2016 (II) ILR - CUT- 707

SUPREME COURT OF INDIA

ANIL R. DAVE, J., KURIAN JOSEPH, J. & A.K.GOEL, J.

CRIMINAL APPEAL NO. 63 OF 2006

MAHIPAL SINGH RANA, ADVOCATE ……..Appellant

.Vrs.

STATE OF UTTAR PRADESH ……Respondent

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

Criminal Contempt – Whether on conviction for criminal contempt, the appellant-advocate can be allowed to practice ?

An Advocate who is found guilty of contempt of court may also be guilty of professional misconduct and it is for the Bar Council of the State or Bar Council of India to punish that Advocate, either by debarring him from practice or suspending his licence – In this case, High Court found the appellant guilty of criminal contempt for intimidating and threatening the Civil Judge, Etah in his Court and sentenced him to simple imprisonment of two months with fine of Rs. 2000/-, in default to undergo further imprisonment of 2 weeks and directed the Bar Council of U.P. to consider the complaint of the Civil Judge and to initiate appropriate proceeding against the appellant for professional misconduct – Hence this appeal – In appeal this Court has also issued notice to the Supreme Court Bar Association as well as the Bar Council of India but when they failed to take any action this Court by invoking its appellate power U/s. 38 of the Advocates Act, 1961 prevented the contemner-advocate from appearing before it or other courts till he purges himself in view of his proved misconduct – Held, the direction of the High Court that the appellant shall not be permitted to appear in Courts of District Etah until he purges himself of contempt is upheld. (Paras 25, 44)

CONTEMPT OF COURTS ACT, 1971 – Ss. 2(C), 12, 19

Criminal Contempt – High Court found the appellant-advocate guilty for threatening the Civil Judge Etah in his Court and convicted him – Hence this appeal – Language used by the appellant to the complainant-Judge is contemptuous – Appellant, though aged about 84 years was not suffering form any mental imbalance – His affidavit before the Court did not show any remorse, which shows that he had no regards for the majesty of law – Held, conviction of the appellant by the High Court is upheld but the sentence of imprisonment is set aside in view of his advanced age – However the sentence of fine and default

sentence, so also the direction that appellant shall not be permitted to appear in Courts in District Etah until he purges himself of contempt are confirmed – The enrollment of the appellant will stand suspended for two years form the date of this order U/s 24 A of the Advocates Act and as a disciplinary measure for proved misconduct the licence of the appellant will remain suspended for further five years.

(Para 49)

ADVOCATES ACT, 1961 – S.24 A

A person convicted of, even, a most heinous offence is eligible to be enrolled as an advocate after expiry of two years from expiry of his sentence U/s 24 A of the Act – Does passage of 2 years change a person of corrupt character to be a person fit to be enrolled as a member of the noble profession ? The provision needs urgent attention of all concerned for amendment – Held, the appellant will suffer automatic consequence of his conviction U/s 24 A of the Act, which is applicable at the post enrollment stage i.e. the enrollment of the appellant will stand suspended for two years from the date of this order. (Paras 39 to 49)

ADVOCATES ACT, 1961 – S.38

Criminal contempt against appellant-advocate – Bar Council failed to take action inspite of reference made to it – Apex Court can exercise its suo-motu powers for punishing the contemnor-advocate for professional misconduct – Held, the power permissible for the Apex Court by virtue of statutory appellate power U/s 38 of the Advocates Act, 1961, is also permissible to a High Court under Article 226 of the Constitution of India in appropriate cases. **(**Paras 45,46)

Case Laws Relied on :-

1. (1998) 4 SCC 409 : Supreme Court Bar Association versus Union of India[1]

5. (2009) 8 SCC 106 : R.K. Anand versus Registrar, Delhi High Court [5]

Case Laws Referred to :-

2 (2001) 8 SCC 650 : Pravin C. Shah versus K.A. Mohd. Ali [2]
3. (2003) 2 SCC 45 : Ex-Captain Harish Uppal versus Union of India[3]
4. (2004) 6 SCC 311 : Bar Council of India versus High Court of Kerala[4]
9. (2004) 6 SCC 311 : Bar Council of India versus High Court of Kerala [9]
12. (1976) 2 SCC 291: Bar Council of Maharashtra versus M.V.Dabholkar[12]
13. 1995 Supp.(1) SCC 384 : Jaswant Singh versus Virender Singh[13]
14. (2014) 8 SCC 470In : Subrata Roy Sahara v. Union of India[14]
15. (2015) 13 SCC 288 : Amit Chanchal Jha versus Registar, High Court of Delhi[15]

16. 16 (1985) 3 SCC 398 : Union of India versus Tulsiram Patel[16]
18. (1995) 2 SCC 513 : Rama Narang versus Ramesh Narang[18]
19. (2013) 7 SCC 653 : *Lily Thomas versus UOI*[19]
21. (2014) 9 SCC 1 : Manoj Narula versus UOI[21]
22. AIR 1953 SC 210 : Election Commission versus Venkata Rao[22]
23. (1982) 2 GLR 706 : C. versus Bar Council [23]

For Appellant : Mr. T. N. Singh
For Respondent : Mr. Ashok K. Srivastava

Date of judgment : 07.05.2016

JUDGMENT

ANIL R. DAVE, J.

1. The present appeal is preferred under Section 19 of the Contempt of Courts Act, 1971 (hereinafter referred to as "the Act") against the judgment and order dated 02.12.2005 delivered by the High Court of Judicature at Allahabad in Criminal Contempt Petition No. 16 of 2004, whereby the High Court found the appellant guilty of Criminal Contempt for intimidating and threatening a Civil Judge (Senior Division), Etah in his Court on 16.4.2003 and 13.5.2003 and sentenced him to simple imprisonment of two months with a fine of Rs. 2,000/- and in default of payment of the fine, the appellant to undergo further imprisonment of 2 weeks. The High Court further directed the Bar Council of Uttar Pradesh to consider the facts contained in the complaint of the Civil Judge (Senior Division) Etah, and earlier contempt referred to in the judgement and to initiate appropriate proceedings against the appellant for professional misconduct.

Reference to larger Bench and the Issue

2. On 27th January, 2006, this appeal was admitted by this Court and that part of the impugned judgment, which imposed the sentence, was stayed and the appellant was directed not to enter the Court premises at Etah (U.P.). Keeping in view the importance of the question involved while admitting the appeal on 27th January, 2006, notice was directed to be issued to the Supreme Court Bar Association as well as to the Bar Council of India. The matter was referred to the larger Bench. Learned Solicitor General of India was requested to assist the Court in the matter.

3. On 6th March, 2013 restriction on entry of the appellant into the court premises as per order dated 27th January, 2006 was withdrawn. Thereby, the appellant was permitted to enter the court premises. The said

restriction was, however, restored later. On 20th August, 2015, notice was issued to the Attorney General on the larger question whether on conviction under the Contempt of Courts Act or any other offence involving moral turpitude an advocate could be permitted to practise.

4. Thus following questions arise for consideration:
(i) Whether a case has been made out for interference with the order passed by the High Court convicting the appellant for criminal contempt and sentencing him to simple imprisonment for two months with a fine of Rs.2,000/- and further imprisonment for two weeks in default and debarring him from appearing in courts in judgeship at Etah; and

(ii) Whether on conviction for criminal contempt, the appellant can be allowed to practise.

The facts and the finding of the High Court

5. The facts of the present appeal discloses that the Civil Judge (Senior Division), Etah made a reference under Section 15 (2) of the Act to the High Court through the learned District Judge, Etah (U.P.) on 7.6.2003 recording two separate incidents dated 16.4.2003 and 13.5.2003, which had taken place in his Court in which the appellant had appeared before him and conducted himself in a manner which constituted "Criminal Contempt" under Section 2 (c) of the Act.

6. The said letter was received by the High Court along with a forwarding letter of the District Judge dated 7.6.2003 and the letters were placed before the Administrative Judge on 7.7.2003, who forwarded the matter to the Registrar General vide order dated 18.6.2004 for placing the same before the Hon'ble Chief Justice of the High Court and on 11.7.2004, the Hon'ble Chief Justice of the High Court referred the matter to the Court concerned dealing with contempt cases and notice was also issued to the appellant.

7. Facts denoting behaviour of the appellant, as recorded by the Civil Judge (Senior Division), Etah, can be seen from the contents of his letter addressed to the learned District Judge, Etah. The letter reads as under:-

"Sir,

It is humbly submitted that on 16.4.2003, while I was hearing the 6-Ga-2 in Original Suit No.114/2003 titled as "Yaduveer Singh Chauhan vs. The Uttar Pradesh Power Corporation", Shri Mahipal Singh Rana, Advocate

appeared in the Court, and, while using intemperate language, spoke in a loud voice:

> "*How did you pass an order against my client in the case titled as "Kanchan Singh vs. Ratan Singh"?* How did you dare pass such an order against my client?
>
> I tried to console him, but he started shouting in a state of highly agitated mind:
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> *"Kanchan Singh is my relative and how was this order passed against my relative? No Judicial Officer has, ever, dared pass an order against me. Then, how did you dare do so? When any Judicial officer passes an order on my file against my client, I set him right. I shall make a complaint against you to Hon'ble High Court", and* he threatened me: "*I will not let you remain in Etah in future, I can do anything against you. I have relations with highly notorious persons and I can get you harmed by such notorious persons to the extent I want to do, and I myself am capable of doing any deed (misdeed) as I wish, and I am not afraid of any one. In the Court compound, even my shoes are worshipped and I was prosecuted in two murder cases. And I have made murderous assaults on people and about 15 to 20 cases are going on against me. If you, in future, dare pass an order on the file against my client in which I am counsel, it will not be good for you".*
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> *Due to the above mentioned behaviour of Shri Mahipal Singh Rana, Advocate, the judicial work was hindered and aforesaid act of Shri Mahipal Singh falls within the ambit of committing the contempt of Court.*

In this very succession, on 13.5.2003, while I was hearing 6-Ga-2 in the O.S. No. No. 48/2003 titled as "Roshanlal v Nauvat Ram", Shri Mahipal Singh Rana Advocate appeared in the Court and spoke in a loud voice: "Why did you not get the OS No. 298/2001 title as 'Jag Mohan vs. Smt. Suman' called out so far, whereas the aforesaid case is very important, in as much as I am the plaintiff therein". I said to Shri Mahipal Singh Rana, Advocate: "Hearing of a case is going on. Thereafter, your case will be called out for hearing", thereupon he got enraged and spoke: "Thatcase will be heard first which I desire to be heard first. Nothing is done as per your desire. Even an advocate does not dare create a hindrance in my case. I shall get the case decided which I want and that case will never be decided, which I do not

want. You cannot decide any case against my wishes". Meanwhile when the counsel for Smt. Suman in O.S. No. 298/2001 titled as "Jag Mohan vs. Smt. Suman" handed some papers over to Shri Mahipal Singh Rana, Advocate for receiving the same, he threw those papers away and misbehaved with the counsel for Smt. Suman. Due to this act of Shri Mahipal Singh Rana, the judicial work was hindered and his act falls within the ambit of committing the contempt of Court. Your good self is therefore requested that in order to initiate proceedings relating to committing the contempt of Court against Shri Mahipal Singh Rana, Advocate, my report may kindly be sent to the Hon'ble High Court by way of REFERENCE".

