the legal obligation as mandated under the ESI Act. But the question remains that can it be said to be a deficiency on its part. It certainly refers to the 'in-action' or 'failure' on the part of the employer in giving due regard to the statutory provision that the contribution has to be made in time as provided in the ESI Act.

16. Adverting to the factual settings of the present case, the contention of the appellant stands that because of the views of the High Court of Calcutta, Karnataka and then of this Court, under the circumstance, the appellant was not having the strict legal obligation to make the payment of contribution on that very component of remuneration paid to the employee towards overtime work, as the views were that the same does not come within the definition of sub-section 22 of section 2 of the ESI Act. So this position having prevailed till 6.11.1996 when the divergent interpretations and views were set at rest and the law was finally laid down by the Hon'ble Apex Court, the question of liability on the part of the appellant to pay the contribution on that very component springs upon and from 6. 11. 1996 which is undoubtedly for the period both prior and later to it but the levying of interest for non-payment of the contribution on that component for the period prior to 6.11.1996 is not legally permissible. The employer under the circumstance cannot be said to have failed to pay the contribution in time and that under no circumstance be held to be a deficiency on its part in making the contribution on that component in defiance to the strict statutory provision governing the field when in view of the rulings of three High Courts including that of ours, it was not required to be so paid being held beyond the scope.

Since the law stood finally settled by setting at rest the divergent views of different High Courts including this Court as regards the payment of contribution under the ESI Act on that particular head, undoubtedly the law as settled with the interpretation has to be read to be there in the statutory provision from very inception. But when we go to view the imposition of interest on the ground of non-payment of contribution on that particular head in time, the due date of payment of contribution cannot be reckoned beyond the date, the law stood finally set at rest by the Apex Court as regards the particular interpretation. This is because of the simple reason that the imposition of interest is for non-payment of contribution by the due date

which in the facts and circumstances cannot be reckoned from a date anterior to the decision of the Apex Court.

The legislation undoubtedly is a socio-welfare one and accordingly, the provisions embodied therein for extending benefits to the employees burdening the employers for payment of contribution are to be given the broad and liberal interpretation shunning the narrower one so as to subserve the purpose and objectives sought to be achieved.

However, the provisions contained therein which are having penal consequences such as relating to payment of interest or otherwise for non-payment of contribution in adherence to the provisions of said legislation, those cannot receive the same interpretation. For those, the rule of strict construction will have their play as those are for the purpose of ensuring timely payment and not in the direction of preventing evasion of payment of contribution which stand undisputed.

17. Learned counsel for the ESI Corporation in response has placed the decision of the Apex Court in "GOGETZE (India) Ltd. vs. ESI Corporation";2008 (8) SCC 705. There the component was 'efficiency bonus'. The employer took the stand that the same falls outside the definition of wages under section 2 (22) of the ESI Act and thus it had raised a dispute which according to it was a bona fide one, placing reliance upon the decision of the Apex Court in Whirlpool of India Ltd. vrs. ESI Corporation (2000) 3 SCC 185 wherein the law had been laid down that the payment of 'production incentive' by the employer to its worker in the facts of the said case was not falling within the definition of the term 'wages' as defined in section 2(22) of the ESI Act. The dispute was carried to the Court and finally a compromise had been arrived at. The ESI Corporation however took the stand that the liability to pay the interest being statutory, there could not have been any compromise on that count. The employer took the stand that as the compromise was made stating nothing further to be payable as ESI contribution the question of payment of interest under Section 39 (5) and regulations 31 and 31-A would not arise. The Apex Court held in that case held that the liability to pay the interest being statutory and there being no power of waiver, the question of any compromise or settlement with regard to that liability of payment of interest did not really arise and the word' no further dues' finding mention in the order of the ESI Court was obviously relatable to the contribution payable and nothing beyond that. Facts and circumstances of the case cited by the learned counsel for the ESI Corporation are quite distinguishable from the facts and circumstances with

which we are faced here to address the question of attraction of the liability of payment of interest under section 39 (5) of the ESI Act. Therefore, the ratio of above cited decision does not come to the aid of the respondents in support of the demand of payment of interest as aforesaid.

18. For the aforesaid discussion and reasons thus I conclude that for the non-payment of contribution under the ESI Act on the component of remuneration paid to the employees for the overtime work for the period up to 5th of Nov. 1996 in the peculiar circumstances does not warrant levying interest in accordance with the provision of Clause –a of sub-section 5 of section 39 of the ESI Act read with regulations 31 and 31-A of the Regulations.

19. Now coming to the next limb of submission in relation to the second substantial question of law, if we read clause (b) of section 2 (22) of the ESI Act which is the excepted clause from the definition of 'wages', the travelling allowance or the value of travelling concession very much finds place therein. The learned Counsel for the ESI Corporation has not been able to place anything on record so as to show that said leave travel allowance as is being paid is an additional remuneration or that it would come within the other additional remuneration paid at intervals not exceeding two months. The learned Senior Counsel for the appellant submits that it has been rightly so held by the ESI Court that the said component is not to be visited with the contribution under the ESI Act as it is a sort of travelling allowance.

Regard being had to the nature of payment as leave travel allowance in view of available materials when the same is tested in the touchstone of the definition as provided in the ESI Act, it clearly passes through the said net. Thus I do not find any such reason to hold the order of the ESI Court in that regard quashing the demand of contribution on that head to be a flawed one. The cross-objections are accordingly found to be devoid of merit and as such are liable to be dismissed.

20. Lastly, so as to answer the second substantial question of law relating to the demand of contribution on account of payment of cycle allowance to the employees, it is seen that the appellant has not placed any material on record in showing the interval of the payment so as to conclude that its made exceeding the interval of two months in escaping from the paw of the definition of 'wages'. This being so keeping in view that the ESI Act is a social legislation enacted to provide benefits to the employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto, the said allowance has to be deemed to have

been paid every month so as to attract the meaning of wages, as other additional remuneration making the appellant squarely liable for payment of the contribution under the ESI Act. Thus, the submission of the learned Senior Counsel in this regard cannot be countenanced with.

Therefore, the view taken by the ESI Court on this score has to receive the seal of approval.

21. The aforesaid discussion and reasons accordingly provide the answers to the substantial questions of law that the answers to question nos. 1 and 3 stand recorded in favour of the appellant whereas the answer to the question no. 2 is recorded against the appellant.

22. In the wake of aforesaid, the appeals are partly allowed and the order of the ESI Court in the above ESI Misc. Cases stand modified to the extent as indicated above. The cross-objections filed by the respondents are hereby dismissed. No order as to costs.

Appeals allowed.

2016 (II) ILR - CUT-614

S. PUJAHARI, J.

CRLREV NO. 215 OF 2014

DR. K. (KAPULI) HARIBAN .....Petitioner

.Vrs.

STATE OF ORISSA (VIGILANCE) .....Opp. Party

(A) CRIMINAL PROCEDURE CODE, 1973 – Ss. 197, 239

Sanction – If the act of the accused complained of and the discharge of his official duty are inseparable, sanction U/s. 197 would be necessary but if there was no necessary connection between them no sanction would be required.

In this case, there being allegations that the petitioner has committed criminal misconduct by misappropriating public money, which can not be said to be in discharge of his official duty, absence of sanction U/s. 197 Cr.P.C. is not a bar in taking cognizance of the offences against the petitioner and that can not be a ground to seek discharge U/s. 239 Cr.P.C. (Para 15)

(B) PREVENTION OF CORRUPTION ACT, 1988 – S.19 r/w section 197 Cr.P.C.

Cognizance taken against the petitioner both under the provisions of P.C.Act and I.P.C, while he was working under contractual appointment after retirement – Though he comes within the definition of "public servant" u/s. 2(c) of the Act 1988, sanction U/s. 19 is not necessary as he is not holding a regular post – However section 197 Cr.P.C. is different as it is applicable to the cases of both in service and retired public servants – Since allegations against the petitioner has no connection with the discharge of his official duty, absence of sanction either U/s 19 of the Act or U/s. 197 Cr.P.C. is not a bar in taking cognizance of the offences against the petitioner and that cannot be a ground to seek discharge U/s. 239 Cr.P.C.

(Para 15)

Case Laws Referred to :-

1. (2007) 1 SCC 45 : Balakrishnan Ravi Menon vrs. Union of India.
2. AIR 1955 SC 309 : [Amrik Singh vrs. State of Pepsu]
3. AIR 1955 SC 287 : [Shreekantiah Ramayya Munipalli vrs. State of Bombay]
3. AIR 1996 SC 901 : [R. Balakrishna PIllai vrs. State of Kerala & Anr.]
4. (2009) CCR 724 (SC)] : State of Madhya Pradesh vrs. Sheetla Sahai & Ors.
5. AIR 1999 SC 2405 : State of Kerala vrs. V. Padmanabhan Nair
6. (2004) 2 SCC 349 : State of H.P. vrs. M.P. Gupta.
7. 2015 (61) OCR (SC) 350 : Inspector of Police and another vrs. Battenapatla Venkata Ratnam & anr.

For Petitioner : M/s. Gautam Misra
For Opp. Party : Standing Counsel (Vigilance)

Date of Judgment: 30.06.2016

JUDGMENT

S. PUJAHARI, J.

The legality and propriety of the order dated 25.02.2014 passed by the learned Special Judge (Vigilance), Jeypore in G.R. Case No.10 of 2010 (V) rejecting the petition filed by the present petitioner under Section 239 of the Code of Criminal Procedure (for short "Cr.P.C.") is called in question in this criminal revision.

2. It is alleged by the prosecution that the present petitioner while remaining in additional charge of ADMO (PH, Malaria & Leprosy), Koraput during the period from 01.08.2003 to 25.09.2006, in connivance with the then

Senior Clerk-cum-Accountant (since deceased) committed criminal misconduct by misappropriating public money to the tune of Rs.2,31,396/- meant for implementation of Leprosy Eradication Programme by forging and fraudulently using forged bills and vouchers. The aforesaid criminality was detected during a vigilance enquiry conducted by Sri Dasarathi Sethi, the then Inspector, Vigilance, Jeypore and pursuant to his report dated 15.03.2010, a case was registered at Koraput Vigilance Police Station and on completion of investigation, charge-sheet was filed against the petitioner for his trial under Section 13(2) read with Section 13(1)(c)/7 of the Prevention of Corruption Act and Sections 420/409/468/471/477(A)/120-B of I.P.C. In the aftermath of the order of cognizance passed by the learned Special Judge (Vigilance), Jeypore, the petitioner filed an application under Section 239 of Cr.P.C. seeking an order of discharge on the ground of absence of the requisite sanction as contemplated under the Prevention of Corruption Act, 1988 (for short "the Act") and Cr.P.C. and also for non-existence of a prima-facie case to frame charge against him. The learned Court below having rejected the aforesaid application vide the impugned order, the petitioner has filed the present revision petition.

3. I have heard the learned counsel for the petitioner as well as the learned Standing Counsel appearing for the Vigilance Department. I have also perused the impugned order vis-à-vis the available papers on record.

4. In course of hearing, the learned counsel for the petitioner submitted, inter-alia, that although the petitioner retired from service on superannuation on 30.09.2007, by the time of filing of charge-sheet and the order of cognizance he was in contractual appointment as Consultant Physician, C.H.C., Mathalpur vide Annexure-1 and since he continued to be a public servant within the meaning of Section 19 of the Act, no order of cognizance could have been passed by the trial court in absence of the requisite sanction under that Act. So far as the offences under the Indian Penal Code (for short "I.P.C.") are concerned, he further submitted that Section 197 of Cr.P.C. being applicable to both 'in-service' and retired public servant, in absence of sanction from the competent authority, no prosecution could have been launched for the alleged offences under the I.P.C. He is critical of the impugned order on the ground, inter-alia, that the learned Court below failed to deal with the question of sanction in right perspective. Having cited before a number of authoritative pronouncements, the learned counsel for the petitioner urged for setting aside the impugned order and discharging the petitioner from the prosecution.

5. Learned Standing counsel for the Vigilance Department, however, repudiated the contention of the petitioner on the ground that in view of the settled principle of law, no sanction is necessary to prosecute a public servant for the offences alleged in the present case both under the Act and I.P.C. He pointed out that the learned trial court has observed that it is premature at this stage to find any lacuna with the prosecution on account of absence of sanction. He further submitted that in view of the materials on record, there can be no denial of existence of a prima-facie case to frame charge against the petitioner.

6. In the present case, the alleged offence under the Act is shown to have been committed by the petitioner while he was indisputably a public servant, and as it appears from Annexure-A, by the time the charge-sheet was filed, the petitioner on having already retired from regular service was holding a contractual post under the State Government. A reading of Section 2(c) of the Act, which defines "public servant" in extenso, leaves no room for doubt that a contractual employee is a public servant for the purpose of this Act, inasmuch as he is remunerated by the Government for performance of public duty within the meaning of Clause (i) of Section 2(c) of the Act. The next question is; whether sanction was necessary in the present case for taking cognizance of offence under Section 13(2) read with Section 13(1)(e) of the Act against the accused-petitioner ? The answer is certainly 'No' in view of the very words employed in the sub-sections (1) and (2) of Section 19 of the Act. The principle has been stated by the Apex Court in the case of ***Balakrishnan Ravi Menon vrs. Union of India,*** (2007) 1 SCC 45 in paragraph-7 as follows :-

> "7. Clauses (a) and (b) of sub-section (1) specifically provide that in case of a person who is employed and is not removable from his office by the Central Government or the State Government, as the case may be, sanction to prosecute is required to be obtained either from the Central Government or the State Government. The emphasis is on the words "who is employed" in connection with the affairs of the Union or the State Government. If he is not employed then Section 19 nowhere provides for obtaining such sanction. Further, under sub-section (2), the question of obtaining sanction is relatable to the time of holding the office when the offence was alleged to have been committed. In case where the person is not holding the said office as he might have retired, superannuated, be discharged or dismissed then the question of removing would not arise. Admittedly,

when the alleged offence was committed, the petitioner was appointed by the Central Government. He demitted his office after completion of five years' tenure. Therefore, at the relevant time when the charge-sheet was filed, the petitioner was not holding the office of the Chairman of Goa Shipyard Ltd. Hence, there is no question of obtaining any previous sanction of the Central Government."

Since in the present case, the question of obtaining sanction is relatable to the time of the petitioner's holding the regular post which was no more held by him by the time charge-sheet was filed and cognizance of offence was taken, the question of sanction under Section 19 of the Act did not arise.

7. The next contention of the learned counsel for the petitioner is with reference to Section 197 of Cr.P.C. inasmuch as the petitioner has also been indicted under several offences of I.P.C., and admittedly, no sanction as contemplated under Section 197 Cr.P.C. has been obtained. Needless to mention that Section 197 Cr.P.C. is applicable to the cases against both "in-service public servants" and "retired public servants". The learned counsel has placed reliance on the following authorities of the Apex Court;

(i) AIR 1955 SC 309 [Amrik Singh vrs. State of Pepsu]
(ii) AIR 1955 SC 287 [Shreekantiah Ramayya Munipalli vrs. State of Bombay]
(iii) AIR 1996 SC 901 [R. Balakrishna PIllai vrs. State of Kerala and another]
(iv) State of Madhya Pradesh vrs. Sheetla Sahai and others [III (2009) CCR 724 (SC)]

8. In the case of ***Amrik Singh (supra),*** upon a detailed discussion the Apex Court was of the view that if the discharge of official duty and the act of the accused complained of are inseparable, sanction under Section 197 of Cr.P.C. would be necessary, but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required.

9. In the case of ***Shreekantiah Ramayya Munipalli (supra),*** the Apex Court in paragraph-18 of the judgment held as follows :-

"18. Now it is obvious that if Section 197 of the Code of Criminal Procedure is construed too narrowly it can never be applied, for of

course it is no part of an official's duty to commit an offence and never can be. But it is not the duty we have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The section has content and its language must be given meaning. What is says is –

"when any public servant ….. is accused of any *offence* alleged to have been committed by him while acting or purporting to act in the discharge of his official duty….."

We have therefore first to concentrate on the word "offence"."

10. In the case of ***R. Balakrishna PIllai (supra),*** the Apex Court in paragraph-6 of the judgment held as follows :-

"6. Xxxxx xxxxxx xxxxxx
Our attention was next invited to a three-Judge decision in S.B. Saha v. M.S. Kochar, (1979) 4 SCC 177 : (AIR 1979 SC 1841). The relevant observations relied upon are to be found in paragraph 17 of the judgment. It is pointed out that the words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed Section 197 (1) of the Code, are capable of both a narrow and a wide interpretation but their Lordships pointed out that if they were construed too narrowly, the section will be rendered altogether sterile, for, "it is no part of an official duty to commit and offence, and never can be. At the same time, if they were too widely construed, they will take under their umbrella every act constituting an offence committed in the course of the same transaction in which the official duty is performed or is purported to be performed. The right approach, it was pointed out, was to see that the meaning of this expression lies between these two extremes. While on the hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection. Only an act constituting an offence directly or reasonably connected with his official duty will require sanction for prosecution. To put it briefly, it is the quality of the act that is important, and if it falls within the scope of the afore-quoted words, the protection of Section 197 will have to be extended to the concerned public servant. This decision, therefore, points out what approach the Court should adopt while construing Section 197(1) of the Code and its application to the facts of the case on hand."

11. In the case of ***Sheetla Sahai (supra),*** the principles laid down or reiterated in some previous decisions were referred to, and in the facts and situation of that case on the point of sanction, it was held that when fresh decision was taken by the accused persons collectively keeping in view the exigencies of situation, and no material having been brought on record to show that they did the purported act for causing any wrongful gain to themselves or to third party or for causing wrongful loss to the State, sanction in terms of Section 197 of Cr.P.C. was required for prosecution of the accused persons.

12. The Apex Court in the case of ***State of Kerala vrs. V. Padmanabhan Nair,*** AIR 1999 SC 2405, in paragraphs-7 and 8 held as follows:-

> "7. That apart, the contention of the respondent that for offence that for offences under Ss.406 and 409 read with S.120-B of the IPC sanction under S.197 of the Code is a condition precedent for launching the prosecution is equally fallacious. This Court has stated the correct legal position in Shreekantiah Ramayya Munnipalli v. State of Bombay, AIR 1955 SC 287 : (1955 Cri L.J. 857) and also Amrik Singh v. State of Pepsu, AIR 1955 SC 309 : (1955 Cri LJ 865) that it is not every offence committed by a public servant which requires sanction for prosecution under S. 197 of the Code, nor even every act done by him while he is actually engaged in the performance of his official duties. Following the above legal position it was held in Harihar Prasad (1972 Cri LJ 707) (supra) as follows:
>
> "As far as the offence of criminal conspiracy punishable under S. 120-B, read with S.409, IPC is concerned and also S. 5(2) of the Prevention of Corruption Act, are concerned they cannot be said to be of the nature mentioned in S. 197 of the Code of Criminal Procedure. To put it shortly, it is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction under S. 197 of the Code of Criminal Procedure is, therefore, no far."
>
> 8. Learned single Judge of the High Court declined to follow the aforesaid legal position in the present case on the sole premise that the offence under S. 406 of the IPC has also been fastened against the accused besides S. 409 of the IPC. We are unable to discern the rationale in the distinguish-ment. Sections 406 and 409 of the IPC are cognate offences in which the common component is criminal breach

of trust. When the offender in the offence under S. 406 is a public servant (or holding any one of the positions listed in the section) the offence would escalate to S. 409 of the Penal Code. When this Court held that in regard to the offence under S. 409 of the IPC read with S. 120-B it is no part of the duty of the public servant to enter into a criminal conspiracy for committing breach of trust, we find no sense in stating that if the offence is under S. 406 read with S. 120-B, IPC it would make all the difference vis-à-vis S. 197 of the Code."

13. Further, the Apex Court in the case of ***State of H.P. vrs. M.P. Gupta,*** (2004) 2 SCC 349 held that it is no part of the duty of a public servant while discharging his official duty to commit forgery of the type covered by the offences under Sections 467/468/471 of I.P.C. Ultimately, it was held that want of sanction under Section 197 of Cr.P.C. is no bar for prosecution of the accused for the aforesaid offences.

14. The latest view of the Apex Court in the case of ***Inspector of Police and another vrs. Battenapatla Venkata Ratnam and another,*** 2015 (61) OCR (SC) 350, is that "indulgence of the officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. Their official duty is not to fabricate records or permit evasion of payment of duty and cause loss to the Revenue".

15. In view of the settled principles of law, as referred to above, I am of the view that absence of sanction either under Section 19 of the Act or under Section 197 of Cr.P.C. is not a bar in taking cognizance of the offences against the petitioner and the same also cannot afford him a ground to seek discharge under Section 239 of Cr.P.C. Further, a perusal of the available materials on record does not support the contention of the petitioner that there is no prima-facie case against him to frame charge.

16. In the result, this criminal revision being devoid of merit stands dismissed.

Revision dismissed.

2016 (II) ILR - CUT- 622

S. PUJAHARI, J.

CRREF NO. 1 OF 1997

STATE OF ORISSA ……..Petitioner

.Vrs.

MAHESWAR SAHU ……..Respondent

(A) CRIMINAL PROCEDURE CODE, 1973 – S.395

Whether a successor judge can hear a convict on the question of sentence, sign and pronounce the judgment written by his predecessor who has held the accused guilty and convicted him ?

There is no provision under Cr.P.C. as to pronouncement of a judgment written by a predecessor – However, section 326 Cr.P.C. only enables a judge or Magistrate to act on the evidence recorded wholly or in part by his predecessor – Moreover if a judgment is prepared but not pronounced it remains as a draft, amenable to alteration with the change of the mind of the Judge – Held, the successor Judge or Magistrate can not pronounce the judgement written by his predecessor (whether signed or not signed) regardless the judgement being that of acquittal or conviction – However, in that case the successor Judge or Magistrate has to pronounce his own judgment by following the provisions U/s. 326 Cr.P.C. (Para 18)

B) CRIMINAL PROCEDURE CODE, 1973 – S.326

Whether, in view of the specific bar U/s. 326(3) Cr.P.C., can a case be tried *de novo* after the accused is held guilty and convicted ? – Held, in view of the finding that the successor Judge or Magistrate can not pronounce the judgement written by his predecessor coupled with the bar contained under sub-section (3) of section 326 Cr.P.C., there is no other alternative for the successor Judge/Magistrate than to go for a *de novo* trial in such a case. (Paras 18, 19)

Case Laws Referred to :-

1. AIR 1954 S.C. 1994 : Surendra Singh vrs. State of U.P.
2. 2013 CRI.L.J. (NOC) 75 (DEL.) : Jitender alias Kalle vrs. State

For Petitioner : A.S.C.

For Respondent :Mr. G.N.Mohapatra (Amicus Curiae)

Date of Judgment : 21.07.2016

JUDGMENT

S. PUJAHARI, J.

This is a Reference made by the learned District & Sessions Judge Sambalpur under Section 395 of the Code of Criminal Procedure (for short "Cr.P.C.") for decision of this Court.

2. The questions those have been posed under the Reference are as follows :-

(1). Can a successor Judge hear the convict on the question of sentence and sign and pronounce the judgment written by his predecessor who has held the accused guilty and convicted him ?

(2). In view of the specific bar of Section 326(3) Cr.P.C. can a case be tried denovo after the accused is held guilty and convicted ?

(3). In view of the specific provisions contained in Sections 255(3) 262 and 264 Cr.P.C. is the hearing on the question of sentence necessary keeping in view the direction given in G.L.7 of 74 (Crl.) ?¶

3. In the context I have heard Shri G.N. Mohapatra the learned counsel engaged in this case as Amicus Curiae as well as the learned Addl. Standing counsel for the State.

4. It is apposite at the outset to have a reference to Section 35 of Cr.P.C. according to which subject to the other provisions of the Cr.P.C. the powers and duties of a Judge or Magistrate may be exercised or performed by his Successor in his office. In case of doubt as to who is the Successor in office of the Additional or Assistant Sessions Judge or in the office of any Magistrate it is the Sessions Judge on sessions side and the Chief Judicial Magistrate or the District Magistrate as the case may be on magisterial side who are competent to determine the same by a written order.

5. Section 326 of Cr.P.C. authorizes the Successor in office to act on the evidence recorded wholly or in part by his Predecessor in an inquiry or trial. The said Section is reproduced here below :-

> 326. Conviction or commitment on evidence partly recorded by one [Judge or Magistrate] and partly by another ⊤ (1) Whenever any [Judge or Magistrate] after having heard and recorded the whole or any part of the evidence in an inquiry or a trial ceases to exercise jurisdiction therein and is succeeded by another [Judge or Magistrate] who has and who exercises such jurisdiction the [Judge or Magistrate] so succeeding may act on the evidence so recorded by his predecessor or partly recorded by his predecessor and partly recorded by himself:

> Provided that if the succeeding [Judge or Magistrate] is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice he may re-summon any such witness and after such further examination cross-examination and re-examination if any as he may permit the witness shall be discharged.
>
> (2) When a case is transferred under the provisions of this Code [from one Judge to another Judge or from one Magistrate to another Magistrate] the former shall be deemed to cease to exercise jurisdiction therein and to be succeeded by the latter within the meaning of sub-section (1).
>
> (3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under section 322 or in which proceedings have been submitted to a superior Magistrate under section 325. [*Underlining by me*]

6. Now coming to Sections 353 and 354 of Cr.P.C. which have direct bearing on the present questions while Section 353 speaks of the mode and manner of delivery and pronouncement of the judgment Section 354 enumerates the body requirements of the same in a criminal case. In view of Clause (c) of sub-section (1) of Section 354 of Cr.P.C. a judgment of conviction is not complete without specific mention of the punishment to which the convict is sentenced. Of course where the convict is dealt with as per the provisions of Section 360 Cr.P.C. or the Probation of Offenders Act 1958 the question of sentence does not arise and in that case an order regarding release of the convict as per those provisions will suffice the completeness of the judgment.

7. Sub-sections (5) (6) and (7) of Section 353 of Cr.P.C. which are relevant for the purpose are reproduced here below :-

> 353. Judgment -
>
> (1) xxxxxx xxxxxxx
> (2) xxxxxx xxxxxxx
> (3) xxxxxx xxxxxxx
> (4) xxxxxx xxxxxxx
>
> (5)If the accused is in custody he shall be brought up to hear the judgment pronounced.

(6)If the accused is not in custody he shall be required by the Court to attend to hear the judgment pronounced except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted:

Provided that where there are more accused than one and one or more of them do not attend the Court on the date on which the judgment is to be pronounced the presiding officer may in order to avoid undue delay in the disposal of the case pronounce the judgment notwithstanding their absence.

(7) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof or of any omission to serve or defect in serving on the parties or their pleaders or any of them the notice of such day and place.

(8) xxxxx xxxxxxx xxxxxxx¶

8. It is thus made explicit by the provisions of Section 353 of Cr.P.C. as quoted above personal attendance of the accused before the Court to hear the judgment pronounced is not necessary where it is an acquittal judgment or where personal attendance of the accused has been dispensed with and the sentence is one of fine only. The proviso to sub-section (6) as it exists was not there in the old Cr.P.C. 1898 and the same has been incorporated in the Cr.P.C. 1973 with a view to avoid undue delay in the disposal of the case on account of absence of one or more of the accused persons before the Court. The proviso if given a plain interpretation and considered from the view point of the legislative intention can be construed as a non-abstante clause and if it is read conjointly with sub-section (7) any omission or deficiency in giving prior notice to the accused persons or their pleaders regarding the date fixed for pronouncement of judgment will be treated as a mere irregularity curable under Section 465 of Cr.P.C. The vital question which needs to be considered under Section 465 of Cr.P.C. is whether a failure of justice has in fact been occasioned by any error omission or irregularity in the proceeding of the case so as to invalidate a judgment or order passed therein. Now reverting to the proviso to sub-section (6) of Section 353 of Cr.P.C. where there are more than one accused person if despite due notice regarding the date fixed for pronouncement of judgment one or more of the accused persons do not attend the Court on the date so fixed the Court can pronounce the judgment notwithstanding histheir absence. It is redundant to mention that the proviso

referred to above has no application to a case where the accused is solo in number.

9. The provisions which next invite attention in the context are those under Sections 235 236 and 248 of Cr.P.C. in accordance with which judgment is to be passed or delivered in Sessions Trial cases and warrant trial cases. Those provisions are quoted here below :-

> **235. Judgment of acquittal or conviction**. (1) After hearing arguments and points of law (if any) the Judge shall give a judgment in the case.
>
> (2) If the accused is convicted the Judge shall unless he proceeds in accordance with the provisions of Section 360 hear the accused on the question of sentence and then pass sentence on him according to law.
>
> **236. Previous conviction.** In a case where a previous conviction is charged under the provisions of sub-section (7) of section 211 and the accused does not admit that he has been previously convicted as alleged in the charge the Judge may after he has convicted the said accused under section 229 or section 235 take evidence in respect of the alleged previous conviction and shall record a finding thereon:
>
> Provided that no such charge shall be read out by the Judge nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it unless and until the accused has been convicted under section 229 or section 235.
>
> **248. Acquittal or conviction**. (1) If in any case under this Chapter in which a charge has been framed the Magistrate finds the accused not guilty he shall record an order of acquittal.
>
> 2) Where in any case under this Chapter the Magistrate finds the accused guilty but does not proceed in accordance with the provisions of section 325 or section 360 he shall after hearing the accused on the question of sentence pass sentence upon him according to law.
>
> (3) Where in any case under this Chapter a previous conviction is charged under the provisions of sub-section (7) of section 211 and the accused does not admit that he has been previously convicted as alleged in the charge the Magistrate may after he has convicted the

said accused take evidence in respect of the alleged previous conviction and shall record a finding thereon:

Provided that no such charge shall be read out by the Magistrate nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it unless and until the accused has been convicted under sub-section (2)

10. Now it is required to examine the above quoted provisions in juxtaposition with the proviso to sub-section (6) of Section 353 of Cr.P.C. To reiterate the said proviso was newly added in the Cr.P.C. 1973 with a view to avoid delay in pronouncement of judgment making it permissive for the Court to pronounce judgment even in a conviction case notwithstanding absence of one or more of the accused persons before the Court. It can not be said that the Legislature while incorporating the said new proviso remained oblivious of the provisions under Sections 235(2) or 248(2) Cr.P.C. regarding hearing on the question of sentence. To put in other words the said proviso impliedly carries a force of forfeiture of the right of the absentee accused to participate in the hearing on the question of sentence in the cases tried under Sessions procedure and warrant procedure and it consequently follows that the absentee accused on being produced or when attends the Court shall suffer the sentence awarded in his absence.

11. The cases in which only one accused faces the trial and stands convicted having not been covered by the proviso to sub-section (6) of Section 353 of Cr.P.C. the Court cannot pronounce judgment in those cases in absence of the sole accused.

12. The proviso to sub-section (6) of Section 353 Cr.P.C. has also no application to the conviction cases in which one or more of the accused persons have been charged with previous conviction to be dealt with under the provisions of Section 236 or sub-section (3) of Section 248 of Cr.P.C. as the case may be. A plain reading of those provisions especially the proviso to Section 236 of Cr.P.C. and the proviso to sub-section (3) of Section 248 of Cr.P.C. makes it explicit that unless and until the accused has been convicted under Section 229 or Section 235 Cr.P.C. in a Sessions trial or under sub-section (2) of Section 248 of Cr.P.C. in a warrant trial the charge of previous conviction under the provisions of sub-section (7) of Section 211 Cr.P.C. can not even be read out by the Judge Magistrate to him much less be dealt with. The charge of previous conviction being a separate one providing for

enhancement in the punishment further proceeding in that regard has been prescribed under Section 236 and sub-section (3) of Section 248 of Cr.P.C. Uptil completion of that additional proceeding the proceeding of the main case remains pending as against the accused (convict) who has been charged with previous conviction.

13. From the above discussion and keeping the proviso to sub-section (6) of Section 353 of Cr.P.C. in the centre stage this Court arrives at the opinion that where there are more accused than one and one or more of them do not attend the Court on the date on which the judgment is to be pronounced the Presiding Officer may pronounce the judgment subject to the exception that if any of the absentee accused persons or the sole absentee accused has been charged with previous conviction the case on being split up shall remain pending against himthem for the obvious reason that no sentence can be passed against him them without resorting to the provisions under Section 236 of Cr.P.C. or under sub-section (3) of Section 248 of Cr.P.C. as the case may be.

14. Now adverting to the question No.1 under the Reference it is pertinent to glance through the observation in paragraph-26.11 of the 41st Law Commission Report in the context of the amendment to Section 366 of the Cr.P.C. 1898 corresponding to Section 353 of the Cr.P.C. 1973 which reads as follows :-

> 26.11 we note that there is no provision in the Code as to pronouncement of a judgment written by a predecessor. We considered the question whether any provision on the subject should be inserted. In our view it is not proper that in criminal cases a judge should pronounce a judgment written by his predecessor. He can no doubt make use of the material contained in the (draft) judgment prepared by his predecessor. But in that case he is himself responsible for the contents of the judgment.

15. Emphasizing the sanctity of judgment and the significance attached to its pronouncement the Apex Court in the case of ***Surendra Singh vrs. State of U.P. AIR 1954 S.C. 1994*** observed as follows :-

> 4. Delivery of judgment is a solemn act which carries with it serious consequences for the person or persons involved. In a criminal case it often means the difference between freedom and jail and when there is a conviction with a sentence of imprisonment it alters the status of a prisoner from a n undertrial to that of a convict also the

term of his sentence starts from the moment judgment is delivered. It is therefore necessary to know with certainty exactly when these consequences start to take effect. For that reason rules have been drawn up to determine the manner in which and the time from when the decision is to take effect and crystallize into an act which is thereafter final so far as the Court delivering the judgment is concerned.

xxxxxxx xxxxxxx xxxxxxx

10. In our opinion a judgment within the meaning of these sections is the final decision of the Court intimated to the parties and to the world at large by formal pronouncement or delivery in open Court. It is a judicial act which must be performed in a judicial way. Small irregularities in the manner of pronouncement or the mode of delivery do not matter but the substance of the thing must be there: that can neither be blurred nor left to inference and conjecture nor can it be vague. All the rest the manner in which it is to be recorded the way in which it is to be authenticated the signing and the sealing all the rules designed to secure certainty about its content and matter -- can be cured but not the hard core namely the formal intimation of the decision and its contents formally declared in a judicial way in open Court.

xxxxx xxxxx xxxxxx

11. An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the Court as it is at the time of pronouncement. We lay no stress on the mode or manner of delivery as that is not of the essence except to say that it must be done in a judicial way in open Court. But however it is done it must be an expression of the mind of the Court at the time of delivery. We say this because that is the first judicial act touching the judgment which the Court performs after the hearing. Everything else uptil then is done out of Court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion.

xxxxxx xxxxxxx

12. Now up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of locus poenitentioe and indeed last minute alterations often do occur. Therefore however

must a draft judgment may have been signed beforehand it is nothing but a draft till formally delivered as the judgment of the Court. Only then does it crystallize into a full fledged judgment and become operative.

xxxxxxx xxxxxxx xxxxxxx

16. A question similar to the Question No.1 under the present reference came up for consideration before a two Judge Bench of the High Court of Delhi in the case of ***Jitender alias Kalle vrs. State 2013 CRI.L.J. (NOC) 75 (DEL.).*** Referring to the aforesaid pronouncement of the Apex Court besides the decisions of some High Courts and discussing the relevant provisions of the Cr.P.C. including those under Sections 326 and 353 of Cr.P.C. the High Court of Delhi answered the question in negative with an observation inter-alia that Section 326 of Cr.P.C. 1973 only enables a successor Judge or Magistrate to act on the evidence recorded by his predecessor in office and then proceed to pronounce the judgment and that it does not empower the successor Judge or Magistrate to merely 'announce' a 'judgment' written by his predecessor.

17. Although in Civil Procedure Code there is a specific provision under Order-XX Rule-(2) making it mandatory for a successor Judge to pronounce a judgment written but not pronounced by his predecessor there is no such provision much less in specific in the Cr.P.C. 1973 at least enabling the successor to pronounce a judgment written by his predecessor. To reiterate Section 326 of Cr.P.C. only enables a Judge or Magistrate to act on the evidence recorded wholly or in part by his predecessor at his discretion.

18. There may be cases be not very often alike the one under the present Reference that though the judgment upto the finding of guilt is prepared and signed by the Judge but kept undelivered pending hearing on the question of sentence due to absence of the sole accused and by the date the convict was produced before the Court the Judge who prepared and signed the judgment upto the stage of recording the finding of guilt has ceased to be in office due to transfer or other reasons. Of course in the case under the present Reference which was tried under summary procedure hearing on the question of sentence was not required but absence of the convict was certainly an impediment for pronouncement of the judgment in view of Section 353 of Cr.P.C. If the same Judge Magistrate who prepared the judgment continues in office till the convict appears or is produced on the strength of warrant or other process there remains nothing to ponder upon and judgment if already completed with award of sentence can well be pronounced then and there and

if hearing on the question of sentence is necessary then on completing further exercise in that regard the judgment can be completed and pronounced by the same Judge. But if the convict did not appear or could not be produced during the tenure of the same Judge in the Office there arises the legal intricacy before his successor in office when the convict appears or is produced before him. There being no specific provision under the Cr.P.C. 1973 to authorize or permit the successor Judge Magistrate to pronounce the judgment written by his predecessor the Legislature is deemed to have denied that permission or authority to the successor notwithstanding the provision under Section 35 of Cr.P.C. It is worthwhile to mention that Section 326 of Cr.P.C. though enables the successor Judge Magistrate to act upon the evidence recorded by his predecessor in an enquiry or trial remains silent as to the power of such successor in respect of the judgment if any written but not pronounced by his predecessor in office. As vividly discussed by the Apex Court in the case of Surendra Singh (supra) pronouncement of a judgment is a judicial act expressing the judicial mind of the Court with intention to make it operative. A judgment though prepared but not pronounced remains as a draft only amenable to alteration with the change of the mind of the author. In that view of the pronouncement and for the discussion made hereinabove the inevitable answer to the question no.(1) under the Reference is that the successor Judge Magistrate cannot pronounce the judgment written by his predecessor (whether signed or not signed) regardless the judgment being that of acquittal or conviction. The successor Judge Magistrate in that case has to pronounce his own judgment in following the provisions under Section 326 of Cr.P.C.

19. In so far as the question no.(2) under the Reference is concerned sub-section (3) of Section 326 of Cr.P.C. makes the bar explicit and absolute that the enabling provision under sub-section (1) of the said Section shall have no application to a case in which summary procedure was adopted by the predecessor Judge Magistrate. In view of the answer already given to the question no.(1) coupled with the bar contained under sub-section (3) of Section 326 of Cr.P.C. there is no other alternative for the successor Judge Magistrate than to go for a de novo trial in such a case.

20. Now coming to the question no.(3) under the Reference it be mentioned at the outset that while requirement of hearing on the question of sentence has been specifically mandated in Sessions trial and warrant trial cases where the accused is held guilty no such requirement has been prescribed much less mandated in respect of summons cases or the cases tried under summary procedure. This is a legislative discrimination made with

consciousness keeping in view that summons cases are those cases which are punishable with imprisonment for not more than two years and in the cases tried summarily no sentence of imprisonment for a term exceeding three months can be passed in the event of conviction. In that view of the scheme of trial of those cases contemplated under the Cr.P.C. hearing on question of sentence is not necessary in the event of conviction of an accused in those trials. A reading of General Letter No.7 of 1974 of the Cr.P.C. as referred to by the learned District Judge Sambalpur does not reveal the same to be in conflict in any manner with the provisions under Sections 255 264 and 266 of Cr.P.C. The instructive portion of the said letter is quoted here below :-

> 3. In view of the above the Court wish to make it clear that there is no conflict between the instructions conveyed in G.L.2 of 1970 and the decision reported in 1972 C.L.T. page 506. The subordinate criminal courts should in all cases take suitable measures in advance to secure the attendance of the accused. They may deliver the judgment in the absence of the accused in cases contemplated in sub-section (6) of S.353 of the Criminal Procedure Code and the proviso thereto and also cases where there are justifying reasons for so doing.

21. There being nothing to entertain any doubt about the import of the aforesaid General Letter of this Court vis-`-vis the provisions of Cr.P.C. quoted by the learned District Judge Sambalpur no answer to the question no.(3) under the Reference is occasioned.

22. The Reference is decided accordingly.

While parting with this Court appreciates the sincere efforts made by Shri G.N. Mohapatra learned counsel engaged in this case as Amicus Curiae in rendering valuable assistance to the Court in the matter. The Registry is directed to circulate a copy of this order to all the subordinate Courts in the State for future guidance.

Reference answered.

2016 (II) ILR - CUT- 633

BISWANATH RATH, J.

C.M.P. NO. 684 OF 2016

MAHANTA LAXMIDHAR DAS …….Petitioner

.Vrs.

MAHANTA SRI GOPI DAS JI MAHARAJ & ORS. ……..Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-26, R-10(A)

Commission for scientific investigation – Prayer for sending signatures in the will to a handwriting expert to examine its genuineness – Absence of specific pleading regarding the genuineness of the signatures – Provision is not attracted – Moreover in course of examination in chief neither the plaintiffs' witnesses disputed the signature of Mahanta Natabar Das nor they have given any suggestion to defendant No. 1 to that effect, during his cross examination – Learned lower appellate court failed to appreciate that the provision is not attracted – Held, the impugned orders allowing application under Order 26 Rule 10-A C.P.C. is set aside.

(Para 18)

Case Laws Referred to :-

(1) AIR 1987 ORISSA 7 : Natabar Behera Vrs. Batakrishna Das'
(2) AIR 1996 SCC 1140 : O. Bharathan Vrs. K. Sudhakaran and another
(3) AIR 2001 ORISSA 185 : Bhagirati Sahu & Ors. Vrs. Akapati Bhaskar Patra.
(4) 106 (2008) CLT 721 : Sri Raj Kishore Dash Vrs. Sri Ramaniranjan Das.
(5) 2015 (Suppl.-II) OLR-166 : Ramaballahaba Mishra Vrs. Somanath Satpathy & Ors.

For Petitioner : Dr. Ashok Kumar Mohapatra, Senior Advocate
M/s. Alok Ku. Mohapatra, B.Panda, S.P.Mangaraj,T.Dash, S.K.Barik, S.Nath,A.K.Barik

For Opp. Parties :Mr. P.K.Mohanty, Senior Advocate
M/s. D.N.Mohapatra, J.Mahanta, P.K.Nayak, S.N.Dash, A.Dash & P.K.Pasayat

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Date of hearing :24.06. 2016
Date of Order : 30.06.2016

JUDGMENT

BISWANATH RATH, J.

The present Civil Miscellaneous Petition arises out of an order dated 15.3.2016 passed by the District Judge, Puri in C.S. No.2/34 of 2008/2003

appearing at Annexure-3 thereby allowing an application at the instance of the plaintiffs-opposite party Nos.1 & 2 under Order 26 Rule 10-A of the Code of Civil Procedure and also thereby directing for sending the signatures appearing in the petition, affidavit, vaklatnama and deposition of Mahanta Natabar Das in Probate Misc. Case No.19/13 of 1982 along with the present Will vide Ext.A to the Deputy Superintendent Handwriting Bureau, Rasulgarh, Bhubaneswar for comparison.

2. Short facts involved in the case are that the opposite party Nos.1 & 2 filed a suit under Section 263 & Section 283 of the Indian Succession Act read with Section 151 of C.P.C. and Section 47 of C.P.C. before the District Judge, Puri with a prayer for revoking or annulling the Will granted or probated and letters of administration in Probate Misc. Case No.14/5 of 2008/97 in favour of the defendant No.1 therein. During pendency of the suit, the plaintiffs-opposite parties Nos.1 & 2 filed a petition under Order 26 Rule 10 (A) of C.P.C. with an intention of examining the genuineness of the signature of the particular persons. The opposite party Nos.1 & 2 also contended therein that on an earlier occasion, the trial Court allowed the prayer of the opposite party No.1. The present petitioner challenged the said order in W.P.(C) No.14977 of 2013 and this Court while disposing the said writ petition directed the lower Court for considering the said application after closure of the evidence. The further facts as narrated by the opposite party No.1 in his application under Order 26 Rule 10 (A) of C.P.C. is that the plaintiff has challenged the Will as forged and the signature of Natabar Das was also forged.

It is under these circumstances, the opposite party No.1 asserted in the Court below that necessity arises for sending the signatures of Mahanta Natabar Das contained in different documents to a handwriting expert to examine as to if the signatures in the Will is genuine or not and if the signature of Laxmidhar Mohapatra in the compromise petition is genuine or not and for submission of a report.

3. By submitting his objection the petitioner inter alia contended therein that in absence of specific pleading with regard to genuineness of the signatures of the aforesaid persons, the provisions under Order 26 Rule 10 (A) shall not be attracted. Further in view of not disputing the signature of Mahanta Natabar Das appearing in the Will vide Ext. A during examination in chief of the plaintiff and further in absence of any suggestion to that effect to the petitioner's witnesses, the petition is also otherwise not maintainable.

4. Hearing the rival contentions of the parties and after considering their respective pleadings, learned District Judge, Puri while disposing the application under Order 26 Rule 10(A) of C.P.C. along with some other applications, allowed the opposite party No.1's request for sending the signature along with the documents indicated hereinabove for expert opinion.

5. In assailing the impugned order appearing at Annexure-3, Dr. A.K. Mohapatra, learned Senior Advocate while re-agitating his objection in the Court below contended that the lower Court not only failed in appreciating the purport of Order 26 Rule 10(A) of C.P.C but also failed in appreciating the fact situation available on record in arriving at such a decision. Dr. A.K. Mohapatra, learned Senior Advocate appearing for the petitioner further contended that in absence of any pleading, the application was not at all maintainable and consequently, requested for interference in the impugned order and setting aside the same.

6. In his opposition, Mr. P.K. Mohanty, learned Senior Advocate appearing for the contesting opposite parties while justifying the grounds taken by the petitioner in the application under Order 26 Rule 10(A) contended that there existed sufficient pleading as well as evidence in support of the claim of his parties, and in drawing the attention of this Court to several portion of the plaint as well as the evidence further contended that there is no illegality in the impugned order. Further in referring to some decisions, learned Senior Advocate appearing for the opposite party No.1 also contended that the impugned order is sustainable.

7. Heard learned Senior Counsels appearing for the parties. Before proceeding to analyze the fact position, it is necessary for this Court to first take into consideration the purpose of Order 26 Rule 10 (A) of C.P.C, which provision is quoted as herein below:

> "**10-A. Commission for scientific investigation** – (1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a common to such person as it thinks fit, directing him to enquire into such question and report thereon to the Court.
>
> (2) The provisions of Rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under Rule 9.

From reading of the aforesaid provision, it appears that the provision authorizes a Court considering such application provided any question involved in the suit needs scientific investigation.

Coming to the factual scenario involved in the case, it appears that in filing an application under Order 26 Rule 10 (A), the opposite party Nos.1 has the following specific averments

> "2. That, the plaintiff has challenged the Will as forged and the signature of Natabar Das was forged.
> 3. That, in view of the Hon'ble Court's order the Will said to be executed by Natabar Das be sent to handwriting expert to examine if signature of Natabar Das in Will is genuine and if signature of Laxmidhar Mohapatra in compromise petition is genuine. The result of scientific examination will be helpful for just devision of the case."

8. The present petitioner being the opposite party to the said petition had the following objection

> "**4.** That the contents of the petition that in view of the Hon'ble Court's order the said Will to be executed by Mahant Natabar Das be sent to handwriting expert to examine if signature of Natabar Das in WILL is genuine and if signature of Laxmidhar Mohapatra in compromise petition is genuine is false and denied. It is also false to state that the result of scientific examination will be helpful for just decision of the case. Without any pleading, the plaintiffs cannot be permitted to raise new facts and adduce evidence on those points.
>
> **5.** That during course of examination in chief of the plaintiffs' witnesses as well as plaintiff No.1 (one) have not disputed the signature of Mahant Natabar Das in Exhibit-A(WILL). Moreover the plaintiffs have neither suggested the defendant No.1's witnesses nor defendant No.1 (one) in cross examination that the signature of Mahant Natabar Das in Exhibit-A(WILL) is forged. That apart the plaint does not reveal/contain that any compromise was made in between the parties in respect of the suit property at any point of time, therefore the Exhibit-A(WILL) and compromise petition are not required to be examined by scientific expert. The plaintiffs have unnecessarily filed the petition with an ill intention only to delay the proceeding of the case and harass the defendant.
>
> In such circumstances the petition is liable to be dismissed."