With regards,"

8. On the same day, the learned Civil Judge (Senior Division) also wrote another letter to the Registrar-General of the High Court, giving some more facts regarding contemptuous behaviour of the appellant with a request to place the facts before the Hon'ble Chief Justice of the High Court so that appropriate action under the Act may be taken against the appellant. As the aforestated letters refer to the facts regarding behaviour of the appellant, we do not think it necessary to reiterate the same here.

9. Ultimately, in pursuance of the information given to the High Court, proceedings under the Act had been initiated against the appellant.

10. Before the High Court, it was contended on behalf of the appellant that it was not open to the Court to proceed against the appellant under the provisions of the Act because if the behaviour of the appellant was not proper or he had committed any professional misconduct, the proper course was to take action against the appellant under the provisions of the Advocates Act, 1961. It was also contended that summary procedure under the Act could not have been followed by the Court for the purpose of punishing the appellant. Moreover, it was also submitted that the appellant was not at all present before the learned Civil Judge (Senior Division), Etah on 16.4.2003 and 13.5.2003.

11. Ultimately, after hearing the parties concerned, the High Court did not accept the defence of the appellant and after considering the facts of the case, it delivered the impugned judgment whereby punishment has been imposed upon the appellant. The High Court observed:

> *"22. Extraordinary situations demand extraordinary remedies. The subordinate courts in Uttar Pradesh are witnessing disturbing period.*

In most of the subordinate courts, the Advocates or their groups and Bar Associations have been virtually taken over the administration of justice to ransom. These Advocates even threaten and intimidate the Judges to obtain favourable orders. The Judicial Officers often belonging to different districts are not able to resist the pressure and fall prey to these Advocates. This disturbs the equilibrium between Bar and the Bench giving undue advantage and premium to the Bar. In these extraordinary situations the High Court can not abdicate its constitutional duties to protect the judicial officers.

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24. ……The criminal history of the contemnor, the acceptance of facts in which his actions were found contumacious and he was discharged on submitting apologies on two previous occasions, and the allegations against him in which he was found to continue with intimidating the judicial officers compelled us to issue interim orders restraining his entry of the contemnor in the judgeship at Etah. The Bar Council of Uttar Pradesh, is fully aware of his activities but has chosen not to take any action in the matter. In fact the Bar Council hardly takes cognizance of such matters at all. The Court did not interfere with the statutory powers of the Bar Council of Uttar Pradesh to take appropriate proceedings against the contemnor with regard to his right of practice, and didnot take away right of practice vested in him by virtue of his registration with the Bar Council. He was not debarred from practice but was only restrained to appear in the judgeship at Etah in the cases he was engaged as an Advocate. The repeated contumacious conduct, without any respect to the Court committed by him repeatedly by intimidating and brow beating the judicial officers, called for maintaining discipline, protecting the judicial officers and for maintaining peace in the premises of judgeship at Etah.

25. Should the High Court allow such advocate to continue to terrorise, brow beat and bully the judicial officers? It is submitted that he has a large practice. We are not concerned here whether the contemnor or such advocates are acquiring large practice by intimidating judicial officers. These are questions to be raised before the Bar Council. We, however, must perform our constitutional duty to protect our judicial officers. This is one such case illustrated in para 78, of the Supreme Court Bar Association's case (supra), in

which the occasion had arisen to prevent the contemnor to appear before courts at Etah. The withdrawal of such privilege did not amount to suspending or revoking his licence to practice as an advocate in other courts or tribunal, drafting the petitions and advising his clients. It only prevented him from intimidating the judicial officers and from vitiating the atmosphere conducive for administration of justice in the judgeship at Etah.

31. The Supreme Court held that Section 20 of the Contempt of Courts Act, has to be construed in a manner which would avoid anomaly and hardships both as regards the litigant as also by placing a pointless fetter on the part of the court to punish for its contempt. In Pallav Seth the custodian received information of the appellant having committed contempt of taking over benami concerns, transferring funds to these concerns and operating their accounts, from a letter dated 5.5.1998, received from the Income Tax Authorities. Soon thereafter on 18.6.1998 a petition was filed for initiating action in contempt and notices were issued by the Court on 9.4.1999. The Supreme Court found that on becoming aware of the forged applications the contempt proceedings were filed on 18.6.1998 well within the period of limitation prescribed by Section 20 of the Act. The action taken by the special court by its order dated 9.4.1999 directing the applications to be treated as show cause notice, was thus valid and that the contempt action was not barred by Section 20 of the Act. 32. In the present case the alleged contempt was committed in the court of Shri Onkar Singh Yadav, Civil Judge (Senior Division) Etah on 16.4.2003 and 13.5.2003. The officer initiated the proceedings by making reference to the High Court through the District Judge vide his letters dated 7.6.2003, separately in respect of the incidents. These letters were received by the Court with the forwarding letter of the District Judge dated 1.6.2003 and were placed before Administrative Judge on 7.7.2003, who returned the matter to the Registrar General with his order dated 18.6.2004 to be placed before Hon'ble the Chief Justice and that by his order dated 11.7.2004, Hon'ble the Chief Justice referred the matter to court having contempt determination. Show cause notices were issued by the court to the contemnor on 28.10.2004. In view of the law as explained in Pallav Seth (supra) the contempt proceedings would be taken to be initiated on 7.6.2003 by the Civil Judge (Senior Division)

Etah, which was well within the period of one year from the date of the incidents prescribed under Section 20 of the Act.

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36. We do not find that the contemnor Shri Mahipal Singh Rana is suffering from any mental imbalance. He is fully conscious of his actions and take responsibility of the same. He suffers from an inflated ago, and has a tremendous superiority complex and claims himself to be a champion for the cause of justice, and would not spare any effort, and would go to the extent of intimidating the judges if he feels the injustice has been done to his client. We found ourselves unable to convince him that the law is above every one, and that even if he is an able lawyer belonging to superior caste, he could still abide by the dignity of court and the decency required from an advocate appearing in any court of law.

37. The due administration of law is of vastly greater importance than the success or failure of any individual, and for that reason public policy as well as good morals require that every Advocate should keep attention to his conduct. An Advocate is an officer of the Court apart of machinery employed for administration of justice, for meeting out to the litigants the exact measure of their legal rights. He is guilty of a crime if he knowingly sinks his official duty, in what may seem to be his own or his clients temporary advantage.

38. We find that the denial of incidents and allegations of malafides against Shri Onkar Singh Yadav, the then Civil Judge (Senior Division) Etah have been made only to save himself from the contumacious conduct.

39. Shri Mahipal Singh Rana, the contemnor has refused to tender apologies for his conduct. His affidavit in support of stay vacation/modification and supplementary affidavit do not show any remorse. He has justified himself again and again, in a loud and thundering voice.

40. We find that Shri Mahipal Rana the contemnor is guilty of criminal contempt in intimidation and threatening Shri Onkar Singh Yadav the then Civil Judge (Senior Division) Etah in his court on 16.4.2003 and 13.5.2003 and of using loud and indecent language both in court and in his pleadings in suit No. 515/2002. He was discharged from proceeding of contempt in Criminal Contempt

Petition No. 21/1998 and Criminal Contempt No. 60 of 1998 on his tendering unconditionally apology on 3.8.1999 and 11.11.2002 respectively. He however did not mend himself and has rather become more aggressive and disrespectful to the court. He has virtually become nuisance and obstruction to the administration of justice at the Judgeship at Etah. We are satisfied that the repeated acts of criminal contempt committed by him are of such nature that these substantially interfere with the due course of justice. We thus punish him under Section 12 of the Contempt of Courts Act 1971, with two months imprisonment and also impose fine of Rs. 2000/- on him. In case non-payment of fine he will undergo further a period of imprisonment of two weeks. However, the punishment so imposed shall be kept in abeyance for a period of sixty days to enable the contemner Shri Rana to approach the Hon'ble Supreme Court, if so advised.

41. We also direct the Bar Council of Uttar Pradesh to take the facts constituted in the complaints of Shri Onkar Singh Yadav, the then Civil Judge (Senior Division) Etah, the two earlier contempts referred in this judgment, and to draw proceedings against him for professional misconduct.

42. Under the Rules of this Court, the contemnor shall not be permitted to appear in courts in the Judgeship at Etah, until he purges the contempt.

43. The Registrar General shall draw the order and communicate it to the Bar Council of Uttar Pradesh and Bar Council of India within a week. The contemnor shall be taken into custody to serve the sentence immediately of the sixty days if no restrain order is passed by the appellate court."

Rival Contentions:

12. The learned counsel appearing for the appellant before this Court specifically denied the instances dated 16.4.2003 and 13.5.2003 and further submitted that the appellant had not even gone to the Court of the learned Civil Judge (Senior Division), Etah on the aforestated two days and therefore, the entire case made out against the appellant was false and frivolous. The learned counsel, therefore, submitted that the High Court had committed an error by not going into the fact as to whether the appellant had, in fact,

attended the Court of the learned Civil Judge (Senior Division), Etah on 16.4.2003 and 13.5.2003. The learned counsel further submitted that the High Court ought to have considered the fact that the appellant had filed several complaints against the learned Judge who was the complainant and therefore, with an oblique motive the entire contempt proceedings were initiated against the appellant. The said complaints ought to have been considered by the High Court. It was further submitted that contempt proceedings were barred by limitation. The incidents in question are dated 16th April, 2003 and 13th May, 2003 while notice was ordered to be issued on 28th April, 2004.

13. The learned counsel, thus, submitted that the action initiated against the appellant was not just and proper and the impugned judgment awarding punishment to the appellant under the Act is bad in law and therefore, deserved to be set aside. In the alternative, it is submitted that the appellant was 84 years of age and keeping that in mind, the sentence for imprisonment may be set aside and instead, the fine may be increased.

14. On the other hand, the learned counsel appearing for the State of Uttar Pradesh submitted that the impugned judgment was just, legal and proper and the same was delivered after due deliberation and careful consideration of the relevant facts. He submitted that looking at the facts of the case, the High Court rightly came to the conclusion that the appellant was not only present in the Court on those two days i.e. on 16.4.2003 and 13.5.2003, but the appellant had also misbehaved and misconducted in such a manner that his conduct was contemptuous and therefore, the proceedings under the Act had to be initiated against him. The learned counsel also drew attention of the Court to the nature of the allegations made by the appellant against the learned Judge and about the contemptuous behaviour of the appellant. The learned counsel also relied upon the report submitted to the learned District Judge and submitted that the impugned judgment is just, legal and proper. He also submitted that the misbehaviour and contemptuous act of the appellant was unpardonable and therefore, the High Court had rightly imposed punishment upon the appellant.

15. In response to the notice issued by this Court on 20th August, 2015 in respect of the question framed, the learned counsel appearing for the Bar Council of India submitted that Section 24A of the Advocates Act, 1961 provides for a bar against admission of a person as an advocate if he is convicted of an offence involving moral turpitude, apart from other situations in which such bar operates. The proviso however, provides for the bar being

lifted after two years of release. However, the provision did not expressly provide for removal of an advocate from the roll of the advocates if conviction takes place after enrollment of a person as an advocate. Only other relevant provision under which action could be taken is Section 35 for proved misconduct. It is further stated that though the High Court directed the Bar Council of Uttar Pradesh to initiate proceedings for professional misconduct on 2.12.2005, the consequential action taken by the Bar Council of the State of Uttar Pradesh was not known. It is further stated that the term moral turpitude has to be understood having regard to the nature of the noble profession of law which requires a person to possess higher level of integrity. Even a minor offence could be termed as an offence involving moral turpitude in the context of an advocate who is expected to be aware of the legal position and the conduct expected from him as a citizen is higher than others. It was further submitted that only the State Bar Council or Bar Council of India posses the power to punish an advocate for "professional misconduct" as per the provisions of Section 35 of the Advocates Act, 1961 and reiterated the law laid down by this Court in ***Supreme Court Bar Association versus Union of India***[1]**.** In addition, the counsel submitted that a general direction to all the Courts be given to communicate about conviction of an advocate for an offence involving moral turpitude to the concerned State Bar Council or the Bar Council of India immediately upon delivering the judgment of conviction so that proceedings against such advocates can be initiated under the Advocates Act, 1961.

16. The Learned Additional Solicitor General of India appearing on behalf of Union of India, submitted that normally in case of all professions, the apex body of the professionals takes action against the erring professional and in case of legal profession, the Bar Council of India takes disciplinary action and punishes the concerned advocate if he is guilty of any misconduct etc. Reference was made to Architects Act, 1972, Chartered Accountants Act, 1949, Company Secretaries Act, 1980, Pharmacy Practice Regulations, 2015, Indian Medical Council (Professional Conduct Etiquettes and Ethics) Regulations, 2002, National Council for Teacher Education Act, 1993, Cost and Works Accountants Act, 1959, Actuaries Act, 2006, Gujarat Professional Civil Engineers Act, 2006, Representation of Peoples Act, 1951, containing provisions for disqualifying a person from continuing in a regulated profession upon conviction for an offence involving moral turpitude. Reference was also made to Section 24A of the Advocates Act which

[1] (1998) 4 SCC 409

provides for a bar on enrolment as an advocate of a person who has committed any offence involving moral turpitude. It was further submitted that if a person is disqualified from enrolment, it could not be the intention of the legislature to permit a person already enrolled as an advocate to continue him in practice if he is convicted of an offence involving moral turpitude. Bar against enrolment should also be deemed to be bar against continuation. It was further submitted that Article 145 of the Constitution empowers the Supreme Court to make rules for regulating practice and procedure including the persons practicing before this Court. Section 34 of the Advocates Act empowers the High Courts to frame rules laying down the conditions on which an advocate shall be permitted to practice in courts. Thus, there is no absolute right of an advocate to appear in court. Appearance before Court is subject to such conditions as are laid down by this Court or the High Court. An Advocate could be debarred from appearing before the Court even if the disciplinary jurisdiction for misconduct was vested with the Bar Council as laid down in ***Supreme Court Bar Association (supra)*** and as further clarified in ***Pravin C. Shah versus K.A. Mohd. Ali*** [2]***, Ex-Captain Harish Uppal versus Union of India***[3]***, Bar Council of India versus High Court of Kerala***[4] and ***R.K. Anand versus Registrar, Delhi High Court*** [5]. Thus, according to the counsel, apart from the Bar Council taking appropriate action against the appellant, this Court could debar him from appearance before any court.

17. Shri Dushyant Dave, learned senior counsel and President of the Supreme Court Bar Association supported the interpretation canvassed by the learned Additional Solicitor General. He submitted that image of the profession ought to be kept clean by taking strict action against persons failing to maintain ethical standards.

18. We have heard the learned counsel appearing for the parties and have perused the judgments cited by them.

Consideration of the questions

We may now consider the questions posed for consideration:
Re: (i)

19. Upon going through the impugned judgment, we are of the view that no error has been committed by the High Court while coming to the conclusion that the appellant had committed contempt of Court under the provisions of the Act.

[2] (2001) 8 SCC 650, [3](2003) 2 SCC 45, [4](2004) 6 SCC 311 & [5](2009) 8 SCC 106

20. We do not agree with the submissions of the learned counsel for the appellant that the appellant did not appear on those two days before the Court. Upon perusal of the facts found by the High Court and looking at the contents of the letters written by the concerned judicial officers, we have no doubt about the fact that the appellant did appear before the Court and used the language which was contemptuous in nature.

21. So far as the allegations made by the appellant with regard to the complaints made by him against the complainant judge, after having held that the appellant had appeared before the Court and had made contemptuous statements, we are of the opinion that those averments regarding the complaints are irrelevant. The averments regarding the complaints cannot be a defence for the appellant. Even if we assume those averments about the complaints to be correct, then also, the appellant cannot use such contemptuous language in the Court against the presiding Judge.

22. There is no merit in the contention of the appellant that there was delay on the part of the complainant Judge in sending the reference and he could have tried the appellant under Section 228 of the Indian Penal Code and the procedure prescribed under Code of Criminal Procedure. It is for the learned judge to decide as to whether action should be taken under the Act or under any other law.

23. The High Court has rightly convicted the appellant under the Act after having come to a conclusion that denial of the incidents and allegations of malafides against the complainant Judge had been made by the appellant to save himself from the consequences of contempt proceedings. The appellant had refused to tender apology for his conduct. His affidavit in support of stay vacation/modification and supplementary affidavit did not show any remorse and he had justified himself again and again, which also shows that he had no regards for the majesty of law.

24. It is a well settled proposition of law that in deciding whether contempt is serious enough to merit imprisonment, the Court will take into account the likelihood of interference with the administration of justice and the culpability of the offender. The intention with which the act complained of is done is a material factor in determining what punishment, in a given case, would be appropriate. In the case at hand, the High Court has rightly held that the appellant was guilty of criminal contempt. We are however, inclined to set aside the sentence for imprisonment in view of advance age of the appellant and also in the light of our further direction as a result of findings of question No. (ii)

Re: (ii)
Court's jurisdiction vis a vis statutory powers of the Bar Councils

25. This Court, while examining its powers under Article 129 read with Article 142 of the Constitution with regard to awarding sentence of imprisonment together with suspension of his practice as an Advocate, in **Supreme Court Bar Association (supra),** the Constitution Bench held that while in exercise of contempt jurisdiction, this Court cannot take over jurisdiction of disciplinary committee of the Bar Council[6] and it is for the Bar Council to punish the advocate by debarring him from practice or suspending his licence as may be warranted on the basis of his having been found guilty of contempt, if the Bar Council fails to take action, this Court could invoke its appellate power under Section 38 of the Advocates Act[7]. In a given case, this court or the High Court can prevent the contemnor advocate from appearing before it or other courts till he purges himself of the contempt which is different from suspending or revoking the licence or debarring him to practise[8].

26. Reference may be made to the following observations in ***SCBA case (supra):***

> ***"79.*** *An advocate who is found guilty of contempt of court may also, as already noticed, be guilty of professional misconduct in a given case but it is for the Bar Council of the State or Bar Council of India to punish that advocate by either debarring him from practice or suspending his licence, as may be warranted, in the facts and circumstances of each case. The learned Solicitor General informed us that there have been cases where the Bar Council of India taking note of the contumacious and objectionable conduct of an advocate, had initiated disciplinary proceedings against him and even punished him for "professional misconduct", on the basis of his having been found guilty of committing contempt of court. We do not entertain any doubt that the Bar Council of the State or Bar Council of India, as the case may be, when apprised of the established contumacious conduct of an advocate by the High Court or by this Court, would rise to the occasion, and take appropriate action against such an advocate. Under Article 144 of the Constitution "all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court". The Bar Council which performs a public duty and is*

charged with the obligation to protect the dignity of the profession and maintain professional standards and etiquette is also obliged to act "in aid of the Supreme Court". It must, whenever facts warrant, rise to the occasion and discharge its duties uninfluenced by the position of the contemner advocate. It must act in accordance with the prescribed procedure, whenever its attention is drawn by this Court to the contumacious and unbecoming conduct of an advocate which has the tendency to interfere with due administration of justice. It is possible for the High Courts also to draw the attention of the Bar Council of the State to a case of professional misconduct of a contemner advocate to enable the State Bar Council to proceed in the manner prescribed by the Act and the Rules framed thereunder. There is no justification to assume that the Bar Councils would not rise to the occasion, as they are equally responsible to uphold the dignity of the courts and the majesty of law and prevent any interference in the administration of justice. Learned counsel for the parties present before us do not dispute and rightly so that whenever a court of record records its findings about the conduct of an advocate while finding him guilty of committing contempt of court and desires or refers the matter to be considered by the Bar Council concerned, appropriate action should be initiated by the Bar Council concerned in accordance with law with a view to maintain the dignity of the courts and to uphold the majesty of law and professional standards and etiquette. Nothing is more destructive of public confidence in the administration of justice than incivility, rudeness or disrespectful conduct on the part of a counsel towards the court or disregard by the court of the privileges of the Bar. In case the Bar Council, even after receiving "reference" from the Court, fails to take action against the advocate concerned, this Court might consider invoking its powers under Section 38 of the Act by sending for the record of the proceedings from the Bar Council and passing appropriate orders. Of course, the appellate powers under Section 38 would be available to this Court only and not to the High Courts. We, however, hope that such a situation would not arise.

80. *In a given case it may be possible, for this Court or the High Court, to prevent the contemner advocate to appear before it till he purges himself of the contempt but that is much different from suspending or revoking his licence or debarring him to practise as an advocate. In a case of contemptuous, contumacious, unbecoming or*

blameworthy conduct of an Advocate-on-Record, this Court possesses jurisdiction, under the Supreme Court Rules itself, to withdraw his privilege to practice as an Advocate-on-Record because that privilege is conferred by this Court and the power to grant the privilege includes the power to revoke or suspend it. The withdrawal of that privilege, however, does not amount to suspending or revoking his licence to practice as an advocate in other courts or tribunals.