Now looking to the averments, counter objection as well as the provision of law made under Order 26 Rule 10A of C.P.C., it is necessary to examine from the pleadings of the plaintiff in the Court below particularly, as to whether there is at all any question involving the genuineness in the signature of the two persons named therein. Looking to the pleadings quoted hereinabove and the prayer made therein, it appears that the claim in petition under Order 26 Rule 10A of C.P.C. rests only on the examination of the signature of Mahanta Natabar Das in the Will and the signature of Laxmidhar Mohapatra in the compromise petition.

9. This petition has been placed along with W.P. (C) No.14977 of 2013 already disposed of by this Court, as a reference shake. From the said record, this Court finds that the plaint involved in the case is available at page 21 of the brief. This Court also finds a copy of plaint being attached with the written note of submissions of the opposite party No.1. From reading of the plaint averments, this Court finds that the plaint contains the following pleadings. During course of argument Mr. P.K. Mohanty, learned Senior Advocate appearing for the contesting opposite parties drew my attention in this regard to paragraph No.7 of the plaint of W.P.(C) No.14977 of 2013 which is quoted hereunder :

> "7. That the deceased Mahanta Natabar Das had become very old at the time of his death. Nearly four years prior to his death on 27.04.89 (Twenty seventh day of April, eighty nine) his hands were shaking and his eye sights became defective. He was thus suffering from ailments like Attacksia or some what like Parkinsons disease. He as neither able to write or read anything. Forth aforesaid old age, ailments he always needed helping hands to carry out normal pursuits of life. Since he as unable to write anything prior to four years of his death it cannot be believed that the alleged WILL was executed by him or that he has signed the same after knowing its contents. The socalled attesting witnesses and the scribe are all henchmen of defendant No.1 (one) and therefore they have supported the cock and bull story of execution and attestation of the WILL in question. Neither the defendant No.-1(one) nor his so called witnesses and the scribe being ever connected with Kabir Choura Math or it's the then Mahanta were not in a position to know the details of the estate of the deceased except Puri Town property which TOM Dieny and Harry of the street can say. Therefore the story of execution and attestation of the WILL is out and out false. The alleged WILL is thus a forged, fabricated and manufactured scrap of paper. Nor the Kabir Panthies,

> nor the plaintiff No.1 (two) nor Sri Sadguru Kabir Dharmadas Saheb Vanshavali Pratinidhi Sabha know such Mahantaship of defendant No.-1 (one). The defendant no.-1 (one) never obtained any such 'Mahanti Panja'. It may be mentioned here that the plaintiff No.-1 (one) the successor of Mahanta Natabar Das, has got such "Mahanti Panja" from the Sabha. It may also be mentioned here that such "Panja" is renewed from time to time according to the resolution of the said Sabha.

From reading of the aforesaid pleadings, it is amply clear that as the opposite party No.1 was unable to write anything prior to four years of his death, it cannot be believed that the alleged Will is executed by him or that he has signed the same after knowing its contents. Reading of the aforesaid paragraph along with the entire pleading as available in the plaint, this Court observes that the entire endeavour of the opposite party No.1 was with regard to the genuineness of the Will and it nowhere carries any allegation with regard to the genuineness of the signature of Mahanta Natabar Das. This Court also nowhere finds any allegation with regard to challenge to the signature of the other person namely Laxmidhar Mohapatra in the Compromise Petition. In absence of any specific pleadings in the said regard, this Court finds that there is no application of the provision under Order 26 Rule 10A of C.P.C in the present circumstances.

10. Further from the evidence of the P.W.3 as produced by Mr. P.K. Mohanty, learned Senior Advocate appearing for the contesting opposite party and from reading of the examination in chief in paragraph No.3, this Court does not find any statement as to whether the signature belongs to Natabar Das or not, on the other hand, this Court finds that there is a specific statement made by P.W. 3 that the said Natabar Das has not signed in his presence and he has also not seen him in signing any Will. From reading of the pleading coupled with the statement made through the witness indicated hereinabove, this Court finds that the claim of the opposite party No.1 in the Court through the petition giving rise to the impugned order was beyond the scope of the suit and in such situation there is no scope for applying the provision contained in Order 26 Rule 10A of C.P.C.

Mr. P.K. Mohanty, learned Senior Advocate appearing for the contesting opposite parties has cited some decisions in support of his case, which are analyzed as hereunder:

(1) **AIR 1987 ORISSA 7** a case in between ***Natabar Behera*** **Vrs.** ***Batakrishna Das***

(2) **AIR 1996 SUPREME COURT 1140** a case in between ***O. Bharathan*** **Vrs.** ***K. Sudhakaran and another***

(3) **AIR 2001 ORISSA 185** a case in between ***Bhagirati Sahu and others*** **Vrs.** ***Akapati Bhaskar Patra***

(4) **106 (2008) CLT 721** a case in between ***Sri Raj Kishore Dash*** **Vrs.** ***Sri Ramaniranjan Das.***

(5) **2015 (Suppl.-II) OLR-166** a case in between ***Ramaballahaba Mishra*** **Vrs.** ***Somanath Satpathy and others.***

From perusal of the citation vide **AIR 1987 ORISSA 7** a case in between ***Natabar Behera*** **Vrs.** ***Batakrishna Das,*** this Court finds the said citation is not applicable to the present case for reason of difference in the fact situation. Similarly, from perusal of the citation vide **AIR 1996 SUPREME COURT 1140** a case in between ***O. Bharathan*** **Vrs.** ***K. Sudhakaran and another*** this Court finds that there is no involvement of Order 26 Rule 10A in this case at all, thus the same is not applicable to the present case. From perusal of the paragraph No.4 of the decision vide **AIR 2001 ORISSA 185** a case in between ***Bhagirati Sahu and others*** **Vrs.** ***Akapati Bhaskar Patra*** this Court finds that there existed an allegation on the genuineness of the signature of the defendant No.1 therein and the Court was considering the case on such specific allegation being available. As observed by this Court hereinabove, the case at hand did not have any allegation with regard to the genuineness in the signature of the particular parties. Therefore, the decision is not applicable to the present case. From perusal of the decision vide **106 (2008) CLT 721** a case in between ***Sri Raj Kishore Dash*** **Vrs.** ***Sri Ramaniranjan Das*** this Court finds that this case also was considered with the facts existing, challenging the signature of a particular party on a particular document and requiring an expert report. So far as the decision vide **2015 (Suppl.-II) OLR-166** a case in between ***Ramaballahaba Mishra*** **Vrs.** ***Somanath Satpathy and others*** is concerned, this Court finds that existence of the allegation on genuineness with the signature of particular persons, for which this Court finds that the said decision is not applicable to the present case.

11. Considering the contentions of the parties, considering the citations shown by the opposite parties and looking to the provisions contained in Order 26 Rule 10A of C.P.C, this Court is of the opinion that the lower Appellate Court has failed in appreciating the facts available in the case in

applying the provision contained in Order 26 Rule 10A of C.P.C. Therefore, this Court finds that the impugned order so far it relates to allowing the application under Order 26 Rule 10A of C.P.C. is erroneous being contrary to Law and the said part of the order is hereby set-aside.

12. The Civil Miscellaneous Petition stands allowed but, however, there is no order as to cost.

Petition allowed.

2016 (II) ILR - CUT- 640

BISWANATH RATH, J.

C.M.P. NO. 199 OF 2016

RAMAKANTA PATNAIK & ORS. …….Petitioners

.Vrs.

SURESH CH. SAHOO & ANR. ……..Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-26, R-9

Application for appointment of survey knowing commissioner – Prayer rejected – Hence the writ petiton – Controversy with regard to identification of the suit property alleged – However, reading of the plaint and written statement, this Court nowhere finds any dispute with regard to identification or location of the suit property – No scope to entertain an application under Order 26, Rule 9 C.P.C. – No illegality or infirmity in the impugned order, calling for interference by this Court.

(Para 7)

Case Laws Referred to :-

1. 39 (1973) C.L.T. – 180 : Debendranath Nandi –vrs- Natha Bhuiyan
2. 64 (1987) C.L.T.-722 : Mahendranath Parida -vrs-Purnananda Parida & Ors.
3. 1990(1) OLR-247 : Krushna Behera and another -vrs- Gitarani Nandy.

For Petitioners : M/s. Bidhayak Pattnaik, S.K.Swain, B.Rath & A.Patnaik

For Opp. Parties : M/s. Amit Prasad Bose, N.Hota, S.S.Routray, Mrs. Vijaya Kar, D.J.Sahoo & S.S.Das

Date of Hearing : 03.8.2016
Date of Judgment : 09.8.2016.

JUDGMENT

BISWANATH RATH,J

This Civil Miscellaneous petition is filed under Article 227 of the Constitution of India assailing the order dated 12.01.2016 passed by the Civil Judge (Senior Division), Bhubaneswar in Civil Suit No.1131 of 2011 thereby rejecting an application under Order 26, Rule 9 of the Civil Procedure Code at the instance of the petitioners(plaintiff Nos.1 to 3 in the court below).

2. Short facts involved in the case is that plaintiff Nos.1 to 3 filed Civil Suit No.1131 of 2011 praying therein to declare the registered sale deed No.5396 dated 27.12.1993 as void, illegal, inoperative, fabricated one and not binding to the plaintiffs, further for a declaration that the defendant has not derived any right, title, interest by virtue of forged registered sale deed No.5396 dated 27.12.1993 in respect of suit 'A' schedule land, further to declare the possession of the plaintiffs confirm and in the event if it is found that during course of the suit, the plaintiffs are dispossessed from the suit land, the possession of the same be delivered to them through process of the court and also for permanent injunction against the defendant or anybody claiming under him restraining them/him from interfering in the possession of the plaintiffs in respect of suit 'A" schedule land.

3. During pendency of the suit, plaintiffs filed a petition under Order 26, Rule 9 of the Civil Procedure Code on 22.12.2015 praying therein to pass an appropriate order for deputing a survey knowing Commissioner for identification of the suit Schedule-A land out of the Settlement Plot No.402. In filing the aforesaid petition, the plaintiffs contended before the trial court that for proper adjudication of the suit and in the interest of justice, a survey knowing Commissioner is required to be deputed for identification of the suit schedule-A land so also for ascertainment of fact of construction of house over the alleged purchased land. In filing objection, the contesting defendant challenged the petition submitting that as the plaintiffs are the master of their own suit, they must have an idea about the identification of the suit schedule land and they are required to prove their case basing on the pleadings made in their plaint. Further there is no such necessity here for the reason that there is already a report of the Pleader Commissioner following an order involving an application under Order 39, Rule 7, CPC at the intervention of this Court. The defendant also contended that by filing such application, there is a clear attempt by the plaintiffs to linger the disposal of the suit inspite of the fact that there is already a direction by this Court in disposal of C.M.P.No.1212 of 2015 where an order was passed targeting the disposal of the suit.

Considering the rival contentions of the parties, the trial court while disposing the application under Order 26, Rule 9, CPC at the instance of the plaintiffs, rejected the application on the grounds assigned in the order impugned herein.

4. In assailing the impugned order, Mr.B.Pattnaik, learned counsel appearing for the petitioners apart from reiterating the grounds already taken in the application under Order 26, Rule 9,CPC, further submitted that it is the settled proposition of law to issue a writ normally directing the Commissioner for local investigation to appreciate the evidence already on record .But there may be a departure from the said rule as held by this Court in the case between ***Debendranath Nandi –vrs- Natha Bhuiyan***, reported in ***39 (1973) C.L.T. - 180***, between ***Mahendranath Parida –vrs-Purnananda Parida & Oothers***, reported in ***64 (1987) C.L.T.-722*** and between ***Krushna Behera and another -vrs- Gitarani Nandy***, reported in ***1990(1) OLR-247***. Mr. Pattnaik, learned counsel further contended that as per the settled proposition of law, the court has discretion to depute a survey knowing Commissioner depending on the facts of the case and pleadings of the parties and here is a fit case where the court ought to have issued a survey knowing Commissioner. Further since there is controversy with regard to identification of the suit schedule property, a survey knowing Commissioner should have been deputed.

5. On the other hand, Mr.A.P.Bose, learned counsel appearing for the Opp. party No.1 while vehemently objecting the pleadings and contentions raised on behalf of the petitioners, submitted that from the pleadings available in the plaint, there is no scope for deputing a survey knowing Commissioner. He further contended that as there is already a report available on record submitted by a Pleader Commissioner in disposal of the application under Order 39, Rule 7, C.P.C, there has been no illegality in the impugned order and thus contended for dismissal of the present Civil Miscellaneous Petition.

6. On perusal of the record, this Court finds the plaint involving C.S.No.1131 of 2011 as at Annexure-1. Perusal of the whole averments of the plaint, it reveals that plaintiffs have claimed specific relief as reflected in paragraph-2 hereinabove. The plaint averments nowhere indicate the dispute about the identification of the suit schedule property. The entire plaint story relates to the registered sale deed obtained by the Opp. party No.1 by practising fraud. This Court has also got a scope to go through the response and averments of the defendant-Opp. party No.1 in his written statement available at Annexure-2 series. On whole reading of the plaint and written

statement, this Court nowhere finds any dispute regarding identification or location of the disputed suit schedule property. Order 26, Rule 9,CPC reads as under:

> " **Commissions to make local investigations-**
> In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:
>
> Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules. "

7. Reading of the aforesaid provision makes it clear that purpose of the Act is to elucidate any matter in dispute. From the observation made hereinabove, this Court nowhere finds any dispute with regard to identification or location of the disputed schedule property in the entire suit. Under the circumstances, this Court feels that there is no scope for an application under Order 26, Rule 9, CPC is applicable to the suit at the present stage. This Court has gone through the citations relied on by the learned counsel appearing for the petitioners and finds none of the citation is helpful to the petitioners due to difference in fact and situation.

8. In view of the observation and reasons assigned hereinabove, this Court finds no illegality or infirmity in the observation of the trial court in the impugned order. Under the circumstances, this Court finds no merit in the Civil Miscellaneous Petition.

9. Civil Miscellaneous Petition stands dismissed. Parties to bear their respective cost.

Petition dismissed.

2016 (II) ILR - CUT- 644

S. K. SAHOO, J.

CRLA NOs. 392, 555 OF 2012 & 491 OF 2013

SADANANDA MISHRA .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

ODISHA SPECIAL COURTS ACT, 2006 – S. 5(1)(2), 13
r/w Rule 2(e) of the Rules, 2007

Confiscation of money and other properties – Order passed by the Authorised Officer – Appellants and their family members are delinquents – Maintainability of the proceedings challenged – Section 5(1) of the Act makes it crystal clear that if the State Govt. is of the opinion that there is prima-facie evidence of commission of an offence U/s. 2(d) of the Act alleged to have been committed by a person, who held "high public or political office" in the State of Odisha, the state Govt. shall make a declaration to that effect in every case in which it is of the aforesaid opinion – Such declaration shall not be questioned in any Court as provided U/s. 5(2) of the Act – Though the words 'high public or political office' has not been defined under the Act, such words convey a category of public servants which is well understood and there is no arbitrariness.

In this case, one appellant was the Ex-General Manager, Odisha Mining Corporation Ltd. and other two appellants were Ex-Executive Engineers being special class officers were in a position to take major decisions regarding economic and financial aspects of the Project/assignments, so there was no difficulty on the part of the State Govt. to hold that they were holding "high public office" in the State of Odisha – The preamble to the Act is clear and there is no vagueness or ambiguity in the same – Since chargesheet submitted against them U/s. 13(2) read with 13(1)(e) of the P.C. Act, 1988 and cognizance of offence has been taken, declaration made U/s. 5(1) and prosecution instituted in the special court U/s. 6(1) of the Act 2006 – So application filed by the public prosecutor U/s. 13 of the Act, 2006 for confiscation being authorized by the State Govt. there is no infirmity in the impugned orders in rejecting the petitions filed by the delinquents challenging the maintainability of the confiscation proceedings.

(Paras 27, 28)

Case Laws Refered to :-

1. (2011) 49 OCR 1) Dibyadarshi Biswal & Ors. -Vrs.- State of Orissa & Ors.
2. (2016) 63 OCR (SC) 426 : Yogendra Kumar Jaiswal -Vrs.- State of

Bihar & Ors.
3. 2010 C .L. J 3848 : Krishna Kumar Variar -Vrs.- Share Shoppe

For Appellant : M/s. Santosh Kr. Mund, Hemanta Ku. Mund, Anima Kumar Dei & J.Sahu, A.R.Mohanty
M/s. S.K.Sanganeria, A.Sanganeria & S.Ranasingh

For Respondent : Mr. Sanjay Ku. Das, S.C. (Vig.)

Date of hearing : 16.03. 2016
Date of Judgment : 12.04.2016

JUDGMENT

S. K. SAHOO, J.

In all these three appeals, though the appellants are different but they have challenged the orders passed by the learned Authorised Officer, Special Court, Cuttack in three confiscation proceedings in rejecting their petitions filed challenging the maintainability of the confiscation proceedings and since the questions of law and facts involved are identical, with the consent of the respective parties, all these matters were heard analogously and a common judgment is being passed.

CRLA No. 392 of 2012

2. The appellant Sadananda Mishra has preferred this appeal under section 17 of the Orissa Special Courts Act, 2006 (hereafter '2006 Act') challenging the order dated 13.06.2012 of the learned Authorized Officer, Special Court, Cuttack passed in Confiscation Case No.1 of 2012 in rejecting the petition dated 6.6.2012 filed by the delinquents challenging the maintainability of the confiscation proceeding.

3. The appellant Sadananda Mishra is an accused in Cuttack Vigilance P.S. Case No.34 dated 10.11.1994 which corresponds to T.R. Case No.6 of 2008 pending in the Court of Special Judge, Special Court, Cuttack for offences punishable under sections 13(2) read with 13(1)(e) of Prevention of Corruption Act, 1988 (hereafter '1988 Act'). A proceeding for confiscation was instituted at the instance of the State of Orissa under section 13 of the 2006 Act vide Confiscation Case No.1 of 2012 before the Authorized Officer, Special Court, Cuttack in which apart from the appellant, his wife Smt. Smruti Prava Mishra, son Sunanda Mishra and mother Nishamani Mishra are the delinquents. The delinquents are the residents of Sheikh Bazar under Lalbag Police Station in the district of Cuttack.

The prosecution case is that the appellant after passing Diploma in Mining Engineering joined as a Blasting Supervisor in O.M.C., Sambalpur on 26.04.1964 and then he was promoted to the rank of Mines Manager and worked in such capacity in different mines till 1976 and then he was promoted to the rank of Regional Manager and thereafter he worked as General Manager, Daitari Iron Ore

Project since April, 1993. It is the prosecution case that during the check period i.e. from 22.04.1966 to 02.03.1994, the appellant was found in possession of disproportionate assets to the tune of Rs.15,31,367.20 paisa which he could not account for.

4. After completion of investigation, charge sheet was submitted against the appellant under sections 13(2) read with 13(1)(e) of 1988 Act on 30.12.1993 and accordingly cognizance of offence was taken by the Special Judge, Vigilance, Bhubaneswar and process was issued to the appellant, in pursuance of which the appellant appeared in the said Court and released on bail.

5. The State Government in Home Department exercising power conferred under section 5 of the 2006 Act made a declaration in respect of the appellant on dated 31.05.2008 which was published in the Extraordinary Orissa Gazette dated 02.06.2008. The declaration, so made is quoted herein below for ready reference:-

> **HOME DEPARTMENT**
> NOTIFICATION
> The 31th May 2008
> **FORM NO.1**
> (See Rule-7)
> DECLARATION
>
> **S.R.O. No.253/08**- WHEREAS, it was alleged that Shri Sadananda Mishra, Ex-General Manager, Orissa Mining Corporation Ltd. Daitari Iron Ore Project, Keonjhar, S/o Late Sarat Kumar Mishra, At Sheikh Bazar, P.S: Lalbag, Dist: Cuttack, while holding high public office in the State of Orissa, i.e. Orissa Mining Corporation Ltd, Daitari Iron Ore Project, Keonjhar committed an offence under Clause (e) of sub-section (1) of Section 13 of the Prevention of Corruption Act, 1988 and that the matter was investigated in Cuttack Vigilance P.S. Case No.34 dt.10.11.1994;
>
> AND WHEREAS, on scrutiny of relevant materials available on record, the State Government is of the opinion that there is *prima facie* case of commission of the offence of Shri Sadananda Mishra, who has accumulated properties disproportionate to his known sources of income by resorting to corrupt means;
>
> AND WHEREAS, it is felt necessary and expedient by the Government that the said offender should be tried by the Special Court established under sub-section (1) of Section 3 of Special Courts Act, 2006;
>
> NOW, THEREFORE, in exercise of the powers conferred by sub-section (1) of Section 5 of Special Courts Act, 2006 (Orissa Act 9 of 2007), the State Government do hereby declare that the said offence shall be dealt with under Special Courts Act, 2006.

[No. 2600/C]
By order of the Governor
TARUN KANTI MISHRA
Principal Secretary to Government

6. After issuance of the aforesaid declaration dated 31.05.2008, an application under section 13(1) of the 2006 Act was submitted before the Authorized Officer, Special Court, Cuttack for confiscation of the assets and properties of the appellant, his wife and son and on the basis of such application, Confiscation Case No.1 of 2012 was instituted.

7. On 06.06.2012 the appellant filed an application before the learned Authorized Officer, Special Court, Cuttack challenging the maintainability of the confiscation proceeding with a prayer to drop the proceeding. It was contended by the learned counsel for the appellant before the Authorized Officer that the appellant was not holding 'high public office' as defined under Rule 2(e) of the Orissa Special Courts Rules, 2007 (hereafter '2007 Rules'). It was further contended that classification of civil posts under the State of Orissa i.e. Group-A, B, C and D were not existing earlier and it was introduced for the first time by way of an amendment to Rule 8(1) of the Orissa Civil Services (C.C.A) Rules, 1962 (hereafter '1962 Rules') through G.A. Department Notification No.17902-S.C./3-2/99/Pt-1-Gen. dated 23.05.2000 published in the Orissa Gazette Extraordinary No.20 dated 09.06.2000. It was further contended that the amended Rule 8(1) of the 1962 Rules cannot be taken resort to in case of the appellant as the check period ended on 02.03.1994 and by then the said classification of Group-A Service i.e. the very basis of definition of 'high public office' given in Rule 2(e) of 2007 Rules was not existing. It was further contended that the appellant was not a holder of Group-A Civil Post under the State Government at any time.

On behalf of the applicant State of Odisha, while rebutting such contentions, it was urged before the Authorised Officer that the appellant who was the Ex-General Manager of Orissa Mining Corporation, Daitari Iron Ore Project, Keonjhar was holding 'high public office' in the State of Odisha and the State Government on scrutiny of the relevant materials available on record being prima facie satisfied about the commission of the offence by the appellant in accumulating properties disproportionate to his known sources of income by resorting to corrupt means felt it necessary and expedient that the appellant should be tried by the Special Court established under sub-section (1) of section 3 of 2006 Act. It was further contended that since during the check period, the appellant was holding 'high public office' as per the classification of services made by the Government of Orissa, vide Authorization Letter No.3642/C dated 8.8.2008, the Government of Orissa, Home Department, Bhubaneswar authorized the Public Prosecutor for making an application under section 13(1) of the 2006 Act for confiscation of the properties of the delinquents in accordance with law. It was further contended on

behalf of the State that the appellant had challenged the maintainability the case before the High Court in W.P.(Crl.) No.562 of 2008 which was dismissed on 16.09.2009 along with a batch of writ petitions.

8. The learned Authorized Officer vide impugned order dated 13.06.2012 has been pleased to observe that the State Government being prima facie satisfied that the appellant held 'high public office' and committed the offence and the amount of money was procured by means of the offence authorized the Special Public Prosecutor for making an application for confiscation of money and other properties. It was further held that the appellant has failed to establish that he was not holding 'high public office' during the check period. It was further held that the confiscation proceeding is maintainable against the delinquents and accordingly the petition filed by the delinquents was dismissed.