81. *We are conscious of the fact that the conduct of the contemner in V.C. Mishra case [(1995) 2 SCC 584] was highly contumacious and even atrocious. It was unpardonable. The contemner therein had abused his professional privileges while practising as an advocate. He was holding a very senior position in the Bar Council of India and was expected to act in a more reasonable way. He did not. These factors appear to have influenced the Bench in that case to itself punish him by suspending his licence to practice also while imposing a suspended sentence of imprisonment for committing contempt of court but while doing so this Court vested itself with a jurisdiction where none exists. The position would have been different had a reference been made to the Bar Council and the Bar Council did not take any action against the advocate concerned. In that event, as already observed, this Court in exercise of its appellate jurisdiction under Section 38 of the Act read with Article 142 of the Constitution of India, might have exercised suo motu powers and sent for the proceedings from the Bar Council and passed appropriate orders for punishing the contemner advocate for professional misconduct after putting him on notice as required by the proviso to Section 38 which reads thus:*

"Provided that no order of the Disciplinary Committee of the Bar Council of India shall be varied by the Supreme Court so as to prejudicially affect the person aggrieved without giving him a reasonable opportunity of being heard." But it could not have done so in the first instance."

27. In ***Pravin C. Shah (supra)*** this Court held that an advocate found guilty of contempt cannot be allowed to act or plead in any court till he purges himself of contempt. This direction was issued having regard to Rule 11 of the Rules framed by the High Court of Kerala under Section 34 (1) of the Advocates Act and also referring to observations in para 80 of the judgment of this Court in ***Supreme Court Bar Association (supra)***. It was explained that debarring a person from appearing in Court was within the

purview of the jurisdiction of the Court and was different from suspending or terminating the licence which could be done by the Bar Council and on failure of the Bar Council, in exercise of appellate jurisdiction of this Court. The observations are:

> ***16.*** *Rule 11 of the Rules is not a provision intended for the Disciplinary Committee of the Bar Council of the State or the Bar Council of India. It is a matter entirely concerning the dignity and the orderly functioning of the courts. The right of the advocate to practice envelops a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions etc. Rule 11 has nothing to do with all the acts done by an advocate during his practice except his performance inside the court. Conduct in court is a matter concerning the court and hence the Bar Council cannot claim that what should happen inside the court could also be regulated by the Bar Council in exercise of its disciplinary powers. The right to practise, no doubt, is the genus of which the right to appear and conduct cases in the court may be a specie. But the right to appear and conduct cases in the court is a matter on which the court must have the major supervisory power. Hence the court cannot be divested of the control or supervision of the court merely because it may involve the right of an advocate.*
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> ***17.*** *When the Rules stipulate that a person who committed contempt of court cannot have the unreserved right to continue to appear and plead and conduct cases in the courts without any qualm or remorse, the Bar Council cannot overrule such a regulation concerning the orderly conduct of court proceedings. Courts of law are structured in such a design as to evoke respect and reverence for the majesty of law and justice. The machinery for dispensation of justice according to law is operated by the court. Proceedings inside the courts are always expected to be held in a dignified and orderly manner. The very sight of an advocate, who was found guilty of contempt of court on the previous hour, standing in the court and arguing a case or cross-examining a witness on the same day, unaffected by the contemptuous behaviour he hurled at the court, would erode the dignity of the court and even corrode the majesty of it*

besides impairing the confidence of the public in the efficacy of the institution of the courts. This necessitates vesting of power with the High Court to formulate rules for regulating the proceedings inside the court including the conduct of advocates during such proceedings. That power should not be confused with the right to practise law. While the Bar Council can exercise control over the latter, the High Court should be in control of the former.

18. *In the above context it is useful to quote the following observations made by a Division Bench of the Allahabad High Court in Prayag Das v. Civil Judge, Bulandshahr {AIR 1974 All 133] : (AIR p. 136, para 9)*

"The High Court has a power to regulate the appearance of advocates in courts. The right to practise and the right to appear in courts are not synonymous. An advocate may carry on chamber practice or even practise in courts in various other ways, e.g., drafting and filing of pleadings and vakalatnama for performing those acts. For that purpose his physical appearance in courts may not at all be necessary. For the purpose of regulating his appearance in courts the High Court should be the appropriate authority to make rules and on a proper construction of Section 34(1) of the Advocates Act it must be inferred that the High Court has the power to make rules for regulating the appearance of advocates and proceedings inside the courts. Obviously the High Court is the only appropriate authority to be entrusted with this responsibility."

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24. *Purging is a process by which an undesirable element is expelled either from one's own self or from a society. It is a cleaning process. Purge is a word which acquired implications first in theological connotations. In the case of a sin, purging of such sin is made through the expression of sincere remorse coupled with doing the penance required. In the case of a guilt, purging means to get himself cleared of the guilt. The concept of purgatory was evolved from the word "purge", which is a state of suffering after this life in which those souls, who depart this life with their deadly sins, are purified and rendered fit to enter into heaven where nothing defiled enters (vide Words and Phrases, Permanent Edn., Vol. 35-A, p. 307). In Black's Law Dictionary the word "purge" is given the following*

meaning: "To cleanse; to clear. To clear or exonerate from some charge or imputation of guilt, or from a contempt." It is preposterous to suggest that if the convicted person undergoes punishment or if he tenders the fine amount imposed on him the purge would be completed.

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27. *We cannot therefore approve the view that merely undergoing the penalty imposed on a contemnor is sufficient to complete the process of purging himself of the contempt, particularly in a case where the contemnor is convicted of criminal contempt. The danger in giving accord to the said view of the learned Single Judge in the aforecited decision is that if a contemnor is sentenced to a fine he can immediately pay it and continue to commit contempt in the samecourt, and then again pay the fine and persist with his contemptuous conduct. There must be something more to be done to get oneself purged of the contempt when it is a case of criminal contempt.*

28. *The Disciplinary Committee of the Bar Council of India highlighted the absence of any mode of purging oneself of the guilt in any of the Rules as a reason for not following the interdict contained in Rule 11. Merely because the Rules did not prescribe the mode ofpurging oneself of the guilt it does not mean that one cannot purge the guilt at all. The first thing to be done in that direction when a contemnor is found guilty of a criminal contempt is to implant or infuse in his own mind real remorse about his conduct which the courtfound to have amounted to contempt of court. Next step is to seek pardon from the court concerned for what he did on the ground that he really and genuinely repented and that he has resolved not tocommit any such act in future. It is not enough that he tenders an apology. The apology tendered should impress the court to be genuine and sincere. If the court, on being impressed of his genuineness, accepts the apology then it could be said that the contemnor has purged himself of the guilt."*

28. In ***Bar Council of India versus High Court of Kerala***[9]**,** constitutionality of Rule 11 of the Rules framed by the High Court of Kerala for barring a lawyer from appearing in any court till he got himself purged of contempt by an appropriate order of the court was examined. This Court held that the rule did not violate Articles 14 and 19 (1) (g) of the Constitution nor

[9] (2004) 6 SCC 311

amounted to usurpation of power of adjudication and punishment conferred on the Bar Councils and the result intended by the application of the rule was automatic. It was further held that the rule was not in conflict with the law laid down in the ***SCBA judgment (supra)***. Referring to the Constitution Bench judgment in ***Harish Uppal (supra),*** it was held that regulation of right of appearance in courts was within the jurisdiction of the courts. It was observed, following ***Pravin C. Shah (supra),*** that the court must have major supervisory power on the right to appear and conduct in the court. The observations are:

> ***"46.*** *Before a contemner is punished for contempt, the court is bound to give an opportunity of hearing to him. Even such an opportunity of hearing is necessary in a proceeding under Section 345 of the Code of Criminal Procedure. But if a law which is otherwise valid provides for the consequences of such a finding, the same by itself would not be violative of Article 14 of the Constitution of India inasmuch as only because another opportunity of hearing to a person, where a penalty is provided for as a logical consequence thereof, has been provided for. Even under the penal laws some offences carry minimum sentence. The gravity of such offences, thus, is recognised by the legislature. The courts do not have any role to play in such a matter."*

29. Reference was also made to the following observations in *Harish Uppal (supra)*:

> *"34……The right to practise, no doubt, is the genus of which the right to appear and conduct cases in the court may be a specie. But the right to appear and conduct cases in the court is a matter on which the court must and does have major supervisory and controlling power. Hence courts cannot be and are not divested of control or supervision of conduct in court merely because it may involve the right of an advocate. A rule can stipulate that a person who has committed contempt of court or has behaved unprofessionally and in an unbecoming manner will not have the right to continue to appear and plead and conduct cases in courts. The Bar Councils cannot overrule such a regulation concerning the orderly conduct of court proceedings. On the contrary, it will be their duty to see that such a rule is strictly abided by. Courts of law are structured in such a design as to evoke respect and reverence to the majesty of law and justice. The machinery for dispensation of justice*

according to law is operated by the court. Proceedings inside the courts are always expected to be held in a dignified and orderly manner. The very sight of an advocate, who is guilty of contempt of court or of unbecoming or unprofessional conduct, standing in the court would erode the dignity of the court and even corrode its majesty besides impairing the confidence of the public in the efficacy of the institution of the courts. The power to frame such rules should not be confused with the right to practise law. While the Bar Council can exercise control over the latter, the courts are in control of the former. This distinction is clearly brought out by the difference in language in Section 49 of the Advocates Act on the one hand and Article 145 of the Constitution of India and Section 34(1) of the Advocates Act on the other. Section 49 merely empowers the Bar Council to frame rules laying down conditions subject to which an advocate shall have a right to practise i.e. do all the other acts set out above. However, Article 145 of the Constitution of India empowers the Supreme Court to make rules for regulating this practice and procedure of the court including inter alia rules as to persons practicing before this Court. Similarly Section 34 of the Advocates Act empowers High Courts to frame rules, inter alia to lay down conditions on which an advocate shall be permitted to practise in courts. Article 145 of the Constitution of India and Section 34 of the Advocates Act clearly show that there is no absolute right to an advocate to appear in a court. An advocate appears in a court subject to such conditions as are laid down by the court. It must be remembered that Section 30 has not been brought into force and this lso shows that there is no absolute right to appear in a court. Even if Section 30 were to be brought into force control of proceedings in court will always remain with the court. Thus even then the right to appear in court will be subject to complying with conditions laid down by courts just as practice outside courts would be subject to conditions laid down by the Bar Council of India. There is thus no conflict or clash between other provisions of the Advocates Act on the one hand and Section 34 or Article 145 of the Constitution of India on the other."

30. In *R.K. Anand (supra)* it was held that even if there was no rule framed under Section 34 of the Advocates Act disallowing an advocate who

is convicted of criminal contempt is not only a measure to maintain dignity and orderly function of courts, it may become necessary for the protection of the court and for preservation of the purity of court proceedings. Thus, the court not only has a right but also an obligation to protect itself and save the purity of its roceedings from being polluted, by barring the advocate concerned from appearing before the courts for an appropriate period of time[10]. This court noticed the observations about the decline of ethical and professional standards of the Bar, and need to arrest such trend in the interests of administration of justice. It was observed that in absence of unqualified trust and confidence of people in the bar, the judicial system could not work satisfactorily. Further observations are that the performance of the Bar Councils in maintaining professional standards and enforcing discipline did not match its achievements in other areas. This Court expressed hope and expected that the Bar Council will take appropriate action for the restoration of high professional standards among the lawyers, working of their position in the judicial system and the society. It was further observed:

> ***"331.*** *The other important issue thrown up by this case and that causes us both grave concern and dismay is the decline of ethical and professional standards among lawyers. The conduct of the two appellants (one convicted of committing criminal contempt of court and the other found guilty of misconduct as Special Public Prosecutor), both of them lawyers of long standing, and designated Senior Advocates, should not be seen in isolation. The bitter truth is that the facts of the case are manifestation of the general erosion of the professional values among lawyers at all levels. We find today lawyers indulging in practices that would have appalled their predecessors in the profession barely two or three decades ago. Leaving aside the many kinds of unethical practices indulged in by a section of lawyers we find that even some highly successful lawyers seem to live by their own rules of conduct.*
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> *xxxxxxxx*
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> ***333.*** *We express our concern on the falling professional norms among the lawyers with considerable pain because we strongly feel that unless the trend is immediately arrested and reversed, it will have very deleterious consequences for the administration of justice in the country. No judicial system in a democratic society can work satisfactorily unless it is supported by a Bar that enjoys the*

unqualified trust and confidence of the people, that shares the aspirations, hopes and the ideals of the people and whose members are monetarily accessible and affordable to the people.

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335. *Here we must also observe that the Bar Council of India and the Bar Councils of the different States cannot escape their responsibility in this regard. Indeed the Bar Council(s) have very positively taken up a number of important issues concerning the administration of justice in the country. It has consistently fought to safeguard the interests of lawyers and it has done a lot of good work for their welfare. But on the issue of maintaining high professional standards and enforcing discipline among lawyers its performance hardly matches its achievements in other areas. It has not shown much concern even to see that lawyers should observe the statutory norms prescribed by the Council itself. We hope and trust that the Council will at least now sit up and pay proper attention to the restoration of the high professional standards among lawyers worthy of their position in the judicial system and in the society."*

31. In ***Re: Sanjiv Dutta & Ors.***[11], it was observed that the members of legal profession are required to maintain exemplary conduct in and outside of the Court. The respect for the legal system was due to role played by the stalwarts of the legal profession and if there was any deviation in the said role, not only the profession but also the administration of justice as a whole would suffer. In this regard, relevant observations are :

"20. The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by the its members by their exemplary conduct both in and outside the court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society. Both as a leading member of the intelligential of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behavior. It must not be forgotten

[11] (1995) 3 SCC 619

that the legal profession has always been held in high esteem and its members have played an enviable role in public life. The regard for the legal and judicial systems in this country is in no small measure due to the tiredness role played by the stalwarts in the profession to strengthen them. They took their profession seriously and practised it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible. The casualness and indifference with which some members practise the profession are certainly not calculated to achieve that purpose or to enhance the prestige either of the profession or of the institution they are serving. If people lose confidence in the profession on account of the deviant ways of some of its members, it is not only the profession which will suffer but also the administration of justice as a whole. The present trend unless checked is likely to lead to a stage when the system will be found wrecked from within before it is wrecked from outside. It is for the members of the profession to introspect and take the corrective steps in time and also spare the courts the unpleasant duty. We say no more."

32. n ***Bar Council of Maharashtra versus M.V. Dabholkar***[12] following observations have been made about the vital role of the lawyer in administration of justice.

"15. Now to the legal issue bearing on canons of professional conduct. The rule of law cannot be built on the ruins of democracy, for where law ends tyranny begins. If such be the keynote thought for the very survival of our Republic, the integral bond between the lawyer and the public is unbreakable. And the vital role of the lawyer depends upon (his probity and professional life style. Be it remembered that the central function of the legal profession is to promote the administration of justice. If the practice of law is thus a public utility of great implications and a monopoly is statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of the confidence of the community in him as a vehicle of justice-social justice. The Bar cannot behave with doubtful scruples or strive to thrive on litigation. Canons of conduct cannot be crystallised into rigid rules but felt by the collective conscience of the practitioners as right: It must be a

[12] (1976) 2 SCC 291

conscience alive to the proprieties and the improprieties incident to the discharge of a sacred public trust. It must be a conscience governed by the rejection of self-interest and selfish ambition. It must be a conscience propelled by a consuming desire to play a leading role in the fair and impartial administration of justice. to the end that public confidence may be kept undiminished at all times in the belief that we shall always seek truth and justice in the preservation of the rule of law. It must be a conscience, not shaped by rigid rules of doubtful validity, but answerable only to a moral code which would drive irresponsible judges from the profession. Without such a conscience, there should be no judge. and, we may add, no lawyer. Such is the high standard set for professional conduct as expounded by courts in this country and elsewhere."

33. In ***Jaswant Singh versus Virender Singh***[13], it was observed :

"36. ……. An advocate has no wider protection than a layman when he commits an act which amounts to contempt of court. It is most unbefitting for an advocate to make imputations against the Judge only because he does not get the expected result, which according to him is the fair and reasonable result available to him. Judges cannot be intimidated to seek favorable orders. Only because a lawyer appears as a party in person, he does not get a license thereby to commit contempt of the Court by intimidating the Judges or scandalising the courts. He cannot use language, either in the pleadings or during arguments, which is either intemperate or unparliamentary. These safeguards are not for the protection of any Judge individually but are essential for maintaining the dignity and decorum of the Courts and for upholding the majesty of law. Judges and courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgments. Fair comments, even if, out-spoken, but made without any malice or attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of court. However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute the courts must bistre themselves to uphold their dignity and the majesty of law. The

[13] 1995 Supp.(1) SCC 384

appellant, has, undoubtedly committed contempt of the Court by theuse of the objectionable and intemperate language. No system of justice can tolerate such unbridled licence on the part of a person, be he a lawyer, to permit himself the liberty of scandalising a Court by casting unwarranted, uncalled for and unjustified aspersions on the integrity, ability, impartiality or fairness of a Judge in the discharge of his judicial functions as it amounts to an interference with the dues course of administration of justice."

34. **In *Subrata Roy Sahara v. Union of India*[14],** it was observed :

"*188. The number of similar litigants, as the parties in this group of cases, is on the increase. They derive their strength from abuse of the legal process. Counsel are available, if the litigant is willing to pay their fee. Their percentage is slightly higher at the lower levels of the judicial hierarchy, and almost non-existent at the level of the Supreme Court. One wonders what is it that a Judge should be made of, to deal with such litigants who have nothing to lose. What is the level of merit, grit and composure required to stand up to the pressures of today's litigants? What is it that is needed to bear the affront, scorn and ridicule hurled at officers presiding over courts? Surely one would need superhumans to handle the emerging pressures on the judicial system. The resultant duress is gruelling. One would hope for support for officers presiding over courts from the legal fraternity, as also, from the superior judiciary up to the highest level. Then and only then, will it be possible to maintain equilibrium essential to deal with complicated disputations which arise for determination all the time irrespective of the level and the stature of the court concerned. And also, to deal with such litigants."*

35. In ***Amit Chanchal Jha versus Registar, High Court of Delhi***[15] this Court again upheld the order of debarring the advocate from appearing in court on account of his conviction for criminal contempt.

36. We may also refer to certain articles on the subject. In "Raising the Bar for the Legal Profession" published in the Hindu newspaper dated 15th September, 2012, Dr. N.R.Madhava Menon wrote:

"……..Being a private monopoly, the profession is organised like a pyramid in which the top 20 per cent command 80 per cent of paying

14 (2014) 8 SCC 470, 15 (2015) 13 SCC 288

work, the middle 30 per cent managing to survive by catering to the needs of the middle class and government litigation, while the bottom 50 per cent barely survive with legal aid cases and cases managed through undesirable and exploitative methods! Given the poor quality of legal education in the majority of the so-called law colleges (over a thousand of them working in small towns and panchayats without infrastructure and competent faculty), what happened with uncontrolled expansion was the overcrowding of ill-equipped lawyers in the bottom 50 per cent of the profession fighting for a piece of the cake. In the process, being too numerous, the middle and the bottom segments got elected to professional bodies which controlled the management of the entire profession. The so-called leaders of the profession who have abundant work, unlimited money, respect and influence did not bother to look into what was happening to the profession and allowed it to go its way — of inefficiency, strikes, boycotts and public ridicule. This is the tragedy of the Indian Bar today which had otherwise a noble tradition of being in the forefront of the freedom struggle and maintaining the rule of law and civil liberties even in difficult times.

37. In "Browbeating, prerogative of lawyers", published in the Hindu newspaper dated 7th June, 2016, Shri S. Prabhakaran, Co-Chairman of Bar Council of India and Senior Advocate, in response to another Article "Do not browbeat lawyers", published in the said newspaper on June 03, 2016, writes

"……The next argument advanced against the rules is that the threat of action for browbeating the judges is intended to silence the lawyers. But the authors have forgotten very conveniently that (i) when rallies and processions were taken out inside court halls obstructing the proceedings, (ii) when courts were boycotted for all and sundry reasons in violation of the law laid down by the Supreme Court in Ex-Capt. Harish Uppal, (iii) when two instances of murder of very notorious lawyers inside the Egmore court complex took place on the eve of elections to the Bar Associations, (iv) when a lady litigant who came to the Family Court in Chennai was physically assaulted by a group of lawyers who also coerced the police to register a complaint against the victim, (v) when a group of lawyers barged into the chamber of a magistrate in Puducherry and wrongfully confined him till he released a lawyer on his own bond in a criminal complaint of sexual assault filed by a lady, (vi) when a

group of lawyers gheraoed a magistrate for not granting bail and one of them spat on his face, leading to strong protests by the Association of Judicial Officers, and (vii) when very recently, a lady litigant was physically assaulted by a group of lawyers for sitting in the chair intended for lawyers inside the court hall, lawyers such as the authors of the article under response maintained a stoic silence. Even lawyers who claim to be human rights activists choose to be silent when the human rights of millions of litigants are affected by boycott of courts. It shows that some lawyers, like the authors of the article under response, have always maintained silence and do not mind being silenced by a few unruly members of the Bar who go on the rampage at times. But they do not want to be silenced by any rule prescribing a decent code of conduct in court halls. The raison d'être appears to be that browbeating is the prerogative of the lawyers and it shall be allowed with impunity."

Undesirability of convicted person to perform important public functions:

38. It may also be appropriate to refer to the legal position about undesirability of a convicted person being allowed to perform important public functions. In *Union of India versus* ***Tulsiram Patel***[16] it was observed that it was not advisable to retain a person in civil service after **conviction.**[17]. In ***Rama Narang versus Ramesh Narang***[18] reference was made to Section 267 of the Companies Act barring a convicted person from holding the post of a Managing Director in a company. This Court observed that having regard to the said wholesome provision, stay of conviction ought to be granted only in rare cases. In ***Lily Thomas versus UOI***[19], this Court held that an elected representative could not continue to hold the office after conviction20. In ***Manoj Narula versus UOI*****21** similar observation was made. In ***Election Commission versus Venkata Rao***[22] the disqualification against eligibility for contesting election was held to operate for continuing on the elected post.