CRLA No. 491 of 2013

9. The appellant Durga Prasanna Das has preferred this appeal under section 17 of the Orissa Special Courts Act, 2006 (hereafter '2006 Act') challenging the order dated 21.09.2013 of the learned Authorized Officer, Special Court, Cuttack passed in Confiscation Case No.9 of 2013 in rejecting the petition dated 10.9.2013 filed by the delinquents challenging the maintainability of the confiscation proceeding.

10. The appellant Durga Prasanna Das is an accused in Cuttack Vigilance P.S. Case No.38 of 1999 which corresponds to T.R. Case No.3 of 2012 pending in the Court of Special Judge, Special Court, Cuttack for offences punishable under sections 13(2) read with 13(1)(e) of Prevention of Corruption Act, 1988 (hereafter '1988 Act'). A proceeding for confiscation was instituted at the instance of the State of Orissa under section 13 of the 2006 Act vide Confiscation Case No.9 of 2013 before the Authorized Officer, Special Court, Cuttack in which apart from the appellant, his wife Smt. Bijaya Laxmi Das and son Debraj Das are the delinquents.

The prosecution case is that the appellant entered into Government Service under the State of Orissa as a Junior Engineer on 27.5.1966 and during his service career, he was promoted to the rank of Asst. Engineer and then to the rank of Executive Engineer and posted at Mahanadi North Division, Jagatpur, Cuttack. It is the prosecution case that during the check period i.e. from 27.05.1966 to 18.09.1999, the appellant was found in possession of disproportionate assets to the tune of Rs.17,73,406.69 paisa which he could not account for.

11. After completion of investigation, charge sheet was submitted against the appellant under sections 13(2) read with 13(1)(e) of 1988 Act and accordingly cognizance of offence was taken by the learned Special Judge and process was issued to the appellant, in pursuance of which the appellant appeared in the said Court and released on bail.

12. The State Government in Home Department exercising power conferred under section 5 of the 2006 Act made a declaration in respect of the appellant on

dated 19.10.2011 which was published in the Extraordinary Odisha Gazette dated 17.01.2012.

13. After issuance of the aforesaid declaration dated 19.10.2011, an application under section 13(1) of the 2006 Act was submitted before the Authorized Officer, Special Court, Cuttack for confiscation of the assets and properties of the appellant, his wife and son and on the basis of such application, Confiscation Case No.9 of 2013 was instituted.

14. On 10.09.2013 the appellant filed an application before the learned Authorized Officer, Special Court, Cuttack challenging the maintainability of the confiscation proceeding with a prayer to drop the proceeding. It was contended by the learned counsel for the appellant before the Authorized Officer that the appellant was not holding 'high public office' as defined under Rule 2(e) of the Orissa Special Courts Rules, 2007 (hereafter '2007 Rules'). It was further contended that classification of civil posts under the State of Orissa i.e. Group-A, B, C and D were not existing earlier and it was introduced for the first time by way of an amendment to Rule 8(1) of the Orissa Civil Services (C.C.A) Rules, 1962 (hereafter '1962 Rules') through G.A. Department Notification No.17902-S.C./3-2/99/Pt-1-Gen. dated 23.05.2000 published in the Orissa Gazette Extraordinary No.20 dated 09.06.2000. It was further contended that the amended Rule 8(1) of the 1962 Rules cannot be taken resort to in case of the appellant as the check period ended on 18.09.1999 and by then the said classification of Group-A Service i.e. the very basis of definition of 'high public office' given in Rule 2(e) of 2007 Rules was not existing. It was further contended that the appellant was not a holder of Group-A Civil Post under the State Government at any time.

On behalf of the applicant State of Odisha, while rebutting such contentions, it was urged before the Authorised Officer that the appellant who was the Ex-Executive Engineer, Mahanadi North Division, Jagatpur, Cuttack was holding 'high public office' in the State of Odisha and the State Government on scrutiny of the relevant materials available on record being prima facie satisfied about the commission of the offence by the appellant in accumulating properties disproportionate to his known sources of income by resorting to corrupt means felt it necessary and expedient that the appellant should be tried by the Special Court established under sub-section (1) of section 3 of 2006 Act. It was further contended that since during the check period, the appellant was holding 'high public office' as per the classification of services made by the Government of Orissa, vide Authorization Letter No.3642/C dated 8.8.2008, the Government of Orissa, Home Department, Bhubaneswar authorized the Public Prosecutor for making an application under section 13(1) of the 2006 Act for confiscation of the properties of the delinquents in accordance with law.

15. The learned Authorized Officer vide impugned order dated 21.09.2013 has been pleased to observe that the day on which the State Govt. has formed an opinion

about the existence of a prima facie case and if on that day the delinquent is a person holding 'high public office' as defined under the Act, then the proceeding is definitely maintainable in a Special Court. It was further held that the proceeding as has been framed against the delinquents is maintainable and accordingly the petition filed by the delinquents was dismissed.

CRLA No. 555 of 2012

16. The appellant Sri Charu Chandra Parida has preferred this appeal under section 17 of the Orissa Special Courts Act, 2006 (hereafter '2006 Act') challenging the order dated 13.09.2012 of the learned Authorized Officer, Special Court, Cuttack passed in Confiscation Case No.2 of 2012 in rejecting the petition dated 5.9.2012 filed by the delinquents challenging the maintainability of the confiscation proceeding.

17. The appellant Sri Charu Chandra Parida is an accused in Cuttack Vigilance P.S. Case No.35 of 1997 which corresponds to T.R. Case No. 10 of 2008 pending in the Court of Special Judge, Special Court, Cuttack for offences punishable under sections 13(2) read with 13(1)(e) of Prevention of Corruption Act, 1988 (hereafter '1988 Act'). A proceeding for confiscation was instituted at the instance of the State of Orissa under section 13 of the 2006 Act vide Confiscation Case No.2 of 2012 before the Authorized Officer, Special Court, Cuttack in which apart from the appellant, his wife Smt. Manjulata Parida, sons Mrunmaya Parida, Chinmay Parida and Tanmay Parida are the delinquents.

The prosecution case is that the appellant after passing Degree in B. Tech in Civil Engineering joined service under the Government of Odisha on 22.06.1964 as a Junior Engineer. Then he was promoted to Assistant Engineer and then to Executive Engineer. After attending the age of superannuation, he retired on 31.01.1998 from the Government Service. It is the prosecution case that during the check period i.e. from 01.01.1979 to 15.05.1997, the appellant was found in possession of disproportionate assets to the tune of Rs.25,80,527.93 paisa which he could not account for.

18. After completion of investigation, charge sheet was submitted against the appellant under sections 13(2) read with 13(1)(e) of 1988 Act and accordingly cognizance of offence was taken by the Special Judge and process was issued to the appellant, in pursuance of which the appellant appeared in the said Court and released on bail.

19. The State Government in Home Department exercising power conferred under section 5 of the 2006 Act made a declaration in respect of the appellant on dated 11.07.2008 which was published in the Extraordinary Orissa Gazette dated 15.07.2008. The declaration, so made is quoted herein below for ready reference:-

HOME DEPARTME
NOTIFICATION
The 11th July 2008
FORM NO.1
(See Rule-7)
DECLARATION

S.R.O. No.348/2008- WHEREAS, it was alleged that Shri Charu Chandra Parida, S/o- Trailokyanath Parida of Village- Bhubaneswar, P.S.- Singla, Dist- Balasore, at present Bagbrundaban (Srikanthpur), P.S.-Balasore Town, Dist- Balasore, State- Orissa, while holding high public office in the State of Orissa, i.e. Ex-Executive Engineer, Charbatia (R&B) Division, Choudwar, Cuttack, committed an offence under Clause (e) of sub-section (1) of Section 13 of the Prevention of Corruption Act, 1988 and that the matter was investigated in Cuttack Vigilance P.S. Case No.35 dated 2nd June, 1997;

AND WHEREAS, on scrutiny of relevant materials available on record, the State Government is of the opinion that there is *prima facie* case of commission of the offence of Shri Charu Chandra Parida, who has accumulated properties disproportionate to his known sources of income by resorting to corrupt means;

AND WHEREAS, it is felt necessary and expedient by the Government that the said offender should be tried by the Special Court established under sub-section (1) of Section 3 of Special Courts Act, 2006;

NOW, THEREFORE, in exercise of the powers conferred by sub-section (1) of Section 5 of Special Courts Act, 2006 (Orissa Act 9 of 2007), the State Government do hereby declare that the said offence shall be dealt with under the Special Courts Act, 2006.

[No. 3176-C]
By order of the Governor
TARUN KANTI MISHRA
Principal Secretary to Government"

20. After issuance of the aforesaid declaration dated 11.07.2008, an application under section 13(1) of the 2006 Act was submitted before the Authorized Officer, Special Court, Cuttack for confiscation of the assets and properties of the appellant, his wife and their three sons and on the basis of such application, Confiscation Case No.2 of 2012 was instituted.

21. On 05.09.2012 the appellant filed an application before the learned Authorized Officer, Special Court, Cuttack challenging the maintainability of the confiscation proceeding with a prayer to drop the proceeding. It was contended

by the learned counsel for the appellant before the Authorized Officer that the appellant was not holding 'high public office' as defined under Rule 2(e) of the Orissa Special Courts Rules, 2007 (hereafter '2007 Rules'). It was further contended that classification of civil posts under the State of Orissa i.e. Group-A, B, C and D were not existing earlier and it was introduced for the first time by way of an amendment to Rule 8(1) of the Orissa Civil Services (C.C.A) Rules, 1962 (hereafter '1962 Rules') through G.A. Department Notification No.17902-S.C./3-2/99/Pt-1-Gen. dated 23.05.2000 published in the Orissa Gazette Extraordinary No.20 dated 09.06.2000. It was further contended that the amended Rule 8(1) of the 1962 Rules cannot be taken resort to in case of the appellant as the check period ended on 15.05.1997 and by then the said classification of Group-A Service i.e. the very basis of definition of 'high public office' given in Rule 2(e) of 2007 Rules was not existing. It was further contended that the appellant was not a holder of Group-A Civil Post under the State Government at any time.

On behalf of the applicant State of Odisha, while rebutting such contentions, it was urged before the Authorised Officer that the appellant who was the Ex-Executive Engineer, Charbatia (R&B) Division, Choudwar and was holding 'high public office' in the State of Odisha and the State Government on scrutiny of the relevant materials available on record being prima facie satisfied about the commission of the offence by the appellant in accumulating properties disproportionate to his known sources of income by resorting to corrupt means felt it necessary and expedient that the appellant should be tried by the Special Court established under sub-section (1) of section 3 of 2006 Act. It was further contended that since during the check period, the appellant was holding 'high public office' as per the classification of services made by the Government of Orissa, vide Authorization Letter No.3642/C dated 8.8.2008, the Government of Orissa, Home Department, Bhubaneswar authorized the Public Prosecutor for making an application under section 13(1) of the 2006 Act for confiscation of the properties of the delinquents in accordance with law. It was further contended on behalf of the State that the appellant had challenged the maintainability the case before the High Court in W.P.(Crl.) No. 8 of 2009 which was dismissed on 16.09.2009 along with a batch of writ petitions.

22. The learned Authorized Officer vide impugned order dated 13.09.2012 has been pleased to observe that the appellant was working in different capacities in his service career and at the time of search and seizure, he was working as Executive Engineer, R & B, Charbatia Division, Choudwar, Cuttack which is one of the top senior posts i.e. Class-I post. The Government of Orissa adopted revised scale of pay of Government of India in respect of the State Government employees with retrospective effect i.e. 01.01.1996 and since post of Executive Engineer comes under Group-A civil posts, the State Government has rightly declared the appellant as an officer holding a 'high public office'. The learned Authorized Officer further held that the confiscation application filed by the State Government through Public

Prosecutor is maintainable and accordingly the petition filed by the delinquents was dismissed.

23. The appellant in CRLA No. 392 of 2012 and the appellant in CRLA No. 555 of 2012 earlier approached this Court in W.P.(Crl) No. 562 of 2008 and W.P.(Crl) No. 8 of 2009 respectively wherein the constitutional validity of the 2006 Act and the Rules framed there under were challenged. A batch of writ petitions were filed and all the writ petitions were heard analogously and a common judgment was passed on 16.09.2009 (**Ref:- Dibyadarshi Biswal and others –Vrs.- State of Orissa and others, (2011) 49 Orissa Criminal Reports 1**).

After considering the rival legal contentions urged on behalf of the parties, seven points were formulated by this Court, out of which points nos. 1 and 4 are relevant for the adjudication of the present case.

Point No.1

Whether the similar provisions in the present impugned Act is required to be re-examined in these writ petitions with reference to either the definition clause or declaration under Section 5 (1) and other provisions of Chapter III of the impugned Act in view of the decision rendered by this Court in **Kishore Chandra Patel's case (Vol 76 (1993) Cuttack Law Times 720)** wherein the provisions of Section 5 and other similar provisions of the impugned Act and chapter III (Confiscation) have already been held to be constitutional, legal and valid as the same do not offend Articles 14 and 21 of the Constitution.

Point No.4

Whether the impugned notification issued under Section 5(1) of the Act is liable to be quashed?

The Hon'ble Court dealt with points no.1 and 4 together as those were inter-related. The Hon'ble Court held as followed:-

"33. In view of the decision in **Kishore Chandra Patel's Case** and the observations made in the subsequent order with reference to the Ordinance, this Court in unmistakable terms held that the provisions of the Special Courts Act, 1990 including Part-III dealing with the classification of the monies and properties of the accused persons who are facing the criminal trial is held to be constitutionally legal and valid and therefore the same does not call for interference. For the reason stated supra, there is no occasion for us to examine/consider all the legal contentions which were adverted to in the earlier part of the judgment wherein the legal contentions urged have been dealt with, and upheld validity of the Act except the provision of section 16 of the Special Courts Act of 1990 and therefore there is no need for us once again to refer the same and record findings and reasons. The decision in **Kishore Chandra Patel's** case attained

finality……. In addition to the reasons assigned by the Division Bench of this Court in the case of **Kishore Chandra Patel** regarding the discretionary power to be exercised by the State Government in picking and choosing the specific cases of persons, who are holding high public and political office against whom criminal cases are launched qua the Special Courts Act, 2006 is wholly untenable in law for the reason that the State Government has filed an affidavit in Court on 23.07.2010. Relevant paragraphs of the affidavit read thus:-

"3. That as informed by the Special Counsel for the State, during the course of hearing a doubt has arisen as to whether the State Government has any discretion in issuing the notification under Section 5 of the Special Courts Act if a case comes within the category of persons holding high public and political office as defined under the Act and Rules and there is prima facie evidence of the commission of offence under section 13(1)(e) of the Prevention of Corruption Act.

4. That it is humbly submitted that in the event there is prima facie evidence of the commission of an offence alleged to have been committed by person who held high public or political office in the State of Orissa as defined under the Act and the Rules, the State Government *shall mandatorily make a declaration to that effect and the State Government does not have any discretion on the subject*.

5. That the role of the State Government is limited to satisfy that the ingredients of section 5(1) of the Special Courts Act are satisfied and if the ingredients of section 5(1) of the Special Courts Act is satisfied, the State Government shall make a declaration to that effect."

34. In view of the aforesaid facts sworn to by the Joint Secretary to the State Government, Home Department, Government of Orissa, the apprehension regarding the declaration of certain cases after picking and choosing amongst the offenders who are charged under section 13(1)(e) of the P.C. Act for the purpose of invoking the provision of Chapter-III is also untenable in law. Therefore, the contention urged in this regard has no merit and is liable to be rejected.

In V.C. Shukla's case, the Apex Court had the occasion to consider the challenge to section 5 of the Delhi Special Courts Act, 1979……Referring to the aforesaid decisions, the Apex Court in V.C. Shukla's case held that as the power has been conferred on the Central Government which is to make a declaration in accordance with the conditions laid down in section 5(1) and, therefore, in conformity with the guidelines mentioned in the preamble, the attack based on discrimination is unfounded and is here by repelled. In this view of the matter, there is no

merit in point no.5. Accordingly, point nos.1 and 4 are answered against the petitioners.

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43. Accordingly, the writ petitions being devoid of merit are dismissed without costs.

44. Since we have dismissed the writ petitions and the cases are pending for more than one decade and the object and intendment of the State Legislature in enacting the Act is for speedy and expeditious disposal of the cases, which will serve the public interest to have a corruption free society in the State, we direct the Special Courts which are constituted under the provisions of the Act to conduct expeditious trial and dispose of the cases by following the Criminal Procedure Code by taking up the case day to day basis."

24. The judgment rendered by this Court upholding the constitutional validity of the 2006 Act was challenged before the Hon'ble Supreme Court. In case of **Yogendra Kumar Jaiswal -Vrs.- State of Bihar & Others reported in (2016) 63 Orissa Criminal Reports (SC) 426**, Hon'ble Shri Justice Dipak Misra, speaking for the Bench, held as follows:-

"98. Applying the aforesaid principle, we are inclined to think that the State Government is only to be *prima facie* satisfied that there is an offence under Section 13(1)(e) and the accused has held high public or political office in the State. Textually understanding, the legislation has not clothed the State Government with the authority to scrutinize the material for any other purpose. The State Government has no discretion except to see whether the offence comes under Section 13(1)(e) or not. Such an interpretation flows when it is understood that in the entire texture provision turns around the words "offence alleged" and "*prima facie*". It can safely be held that the State Government before making a declaration is only required to see whether the person as understood in the context of the provision is involved in an offence under Section 13(1)(e) of the Orissa Act and once that is seen, the concerned authority has no other option but to make a declaration. That is the command of the legislature and once the declaration is made, the prosecution has to be instituted in a Special Court and that is the mandate of Section 6(1) of the Orissa Act. Therefore, while holding that the reference to the affidavit filed by the State Government was absolutely unwarranted, for that cannot make a provision constitutional if it is otherwise unconstitutional, we would uphold the constitutional validity, but on the base of above interpretation. The argument and challenge would fail, once on interpretation it is held that there is no element of discretion and only *prima facie* satisfaction is required as laid down hereinabove.

99. Having said that, we shall dwell upon the argument which is raised with regard to classification part, that is, that the persons holding "high public or political office" are being put in a different class to face a trial in a different Court under a different procedure facing different consequences, is arbitrary and further the provision suffers from serious vagueness. The other aspect which has been seriously pyramided by the learned Counsel for the appellants pertains to transfer of cases to the Special Court once declaration is made.

100. Learned Counsel for the State has also referred to the rules to show that to avoid any kind of confusion a definition has been introduced in the rules. It is obligatory to make it immediately clear that the argument of the State that by virtue of bringing in a set of rules defining the term "high public or political office" takes away the provision from the realm of challenge of Article 14 of the Constitution is not correct. In this regard Mr. Vinoo Bhagat, learned Counsel for the appellants, has drawn our attention to the authority in **Hotel Balaji and Ors. v. State of A.P. and Ors. 1993 Supp (4) SCC 536**. In the said case, a question arose as to how far it is permissible to refer to the rules made in an Act while judging the legislative competency of a legislature to enact a particular provision. In that context, the majority speaking through Ranganathan, J. observed that a subordinate legislation cannot travel beyond the purview of the Act. The learned Judge noted that where the Act says that rules on being made shall be deemed "as if enacted in this Act", the position may be different. Thereafter, the learned Judge said that where the Act does not say so, the rules do not become a part of the Act. A passage from Halsbury's Laws of England (3rd Edn.) Vol. 36 at page 401 was referred to. It was contended on behalf of the State of Gujarat that the opinion expressed by Hedge J. in **J.K. Steel Ltd. v. Union of India AIR 1970 SC 1173**, a dissenting opinion was pressed into service. The larger Bench dealing with the said submission expressed the view:

"...Shri Mehta points out further that Section 86 which confers the rule-making power upon the Government does not say that the rules when made shall be treated as if enacted in the Act. Being a rule made by the Government, he says, Rule 42-E can be deleted, amended or modified at any time. In such a situation, the legislative competence of a legislature to enact a particular provision in the Act cannot be made to depend upon the rule or rules, as the case may be, obtaining at a given point of time, he submits. We are inclined to agree with the learned Counsel. His submission appears to represent the correct principle in matters where the legislative competence of a legislature to enact a particular provision arises. If so, the very foundation of the appellants' argument collapses.

101. From the aforesaid, it is crystal clear that unless the Act provides that the rules if deemed as enacted in the Act, a provision of the rule cannot be read as a part of the Act.

102. In the instant case, Section 24 lays down that the State Government may, by notification, make such rules, if any, as it may deem necessary for carrying out the purposes of this Act. The said provision is not akin to what has been referred to in the case in **Hotel Balaji** (supra). True it is, the said decision was rendered in the case of legislative competence but it has been cited to highlight that unless the condition as mentioned therein is satisfied, rules cannot be treated as a part of the Act. Thus analysed, the submission of the learned Counsel for the State that the Rules have clarified the position and that dispels the apprehension of exercise of arbitrary power, does not deserve acceptance.

103. Having not accepted the aforesaid submission, we shall proceed to deal with the real thrust of the submission on this score. It is urged by Mr. Padhi, learned senior Counsel for the State of Odisha, that the principles stated in the decision in ***V.C. Shukla*** (supra) will apply on all fours.

104. In ***the Special Courts Bill, 1978*** (supra), may it be noted, the President of India had made a reference to this Court under Article 143(1) of the Constitution for consideration of the question whether the Special Courts Bill, 1978 (or any of its other provisions) if enacted would be constitutionally invalid. The Court referred to the text of the preamble. The preamble of the Bill was meant to provide for trial of a certain class of offences. Clause 4 of the Act which is relevant for the present purpose, provided that if the Central Government is of the opinion that there is prima facie evidence of the commission of an offence alleged to have been committed during the period mentioned in the Preamble by a person who held high public or political office in India and that in accordance with the guidelines contained in the Preamble, the said offence ought to be dealt with under the Act, the Central Government shall make a declaration to that effect in every case in which it is of the aforesaid opinion.

105. It was contended that Section 4(1) furnished no guidance for making the declaration for deciding who one and for what reasons should be sent up for trial to the Special Courts. The Court referred to the various statutes with regard to classification and the concept of guidance and vagueness and opined that:

"...By Clause 5 of the Bill, only those offences can be tried by the Special Courts in respect of which the Central Government has made a declaration under Clause 4(1). That declaration can be made by the Central Government only if it is of the opinion that there is *prima facie* evidence of the commission of an offence, during the period mentioned in the preamble,

by a person who held a high public or political office in India and that, in accordance with the guidelines contained in the Preamble to the Bill, the said offence ought to be dealt with under the Act. The classification which Section 4(1) thus makes is both of offences and offenders, the former in relation to the period mentioned in the preamble that is to say, from February 27, 1975 until the expiry of the proclamation of emergency dated June 25, 1975 and in relation to the objective mentioned in the sixth para of the preamble that it is imperative for the functioning of parliamentary democracy and the institutions created by or under the Constitution of India that the commission of such offences should be judicially determined with the utmost dispatch; and the latter in relation to their status, that is to say, in relation to the high public or political office held by them in India. It is only if both of these factors co-exist that the prosecution in respect of the offences committed by the particular offenders can be instituted in the Special Court.

106. Thereafter, the Court referred to certain periods as mentioned in the preamble and in that context, opined that:

"...But persons possessing widely differing characteristic, in the context of their situation in relation to the period of their activities, cannot by any reasonable criterion be herded in the same class. The antedating of the emergency, as it were, from June 25 to February 27, 1975 is wholly unscientific and proceeds from irrational considerations arising out of a supposed discovery in the matter of screening of offenders. The inclusion of offences and offenders in relation to the period from February 27 to June 25, 1975 in the same class as those whose alleged unlawful activities covered the period of emergency is too artificial to be sustained."

107. The Court recorded its conclusion in paragraph 120 as follows:

"The Objects and Reasons are informative material guiding the Court about the purpose of a legislation and the nexus of the differentia, if any, to the end in view. Nothing about Emergency period is adverted to there as a distinguishing mark. If at all, the clear clue is that all abuse of public authority by exalted public men, whatever the time of commission, shall be punished without the tedious delay which ordinarily defeats justice in the case of top echelons whose crimes affect the credentials of democratic regimes.

108. In this context, reference may be made to ***V.C. Shukla*** (supra) upon which heavy reliance has been placed by the State Government. The appellants therein while challenging the conviction raised a number of preliminary objections including constitutional validity of the Special Courts Act [No. 22 of 1979] on several grounds, including contravention of

Articles 14 and 21 of the Constitution. A three-Judge Bench referred to the order passed in the reference made by the President of India Under Article 143(1) of the Constitution wherein majority of the provisions in the Bill were treated to be valid. Thereafter, the Bill ultimately got the assent of the President with certain changes. After the Act came into force, it assumed a new complexion. The Court in the latter judgment referred to clauses in the preamble and scanned the anatomy of the Act. It was contended that regard being had to the principles laid down by this Court in ***the Special Courts Bill, 1978*** (supra) the provisions fail to pass the test of valid classification under Article 14, for the classification which distinguishes persons who are placed in a group from others who are left out of the group is not based on *intelligible differentia*; that there was no nexus between the differentiation which was the basis of the classification and the object of the Act; and that such differentiation did not have any rational relation to the object sought to be achieved by the Act. The Court reading the opinion in ***the Special Courts Bill, 1978*** (supra) did not agree with the submissions of the learned Counsel for the appellants that this Court had held that unless emergency offenders could be punished under the Special Courts Act and that no Act seeking to punish the offences of a special type not related to the emergency would be hit by Article 14. The Court addressed to the validity of Sections 5, 6, 7 and 11 of the Special Courts Act, 1979. One of the arguments advanced was that neither the words 'high public or political office' had been defined nor the offence being delineated so as to make the prosecution of such offenders a practical reality. Dealing with the said contention, the Court held:

"24. As regards the definition of "high public or political office" the expression is of well-known significance and bears a clear connotation which admits of no vagueness or ambiguity. Even during the debate in Parliament, it was not suggested that the expression suffered from any vagueness. Apart from that even in the *Reference case* Krishna Iyer, J. referred to holders of such offices thus: (SCC pp. 440, 441, paras 107, 111)

"...heavy-weight criminaloids who often mislead the people by public moral weight-lifting and multi point manifestoes... *such super-offenders in top positions*.... No erudite pedantry can stand in the way of pragmatic grouping of *high-placed office holders separately*, for purposes of high-speed criminal action invested with early conclusiveness and inquired into by high-level courts.

25. It is manifest from the observations of Krishna Iyer, J., that persons holding high public or political offices mean persons holding top positions wielding large powers.

109. Thereafter, the three-Judge Bench referred to the description of persons holding high public or political office in American Jurisprudence (2d, Vol. 63, pp. 626, 627 and 637) Ferris in his Thesis on "Extraordinary Legal Remedies", Wade and Phillips in "Constitutional Law" and after referring to various meanings attributed to the words ruled:

"28. A perusal of the observations made in the various textbooks referred to above clearly shows that "political office" is an office which forms part of a political department of the Government or the political executive. This, therefore, clearly includes Cabinet Ministers, Ministers, Deputy Ministers and Parliamentary Secretaries who are running the Department formulating policies and are responsible to the Parliament. The word High is indication of a top position and enabling the holder thereof to take major policy decisions. Thus, the term "high public or political office" used in the Act contemplates only a special class of officers or politicians who may be categorised as follows:

(1) officials wielding extraordinary powers entitling them to take major policy decisions and holding positions of trust and answerable and accountable for their wrongs;

(2) persons responsible for giving to the State a clean, stable and honest administration;

(3) persons occupying a very elevated status in whose hands lies the destiny of the nation.

29. The rationale behind the classification of persons possessing the aforesaid characteristics is that they wield wide powers which, if exercised improperly by reason of corruption, nepotism or breach of trust, may mar or adversely mould the future of the country and tarnish its image. It cannot be said, therefore, with any conviction that persons who possess special attributes could be equated with ordinary criminals who have neither the power nor the resources to commit offences of the type described above. We are, therefore, satisfied that the term "persons holding high public or political offices" is self-explanatory and admits of no difficulty and that mere absence of definition of the expression would not vitiate the classification made by the Act. Such persons are in a position to take major decisions regarding social, economic, financial aspect of the life of the community and other far-reaching decisions on the home front as also regarding external affairs and if their actions are tainted by breach of trust, corruption or other extraneous considerations, they would damage the interests of the country. It is, therefore, not only proper but essential to bring such offenders to book at the earliest possible opportunity.

110. After so stating, the Court referred to Clause 4 of the preamble and opined thus:

"31. The words "powers being a trust" clearly indicate that any act which amounts to a breach of the trust or of the powers conferred on the person concerned would be an offence triable under the Act. Clause (4) is wide enough to include any offence committed by holders of high public or political offices which amounts to breach of trust or for which they are accountable in law and does not leave any room for doubt. Mr. Bhatia, however, submitted that even if the person concerned commits a petty offence like violation of municipal bye-laws or traffic rules he would have to be prosecuted under the Act which will be seriously prejudicial to him. In our opinion, this argument is purely illusory and based on a misconception of the provisions of the Act. Section 5 which confers powers on the Central Government to make a declaration clearly refers to the guidelines laid down in the preamble and no Central Government would ever think of prosecuting holders of high public or political offices for petty offences and the doubt expressed by the counsel for the appellant is, therefore, totally unfounded."

In view of the aforesaid enunciation of law, we are unable to accept the submission of the learned Counsel for the appellants that the words "high public or political office" not being defined, creates a dent in the provision. The said words, we are absolutely certain, convey a category of public servants which is well understood and there is no room for arbitrariness.

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162. In view of the foregoing analysis, we proceed to summarise our conclusions:

(i) The Orissa Act is not hit by Article 199 of the Constitution.

(ii) The establishment of Special Courts under the Orissa Act as well as the Bihar Act is not violative of Article 247 of the Constitution.

(iii) The provisions pertaining to declaration and effect of declaration as contained in Section 5 and 6 of the Orissa Act and the Bihar Act are constitutionally valid as they do not suffer from any unreasonableness or vagueness.

(iv) The Chapter III of the both the Acts providing for confiscation of property or money or both neither violates Article 14 nor Article 20(1) nor Article 21 of the Constitution.

(v) The procedure provided for confiscation and the proceedings before the Authorised Officer do not cause any discomfort either to Article 14 or to Article 20(3) of the Constitution.

(vi) The provision relating to appeal in both the Acts is treated as constitutional on the basis of reasoning that the power subsists with the High Court to extend the order of stay on being satisfied.

(vii) The proviso to Section 18(1) of the Orissa Act does not fall foul of Article 21 of the Constitution.

(viii) The provisions contained in Section 19 pertaining to refund of confiscated money or property does not suffer from any kind of unconstitutionality……"

25. The learned counsel for the appellants in CRLA No. 392 of 2012 and CRLA No. 491 of 2013 Mr. Hemanta Kumar Mund and the learned counsel for the appellant in CRLA No. 555 of 2012 Mr. S. K. Sanganeria though had canvassed several grounds in the appeal memos but in view of the judgment rendered by the Hon'ble Supreme Court in case of **Yogendra Kumar Jaiswal (supra)**, they very cleverly avoided those grounds but strenuously contended that the dispute relating to the fact as to whether the appellants belonged to Group-A service or not is no longer required to be adjudicated as the definition provided in the 2007 Rules has been held to be not applicable to the 2006 Act and the appellants are legally entitled to challenge the jurisdiction of the learned Authorised Officer to proceed against them on the ground that they do not come within the purview of the expression 'high public office' as delineated by the Hon'ble Supreme Court. Learned counsels for the appellants relied upon the decision of the Hon'ble Supreme Court in case of **Krishna Kumar Variar -Vrs.- Share Shoppe** reported in **2010 Criminal Law Journal 3848** wherein it is held as follows:-

"5. In our opinion, in such cases where the accused or any other person raises an objection that the Trial Court has no jurisdiction in the matter, the said person should file an application before the Trial court making this averment and giving the relevant facts. Whether a Court has jurisdiction to try/entertain a case will, at least in part, depend upon the facts of the case. Hence, instead of rushing to the higher Court against the summoning order, the concerned person should approach the Trial Court with a suitable application for this purpose and the Trial Court should after hearing both the sides and recording evidence, if necessary, decide the question of jurisdiction before proceeding further with the case."

The learned counsels for the appellants urged that the appeal be disposed of giving liberty to the appellants to file fresh applications before the learned Authorized Officer, Special Court, Cuttack ventilating their grievance that the appellants were not holding any 'high public office' during the period for which they are accused of the offence.

The learned Standing Counsel, Vigilance Mr. Sanjay Kumar Das on the other hand vehemently opposed any such reconsideration of application by the

learned Authorized Officer and submitted that it would be a dilly-dallying tactics inasmuch as in view of the ratio laid down in the judgments of Kishore Chandra Patel (supra), Dibyadarshi Biswal (supra) and Yogendra Kumar Jaiswal (supra), the declaration made by the State Government under section 5(1) of the 2006 Act that the appellants were holding 'high public office' in the State of Orissa and that there is prima facie evidence of the commission of an offence of criminal misconduct within the meaning of clause (e) of sub-section (1) of section 13 of the 1988 Act cannot be called in question in any Court in view of section 5(2) of the 2006 Act.

26. The contention of the learned Standing Counsel, Vigilance that in view of section 5(2) of the 2006 Act, the declaration made by the State Government under section 5(1) of the said Act cannot be called in question in this Court, I am afraid, cannot be accepted.

In case of **In re, The Special Courts Bill, 1978 reported in AIR 1979 SC 478**, it is held as follows:-

> "100. There is one more provision of the Bill to which we must refer while we are on this question. Sub-clause (1) of Clause 4 provides for the making of the declaration by the Central Government while sub-clause (2) provides that "such declaration shall not be called in question in any Court". Though the opinion which the Central Government has to form under Clause 4(1) is subjective, we have no doubt that *despite the provisions of sub-clause (2), it will be open to judicial review* at least within the limits indicated by this Court in **Khudiram Das V. The State of West Bengal reported in AIR 1975 SC 550**. It was observed in that case by one of us, Bhagwati J., while speaking for the Court, that in a Government of laws "there is nothing like unfettered discretion immune from judicial reviewability". The opinion has to be formed by the Government, to say the least, rationally and in a bonafide manner."

In case of **State (Delhi Administration) -Vrs.- V. C. Shukla reported in AIR 1980 SC 1382**, it is held as follows:-

> "83. Another allied argument advanced by Mr. Bhatia was that the issuance of a declaration under Section 5 (1) depends purely on the subjective satisfaction of the Central Government and under sub-section (2) of Section 5 such a declaration cannot be called into question by any Court so that there would be an element of inherent bias or malice in an order which the Central Government may pass, for prosecuting persons who are political opponents and that the section is therefore invalid. We are unable to agree with this argument. As already pointed out, the power of the Central Government to issue a declaration is a statutory power circumscribed by certain conditions. Furthermore, as the power is vested in a very high authority, it cannot be assumed that it is likely to be abused. On the other

hand, where the power is conferred on such a high authority as the Central Government, the presumption will be that the power will be exercised in a bona fide manner and according to law. In the case of **Chinta Lingam v. Government of India, (1971) 2 SCR 871 : (AIR 1971 SC 474)**, this Court observed:

"At any rate, it has been pointed out in more than one decision of this Court that when the power has to be exercised by one of the highest officers the fact that no appeal has been provided for is a matter of no moment.....It was said that though the power was discretionary but it was not necessarily discriminatory and abuse of power could not be easily assumed. There was moreover a presumption that public officials would discharge their duties honestly and in accordance with rules of law."

To the same effect is the decision of this Court in **Budhan Choudhry v. The State of Bihar, (1955) 1 SCR 1045 : (AIR 1955 SC 191)**. It was, however, suggested that as the central Government in a democracy consists of the political party which has the majority in Parliament, declarations under Section 5 (1) of the Act could be used as an engine of oppression against members of parties who are opposed to the ideologies of the ruling party. This is really an argument of fear and mistrust which, if accepted, would invalidate practically all laws of the land; for, then even a prosecution under the ordinary law may be considered as politically motivated, which is absurd. Furthermore, prejudice, malice or taint is not a matter for presumption in the absence of evidence supporting it. It is well settled that burden lies on the parties alleging bias or malice to prove its existence, and if malice or bias is proved in a particular case, the courts would strike down the act vitiated by it, in exercise of its powers under Articles 226, 227 or 136. This aspect of the matter was dealt with in the reference case thus:-

"Though the opinion which the Central Government has to form under clause 4 (1) is subjective, we have no doubt that *despite the provisions of sub-clause (2) it will be open to judicial review* at least within the limits indicated by this Court in **Khudiram Das v. The State of West Bengal, (1975) 2 SCR 832, 845 : (AIR 1975 SC 550)**. It was observed in that case by one of us, Bhagwati, J., while speaking for the Court, that in a Government of laws "there is nothing like unfettered discretion immune from judicial reviewability". The opinion has to be formed by the Government, to say the least, rationally and in a bona fide manner."

The Scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India has been well-defined. The power exercised by the statutory, quasi-judicial or administrative authorities can be interfered on the limited ground if it is shown that exercise of discretion itself is

perverse or illegal or has resulted in causing miscarriage of justice. The High Court does not sit in appeal over the decisions of the authorities. A mere wrong decision without anything more is not enough to attract the power of judicial review. The Court is more concerned with the decision-making process than the merit of the decision itself. If the authority passing the order has requisite jurisdiction under the law to do so and there is no procedural impropriety, irrationality, malafideness or illegality in the order, the High Court should exercise restraint and should not interfere with the order in the larger public interest.

27. Adverting to the contentions raised by the learned counsels for the respective parties, section 5(1) of the 2006 Act makes it crystal clear that if the State Government is of the opinion that there is prima facie evidence of the commission of an offence (defined under section 2(d) of the '2006 Act') alleged to have been committed by a person, who held 'high public or political office' in the State of Orissa, the State Government shall make a declaration to that effect in every case in which it is of the aforesaid opinion. Section 5(2) of the 2006 Act provides that such declaration shall not be called in question in any Court.

The preamble to the 2006 Act, inter alia, indicates that it has been enacted to take appropriate action against the persons who are holding high political and public offices and have accumulated vast property disproportionate to their known source of income by resorting to corrupt means and to establish Special Courts for the speedy termination of the trials and for final determination of guilt or innocence of the persons to be tried without interfering with the right to a fair trial.

Even though 'person holding high public office' has not been defined in the 2006 Act and the definition as enumerated in section 2(e) of the 2007 Rules cannot be read as a part of the 2006 Act as there is no such provision in the 2006 Act which says that the rules on being made shall be deemed "as if enacted in the Act" and section 24 of the 2006 Act merely states that the State Government may, by notification, make such rules, if any, as it may deem necessary for carrying out the purposes of this Act, it will not create a dent in the provision as in view of the ratio laid down in **Yogendra Kumar Jaiswal** (supra), the words 'high public or political office' are absolutely certain, convey a category of public servants which is well understood and there is no room for arbitrariness.

The appellant in CRLA No. 392 of 2012 was the Ex-General Manager, Orissa Mining Corporation Ltd., Daitary Iron Ore Project, Keonjhar and the appellants in CRLA No. 491 of 2013 and CRLA No. 555 of 2012 are the Ex-Executive Engineers thus holding such top position, they were wielding large powers and they being Special Class Officers were in a position to take major decisions regarding economic and financial aspects of the project/assignments and therefore it seems that there was no difficulty on the part of the State Government to hold that the appellants were holding 'high public office' in the State of Orissa. The guidelines laid down in the preamble is clear and there is no vagueness or ambiguity in the

same and therefore the decision of the State Government after scrutinizing the materials that the appellants while holding 'high public office' committed the offence does not suffer from arbitrariness. Since charge sheet was submitted against the appellants under sections 13(2) read with 13(1)(e) of 1988 Act and cognizance of offence has been taken, the opinion of the State Government that there is prima facie case of the commission of the offence cannot be faulted with and it cannot be contended that the declaration made by the State Government in consonance with Section 5 of the 2006 Act suffers from any illegality. Once the declaration under Section 5(1) of 2006 Act is made, the prosecution has to be instituted in the Special Court which is the mandate of Section 6(1) of the 2006 Act and accordingly the same has been done and the proceedings are pending in the Court of Special Judge, Special Court, Cuttack for trial in T.R. Cases. Similarly no illegality is found in the approach of the Public Prosecutor in making an application under Section 13 of the 2006 Act for confiscation being authorized by the State Government after being satisfied with regard to the aspects enumerated in sub-section (2). Prayer made by the learned counsel for the appellants for giving liberty to file fresh applications before the learned Authorised Officer for ventilating their grievance, according to my estimation is a delaying tactics which should not be encouraged.

28. In view of the above discussions, I am of the view that there is no infirmity in the impugned orders of the learned Authorized Officer, Special Court, Cuttack in rejecting the petitions filed by the delinquents challenging the maintainability of the confiscation proceedings.

Accordingly, the Criminal Appeals being devoid of merits stand dismissed.

The Authorized Officer, Special Court, Cuttack shall do well to expedite the confiscation proceedings and after giving fair opportunities to the respective sides to present their case, shall do well to dispose of the proceedings within a period of six months from the date of receipt of the order by taking up the cases day to day basis.

This Court passed orders for interim stay of further confiscation proceedings which were extended from time to time. In view of the dismissal of the Criminal Appeals, interim orders of stay of further proceeding stand automatically vacated. Let a copy of the judgment be sent down to the concerned Authorized Officer for necessary action at his end.

Appeals dismissed.

2016 (II) ILR - CUT- 667

S. N.PRASAD, J.

W.P.(C) NO. 28774 OF 2011

REGIONAL PROVIDENT FUND COMMISSION ……..Petitioner

.Vrs.

ORISSA STATE ROAD TRANSPORT CORPORATION & ANR. ……..Opp. Parties

EMPLOYEES PORVIDENT FUNDS AND MISCELLANOUS PROVISIONS ACT, 1952 – Ss. 7- I, 14-B

Delayed remittance of E.P.F. dues by O.P. No1-Corporation – Notice issued upon the corporation for imposition of damages – Competent authority after hearing levied damages U/s. 14-B of the Act read with Para 32A of the Scheme – Corporation challenged the same in appeal before the Tribunal U/s. 7-I of the Act – Tribunal remitted the matter to the EPF authority with a direction to assess the dues @17% inclusive of interest, there by reducing the rate of damages – Hence the writ petition – Whether the learned Tribunal in exercise of the powers conferred U/s. 7-I of the Act, 1952 has got power to go beyond the statute ? Held, No. – Tribunal has never been conferred with any power to sit over the statutory provisions – Held, the learned Tribunal has exceeded its jurisdiction in passing the impugned order by remitting the matter back to the authority to assess the rate of damage @ 17% per annum, which is not sustainable in law, hence quashed.

(Paras 15,18,19)

Case Laws Referred to :-

1. 2005(I) SCC 368 : State of Jharkhanda v. Ambay Cements & anr.
2. (2015) 7 SCC 690 : Zuari Cement Ltd. v. Regional Director, E.S.I. Corporation and another,
3. AIR 1954 SC 322 : Rao Shiv Bahadur Singh v. State of U.P.
4. AIR 1961 SC 1527 : Deep Chand v. State of Rajasthan
5. AIR 1964 SC 358 : State of U.P. v. Singhara Singh
6. (1993) 3 SCC 422 : Babu Verghese and others v. Bar Council of Kerala & ors.

For Petitioner : M/s. S.K.Das, B.C.Pradhan & S.P.Mohanty
For Opp. Parties : Mr.A.K.Mohanty-A, R.K.Behera & R.K.Pradhan

Date of Judgment : 21.07.2016

JUDGMENT

S.N.PRASAD, J.

The Regional Provident Fund Commissioner, being the petitioner, has filed this writ petition seeking to quash the order dated 29.07.2010 passed by the Employees Provident Fund Appellate Tribunal, New Delhi in ATA No.248(10) of 2006.

2. The short fact of the case of the petitioner is that the Orissa State Road Transport Corporation (OSRTC), Sambalpur was covered under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter to be referred to as the "Act, 1952", in short) bearing Code No.OR/1374, but failed to remit the PF dues within due dates granted under the statute and accordingly, notice was issued upon the Corporation under Sections 14B and 7Q of the Act, 1952 for assessment for the periods from 3/1983 to 9/1991 and 3/1995 to 2/1997 along with details of the belated remittance of the payments. In response to the said notice, the Divisional Manager of the establishment appeared and admitted the delay reason being was not intentional. Accordingly, the competent authority has passed order on 27.05.2004 levying damages of Rs.69,063.00 under Section 14-B and nil amount under Section 7Q of the Act, 1952. Assessment was done as per Para 32A of the Employees Provident Fund Scheme, 1952 (hereinafter to be referred to as the "Scheme, 1952"). Opposite party- Corporation challenged the same before the appellate Tribunal as per Section 7I of the Act, 1952 and the said appeal has been registered as ATA No. 249 (10) of 2006. The appellate authority remitted the matter back to the petitioner with a direction to assess the dues @ 17% inclusive of interest. The petitioner aggrieved with the order passed by the appellate authority is before this Court in the present writ petition inter alia challenging on the ground that the rate of damages, which is to be levied under Section 14B of the Act, 1952 has been fixed as per Para 32A of the Scheme, 1952 with effect from 1.9.1991 and as such, since the rate of damages has been provided under the statute, the Tribunal, who is only the fact finding authority, cannot go beyond the statute. It has also been contented by the learned counsel for the petitioner that the authority is duty bound to assess the quantum of damage in view of the specific provision as contained in Para 32A, which has been implemented w.e.f. 1.9.1991.

3. After being noticed, opposite party-Corporation appeared and filed counter affidavit. Learned counsel representing the opposite party-Corporation has submitted that the learned Tribunal has not committed error in passing the order and taking into consideration the situation, which the

Corporation was facing at that time and taking a lenient view, the learned Tribunal has reduced the assessment to 17%, which is not contrary to rule and does not suffer from illegality. Learned counsel for the opposite party-Corporation has placed reliance upon one letter issued on 29.5.1990 in which reference has been made regulating levy of damages at the revised rates in respect of all defaults arising on and after 1.6.1990, i.e. defaults arising in the payment of dues for the month of May 1990 onwards subject to the condition as specified in the preceding paragraphs. Placing reliance on the same, it has been submitted the Tribunal has not committed any error and as such, the writ petition is not worthy to be considered and accordingly, is fit to be dismissed.

4. Learned counsel representing the Corporation has submitted that Para 32B provides that the authority can reduce or waive the damages levied under Section 14B. Rebutting this argument, learned counsel representing the petitioner has submitted that there is no question of application of the provisions of Para 32B of the Scheme, 1952 since Para 32B is applicable with respect to the second proviso to Section 14B of the Act, 1952.

5. Heard learned counsel for the parties and after going through the records available with the pleading, the sole question, arises for consideration is as to

> *Whether the learned Tribunal in exercise of the powers conferred under Section 7I of the Act, 1952, has got power to go beyond the statute ?*

6. In order to answer this question, it is necessary to refer to the provision of Section 7I of the Act, 1952, which is as under:

> *"7 –I. Appeals to the Tribunal. – (1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government, or any authority, under the proviso to sub-section 3, or sub-section4, of section I, or section3, or sub-section 1 of section 7A, or section 7B except an order rejecting an application for review referred to in sub-section 5 thereof, or section 7C, or section 14B may prefer an appeal to a Tribunal against such order.*
> *(2) Every appeal under sub-section 1 shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed."*

Section 7L of the Act, 1952, which is being referred, is as hereunder:

7L. Orders of Tribunal. – (1) A Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against or may refer the case back to the authority which passed such order with such directions as the tribunal may think fit, for a fresh adjudication or order, as the case may be, after taking additional evidence, if necessary.

(2) A Tribunal may, at any time within five years from the date of its order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section 1 and shall make such amendment in the order if the mistake is brought to its notice by the parties to the appeal: Provided that an amendment which has the effect of enhancing the amount due from, or otherwise increasing the liability of, the employer shall not be made under this sub-section, unless the Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

(3) A Tribunal shall send a copy of every order passed under this section to the parties to the appeal.