Interpretation of Section 24-A: Need to amend the provision

39. Section 24A of the Advocates Act is as follows:

"24A. Disqualification for enrolment.—

(1) No person shall be admitted as an advocate on a State roll—

[16] (1985) 3 SCC 398,[17] Para 153, [18] (1995) 2 SCC 513, 19 (2013) 7 SCC 653
[20] Para 28., [21] (2014) 9 SCC 1, [22] AIR 1953 SC 210

(a) if he is convicted of an offence involving moral turpitude;

(b) if he is convicted of an offence under the provisions of the Untouchability (Offences) Act, 1955 (22 of 1955);

2[(c) if he is dismissed or removed from employment or office under the State on any charge involving moral turpitude. Explanation.—In this clause, the expression "State" shall have the meaning assigned to it under Article 12 of the Constitution:] Provided that the disqualification for enrolment as aforesaid shall cease to have effect after a period of two years has elapsed since his 3[release or dismissal or, as the case may be, removal.

(2) Nothing contained in sub-section (1) shall apply to a person who having been found guilty is dealt with under the provisions of the Probation of Offenders Act,
1958 (20 of 1958)."

40. Dealing with the above provision, the Division Bench of the Gujarat High Court in ***C. versus Bar Council*** [23] observed:

"2. … …. …. We, however, wish to avail of this opportunity to place on record our feeling of distress and dismay at the fact that a public servant who is found guilty of an offence of taking an illegal gratification in the discharge of his official duties by a competent Court can be enrolled as a member of the Bar even after a lapse of two years from the date of his release from imprisonment. It is for the authorities who are concerned with this question to reflect on the question as to whether such a provision is in keeping with the high stature which the profession (which we so often describe as the noble profession) enjoys and from which even the members of highest judiciary are drawn. It is not a crime of passion committed in a moment of loss of equilibrium. Corruption is an offence which is committed after deliberation and it becomes a way of life for him.

*A corrupt apple cannot become a good apple with passage of time. It is for the legal profession to consider whether it would like such a provision to continue to remain on the Statute Book and would like to continue to adroit persons who have been convicted for offences involving moral turpitude and pesons who have been found guilty of acceptance of illegal gratification, rape, dacoits, forgery, misappropriation of public funds, relating to counter felt currency*23

23 (1982) 2 GLR 706

and coins and other offences of like nature to be enrolled as members merely because two years have elapsed after the date of their release from imprisonment. Does passage of 2 years cleanse such a person of the corrupt character trait, purify his mind and transform him into a person fit for being enrolled as a member of this noble profession? Enrolled so that widows can go to him, matters pertaining to properties of minors and matters on behalf of workers pitted against rich and influential persons can be entrusted to him without qualms. Court records can be placed at his disposal, his word at the Bar should be accepted? Should a character certificate in the form of a Black Gown be given to him so that a promise of probity and trustworthiness is held out to the unwary litigants seeking justice? A copy of this order may, therefore, be sent to the appropriate authorities concerned with the administration of the Bar Council of India and the State Bar Council, Ministry of Law of the Government of India and Law Commission in order that the matter maybe exmined fully and closely with the end in view to preserve the image of the profession and protect the seekers for justice from dangers inherent in admitting such persons on the rolls of the Bar Council."

41. Inspite of the above observations no action appears to have been taken at any level. The result is that a person convicted of even a most heinous offence is eligible to be enrolled as an advocate after expiry of two years from expiry of his sentence. This aspect needs urgent attention of all concerned.

42. Apart from the above, we do not find any reason to hold that the bar applicable at the entry level is wiped out after the enrollment. Having regard to the object of the provision, the said bar certainly operates post enrollment also. However, till a suitable amendment is made, the bar is operative only for two years in terms of the statutory provision.

43. In these circumstances, Section 24A which debars a convicted person from being enrolled applies to an advocate on the rolls of the Bar Council for a period of two years, if convicted for contempt.

44. In addition to the said disqualification, in view judgment of this Court in ***R.K. Anand (supra),*** unless a person purges himself of contempt or is permitted by the Court, conviction results in debarring an advocate from appearing in court even in absence of suspension or termination of the licence to practice. We therefore, uphold the directions of the High Court in para 42

of the impugned order quoted above to the effect that the appellant shall not be permitted to appear in courts of District Etah until he purges himself of contempt.

Inaction of the Bar Councils – Nature of directions required

45. We may now come to the direction to be issued to the Bar Council of Uttar Pradesh or to the Bar Council of India. In the present case, inspite of direction of the High Court as long back as more than ten years, no action is shown to have been taken by the Bar Council. Notice was issued by this Court to the Bar Council of India on 27th January, 2006 and after all the facts having been brought to the notice of the Bar Council of India, the said Bar Council has also failed to take any action. In view of such failure of the statutory obligation of the Bar Council of the State of Uttar Pradesh as well as the Bar Council of India, this Court has to exercise appellate jurisdiction under the Advocates Act in view of proved misconduct calling for disciplinary action. As already observed, in ***SCBA case (supra)***, this Court observed that where the Bar Council fails to take action inspite of reference made to it, this Court can exercise *suo motu* powers for punishing the contemnor for professional misconduct. The appellant has already been given sufficient opportunity in this regard.

46. We may add that what is permissible for this Court by virtue of statutory appellate power under Section 38 of the Advocates Act is also permissible to a High Court under Article 226 of the Constitution in appropriate cases on failure of the Bar Council to take action after its attention is invited to the misconduct.

47. Thus, apart from upholding the conviction and sentence awarded by the High Court to the appellant, except for the imprisonment, the appellant will suffer automatic consequence of his conviction under Section 24A of the Advocates Act which is applicable at the post enrollment stage also as already observed.

48. Further, in exercise of appellate jurisdiction under Section 38 of the Advocates Act, we direct that the licence of the appellant will stand suspended for a further period of five years. He will also remain debarred from appearing in any court in District Etah even after five years unless he purges himself of contempt in the manner laid down by this Court in ***Bar Council of India (supra)*** and ***R.K. Anand (supra)*** and as directed by the High Court**.** Question (ii) stands decided accordingly.

49. We thus, conclude:

(i) Conviction of the appellant is justified and is upheld;

(ii) Sentence of imprisonment awarded to the appellant is set aside in view of his advanced age but sentence of fine and default sentence are upheld. Further direction that the appellant shall not be permitted to appear in courts in District Etah until he purges himself of contempt is also upheld;

(iii) Under Section 24A of the Advocates Act, the enrollment of the appellant will stand suspended for two years from the date of this order;

(iv) As a disciplinary measure for proved misconduct, the licence of the appellant will remain suspended for further five years.

An Epilogue

50. While this appeal will stand disposed of in the manner indicated above, we do feel it necessary to say something further in continuation of repeated observations earlier made by this Court referred to above. Legal profession being the most important component of justice delivery system, it must continue to perform its significant role and regulatory mechanism and should not be seen to be wanting in taking prompt action against any malpractice. We have noticed the inaction of the Bar Council of Uttar Pradesh as well as the Bar Council of India inspite of direction in the impugned order of the High Court and inspite of notice to the Bar Council of India by this Court. We have also noticed the failure of all concerned to advert to the observations made by the Gujarat High Court 33 years ago. Thus there appears to be urgent need to review the provisions of the Advocates Act dealing with regulatory mechanism for the legal profession and other incidental issues, in consultation with all concerned.

51. In a recent judgment of this Court in ***Modern Dental College and Research Centre versus State of M.P.*** in Civil Appeal No.4060 of 2009 dated 2nd May, 2016, while directing review of regulatory mechanism for the medical profession, this court observed that there is need to review of the regulatory mechanism of the other professions as well. The relevant observations are:

> *"There is perhaps urgent need to review the regulatory mechanism for other service oriented professions also. We do hope this issue will receive attention of concerned authorities, including the Law Commission, in due course."*

52. In view of above, we request the Law Commission of India to go into all relevant aspects relating to regulation of legal profession in consultation with all concerned at an early date. We hope the Government of India will consider taking further appropriate steps in the light of report of the Law Commission within six months thereafter. The Central Government may file an appropriate affidavit in this regard within one month after expiry of one year.

53. To consider any further direction in the light of developments that may take place, put up the matter for further consideration one month after expiry of the period of one year.

Appeal disposed of.

2016 (II) ILR - CUT- 740

SUPREME COURT OF INDIA

DIPAK MISRA,J & A.K.GOEL, J.

CRIMINAL APPEAL NO. 867 OF 2016
(ARISING OUT OF S.L.P.(CRL.) NO. 5410 OF 2014

SAMPELLY SATYANARAYANA RAO ……..Appellant

.Vrs.

INDIAN RENEWABLE ENERGY DEVELOPMENT AGENCY LTD. ……..Respondent

NEGOTIABLE INSTRUMENTS ACT, 1881 – S. 138

Whether dishonour of a post dated cheque given for repayment of loan installment, which is also described as "security" in the loan agreement, is covered by section 138 of the Act, 1881 ?

Held, a post dated cheque being a well recognised mode of payment and in the present case, loan having been disbursed prior to the date of the cheque and dishonour of cheque being for discharge of existing liability is covered under section 138 of the Act .

(Para 19)

Case Laws Referred to :-

1 (2014) 12 SCC 539 : Indus Airways Private Limited versus Magnum Aviation Private Limited [1]
2 (1997) Crl. LJ 1942 (AP) : Swastik Coaters(P) Ltd. versus Deepak Bros.[2],
3 (1999) 1 CTC 6 (Mad) : Balaji Seafoods Exports (India) Ltd. versus Mac Industries Ltd.[3]
4 (2000) Crl LJ 1988 Guj) : Shanku Concretes (P) Ltd. versus State of Gujarat [4]
5 (2006) Crl. LJ 4330 (Ker) : Supply House versus Ullas[5]
6 (2010) 172 DLT 91: (2010) 118 DRJ 505 : Magnum Aviation (P) Ltd. versus State [6]
7 (2008) 154 DLT 579 : Mojj Engg. Systems Ltd. versus A.B. Sugars Ltd.[7]
8 (2015) 11 SCC 776 : HMT Watches Ltd. versus M.A. Abida[8]
[9] (2010) 11 SCC 441 : Rangappa versus Sri Mohan[9]

Appellant : Mr. Lakshmi Raman Singh
Respondent : Mr. Annam D. N. Rao

Date of Judgment : 19.09.2016

JUDGMENT

ADARSH KUMAR GOEL, J.

1. This appeal has been preferred against the judgment and order dated 8th May, 2014 passed by the High Court of Delhi at New Delhi in Writ Petition (Criminal) No.1170 of 2011.

2. Question for consideration is whether in the facts of the present case, the dishonour of a post-dated cheque given for repayment of loan installment which is also described as "security" in the loan agreement is covered by Section 138 of the Negotiable Instruments Act, 1881 ("the Act").