(4) Any order made by a Tribunal finally disposing of an appeal shall not be questioned in any court of law."

7. Para 32A of the Scheme, 1952 is quoted as hereunder:

"32A. Recovery of damages for default in payment of any contribution (1) Where an employer makes default in the payment of any contribution to the fund, or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 of the Act or in the payment of any charges payable under any other provisions of the Act or Scheme or under any of the conditions specified under section 17 of the Act, the Central Provident Fund Commissioner or such officer as may be authorised by the Central Government by notification in the Official Gazette, in this behalf, may recover from the employer by way of penalty, damages at the rates given below:—

	Period of default	*Rate of damages (% of arrears per annum)*
(a)	*Less than two months*	*17*
(b)	*Two months and above but less than four months*	*22*
(c)	*Four months and above but less than six months*	*27*
(d)	*Six months and above*	*37*

(2) The damages shall be calculated to the nearest rupee, 50 paise or more to be counted as the nearest higher rupee and fraction of a rupee less than 50 paise to be ignored."

8. On perusal of the provisions as contained in Section 7I, it is evident that any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government, or any authority, under the proviso to sub-section 3, or sub-section 4, of section I, or section 3, or sub-section 1 of section 7A, or section 7B except an order rejecting an application for review referred to in sub-section 5 thereof, or section 7C, or section 14B may prefer an appeal to a Tribunal against such notification or order.

9. Section 7L also provides that the Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against or may refer the case back to the authority which passed such order with such directions as the Tribunal may think fit, for fresh adjudication or order, as the case may be, after taking additional evidence, if necessary. Thus, it is evident that the Tribunal has been vested with the power to confirm, modify or annul the order appealed against or remit the matter for fresh adjudication or order, as the case may be. In exercise of the powers conferred by sub-section (1) of Section 21 of the Act, 1952, the Central Government has made the rule known as "Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997.

10. So far as the case in hand is concerned, the factual position, which is not in dispute is that the Corporation which is coming under the purview of the Act, 1952 has defaulted in depositing the statutory contribution in the PF account and as such proceeding under Section 14B and 7Q has been initiated and the authorities after hearing the establishment passed order determining the damages due from the establishment under the Act, 1952. The

Corporation being aggrieved with the decision of the authority dated 27.05.2004 has preferred an appeal before the EPF Tribunal taking therein the ground that the Corporation had sustained huge loss and as such, the delay in deposit of the contribution was not intentional rather it is due to the situation beyond its control and taking into consideration this aspect of the matter, the Tribunal has passed the following order:

> *"Hence, assessing the penalty and interests on the higher side does not appear to be proper one. The appeal is to be remanded. The authority is directed to assess the liability @ 17% inclusive of the interests. The appellant is directed to appear before the authority from the date of this order within one month, failing which, the matter may be decided as per law. File be consigned to the record room. Copy of the order be sent to the parties.*

The petitioner being aggrieved with the order regarding direction to assess the dues @ 17% inclusive of interest is before this Court on the ground that the Tribunal has got no jurisdiction to sit over the statutory provision.

11. On perusal of the provisions as contained in Section 14B, it is evident that the said statute has provided in a situation when the employer makes default in payment of any contribution to the Fund and the provision for fixing the quantum of damages as per Para 32A, which has been implemented with effect from 1.9.1991 wherein specific rate of damages (percentage of arrears per annum) has been provided.

12. Argument has been advanced on behalf of the learned counsel representing the opposite party-Corporation that the authority has resorted to the provisions made in Para 32B and according to him, the Tribunal by following the provisions as contained in Para 32B has rightly passed the order.

13. After a close scrutiny of the provisions as contained in Para 32B, it is evident that the provisions contained therein provides the power to the Central Board to reduce or waive the damages levied under Section 14B of the Act, 1952 in relation to the establishments specified in the second proviso to Section 14B subject to certain terms and conditions. From a bare perusal of the second proviso to Section 14B, it is evident that the said provision confers power upon the Central Board to reduce or waive damages levied under this Section in relation to an establishment, which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction

(BIFR) established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, but this is not the case of the opposite party-Corporation, which was ever been declared as a sick industrial company by the BIFR and as such, there is no question of application of the provisions of Para 32B of the Scheme, 1952.

14. There is no dispute about the fact that the Court of law or the Tribunal or quasi judicial authority is expected to follow the statute and they are duty bound to follow it. The Act, 1952 being a Central Act has been promulgated to provide the benefit to the down trodden people being a beneficial legislation. In order to implement the provisions of the Scheme in a proper manner, power has been conferred upon the competent authority under Section 5 to frame a Scheme. In pursuance to the power conferred under Section 5 of the Act, 1952, the Central Government promulgated a provision under the Scheme, 1952 containing therein Para 32A, which provides the procedure to assess the rate of damages percentage wise per annum. Thus, the Scheme, 1952 has a statutory force and as such, the same is to be followed in its letter and spirit.

15. The opposite party-Corporation has challenged the order passed by the competent authority under Section 14B of the Act, 1952 stating therein that the rate of percentage of damages may be reduced considering the precarious financial condition of the Corporation and accepting the said contention, the Tribunal by exceeding its jurisdiction has modified the order passed by the competent authority by giving a go bye to the statutory provision as contained in Para 32A of the Scheme, 1952. Thus, there is no doubt in my mind that the Tribunal has never been conferred with any power to sit over the statutory provision on whatsoever ground may be, otherwise, there will be no sanctity of the statutory provision. Moreover, it is not the duty of the Court or Tribunal to sit over the statutory provision, rather it is the duty of the Court of law to see as to whether the order passed is in accordance with law and certainly if the order is not in accordance with law, the Tribunal or Court of law has got power to rectify the same in consonance with the statute or direct the authorities to rectify the mistake, but in no circumstances, the Court of law or Tribunal can sit over the statutory provision on the basis of sympathy. To note here that in our democratic system, Parliament and Legislature are supreme and once the rule making body has framed a Rule, the Court is to see that the rule of law is to be followed. But without considering this, the Tribunal has passed order travelling beyond the statute as provided under Para 32A of the Scheme,

1952. Further, on perusal of the powers conferred under Section 7I, 7L or even under Rules,1997 no such power has been conferred upon the Tribunal. The Tribunal is only to see the fact whether there is any error in the fact finding or not and not by calling upon the witnesses or evidence assuming the power of a Civil Court, but no where it has been reflected in the statute that the Tribunal can go beyond the statute.

16. There is no dispute about the fact that if the manner of doing a particular act is prescribed in any statute, the act must be done in that manner. Reference in this regard may be made to the judgment rendered by the Apex Court rendered in **State of Jharkhanda v. Ambay Cements and another,** 2005(I) SCC 368 wherein it has been held that it is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way.

17. In **Babu Verghese and others v. Bar Council of Kerala and others,** (1993) 3 SCC 422 their Lordships of the Apex Court has been pleased to hold as under:

> *"31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all."*

18. The aforesaid principle has since been approved by the Apex Court in **Rao Shiv Bahadur Singh v. State of U.P.**, AIR 1954 SC 322 and in **Deep Chand v. State of Rajasthan,** AIR 1961 SC 1527. These two cases have again been considered by the Apex Court in the case of **State of U.P. v. Singhara Singh**, AIR 1964 SC 358. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognized as a salutary principle of administrative law. In this respect, reference may also be made to the judgment rendered by the Apex Court in the case of **Zuari Cement Ltd. v. Regional Director, E.S.I. Corporation and another**, (2015) 7 SCC 690 and in paragraph 15, it has been held as follows :

> *"15. Where there is want of jurisdiction, the order passed by the Court/ tribunal is a nullity or non-est. What is relevant is whether the Court had the power to grant the relief asked for. ESI Court did not have the jurisdiction to consider the question of grant of exemption, order passed by the ESI Court granting exemption and consequently setting aside the demand notices is non-est. The High Court, in our view, rightly set aside the order of ESI Court and the impugned*

judgment does not suffer from any infirmity warranting interference."

19. In view of the aforesaid settled proposition of law, in my considered view, the Tribunal has exceeded its jurisdiction in passing the order impugned by remitting the matter back to the authority to assess the rate of damage @ 17% per annum. Accordingly, the impugned order being not sustainable, is quashed.

20. The writ petition stands allowed. No costs.

Writ petition allowed.

2016 (II) ILR - CUT- 675

K. R. MOHAPATRA, J.

FAO NO. 217 OF 2014

M/S. MIDEAST INTEGRATED STEELS LTD. ……..Appellant

.Vrs.

M/S. KHATAU NARBHERAM & CO. ……Respondent

CIVIL PROCEDURE CODE, 1908 – O-39, R-1 & 2

Temporary injuction – Application rejected by the trial court for suppression of material facts – Hence this appeal – Applicant has to make honest disclosure of relevant statements of facts, otherwise it would amount to an abuse of the Process of the Court – As per clause-196 of General Rules and Circular Orders (GRCO) (Civil) Vol-1, every application for injuction must be supported by affidavit and all material facts must be fully and fairly stated without any concealment – In this case the plaintiff-appellant having suppressed material facts and having not come to the Court with clean hands, he is not entitled to the equitable relief i.e. grant of temporary injuction – Held, there is no illegality in the impugned order calling for interference by this Court.

(Paras 17,18

Case Law Relied on :-

1. AIR 1992 Delhi 197 : M/s. Seemax Construction (P) Ltd. -V- S.B.I. & Anr.

Case Laws Referred to :-

1. AIR 1970 SC 504 : M.C.Chacko -V- State Bank of Travancore, Trivandrum
2. AIR 1993 SC 276 : Dalpat Kumar & Anr. -V- Prahlad Singh & Ors.

For Appellant : Mr. Sanjeet Mohanty, Sr. Advocate
M/s.D.Mohanty, S.C.Samantray, R.R.Swain & S.P.Panda

For Respondents : M/s. Dipak Kumar Dey & C.K.Dey

Date of Judgment: 15.10.2015

JUDGMENT

K.R. MOHAPATRA, J.

Order dated 31.01.2014 passed by the learned Civil Judge (Senior Division), Champua in CMA No.45 of 2013 arising out of CS No.61 of 2013 rejecting an application under Order 39 Rules 1 and 2 of C.P.C. filed by the plaintiff is under challenged in this appeal.

2. Civil Suit No.61 of 2013 has been filed for declaration and permanent injunction. The dispute is in respect of a 30 feet wide road connecting Roida-I iron ore mines with NH 215 running through the leasehold area of in Roida-II iron ore mines of the sole defendant (for short, 'the suit road').

Case of the plaintiff in brief is that defendant was the lessee in respect of Roida-I and Roida-II iron ore mines since 23.01.1953. The said lease was for thirty years, i.e., up to 22.01.1983. First renewal of mining lease was granted in favour of the defendant in respect of both Roida-I and Roida-II iron ore mines for a period of 20 years, i.e., from 23.01.1983 to 22.01.2003. On 16.09.1994, the defendant made an application under Rule 37 of the Mineral Concession Rules, 1960 ('Rules 1960' for short) for transfer of the mining lease of Roida-I iron ore mines in favour of the plaintiff for the remaining period of the lease. On 20.05.1996, the Central Government conveyed its approval for transfer of Roida-I in favour of the plaintiff. Accordingly, the transfer deed in Form 'O' was executed between the plaintiff, the defendant and Government of Odisha on 31.10.1996 for the remaining period, i.e., up to 22.01.2003. Clause-6 of the deed of transfer stipulates that all the rights and interests in the original mining lease in respect of Roida-I iron ore mines was transferred to the plaintiff on the same terms and conditions as was prevailing. Before expiry of the period of lease, the plaintiff submitted an application for second renewal on 25.11.2002 under Section 8(3) of the Mines and Minerals (Development and Regulation) Act, 1957 (for short, 'MMDR Act') and as per the provisions of Rule 24A(6) of

the Rules, 1960, the mining lease was deemed to have been extended. As such, the plaintiff continued to carry out mining operation. It is contended by the plaintiff that in the year 1997, the defendant blocked the suit road which was reported to the Deputy Director of Mines, Joda. Deputy Director of Mines, Joda vide order dated 20.05.1997, directed the defendant to allow access for movement of carriers of the plaintiff on the suit road. Again on 27.11.2013, the defendant attempted to block the suit road disrupting the mining activities and lodged an FIR against the officials of the plaintiff. Hence, the suit was filed for the aforesaid relief. Reiterating the assertions made in the plaint, the plaintiff filed CMA No.45 of 2013 for an order of temporary injunction restraining the defendant and any other person claiming under it from creating any type of blockage over the suit road and interference with the peaceful use of the suit road by the plaintiff till disposal of the suit.

3. The defendant on appearance filed its show cause though admitting the lease of Roida-I mines in favour of the plaintiff with effect from 31.10.1996, but refuted the existence of the suit road and its use by the plaintiff. It is contended by the defendant that the suit road existed prior to the transfer of the mining lease of Roida-I iron ore mines in favour of the plaintiff, but the same is no more in existence. As the said area upon which the suit road existed is under the operational area to carry out the mining activities as per the mining plan approved by the competent authority, i.e., Indian Bureau of Mines (IBM), access through the operational area of Roida-II mines, as claimed by the plaintiff, is not permissible under law. The defendant further contended that the plaintiff had no access to the suit road through Roida-II iron ore mines at any point of time since the date of transfer made in October, 1996. Though the plaintiff had made a complaint before the DDM, Joda regarding alleged refusal of the defendant for an access of the plaintiff through Roida-II mines in the year 1997, the DDM, Joda only made a request to allow access for movement of carriers through the suit road, since such an arrangement was not viable in terms of the provisions under the MMDR Act as well as the Rules made there under, the request was never heeded to by the defendant. From the date of transfer of the mining lease in favour of the plaintiff in respect of Roida-I iron ore mines, it has been using the road running from pillar No.29 to have an access to NH 215, which is apparent from the contentions of the plaintiff in W.P.(C) Nos. 1402 of 2011 and 23722 of 2011 in relation to the user of their existing road and on the basis of such contention and pleadings, interim orders were passed in favour of the plaintiff. It was the further case of the defendant that when the plaintiff

faced difficulty in using the road from pillar No.29 to NH 215 they attempted to construct a road from pillar No.21-A in Roida-II iron ore mines of the defendant for an approach to NH 215 on or about 06.07.2011, which was objected to by the defendant. The defendant lodged a complaint before the Forest Range Officer and in response thereto a notice to show cause was issued to the plaintiff vide Memo No.831 dated 21.07.2011. Thereafter, the plaintiff keeping silence over the matter for some time, again on or about 28.11.2013 as well as 16.12.2013 attempted to trespass into the defendant's leasehold area and cause obstruction in the mining activities for which an FIR was lodged against the plaintiff in Barbil Police Station and a criminal proceeding was initiated against the plaintiff. Thus, the defendant claimed that the plaintiff had neither any *locus standi* nor any cause of action to file the petition for temporary injunction. The same is also not maintainable in the eye of law and facts. As such, the defendant prayed for dismissal of the same.

4. Learned Trial Court while holding that the plaintiff/appellant has *prima facie* case, came to a conclusion that the question of plaintiff's suffering irreparable loss does arise and the balance of convenience leans in favour of the defendant. Accordingly, he dismissed the petition vide order dated 31.01.2014, which is under challenge in this appeal.

5. Learned counsel for the plaintiff/appellant reiterating the pleadings in the plaint submitted that the Hon'ble Supreme Court in W.P.(C) No.114 of 2014 held that the provision of deemed renewal in Rule 24A(6) of the Rules, 1960 is not available for the second and subsequent renewals of mining lease considering the language of Section 8(3) of the MMDR Act. Accordingly, vide Gazette Notification dated 18.07.2014, the Central Government amended Rule 24A(6) of Rules 1960 stating that the provision of sub-rule (6) was not applicable to renewal under sub-Section (3) of Section 8 of the MMDR Act. Thus, the deemed extension of Roida-I iron ore mines in favour of the plaintiff came to an end on 18.07.2014. However, the Government of India promulgated the Mines and Minerals (Development and Regulation) Amendment Ordinance, 2015 published in Gazette of India on 12.01.2015 and subsequently, Section 8 of the MMDR Act was amended and it was published in the Gazette of India on 27.03.2015. Section 8A(6) of the MMDR Amendment Act, 2015 provided as under:-

> 8A(6) Notwithstanding anything contained in sub-sections (2), (3) and sub-section (4), the period of lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, where mineral is used for other

> than captive purpose, shall be extended and be deemed to have been extended up to a period ending on the 31st March, 2020 with effect from the date of expiry of the period of renewal last made or till the completion of renewal period, if any, or a period of fifty years from the date of grant of such lease, whichever is later, subject to the condition that all the terms and conditions of the lease have been complied with.

Pursuant to the amended provision of Section 8A(6) of the MMDR Amendment Act, 2015, the mining lease in respect of Roida-I iron ore mines stood extended in favour of the plaintiff till 31.03.2020. Accordingly, the State Government granted extension of the period of mining lease in respect of Roida-I mines from 22.01.2003 to 31.03.2020. He further contented that the lease was extended up to 2020 on the same terms and conditions as was in existence on the date of transfer, i.e., 31.10.1996. Thus, the plaintiff has the right to use the suit road for movement of his carrier and for other purposes. The alleged existence of another road from pillar No.29 was unauthorized and not approved one. The said road proceeds through the reserve forest and this Court vide order dated 29.09.2011 directed the plaintiff/appellant to approach the competent authority for necessary permission to use the said road from pillar No.29 for access to NH 215. Pursuant to the direction of this Court, Divisional Forest Officer, Keonjahr used to grant temporary permissions for use of that road from time to time. The map attached to the plaint indicates that the suit road is in existence since 1953 as per the land use plan approved by the Ministry of Environment and Forest, Government of India, New Delhi. The said approved road (suit road) existed prior to 30.10.1996, i.e., from 11.11.194, when the Forest (Conservation) Act, 1980 came into force. Thus, denial of the defendant with regard to existence of suit road is not correct and is contradictory to the approved plan of the year 1994 filed along with the plaint. Learned counsel for the appellant further contented that the learned Trial Court rejected the interim application only on the ground that the plaintiff had admitted of road from pillar No.29 as the only road to approach NH-215. It is his submission that 'a road' means a road lawfully permitted to be used as such. An unlawfully constructed road cannot be treated to be an alternative road in existence. Moreover, prosecution is pending against the plaintiff for such illegal construction of road snitched down near pillar No.29. As such, the plaintiff has a right of user of the suit road which is existing since 1953 and was being used by the defendant till 1996 and thereafter by the plaintiff. The plaintiff has been using the said road since 1996 as the dominant heridtment

over the servient heritage for the beneficial use of enjoyment of the dominant owner. Moreover, in view of the transfer of lease of Roida-I mines in favour of the defendant in the year 1996, which was valid up to 2003, the plaintiff had the right to use the suit road as such for the rest of the extended period of lease, i.e., up to 2003 and thereafter. Clause-6 of Chapter-III in Form-K under the Rules 1960 gives a right of use of road to the plaintiff as that of the original owner. The plaintiff also claims the right of easement over the suit road. Learned counsel for the appellant further contended that Clause-6 of Chapter-III of mining lease deed has its source from Rules 1960. The mining lease deed is a statutory deed and as such the defendant has no right of denying or obstructing the right of way/easement. The right of easement created in favour of the plaintiff cannot be terminated by the defendant because he is only a lessee and not the owner of the suit road. The plaintiff has no other approved road except the suit road approved by the Ministry of Environment and Forest as per the sketch map attached to the plaint and it only claims to pass through the approved road and not beyond that. Further, defendant had acquired the prescriptive right by long use of the road. The plaintiff has a right to access to NH 215 through the suit road even if there exists an alternate road carved out by it. Learned Court below failed to appreciate that except the suit road, the plaintiff has no other road for access to NH 215 and by not granting right of easement or access to NH 215 through the suit road the entire mining activities of the plaintiff is closed. Three hundred fifty employees of Roida-I mines would be retrenched and the integrated steel plant would be shutdown. Thus, he prayed for setting aside the impugned order as not sustainable in the eye of law and facts.

6. Mr.Dey, learned counsel for the respondent, on the other hand, refuted the contentions of learned counsel for the appellant and submitted that the learned Trial Court has rightly dealt with the matter in detail and passed the impugned order which needs no interference by this Court. It is his case that a mining leaseholder like the present defendant has to carry out the mining operation in accordance with the Approved Mining Plan (AMP) and in the present case, the area of Roida-II iron ore mines of the defendant/respondent upon which the plaintiff claims right of use as a road does not exist and the same is within the operational area of the mining by the defendant as per the AMP and the plaintiff cannot be allowed to use the same as road in view of the provisions of law, more particularly in view of Rule 22A, Rule 27 (1)(u) of the Rules, 1960 and Rule 13 of the Mineral Conservation and Development Rules, 1988 (for short, 'Rules 1988'), which read as follows:-

"22A. Mining operations to be in accordance with Mining Plans. – (1) Mining operations shall be undertaken in accordance with the duly approved mining plan.

(2) Modification of the approved mining plan during the operation of a mining lease also requires prior approval."

Rule 27 (1)(u) of the MC Rules, 1960:-

"Conditions. –(1) Every mining lease shall be subject to the following conditions :

xx xx xx

(u) the lessee shall comply with the Mineral Conservation and Development Rules framed under section 18."

Rule 13 of the Mineral Conservation and Development Rules, 1988:-

"13. Mining operations to be in accordance with mining plans : - (1) Every holder of a mining lease shall carry out mining operations in accordance with the approved mining plan with such conditions as may have been prescribed under sub-rule (2) of rule 9 or with such modifications, if any, as permitted under rule 10 or the mining plan or scheme approved under rule 11 or 12 as the case may be. (2) If the mining operations are not carried out in accordance with the mining plan as referred to under sub-rule (1), the Regional Controller or the authorised officer may order suspension of all or any of the mining operations and permit continuance of only such operations as may be necessary to restore the conditions in the mine as envisaged under the said mining plan."

Thus, allowing such an access, as claimed by the plaintiff, is neither permissible under law nor on facts, inasmuch as allowing such an access would result in causing substantial hindrance to the mining operation of the defendant and it would attract penal provision of suspension of mining operation as envisaged under Rule 13(2) of Rules, 1988. Moreover, there cannot be a scheduled road in a mining area. Although declaratory relief of injunction is made in the suit it is not clear as to whether the plaintiff raises his claim for getting the relief prayed for in exercise of right of easement or for enforcement of the terms and conditions of lease agreement. However, the plaintiff is neither entitled to the relief under easement or for that purpose enforcing his right over the suit road under the terms and conditions of the lease agreement. Hence, he claimed that the learned Trial Court has rightly

considered the matter from its proper perspective and passed the impugned order, which needs no interference and prayed for dismissal of the appeal.

7. It is not disputed that the defendant was a lessee in respect of Roida-I iron ore mines for a period of thirty years from 23.01.1953 to 22.01.1983. The first renewal of the mining lease in favour of the defendant was granted for a period of twenty years, i.e., from 23.01.1983 to 22.01.2003. The defendant / respondent was also granted lease of Roida-II iron ore mines, which adjoins the northern and eastern part of Roida-I iron ore mines. While continuing as such, the defendant transferred the mining lease in respect of Roida-I iron ore mines in favour of the plaintiff for which the State Government granted approval in terms of Rule 37 of the Rules, 1960. A tripartite deed of transfer dated 31.10.1996 was executed between the defendant as the transferor, plaintiff as the transferee and the Government of Odisha represented through the Collector, Keonjhar. Upon execution of the deed of transfer, the plaintiff stood on the footing of the transferor/lessee, i.e., the defendant, with all rights and liability appended to the said lease in respect of Roida-I mines on and from 31.10.1996 for the rest of the period of lease. Prior to such transfer, the defendant, being the lessee of both Roida-I and Roida-II iron ore mines, for its own convenience had constructed a road for transporting minerals and for other ancillary mining activities from Roida-I mines through Roida-II iron ore mines to get an access to NH 215, which is apparent from the sketch map of 1994 appended to the plaint and relied upon by the appellant in course of hearing of this appeal. Prior to expiry of the lease in respect of Roida-I mines, which was valid up to 22.01.2003, the plaintiff submitted his second renewal application on 25.11.2002 under Section 8(3) of the MMDR Act and in view of the deeming provisions of Rule 24A(6) of the Rules, 1960 (as was existing then) and pursuant to the operation of amended provisions of 8A(6) of the MMDR Amended Act, 2015, the lease in respect of Roida-I mines in favour of the plaintiff is valid up to 31.03.2020. There is also no dispute to the fact that the plaintiff had filed W.P.(C) No.1402 of 2011, which was disposed of on 25.01.2011 and W.P.(C) No.23722 of 2011 (sub judice before this Court), wherein, he has asserted that the only road for access from Roida-I iron ore mines to NH 215 is from pillar No.29 of Roida-I mines though Sidha Math reserve forest, which is being used by the plaintiff from the date of their mining operation and the suit road was constructed in the year 1964. On the basis of such assertion on oath by the plaintiff, interim order was granted on 29.09.2011 in Misc. Case Nos. 13641 and 13642 of 2011 arising out of W.P.(C) No.23722 of 2011, which read as follows:-

> "As an interim measure, it would be just and proper for this Court to direct the petitioner-company to seek permission from the O.P. No.4 to transport the raw materials in the road touching the point No.29 which leads to N.H.-215 as has been shown in the map without affecting the diversion of forest area till the end of October, 2011."

8. During course of argument, learned counsel for the appellant submits that the said road is being used by the plaintiff till date on temporary permissions. It is also not disputed that the plaintiff has come up with a definite case in the suit that the suit road which runs through Roida-II mines is the only road available for access of the plaintiff to NH-215 from Roida-I mines. However, learned counsel for the appellant admitting the same contended that the assertions made in the aforesaid two writ petitions were on a different context and the road which is existing from pillar No.29 of Roida-I mines to have an access to NH-215 is an un-approved road which runs through the reserve forest for which the plaintiff is facing prosecution. However, Mr.Dey, learned counsel for the respondent strongly refuting such submission alleges that existence of a relevant fact will not lose its relevancy, if made, in different context.

9. The plaintiff specifically pleaded in the plaint as well as in the petition for interim injunction that the plaintiff is using the suit road from the date of execution of the deed of transfer of lease dated 31.10.1996 and the same is the only access of the plaintiff to NH-215. The defendant obstructed the plaintiff from using the suit road for which the plaintiff represented to the DDM, Joda, who in his letter dated 20.05.1997, communicated the defendant stating that the plaintiff has the right and privilege to use the suit road and the defendant should allow free access for movement of carriers through the said road over Roida-II iron ore mines under the provisions of mining lease dead (annexure-3 to the appeal). On perusal of the said letter, it appears that only a request was made to the defendant to allow access for free movement of carriers through the existing road over Roida-II mines under the provisions of the mining lease deed. It is further contended that the defendant again created obstruction on 27.11.2013 and also filed FIR against the officers of the plaintiff for disrupting mining activities of the defendant, for which the suit was filed. The defendant/respondent on the other hand, strongly refuting such contentions of the plaintiff/appellant submitted that the plaintiff had never used the suit road for movement of its carriers. On the other hand, it only used the road starting from pillar No.29 to NH-215 for its mining activities. This being the factual dispute can only be adjudicated at the time of trial.

However, the fact remains that the plaintiff with prior permission of the Forest Department is using the road starting from pillar no.29 to have an access to N.H.-215.

10. The appellant strongly relied upon Clause-6 of Chapter-III in Form-K of Rules, 1960, which is the prescribed form of the mining lease deed and claimed that it has a right to use the suit road in view of the terms and conditions embodied in the said mining lease deed. Clause-6 of Chapter-III in Form-K reads as follows:-

> "6. The lessee/lessees shall allow existing and future holders of Government licences or leases over any land which is compromised in or adjoins or is reached by the land held by the lessee/lessees reasonable facilities of access thereto:
>
> PROVIDED THAT no substantial hindrance or interference shall be caused by such holders of licences or leases to the operations of the lessee/lessees under these presents and fair compensation (as may be mutually agreed upon or in the event of disagreement as may be decided by the State Government) shall be made to the lessee/lessees for loss or damage sustained by the lessee/lessees by reason of the exercise of this liberty."

11. Mr.Dey, learned counsel for the respondents drawing attention of this Court to the opening words of the said clause submitted that, the words "the lessee/lessees shall allow…" clearly indicate that the claim of the appellant is based on the terms of lease deed and not the deed of transfer (annexure-2 to the appeal). He further submitted that the benefit granted under Clause-6 for access over the leasehold area of the respondent is not an absolute privilege as may be evident from Clasue-6 itself since the same is qualified by the proviso thereto. The said proviso has two limbs, i.e., (i) no substantial hindrance or interference shall be caused to the respondent and (ii) a fair compensation (as may be agreed upon by the parties or in the event of disagreement as may be decided by the State Government), shall be made to the lessee for the loss or damage, sustained by the respondent, if any. When no such compensation is agreed upon between the appellant and the respondent and/or decided by the Government for alleged use of the suit road, it is apparent that the said condition was never given effect to. However, it is a matter of adjudication as to whether there was any agreement with regard to compensation, as aforesaid and in that event as decided by the Government as a condition precedent use of the suit road. Thus, Clause-6 of the lease

agreement cannot be invoked at this stage for adjudication of this Appeal. Moreover, it is a matter of adjudication as to whether the appellant is entitled to enforce such a condition of the lease deed against the respondent, which is between the State Government and the defendant/respondent in which the respondent is not a party. It is a separate matter that no injunction can be granted to prevent breach of contract.

In a decision in the case of ***M.C. Chacko vs. State Bank of Travancore, Trivandrum***, reported in AIR 1970 SC 504, the Hon'ble Supreme Court held as under:

> "…It must therefore be taken as well settled that except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract."

Thus, in view of the ratio decided by the Hon'ble Supreme Court (supra), the plaintiff/appellant may not enforce any right whatsoever conferred by Clause-6 of the lease deed against the defendant/respondent as he was not a party to the said lease agreement.

12. Learned counsel for the appellant, also led his claim claiming easement over the suit road. Section 4 of the Indian Easement Act, 1982 read as follows:-

> "4. "Easement" defined.- An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. Dominant and servient heritages and owners.- The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.
>
> Explanation.- In the first and second clauses of this section, the expression "land" includes also things permanently attached to the earth; the expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity; and the expression "to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting thereon. Illustrations.

(a) A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(b) A, as the owner of a certain house, has the right to go on his neighbour B 's land, and to take water for the purposes of his household, out of a spring therein. This is an easement.

(c) A, as the owner of a certain house, has the right to conduct water from B 's stream to supply the fountains in the garden attached to the house. This is an easement.

(d) A, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B 's field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of C 's tank, or timber out of D 's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees in E 's land. These are easements.

(e) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.

(f) A is bound to cleanse a water course running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement."

13. The definition of easement envisages that a right of easement can only be claimed over a piece of land if the servient ownership of which belongs to a person other than the dominant owner. On the basis of the aforesaid provision of law, learned counsel for the plaintiff/appellant resorting to Section 13 of the Indian Easement Act as well as the deed of transfer under Annexure-2 to the appeal memo submitted that since Roida-I iron ore mines is inaccessible except by passing over the suit road over Roida-II mines which adjoins the Roida-I, the plaintiff is entitled to use the suit road for movement of its carriers. Resorting to Section 15 of the Indian Easement Act, 1982, he submitted that the plaintiff/appellant has acquired a right of way over the suit road by prescription. Further, the use of the suit road would not be prejudicial or affect any interest of the defendant/respondent. It is the admitted case of the parties that the appellant started its mining activities over Roida-I iron ore mines on or after 31.10.1996. Thus, by no stretch of imagination, it can be said that the plaintiff has acquired a right of easement by prescription over the suit road as the plaintiff/appellant has not completed twenty years from the date of commencement of his mining work. So far as

the right of easement of necessity is concerned, as provided under Section 13 of the Easement Act, it does not fulfill the requirements provided under Clause-(a) and (b) of Section 13. For better appreciation, Clause-(a) and (b) of Section 13 of the Easement Act, 1982 is reproduced hereunder:-

> "13. Easements of necessity and quasi easements -
> Where one person transfers or bequeaths immovable property to another,-
>
> (a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or
>
> (b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or…."

Illustration to Clause-(a) and (b), makes it clear that right of necessity would only arise when the Roida-I iron ore mines becomes inaccessible except passing over the suit road. It is not disputed by the appellant that in W.P.(C) No.23722 of 2011, he has taken a specific stand therein that he (appellant) has access to NH-215 from Roida-I mines through pillar No.29 and the same was the only access and is being used as such from the date of commencement of mining work at Roida-I mines. Learned counsel for the appellant, however, submitted that such a statement on oath was made before this Court on a different context. Mr.Dey, learned counsel for the respondent refuting the same submitted that a statement on oath does not lose its relevancy irrespective of the context for which it is made. Moreover, after rejection of the injunction petition, the plaintiff/appellant filed a petition under Order 6 Rule 17, CPC to incorporate the pleadings to the effect that existence of the road from pillar No.29 stated in the writ petitions was on a different context. The said application was rejected on 24.09.2014 and remained unchallenged till date. Learned counsel for the appellant does not dispute this factual aspect in course of his argument.

From the discussion made above, it is crystal clear that there is a road existing from pillar No.29 to NH-215 from Roida-I mines and it is being used as such under temporary permission of the Forest Department as admitted in course of argument. Thus, the case of the plaintiff does not fall under Clause-

(a) and (b) of Section-13 of the Easement Act. Section 22 of the Easement Act has no application to the case at hand, inasmuch as use of suit road would be detrimental to the interest of the defendant/respondent as contended by him. However, determination of right by easement needs factual adjudication, which can only be done at the time of trial.

14. The decision in the case of ***Dalpat Kumar And Anr. vs Prahlad Singh And Ors***, reported in AIR 1993 SC 276, is a leading case where the principles of grant of temporary injunction has been elaborately discussed. Existence of a prima facie case in favour of the plaintiff-appellant needs no discussion as learned trial court has held that the plaintiff has a prima facie case in its favour while discussing the ingredients of irreparable injury, the Hon'ble Supreme Court held in the case of *Dalpat Kumar (supra)* that the Court has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages.

15. On a scrutiny of the case of the appellant in the light of the aforesaid principles settled, it is seen that the plaintiff/appellant has an alternative road from pillar No.29 of Roida-I mines leading to NH-215 available for movement of his carriers and other purposes. Learned counsel for the appellant submitted that at present the appellant is using the road from pillar No.29 to have access to NH-215 from Roida-I mines on temporary permission of the Forest Department. When an alternative road is available for the appellant for transport of iron ore materials and movement of carriers from Roida-I mines to NH-215, it cannot be said that the appellant would suffer irreparable injury if the order of injunction is refused.

Next comes the question of 'balance of convenience'. In the case of *Dalpat Kumar (supra),* the Hon'ble Supreme Court held that the Court, while granting or refusing to grant injunction, should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury the

Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued.

16. It is the admitted case of the parties that the suit road falls within the leasehold area of Roida-II mines leased out in favour of the respondent. The respondent claims that the suit road is no more in existence at present as it falls within the operational area of the mining lease of the respondent as per the mining plan approved by the IBM and deviation from such mining plan would entail prosecution under Section 13(2) of the Rules, 1988 as well as cancellation of the lease. On the other hand, exigency to use the suit road by the appellant does not arise at this stage because he has an alternate road for movement of his carriers and transportation etc. In view of the above, comparative mischief or prejudice is more likely to be caused to the respondent if an order of injunction is granted. Thus, balance of convenience leans in favour of the respondent and not in favour of the appellant.

17. Injunction is a relief of equity and discretion. Thus, he who seeks an order of injunction must come to the Court with clean hand. Though in one hand the plaintiff/appellant has taken a specific stand before this Court in W.P.(C) No.23722 of 2011 to the effect that Roida-I iron ore mines has approach to NH-215 from pillar No.29 and it is the only road available to him for movement of his carriers. On the other hand, he comes up with a different case in the suit that the suit road is the only way of approach to NH-215. The pleading in the suit is conspicuously silent about the existence of alternate road from pillar No.29 of Roida-I mines to NH-215. After disposal of the interim application for injunction, the plaintiff/appellant made an attempt to amend its pleading by incorporating the pleadings to the effect that the statement on oath in the writ proceeding before this Court to the effect that the plaintiff has only approach to NH-215 from pillar No.29 was on a different context and the said petition was rejected. It is also admitted during course of argument by learned counsel for the appellant that till date the appellant is transporting the materials from pillar No.29 to the NH-215 by obtaining temporary permission from the Forest Department. Clause-196 of General Rules and Circular Orders, (Civil) Vol.-I (for short 'GRCO') provides as follows:

> "**196**. **Particulars in the application for injunction to be supported by affidavit**- Every application for an injunction must be supported by affidavit. All material facts must be fully and fairly stated to the Court and there must be no concealment or misrepresentation of any material fact."

Thus, all material facts must be fully and fairly stated to the Court by the applicant who seeks a temporary injunction. There must be no concealment or misrepresentation of any material fact. In the case of ***M/s. Seemax Construction (P) Ltd. –v- State Bank of India and another***, reported in AIR 1992 Delhi 197, it has been held as under:

> "10. The suppression of material fact by itself is a sufficient ground to decline the discretionary relief of injunction. A party seeking discretionary relief has to approach the court with clean hands and is required to disclose all material facts which may, one way or the other, affect the decision. A person deliberately concealing material facts from court is not entitled to any discretionary relief. The court can refuse to hear such person on merits. A person seeking relief of injunction is required to make honest disclosure of all relevant statements of facts otherwise it would amount to an abuse of the process of the court. Reference may be made to decision in The King v. The General Commissioners for the purposes of the Income-tax Acts for the District of Kensingion, 1917 (1) King's Bench Division 486 where the court refused a writ of prohibition without going into the merits because of suppression of material facts by the applicant. The legal position in our country is also no different. (See : Charanji Lal v. Financial Commissioner, Haryana, Chandigarh, AIR 1978 Punjab and Haryana 326 (1711)). Reference may also be made to a decision of the Supreme Court in Udai Chand v. Shankar Lal, . In the said decision the Supreme Court revoked the order granting special leave and held that there was a misstatement of material fact and that amounted to serious misrepresentation. The principles applicable are same whether it is a case of misstatement of a material fact or suppression of material fact."

Thus, there remains no element of doubt that the plaintiff/appellant has not come to the Court with clean hand to seek for a relief of equity and discretion inasmuch as he has suppressed material fact, which was brought to light by the defendant-respondent.

18. In that view of the matter, the appellant fails in all respect to establish a case for grant of temporary injunction in its favour. Thus, I find no reason to interfere with the impugned order. Hence, the appeal fails and the same is accordingly dismissed, but in the circumstances, there shall be no order as to costs.

Appeal dismissed.

2016 (II) ILR - CUT- 691

K.R. MOHAPATRA, J.

FAO NO. 331 OF 2008

ANANDANANDA DASH ……..Appellant

.Vrs.

KUNTALA KUMARI DASH & ORS. ……Respondents

SUCCESSION ACT, 1925 – Ss. 59, 63, 276, 278

Probate granted in respect of the will Dt. 14.06.1985 – Order challenged – Though the testator died on 10.06.1986, probate proceeding was initiated 16 years after his death – Of course there is no limitation for filing of an application for probate – However,there are many reasons to doubt the execution of the will – Though testator had two sons and four daughters, there is no explanation in the will as to why he had bequeathed the entire suit property in favour of the plaintiff and why his other children were deprived of any share – The will was not registered even though it was scribed in the verandah of the Sub-Registrar office at Cuttack – None of the witnesses deposed that they had seen the testator signing on the will and they attested the will as per the direction of the testator – Non-examination of the scribe creates doubt with regard to non-registration of the will – P.Ws. 2 & 3 deposed that the scribe told them that the will was not required to be registered but as the scribe has not been examined, the veracity of their statement could not have been tested – The will which was executed in the year 1985, contains Hal plot number of the suit land, though settlement RoR published in the year 1992 – Plaintiff has not disclosed about the will in the proceeding U/s. 144 Cr.P.C. filed by her in 2000 in respect of the suit land which creates doubt about the will – Though the testator is a Brahmin and used to sign as 'Gunanidi Dash' his signature on Ext. 2/a as "Gunanidhi Das" is also doubtful – Learned trial court has also failed to sent contemporaneous and admitted signatures of the testator to an expert in exercise of power under Order 26, Rule 10-A C.P.C. to arrive at a definite conclusion – Moreover there is suppression of fact that the testator was not in a sound state of mind at the time of execution of the will which is apparent from the letter Dt. 28.06.1996 Ext. Z/20 written by the plaintiff to his sister stating about the unsound state of mind of the testator and Ext. Z/19 series i.e. certificates showing that the testator was treated by Dr. B.Dash, Associate Professor Psychiatry Department of S.C.B. Medical College & Hospital, Cuttack – Held, execution of the will being shrouded by suspicious circumstances and not satisfactorily explained by the plaintiff-respondent No. 1 to the conscience of the Court, the probate

granted in respect of the will Dt. 14.6.1985 (Ext. 2/a) in favour of the plaintiff-respondent No. 1 is set aside.

(Paras 21 to 24)

Case Laws Referred to :-

1. AIR 1959 SC 443 : H.Venkatachala Iyengar -V- B.N.Thimmajamma & Ors.
2. AIR 1990 SC 396 : Kalyan Singh -V- Smt. Choti & Ors.

For Appellant : Mr. Yeeshan Mohanty, Senior Advocate
M/s. H.N.Tripathy, B.P.Rath, S.R.Tripathy & A.Das

For Respondents : M/s. D.Bhuyan, B.N.Bhuyan, B.N.Das, S.K.Panda,R.Ray, R.N.Paratihari, A.K.Rout & S.N.Panda

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Date of Judgment: 24.06.2016

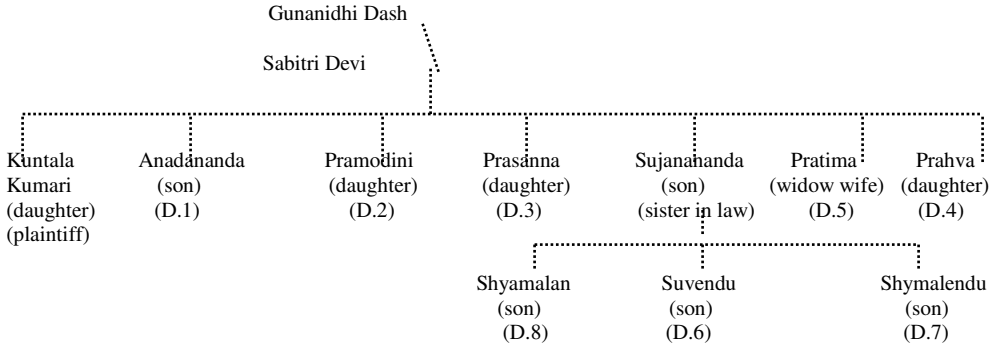
JUDGMENT

K.R. MOHAPATRA, J.

The defendant no. 1 in O.S. No. 1 of 2005 has filed this appeal under Section 299 of the Indian Succession Act, 1925 (for short 'the Act') assailing the judgment dated 6.5.2008 passed by the learned Civil Judge (Senior Division), 1st Court, Cuttack allowing an application under Sections 276 and 278 of the Act and thereby granting probate of the Will dated 14.6.1985 executed by one Gunanidhi Das in favour of the plaintiff (respondent no. 1 herein).

2. The plaintiff filed an application under Sections 276 and 278 of the Act (O.S. No. 1 of 2005) stating, inter alia, that her father, namely, Gunanidhi Dash, had four daughters and two sons. The genealogy of the family hereunder gives a clear picture of the relationship and status of the parties to this case.

GENEALOGY



By virtue of the RSD No. 2917 dated 11.6.1949, the father of the plaintiff, namely, Gunanidhi Dash purchased the case land appertaining to Sabik Khata No. 1261, Plot No. 2956 corresponding to Hal Settlement Khata No. 1268 Plot No. 1914 to an extent of Ac. 0.045 decimals situated at Sagadiasahi, Ranihat (Panasahi), Dist. Cuttack (for short 'the suit land') from Madan Mallik and others. At that point of time, said Gunanidhi Dash along with his family was staying at the Government quarters in the campus of S.C.B. Medical College and Hospital, Cuttack. In the year, 1959, he constructed a Katcha house over the suit land. In the same year, the plaintiff was also given in marriage with one Ananda Chandra Dash, who was a Government servant. Due to the poor financial condition, said Gunanidhi could not give proper dowry to the plaintiff at the time of her marriage. Hence, he voluntarily gifted and dedicated the suit land to the plaintiff on the marriage altar before sacred fire and the plaintiff accepted the same. Subsequently, said Gunanidhi in the year, 1966 delivered the possession of the suit property along with relevant documents to the plaintiff and since then, the plaintiff along with her husband were in exclusive physical possession of the same on payment of land revenue, holding tax and electricity charges etc.. The plaintiff and her husband also developed the suit land by making considerable expenses and resided there with their family members. Though said Gunanidhi was working in the S.C.B. Medical College and Hospital, Cuttack, but it was very difficult on his part to maintain the entire family for which the husband of the plaintiff and herself helped him in various ways by providing financial and physical assistance. They also helped Gunanidhi for solemnization of marriage of her (plaintiff's) brothers and sisters. The brothers of the plaintiff were staying in their respective workplaces and her sisters were staying in their respective in-laws house. Thus, the plaintiff and her husband were taking care of their parents. As there was no document in support of the gift of the suit property in favour of the plaintiff, Gunanidhi executed the Will in question in favour of the plaintiff in presence of the witnesses on 14.6.1985, which was his last Will. The terms of the Will stipulated that the plaintiff would be the exclusive owner of the suit property after the death of the wife (Sabitri Devi) of the testator, namely, Gunanidhi. Gunanidhi died on 10.6.1986 and Sabitri Devi died on 21.8.1983 at her native village Malabiharpur. One of the daughters of Gunanidhi, namely, Prativa and daughter-in-law, namely, Pratima filed a suit claiming right, title and interest over the suit property and tried to evict the plaintiff and her family members therefrom for which the plaintiff filed the present case for the aforesaid relief.

The defendant nos. 1 to 3 filed their objection refuting the contentions made in the probate petition. They contended that the case was not maintainable and the plaintiff had no locus standi to pray for probate of the alleged Will. The probate case was also barred by limitation. The alleged Will was a fabricated document and Gunanidhi had never executed any Will much less in favour of the plaintiff. They further contended that while staying in the Government quarters, said Gunanidhi Dash had constructed the house over the suit land in two phases. The first phase was completed in the year, 1952 when Gunanidhi was residing in a rented house at Nuapatna, Mangalabag with his family members and the rest part of the house was completed in the year, 1954. After its completion, a portion of the suit house was rented out. Gunanidhi was serving as a 'steward' in the S.C.B. Medical College and Hospital, Cuttack and was getting a handsome salary. The husband of the plaintiff belonged to a poor Brahmin family having scanty landed property. Thus, the plaintiff was presented sufficient ornaments and household articles as well as cash at the time of her marriage. The story of the gift of the schedule property by Gunanidhi to the plaintiff on the marriage altar was a myth. When the husband of the plaintiff was transferred to the Board of Revenue, Cuttack, he could not afford to stay in a rented house because of his poor financial condition for which Gunanidhi allowed the plaintiff and her husband to stay in a portion of the house having tin roof, when the tile roofed house was given on rent by Gunanidhi. The marriage of children of said Gunanidhi was performed out of his own income and income of his eldest son, who was serving as an Engineer under the State Government. The second son of late Gunanidhi, namely, Sujanananda Das was serving in O.S.E.B. since 1972. He had also income from the business taken up by him. Thus, Gunanidhi was financially sound all through out of his life. The father-in-law of the plaintiff died in a helpless condition as the husband of the plaintiff did not take care of him. As on 14.6.1985, Gunanidhi was a psycatric patient and was also suffering from rheumatism of both knees and hands and was unable to take a walk or strain of any kind without help. He was almost bed ridden and not in a condition to identify a person. He was also suffering from mental depression due to madness and physical pain and was dependant on others even for wearing his own clothes and taking food. In the year, 1982, Gunanidhi had a leg injury and was brought to Cuttack by his sons. At that time, settlement operation was going on. Since the plaintiff and her husband, namely, Ananda Chandra Dash, were staying at Cuttack, he (Ananda) was given all the documents of the suit property and some blank white papers with signatures of Gunanidhi for the purpose of

looking after the settlement operation. Taking advantage of such situation, the husband of the plaintiff manufactured a forged Will. Sabitri Devi, the widow of late Gunanidhi was all through residing at her native village at Malabiharpur. Thus, there was no occasion on the part of the plaintiff and her husband to take care of Gunanidhi and Sabitri. The second son of late Gunanidhi, namely, Sujanananda had a premature death for which his widow, namely, Pratima was given appointment under Rehabilitation Assistance Scheme. She stayed in a portion of the suit house. The defendant nos. 1 to 3 also made several other allegations against the plaintiff and her husband and prayed for dismissal of the case. The defendant nos. 4 to 8 filed their written statement/show cause separately denying the averments made in the probate petition. They also took a similar stand as that taken by defendant nos. 1 to 3 in their written statement and prayed for dismissal of the case.