3. The appellant is Director of the company whose cheques have been dishonoured and who is also the co-accused. The company is engaged in the field of power generation. The respondent is engaged in development of renewable energy and is a Government of India enterprise. *Vide* the loan agreement dated 15th March, 2001, the respondent agreed to advance loan of Rs.11.50 crores for setting up of 4.00 MW Biomass based Power Project in the State of Andhra Pradesh. The agreement recorded that post-dated cheques towards payment of installment of loan (principal and interest) were given by way of security. The text of this part of the agreement is quoted in the laterpart of this order. The cheques carried different dates depending on the dates when the installments were due and upon dishonour thereof, complaints including the one dated 27th September, 2002 were filed by the respondent in the court of the concerned Magistrate at New Delhi.

4. The appellant approached the High Court to seek quashing of the complaints arising out of 18 cheques of the value of about Rs.10.3 crores. Contention of the appellant in support of his case was that the cheques were given by way of security as mentioned in the agreement and that on the date the cheques were issued, no debt or liability was due. Thus, dishonour of post-dated cheques given by way of security did not fall under Section 138 of the Act. Reliance was placed on clause 3.1 (iii) of the agreement to the effect that deposit of post-dated cheques toward repayment of installments was by way of "security". Even the first installment as per the agreement became due subsequent to the handing over of the post-dated cheque. Thus, contended the appellant, it was not towards discharge of debt or liability in *presenti* but for the amount payable in future.

5. The High Court did not accept the above contention and held :-

"10. In the present case when the post-dated cheques were issued, the loan had been sanctioned and hence the same fall in the first categorythat is they were cheque issued for a debt in present but payable in future. Hence, I find no reason to quash the complaints. However, these observations are only prima facie in nature and it will be open for the party to prove to the contrary during trial."

6. We have heard learned counsel for the parties.

7. It will be appropriate to reproduce the statutory provision in question which is as follows :

"138. ***Dishonour of cheque for insufficiency, etc., of funds in the account.*** *- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:*

Provided that nothing contained in this section shall apply unless –

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. - For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

8. Clause 3.1(iii) of the agreement may also be noted :-

" 3.1 SECURITY FOR THE LOAN

The loan together with the interest, interest tax, liquidated damages, commitment fee, up front fee prima on repayment or on redemption, costs, expenses and other monies shall be secured by ;

(i) xxxxx
(ii) xxxxx

(iii) Deposit of Post dated cheques towards repayment of installments of principal of loan amount in accordance with agreed repayment schedule and installments of interest payable thereon."

9. Reference may now be made to the decision of this Court in ***Indus Airways Private Limited versus Magnum Aviation Private Limited*** [1]**,** on which strong reliance has been placed by learned counsel for the appellant. The question therein was whether post-dated cheque issued by way of advance payment for a purchase order could be considered for discharge of legally enforceable debt.

The cheque was issued by way of advance payment for the purchase order but the purchase order was cancelled and payment of the cheque was stopped. This Court held that while the purchaser may be liable for breach of the contract, when a contract provides that the purchaser has to pay in advance and cheque towards advance payment is dishonoured, it will not give rise to criminal liability under Section 138 of the Act. Issuance of cheque towards advance payment could not be considered as discharge of any subsisting liability. View to this effect of the Andhra Pradesh High Court in ***Swastik Coaters(P) Ltd. versus Deepak Bros.***[2], Madras High Court in ***Balaji Seafoods Exports (India) Ltd. versus Mac Industries Ltd.***[3], Gujarat High Court in ***Shanku Concretes (P) Ltd. versus State of Gujarat*** [4] and Kerala High Court in ***Supply House versus Ullas***[5] was held to be correct view as against the view of Delhi High Court in ***Magnum Aviation (P) Ltd. versus State*** [6] and ***Mojj Engg. Systems Ltd. versus A.B. Sugars Ltd.***[7] which was disapproved**.**

10. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in ***Indus Airways (supra)*** with reference to the explanation to Section 138 of the Act and the expression "for discharge of any debt or other liability" occurring in

[1] (2014) 12 SCC 539, [2] (1997) Crl. LJ 1942 (AP), [3] (1999) 1 CTC 6 (Mad), [4] (2000) Crl LJ 1988 Guj)
[5] (2006) Crl. LJ 4330 (Ker), [6] (2010) 172 DLT 91: (2010) 118 DRJ 505 [7] (2008) 154 DLT 579

Section 138 of the Act. We are of the view that the question whether a post-1 dated cheque is for "discharge of debt or liability" depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.

11. Reference to the facts of the present case clearly shows that though the word "security" is used in clause 3.1(iii) of the agreement, the said expression refers to the cheques being towards repayment of installments. The repayment becomes due under the agreement, the moment the loan is advanced and the installment falls due. It is undisputed that the loan was duly disbursed on 28th February, 2002 which was prior to the date of the cheques. Once the loan was disbursed and installments have fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under Section 138 of the Act. The cheques undoubtedly represent the outstanding liability.

12. Judgment in ***Indus Airways (supra)*** is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in *presenti* in terms of the loan agreement, as against the case of ***Indus Airways (supra)*** where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such deposit of cheques towards repayment of installments was also described as "security" in the loan agreement. In applying the judgment in ***Indus Airways (supra),*** one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

13. Crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing enforceable debt or

liability or whether it represents advance payment without there being subsisting debt or liability. While approving the views of different High Courts noted earlier, this is the underlying principle as can be discerned from discussion of the said cases in the judgment of this Court.

14. In ***Balaji Seafoods (supra),*** the High Court noted that the cheque was not handed over with the intention of discharging the subsisting liability or debt. There is, thus, no similarity in the facts of that case simply because in that case also loan was advanced. It was noticed specifically therein – as was the admitted case of the parties – that the cheque was issued as "security" for the advance and was not intended to be in discharge of the liability, as in the present case.

15. In ***HMT Watches Ltd. versus M.A. Abida***[8], relied upon on behalf of the respondent, this Court dealt with the contention that the proceedings under Section 138 were liable to be quashed as the cheques were given as "security" as per defence of the accused. Negativing the contention, this Court held :-

> ***"10.*** *Having heard the learned counsel for the parties, we are of the view that the accused (Respondent 1) challenged the proceedings of criminal complaint cases before the High Court, taking factual defences. Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial court after recording evidence of the parties. In our opinion, the High Court should not have expressed its view on the disputed questions of fact in a petition under Section 482 of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties. The High Court further erred in observing that Section 138(b) of the NI Act stood uncomplied with, even though Respondent 1(accused) had admitted that he replied to the notice issued by the complainant. Also, the fact, as to whether the signatory of demand notice was authorised by the complainant company or not, could not have been examined by the High Court in its jurisdiction under Section 482 of the Code of Criminal Procedure when such plea was controverted by the complainant before it.*

8 (2015) 11 SCC 776

11. *In Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd. [(2008) 13 SCC 678], this Court has made the following observations explaining the parameters of jurisdiction of the High Court in exercising its jurisdiction under Section 482 of the Code of Criminal Procedure: (SCC pp. 685-87, paras 17 & 22)*

"17. The parameters of jurisdiction of the High Court in exercising its jurisdiction under Section 482 of the Code of Criminal Procedure is now well settled. Although it is of wide amplitude, a great deal of caution is also required in its exercise. What is required is application of the well-known legal principles involved in the matter.

***

22. Ordinarily, a defence of an accused although appears to be plausible should not be taken into consideration for exercise of the said jurisdiction. Yet again, the High Court at that stage would not ordinarily enter into a disputed question of fact. It, however, does not mean that documents of unimpeachable character should not be taken into consideration at any cost for the purpose of finding out as to whether continuance of the criminal proceedings would amount to an abuse of process of court or that the complaint petition is filed for causing mere harassment to the accused. While we are not oblivious of the fact that although a large number of disputes should ordinarily be determined only by the civil courts, but criminal cases are filed only for achieving the ultimate goal, namely, to force the accused to pay the amount due to the complainant immediately. The courts on the one hand should not encourage such a practice; but, onthe other, cannot also travel beyond its jurisdiction to interfere with the proceeding which is otherwise genuine. The courts cannot also lose sight of the fact that in certain matters, both civil proceedings and criminal proceedings would be maintainable."

12. *In Rallis India Ltd. v. Poduru Vidya Bhushan [(2011) 13 SCC 88], this Court expressed its views on this point asunder: (SCC p. 93, para 12)*

"12. At the threshold, the High Court should not have interfered with the cognizance of the complaints having been taken by the trial court. The High Court could not have discharged the respondents of the said liability at the threshold. Unless the parties are given opportunity to

lead evidence, it is not possible to come to a definite conclusion as to what was the date when the earlier partnership was dissolved and since what date the respondents ceased to be the partners of the firm."

16. We are in respectful agreement with the above observations. In the present case, reference to the complaint (a copy of which is Annexures P-7) shows that as per the case of the complainant, the cheques which were subject matter of the said complaint were towards the partial repayment of the dues under the loan agreement (para 5 of the complaint).

17. As is clear from the above observations of this Court, it is well settled that while dealing with a quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at this stage. The court considering the prayer for quashing does not adjudicate upon a disputed question of fact.

18. In ***Rangappa versus Sri Mohan***[9]***,*** this Court held that once issuance of a cheque and signature thereon are admitted, presumption of a legally enforceable debt in favour of the holder of the cheque arises.

It is for the accused to rebut the said presumption, though accused need not adduce his own evidence and can rely upon the material submitted by the complainant. However, mere statement of the accused may not be sufficient to rebut the said presumption. A post dated cheque is a well recognized mode of payment [10]**.**

19. Thus, the question has to be answered in favour of the respondent and against the appellant. Dishonour of cheque in the present case being for discharge of existing liability is covered by Section 138 of the Act, as rightly held by the High Court.

20. Accordingly, we do not find any merit in this appeal and the same is dismissed. Since we have only gone into the question whether on admitted facts, case for quashing has not been made out, the appellant to contest the matter in trial court in accordance with law.

[9] (2010) 11 SCC 441

Appeal dismissed.

2016 (II) ILR - CUT-748

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

W.P.(C) PIL NO. 14002 OF 2016

BELABAHALI ANCHALIKA PANCHAYAT SURAKHAYA MANCHA & ORS. ……..Petitioners

.Vrs.

UNION OF INDIA & ORS. ……Opp.parties

(A) P.I.L – Dispute relating to length of a bridge – Policy decision taken by NHAI after considering reports submitted by different engineers and decided it to be 360 meters – When two or more opinions are possible the policy making body may accept one opinion which should not be malafide or in conflict with any law and in such cases Court has no jurisdiction to interfere.