4. The learned trial court taking into consideration the rival pleadings of the parties and the materials on record framed as many as five issues, which are follows:

1. Is the suit maintainable?
2. Whether the Will dated 14.6.1985 was executed by Gunanidhi Dash and properly attested?
3. Whether the Will is genuine and last Will of Testator and granted with free will and volition of the Testator?
4. Whether the Will is required to be probated?
5. To what other relief, the plaintiff is entitled?

5. In order to substantiate their respective cases, the plaintiff examined four witnesses including herself as P.W.1. P.W. 2 is a friend of the husband of the plaintiff. P.Ws. 3 and 4 are friends and colleagues of P.W. 2. The plaintiff also filed documentary evidence, which were marked as Exts. 1 to 5/a. Defendant no. 1 (appellant herein) was examined as the sole witness on behalf of the defendants. They exhibited documents which were marked as Exts. A to A/31.The learned trial court while answering Issue Nos. 2 and 3 came to a categorical conclusion that the Will (Ext. 2/a) was executed on 14.6.1985 by Gunanidhi, which was properly attested and it was the last Will of the testator. The same was executed at the free will and volition when the testator was of sound mind. Accordingly, the learned trial court answered all other issues in favour of the plaintiff vide his judgment dated 6.5.2008, which is under challenge in this appeal.

On a conspectus reading of the rival pleadings of the parties, the undisputed facts emanates therefrom are that there is no dispute with regard to the relationship of the parties with the testator. The testator, namely, Gunanidhi Dash, retired from service in the year, 1963. Gunanidhi died on 10.6.1986 and his wife, namely, Sabitri Devi died on 21.8.1993.The probate proceeding was initiated 16 years after the death of the testator and 9 years after the death of the widow of the testator. The Will dated 14.6.1985 was an unregistered document.

7. Mr. Yeesan Mohanty, learned Senior Advocate appearing for the appellant assailed the judgment on several grounds. His main thrust of argument is that the Will (Ext. 2/a) was an outcome of fraud. The common ancestor of the parties to the appeal, namely, Gunanidhi, had never executed any such Will during his life time. The description of the suit properties in the Will is not correct. There are suspicious circumstances surrounding the execution of the Will, which were neither explained by the plaintiff properly nor the same were dealt with by the learned trial court in its proper perspective. The evidence of the attesting witnesses did not support the case of the plaintiff. The suspicious circumstances, as stated by him, surrounding the execution of the Will are as follows:

(a) The Will (Ext. 2/a) contains the Hal Plot number of the suit land i.e. 1914. The Hal Settlement R.O.R. (Ext. A) was published on 13.3.1992 and the Will executed much before i.e. on 14.6.1985. Thus, the Will could not have contained the Hal Plot numbers.

(b) The plaintiff filed a proceeding under Section 144 Cr.P.C., which was registered as Crl. Misc. Case No. 495 of 2000 (Ext. L) in respect of the suit land. Nowhere in her petition she had disclosed about the execution of the Will though it is alleged to have been executed in the year, 1985. Further, in para-3 of the said petition (Ext. L), which contains the application under Section 144 Cr.P.C., police report as well as order of the Executive Magistrate, she had stated that she had paid a sum of Rs. 70,000/- towards value of the land to the testator after which possession of the suit land was delivered to her. On the other hand, the probate petition is silent about the proceeding under Section 144 Cr.P.C. and the pleadings made in the probate petition are contrary to the pleadings in Ext.L.

(c) The testator (Gunanidhi Dash) was not in a sound and disposing state of mind at the relevant period in which the Will alleged to have been executed.

(d) The signature of testator on the Will was not of Gunanidhi Dash as the surname was signed as 'Das' instead of 'Dash', which appears in all the admitted documents.

(e) Ext. Z/20 dated 28.06.1996 written by the plaintiff to her sister discloses that the plaintiff had made a confession about the unsound state of mind of the testator. The disposition made in the Will was unnatural. Hence, he prayed for setting aside the impugned order.

8. Mr. Bibekananda Bhuyan, learned counsel appearing for the respondent no.1 made his submission refuting the contention raised by Mr. Mohanty. He submitted that non-examination of the scribe of the Will is not fatal to the case of the plaintiff as the attesting witnesses have proved the execution of the Will to the hilt. The requirement of Section 68 of the Evidence Act is complete in all respect and all the attesting witnesses have supported the execution of the Will. There may be some discrepancies in the signature of the testator (Gunanidhi Dash), but when the attesting witnesses have proved the signature of the testator on the Will, the same is deemed to have been proved. There is no limitation for filing of an application for probate of the Will. However, in para-7 of the probate petition, the plaintiff has given explanation for limitation. The defendants had no dissension with the plaintiff. However, they had some difference of the opinion with the husband of the plaintiff for which the case was filed. He further submitted that when the suspicious circumstances alleged by the defendants have not been specifically pleaded in their respective written statements, the plaintiff is not obliged to explain the same. However, suspicious circumstances as alleged by the defendants have been satisfactorily explained by the plaintiff and the learned trial Court has dealt with the same in its proper perspective and on being satisfied with the explanation has granted the probate. As such, the impugned order needs no interference and the appeal is liable to be dismissed.

9. In the leading case of ***H. Venkatachala Iyengar –v- B.N. Thimmajamma and others***, AIR 1959 SC 443, the Hon'ble Supreme Court has laid down the principles to test the genuineness of a Will in Court of Law. It is held that the Will has to be proved like any other document except as to the special requirement of attestation prescribed by Section 63 of the Act. The Hon'ble Supreme Court in para-20 of the aforesaid case law further held as follows.

> "20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged

> signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter".

10. The rival contention of the parties has to be scrutinized keeping in view the aforesaid settled position of law.

11. The plaintiff has been examined as P.W.1 in this case. P.Ws. 2, 3 and 4 are the attesting witnesses to the execution of the Will. She, in her deposition, narrating the story in the probate petition stated that the Will was executed on 14.06.1985. She also proved the signature of the testator as Ext.2. She deposed in her examination that on 14.06.1985 at about 10 A.M., prior to the execution of the Will, her father (the testator) told her that he was going to Court to execute the Will in her favour. On the same day in the afternoon, the testator read over and explained the contents of the Will and thereafter handed over the same to the plaintiff. She had not shown the Will to any of the family members including the defendants. She also admitted in Para -27 of her cross-examination that Prativa Kar (defendant no.4) had filed Money Suit No.87 of 2004 for realization of the rent of the suit house against her husband. She also admitted that the defendant nos. 4 and 5 had filed Title

Suit No. 329 of 2000 against the plaintiff and her husband claiming right, title and interest over the said property and for eviction. At Para-31 of her cross-examination, she had admitted to have been initiated a proceeding under Section 144 Cr.P.C., which was registered as Crl. Misc. Case No. 495 of 2000 (Ext. L) against Pratima, Ananda and Biswambar in respect of the suit land and the house standing thereon. Thus, it appears from the deposition of P.W. 1 that the Will was with her from the date of execution i.e. on 14.6.1985, but she had not shown to any of the family members. P.Ws. 2, 3 and 4 are the attesting witnesses to the Will. They have proved their signatures on the Will as Exts. 2/b, 2/c and 2/d respectively. P.W. 2 deposed that the Will was scribed by one Shiba Charan Das in the Verandah of Sub-Registrar Office at Cuttack. At Para-17 of his deposition, P.W. 2 deposed that after preparation of the draft Will, it was read over and explained to Gunanidhi. Thereafter, Gunanidhi and Shiba Charan Das (the scribe) signed in the draft Will. Other two witnesses, who were taking tea in the nearby Tea Stall, were called by Gunanidhi and they signed on the Will in presence of P.W. 2. P.W. 3 in his cross-examination stated at Para-15 that Gagan Bihari Mohanty (P.W.4) signed on the Will first and thereafter, he and Kailash Chandra Khatua (P.W. 1) signed on the Will. Lastly, Gunanidhi signed on the Will. At Para-14 of his cross-examination, P.W. 4 deposed that Gunanidhi wanted registration of the Will, but the scribe (Shiba Chandra Das) refrained him saying that it was not required. P.W. 3 in his evidence had also deposed at Para-9 that the scribe intimated them that the Will was not required to be registered. Thus, from the evidence of P.Ws. 2, 3 and 4, it appears that the Will (Ext. 2/a) was executed at the Verandah of the Sub-Registrar Office at Cuttack. P.Ws. 3 and 4 in their evidence deposed that though the testator (Gunanidhi Dash) wanted registration of the Will, the scribe refrained them saying that the registration was not required. Further, though P.W. 2 deposed that the scribe put his signature on the Will first, P.W. 3 deposed that he had signed the Will first and the scribe had put his signature after all the witnesses signed on the Will. Thus, there is a discrepancy in the statements of P.Ws. 2 and 3 with regard to signing of the Will. In view of Section 68 of the Evidence Act, it is incumbent upon the attesting witnesses, namely, P.Ws. 2, 3 and 4 to prove the execution of the Will in terms of Section 63 of the Act.

12. None of the witnesses deposed that they had seen the testator signing on the Will and they had attested the Will as per the direction of the testator. But if their depositions are read as a whole, it can be inferred that they had

attested the document and put their signatures in presence of the testator on being instructed by him. However, a question automatically crops up in mind as to why the Will was not registered when the same was stated to have been prepared on the verandah of Sub-Registrar Office at Cuttack. P.Ws. 2 and 3 in their evidence deposed that the scribe, namely, Shiba Charan Das, told them that the Will was not required to be registered. Had the scribe been examined, the veracity of such a statement could have been tested. Thus, non-examination of the scribe creates a doubt with regard to non-registration of the Will, especially when P.W. 3 in his evidence had categorically stated that the testator wanted the Will to be registered. The effect of such non-registration of the Will is a circumstance which raise suspicion with regard to execution of the Will, which might have been explained by the scribe of the Will.

13. Mr. Mohanty, learned Senior Advocate drew attention of this Court to certain circumstances (stated above) which, according to him, create suspicion surrounding the execution of the Will. He submitted that the signature of the testator appearing on the Will (Ext. 2/a) creates a suspicion with regard to execution of the Will. The testator (Gunanidhi) was ordinarily signing as 'Gunanidhi Dash' but the signature appearing on Ext. 2/a as 'Gunanidhi Das'. He further submitted that as per the prevailing practice in Odisha, the Brahmins of the State use to write their surname as 'Dash' and non-brahmins use to write their surname as 'Das'. The plaintiff herself and defendant no. 1 have also written their surname as 'Dash'. He also relied upon Exts. Z to Z/19 in which the father of the plaintiff and defendant no. 1 had either been described or signed as Gunanidhi Dash. P.W. 1 (the plaintiff) also admitted in her evidence that her father (the testator) was giving his signature as Gunanidhi Dash. The learned trial court did not accept such contention of the learned counsel for the defendant no. 1 on the ground that O.P.W. 1 had stated in his evidence that the signature of Gunanidhi Dash was taken in the blank papers to be used before the settlement authorities but the same has been used for the purpose of Will. Thus, the defendants have admitted to the signature of Gunanidhi Dash in the Will itself. Mr. Mohanty, learned Senior Advocate strenuously urged that finding of the learned trial court to that effect is an error apparent on the face of the record. On scrutiny of the evidence of D.W. 1, it appears that he has categorically stated at para-26 of his cross-examination that the alleged blank papers signed by Gunanidhi Dash, which were kept with Ananda Dash, have not been used to execute the Will in favour of the plaintiff. D.W. 1 has only stated in his

written statement as well as the evidence that during the period of settlement operation, Sri Ananda Dash (husband of the plaintiff) was residing at Cuttack for which all the documents of the suit land along with some blank papers with signatures of Gunanidhi Dash were handed over to him to take follow up action in the settlement operation in good-faith. Thus, finding of the learned trial court is an error apparent on the face of the record. Moreover, the learned trial court did not place any reliance on the signatures of Gunanidhi Dash on Exts. AA/1 to AA/31 for the reason that those are xerox copies and not originals. The learned trial court, however, compared the signature of Gunanidhi Dash appearing in Exts. Z/13, Z/14, Z/15 and Z/16 and held that there was no variance in the signature of Gunanidhi Dash with that appearing in Ext. 2/a. Law is well settled in this regard. No fault can be found with the learned trial court when it compared the signature of Gunanidhi Dash appearing on Ext. 2/a with that of Exts. Z/13, Z/14, Z/15 and Z/16 but it cannot form a definite opinion with regard to the genuineness of the same, unless it is compared with by an expert, more particularly when the signature of Gunanidhi Dash appearing on Ext. 2/a is seriously disputed by the defendants. The process of comparison of signature of Gunanidhi Dash is a scientific investigation which comes within the purview of Order 26 Rule 10-A C.P.C. Thus, the learned trial court has committed an error of law in coming to the aforesaid findings. The learned trial court ought to have sent contemporaneous and admitted signatures of Gunanidhi Dash to a handwriting expert to be compared with that of appearing on Ext. 2/a in exercise of power under Order 26 Rule 10-A C.P.C. to arrive at a definite conclusion.

14. On scrutiny of the materials available on record, it appears that father of the plaintiff and defendant no. 1, namely, Gunanidhi Dash has led his hand by signing as Gunanidhi Dash in most of the documents which are not disputed. Apparently in the signature of Gunanidhi Dash on Ext. 2/a, the surname has been written as 'Das'. Apparently, such a discrepancy has not been explained satisfactorily. In view of the discussions made above, finding of the learned trial court to the effect that the signature of Gunanidhi Dash which finds place in Ext. 2/a is that of the father of the plaintiff, is not acceptable.

15. The next contention raised by Mr. Mohanty is that the Will bears the Hal Plot numbers of the suit land which creates a serious doubt with regard to genuineness of the Will. Referring to Ext. A, Mr. Mohanty submitted that Hal R.O.R. was published on 13.3.1992 and the Will was executed on 14.6.1985. Thus, at no stretch of imagination, it can be said that Hal Plot

numbers were known to the testator in the year, 1985 when Hal R.O.R. was published in the year, 1992.

16. Mr. Bhuyan, learned counsel for the respondent no. 1 refuting the contention raised by Mr. Mohanty submitted that though Hal R.O.R. was published in the year, 1992, the settlement proceeding had commenced much prior to that and there are different stages of the settlement proceedings in which Hal Plot numbers are being referred to. Thus, no exception should be taken to the same. He also drew attention of this Court to the finding of the learned trial court and submitted that the learned trial court taking into consideration the different aspects of the matter came to the conclusion that by the time the Will was executed, there must be publication of the draft R.O.R. showing Hal Plot numbers. This Court in order to test the rival contentions of the parties and finding of the learned trial court verified the case record from which it appears that neither such a plea was taken by any of the parties to the effect that draft R.O.R. was published or Hal Plot numbers were known to the testator at the time of execution of the Will. There is also no document available on record to support the contention of Mr. Bhuyan. There is no explanation as to how Hal Plot numbers were known to the testator in the year, 1985 when final publication of the R.O.R. in respect of the suit land was published in the year, 1992. The discussion of the learned trial court and finding on the aforesaid aspect appears to be based on surmises and conjectures. There is no material in support of the same. In that view of the matter, it cannot, at all, be said that suspicion with regard to mentioning Hal Plot numbers in the Will is explained by the plaintiff satisfactorily.

17. Mr. Mohanty, learned Senior Advocate for the appellant further contented that the plaintiff had filed Crl. Misc. Case No. 495 of 2000 under Section 144 Cr.P.C. (Ext. L) though by that time the Will executed in her favour was in her custody, she had not mentioned about the same in the petition under Section 144 Cr.P.C. He also drew attention of this Court to Para-3 of the said petition (Ext.L) in which the plaintiff had stated about her payment of Rs. 70,000/- towards value of the land to the testator (Gunanidhi) after which Gunanidhi delivered the possession of the case land in her favour. On the other hand, in probate petition, the plaintiff stated that at the time of marriage, the suit land was gifted to her by Gunanidhi Dash on the marriage altar and possession of the same was delivered to her. Though discrepancy in the statement made in Ext. L as well as the probate petition was confronted to the plaintiff, she had not given any satisfactory reply to the

same. Mr. Mohanty further relied upon a decision in the case of ***Kalyan Singh –v- Smt. Choti and others***, reported in AIR 1990 SC 396 in which it was held at para-23 as follows:

> "22. ……. The will in the present case, constituting the plaintiff as a sole legatee with no right whatever to the testator's wife, seems to be unnatural. It casts a serious doubt on genuineness of the will. The will has not been produced for very many years before the court or public authorities even though there were occasions to produce it for asserting plaintiffs title to the property. The plaintiff was required to remove these suspicious circumstances by placing satisfactory material on record. He has failed to discharge his duty. We, therefore, concur with the conclusion of the High Court and reject the will as not genuine."

He further submitted that Gunanidhi had bequeathed the entire suit property in favour of the plaintiff without making any provision for other children. The Will does not explain as to why other children of Gunanidhi should be deprived of any share from the suit property. The Will was also not produced either in the suit filed by defendant nos. 4 and 5 nor in the proceeding under Section 144 Cr.P.C. (Crl. Misc. Case No. 495 of 2000). Thus, it creates a serious doubt with regard to genuineness of the Will.

18. Mr. Bhuyan, learned counsel for the respondent no. 1, on the other hand, submitted that the circumstance prevailing in other cases i.e. the suit filed by defendant nos. 4 and 5 and the proceeding under Section 144 Cr.P.C. initiated by the plaintiff do not require the plaintiff to mention about the Will. In that view of the matter, no fault can be found with the plaintiff for non-disclosure of the Will in the aforesaid proceedings. This Court on verification of the records finds that the plaintiff had not stated about the execution of the Will in her favour by Gunanidhi in the proceeding under Section 144 Cr.P.C., though the said proceeding relates to the very same property and the Will was her custody. Though in the probate case, she had specifically stated that she accrued right over the suit schedule property by virtue of the Will executed by Gunanidhi, she had made out a completely different story in Ext. L i.e. the petition under Section 144 Cr.P.C. No satisfactory explanation to the same was offered by the plaintiff though Ext. L was confronted to her by defendant no. 1 during her cross-examination. Thus, it cannot, at all, be said that the plaintiff has satisfactorily explained this suspicious circumstance surrounding the execution of the Will.

19. Argument was advanced by Mr. Mohanty with regard to the genuineness of the Will contending that Gunanidhi was unsound state of mind and bed ridden at his native village at the relevant time. He also referred to Ext. Z/20 i.e. the letter dated 28.6.1996 written by the plaintiff to her sister in which she had made a confession with regard to the mental illness of Gunanidhi. She in her own handwriting had stated in the letter that "Nana Pagala Hele Kaana Pain". He also relied upon Ext. Z/19 series, which are copies of the essentiality certificates in support of the treatment of Gunanidhi Dash by Dr. B. Dash, Associate Professor, Psychiatry Department of S.C.B. Medical College and Hospital, Cuttack. At the relevant time, he was in a paranoid state of mind which means a form of mental disorder. He further submitted that in view of the specific observation made in Ext. Z/19 series and the letter of the plaintiff addressed to her sister (Z/20), it is quite clear that Gunanidhi was not in a sound state of mind and was bed ridden at his native village at the time of execution of the Will. The learned trial court dealing with the same came to the conclusion that the essentiality certificates relates to the year, 1979 and the Will was executed in the year, 1985. No document was filed to show that Gunanidhi was under treatment of Dr. B. Dash, Associate Professor, Psychiatry Department of S.C.B. Medical College and Hospital, Cutack at the relevant time when the Will was executed. The learned trial court further held that Ext. Z/19 series do not disclose that Gunanidhi was unsound state of mind at the time of execution of the Will. It was further held that the solitary statement of the plaintiff to the effect that "Nana Pagala Hele Kaana Pain" cannot establish that Gunanidhi was suffering from mental disorder and was of unsound mind at the time of execution of the Will.

20. Mr. Bhuyan, learned counsel for the respondent no. 1 supported the finding of the learned trial court.

21. Taking into consideration the aforesaid submission of the learned counsel for the parties as well as finding of the learned trial court, it appears that Gunanidhi during the year, 1979 was suffering from mental disorder and was under treatment of Dr.B.Dash, Associate Professor, Psychiatry Department of S.C.B. Medical College & Hospital, Cuttack. The contents of the letter dated 28.6.1996 written by the plaintiff to her sister and Ext. Z/20 also disclose that the plaintiff has referred to the mental illness of her father. As such, unsoundness of Gunanidhi (testator) cannot be ruled out. In that view of the matter, the onus is heavy on the plaintiff (respondent no. 1) to prove that the testator was not suffering from any mental disorder or illness

at the time of execution of the Will (Ext. 2/a). Finding of the learned trial court appears to be based on surmises as it has not made any endeavour to scrutinize the materials available on record in that regard. No evidence was led by the plaintiff to show that the testator was in sound state of mind and was performing his normal day-to-day activity at the time of execution of the Will. Thus, the onus to establish that the testator was in sound state of mind at the time of execution of the Will was not discharged properly.

22. Mr. Bhuyan, learned counsel for the respondent no. 1 strenuously urged that suspicious circumstances surrounding the execution of the Will are based on facts and whether a Will is genuine or not has to be decided on the facts of each case. There is no mathematical equation to determine as to whether a Will is genuine or not. Further, the suspicious circumstance cannot be definite and the same depends on the facts and circumstances of each case. Thus, there should be specific pleadings with regard to suspicious circumstances surrounding the execution of the Will by the defendants and unless the same is pleaded, the plaintiff will not be in a position to explain the said suspicion by adducing cogent evidence to that effect. True it is that whether a Will is genuine or not depends upon the facts and circumstances of the case for execution of the Will. There cannot be any mathematical equation with regard to the genuineness of the Will. The suspicious circumstances in the Will are the questions of fact and cannot be accurately definite. The Court is to scan the documents and the evidence on record to come to the conclusion that whether suspicious circumstance is of such nature that it would be sufficient to refuse the probate of the Will. The Hon'ble Supreme Court in the case of H. Venkatachala Iyengar (supra) while dealing with the question of suspicious circumstance has categorically observed that even where there was no such plea but the circumstances gave rise to such doubts, it is for the propounder to satisfy the conscience of the Court. The language employed by the Hon'ble Supreme Court makes it abundantly clear that suspicious circumstances need not be pleaded.

23. On scrutiny of the facts and circumstances of the execution of the Will and the documents available on record, which gives rise to some suspicious circumstances surrounding the execution of the Will, it is for the propounder to offer satisfactory explanation and satisfy the Court that the document from which he derives the benefit is genuine and free from suspicion and a probate or a letter on administration can be granted in respect of the Will. Thus, the contention raised by Mr. Bhuyan, learned counsel for the respondent no. 1 does not hold good.

24. Taking into consideration the facts and circumstances of the case and the discussions made above, this Court is of the opinion that execution of the Will is shrouded by suspicious circumstance, which was not satisfactorily explained by respondent no. 1 (plaintiff) to the conscience of the Court. In that view of the matter, the impugned judgment and order is not sustainable in law and the same is accordingly set aside. Consequently, probate granted in respect of the Will dated 14.6.1985 (Ext. 2/a) in favour of the plaintiff (respondent no.1) is hereby set aside. The appeal is, accordingly, allowed, but in the circumstances, there shall be no order as to cost.

Appal allowed.