In this case small section of the local people filed the writ petition alleging that the bridge should be 600 or 434 meters as opined by engineers instead of 360 meters – Their plea that they will be affected during flood can not be accepted as the same river water would now flow under a 360 meters bridge which till now has been flowing under the existing 206 meters bridge – Held, the policy decision taken by NHAI not being in conflict with any law or not malafide this court cannot cross the "Laxman Rekha" to examine the correctness of the administrative decision in exercise of its power of judicial review. (Paras 19, 20)

(B) P.I.L – Dispute relating to length of a river bridge – Writ filed after commencement of execution of the project – No reasonable explanation for the inordinate delay which leads to colossal wastage of public money etc. – Moreover the writ petition does not comply with the requirements of PIL Rules framed by this Court – Held, PIL is liable to be dismissed. (Para 19)

Case Laws Relied on :-

1. AIR 2000 SC 3751 : Narmada Bachao Andolan, etc.,etc. -V- Union of India
2. (2014) 8 SCC 804 : Jal Mahal Resorts Pvt. Ltd. -V- K.P.Sharma

Case Laws Referred to :-

1. AIR 1986 SC 825 : Chaitanya Kumar v. The State of Karnataka
2. 2011 AIR SCW 4460 : Union of India v. Dr. Kushasla Shetty.
3. (2009) 8 SCC 582 : Delhi Development Authority v. Rajendra Singh.

4. 2011 AIR SCW 4460 : Union of India v. Dr. Kushasla Shetty & Ors.,
5. 2016 (II) OLR 210 (DB) : Kalipada Mishra v. State of Orissa
6. 2012 (I) ILR CUT 206 : Niranja Tripathy v. State of Orissa
7. (2014) 8 SCC 804 : Jal Mahal Resorts Private Limited v. K.P. Sharma.

For Petitioners : M/s. Jagannath Patnaik, Sr. Advocate
N.K.Sahu, B.Swain & P.Swain

For Opp.parties : Mr. A.K.Bose, Asst. Solicitor General
Mr. A.Mohanty, Central Govt. Counsel
Mr. S.P.Mishra, Advocate General
M/s Amitav Das, H.K.Mahali, M.M.Das,B
.P.Mohanty & R.K.Sahoo.
Mr. R.K. Rath, Sr. Advocate
Ms. Pami Rath & Mr. J.P. Behera.
M/s. A.K. Mohapatra, Senior Advocate
S.Samal, T.Dash, S.P. Mangaraj, S.Nath and
A.K. Barik.
M/s S.S. Das, Sr. Advocate
P.K. Ghose, S.Das and S.Modi.
M/s U.K. Samal, P.K. Mohapatra, S.P. Patra,
C.D. Sahoo & S. Naik.
M/s. Manas Chand, M.B. Patra &R.R.Misra.

Date of Judgment : 30.08.2016

JUDGMENT

VINEET SARAN, C.J.

Twenty-nine residents of three villages, claiming to be representing all the inhabitants of three Grama Panchayats, i.e., Belabahali Grama Panchayat, Haridapal Grama Panchayat and Balio Grama Panchayat of Anandapur Sub-Division in the district of Keonjhar, have approached this Court by filing this public interest litigation, with the prayer that the proposal approved for construction of the bridge on river Kusei in Keonjhar and its alignment with the road as suggested by Independent Engineer (IE) vide communication dated 15.06.2016 in respect of "Four laning of Panikoili-Remuli Section of NH-215 from KM 0.000 to KM 163.000 in the State of Odisha under NHDP Phase III as BOT (Toll) on DBFOT Pattern – Construction of major bridge at KM 35.803 at village Belbahali, Dist. Keonjhar", be quashed. It is further prayed that the report dated 10.12.2015 submitted by Dr. G.C. Mitra as well as two reports of the Officers (Engineers) of the State Government dated 25.04.2015 and 29.04.2015 with

regard to the length of the bridge proposed to be constructed on the river Kusei in Keonjhar district, be accepted.

2. The brief facts of the case are, that the project for construction of four-lane highway has been undertaken by the National Highway Authority of India (NHAI), and for that purpose a bridge over the said river Kusei is to be constructed. Admittedly, the approach road for the said bridge has already been constructed and the question involved in the present writ petition, which remains to be considered, is with regard to the length of the bridge, as the petitioners have given up their prayer with regard to alignment of road and the site, where the bridge is to be constructed.

3. We have heard Mr. J. Pattnaik, learned Senior Counsel appearing along with Mr. N.K. Sahu, learned counsel for the petitioners; Mr. S.P. Mishra, learned Advocate General for the State-opposite parties; Mr. A. Das, learned counsel appearing for the contesting opposite party- NHAI as well as Mr. R.K. Rath, learned Senior Counsel along with Mr. J.P. Behera, learned counsel appearing for opposite party no.10, who has been assigned the contract for construction of the approach road for the bridge.

4. Four miscellaneous applications have been filed for intervention. Although we have not allowed the said applications, but we have permitted learned counsel appearing for the intervenors to make their submission and, thus, we heard Mr.S.S. Das, Mr.U.K. Samal, Dr. A.K. Mohapatra, and Mr. M. Chand, learned counsel appearing for the four sets of Intervenors.

5. The brief submission of Mr. J. Pattnaik, learned Senior Counsel appearing for the petitioners is that the length of the bridge in question, as per the two reports dated 25.04.2015 and 29.04.2015 of the Officers (Engineers) of the State Government, should be 600 metres and, if not that, then it should be at least 434 metres, as has been opined by Dr. G.C. Mitra, former Engineer in-Chief of the State Government, vide his report dated 10.12.2015. The contention is that ignoring the reports of the Engineers of the State Government as well as that of Dr. G.C. Mitra, the opposite parties are proceeding to construct the bridge as per the design of NHAi, the length of which is only 360 metres and, if the same is permitted, the three villages in question would be adversely affected in case of flood, as the said villages are situated in the downstream of the river. It has been contended that the NHAI is proceeding with the work of construction of the bridge with the length of only 360 metres, after relying on the opinion given by Professor Dr. D. Sen of the IIT, Khadagpur vide report dated 26.11.2015 and the letter issued by

G.M.(T), Odisha dated 15.06.2016, to take up Construction work seeking in principle approval of the COS based on the recommendation of IE on priority, after ignoring the views of the other Engineers of the State Government as well as Dr. G.C. Mitra. In order to substantiate their case, reliance was placed on ***Chaitanya Kumar v. The State of Karnataka***, AIR 1986 SC 825 and ***Jal Mahal Resorts Private Limited v. K.P. Sharma***, (2014) 8 SCC 804.

6. Per contra, Mr. S.P.Mishra, learned Advocate General has submitted that the National Highway Authority of India is a technical body, duly competent to take a decision with regard to construction of highway roads and bridges, and though the Officers (Engineers) of the State Government may have given their reports, but in fact, the State does not have a direct role in the matter, and the NHAI is the body authorized to take the final decision. His further contention is that the construction of the concerned National Highway, as well as the bridge in question, is in public interest and should be completed as quickly as possible.

7. Mr. Amitav Das, learned counsel appearing for NHAI has submitted, that the report of Dr. D. Sen was sought after the two Engineers had given their reports that the length of the bridge should be 600 metres and also after taking into account the report of Dr. G.C. Mitra, wherein it was opined that length of the bridge should be 434 metres. The report submitted by Dr. D. Sen was, according to Sri Das, after inspecting the site on 14.08.2015 along with Project Director and the Chief General Manager-opposite party no.10 (which fact is being disputed by Mr. J. Pattnaik, learned Senior Counsel appearing for the petitioners), and it was only after such visit that the report dated 26.11.2015 was submitted by Dr. D. Sen, categorically stating that the length of the bridge should be 360 metres and the same would not cause floods or affect the interest of the residents of the nearby villages. After the said report had been submitted, it is contended that the report of an Independent Engineer was sought for by the NHAI, and as per such report, the Independent Engineer also opined that the length of the bridge should be 360 metres, as would be clear from communication dated 15.06.2016. As such, according to Sri A.Das, construction as well as the alignment of the road and the bridge, as proposed in the sanctioned designs, is technically justified and appropriate, and does not call for interference. It has also been submitted that the matter in question is a policy decision of the Government and the NHAI, which normally should not be interfered with by the Court of Law. Reliance has been placed on decisions in ***Narmada Bachao Andolan,***

etc. etc. v. Union of India, AIR 2000 SC 3751 and ***Union of India v. Dr. Kushasla Shetty***, 2011 AIR SCW 4460.

8. Mr. R.K. Rath, learned Senior Counsel appearing for the Contractor, opposite party no.10 has submitted that the approach road of 34 k.m. has already been constructed, and although the decision to construct 360 metres bridge was taken in the year 2013, at which stage some villagers did make a representation which was primarily with regard to realignment, they did not approach the Court till the 34 k.m. road had been constructed and the work with regard to construction of bridge had already commenced. It is thus contended that the writ petition, besides not being in public interest, is also liable to be dismissed on the ground of latches. It is further urged by Mr. R.K. Rath, learned Senior Counsel, that his clients had undertaken the work of construction of bridge on the principle of Build Operate and Transfer (BOT) and it is opposite party no.10 which is incurring all the expenses, and would recover the same only after the road and the bridge are constructed, and in case there is any delay in construction of the bridge, opposite party no.10 alone will suffer irreparably. He relied on the judgment in ***Delhi Development Authority v. Rajendra Singh***, (2009) 8 SCC 582.

9. Misc. Case No. 13986 of 2016 has been filed by 71 villagers of Hatadihi Panchayat Samiti and Ghatagaon Panchayat Samiti through Mr. S.S. Das, learned Senior Counsel, who has submitted that the villagers are interested in construction of the bridge at the earliest and it would not be in the public interest to delay the project.

10. Misc. Case No. 13920 of 2016 has been filed by Mr. U.K. Samal, Advocate on behalf of 51 villagers, 24 of them being of Belbahali Grama Panchayat and more than 25 of them being members of the Grama Panchayat and elected representatives of the areas, including Chairman of the concerned Block. It is contended by Mr. Samal that the petitioners are not representing all the inhabitants of three Grama Panchayats, and this writ petition has not been filed in public interest, but in the interest of the 29 petitioners, who, according to the intervenors, have been interested in realignment of the bridge road and of the National Highway because of their personal interest, as their shops in the market would be adversely affected if such bridge is constructed. It is also contended that this writ petition has not been filed in conformity with the Rules relating to the Public Interest Litigation framed by the Orissa High Court, and on that ground also it is claimed that the writ petition deserves to be dismissed, as the same is not maintainable in view of

the decision in the case of **Niranjan Tripathy v. State of Orissa**, 2012 (I) ILR CUT 206. He has also relied on the judgment in ***Jal Mahal Resorts Private Limited v. K.P. Sharma***, (2014) 8 SCC 804.

11. Dr. A.K. Mohapatra, learned Senior Counsel, who has filed Misc. Case No. 14024 of 2016 seeking intervention of 69 villagers, who are all Sarpanchs as well as members of the Grama Panchayats and elected office bearers, also opposes the writ petition on the ground that any delay in construction of the National Highway, including the bridge construction work, would adversely affect the public interest and it is submitted that such work, which is in the interest of the public, should not be delayed and should be completed as expeditiously as possible. It is further urged that the Court should not interfere with the public policy in exercise of power under judicial review in view of the judgment in **Kalipada Mishra v. State of Orissa**, 2016 (II) OLR 210 (DB).

12. Mr. Manas Chand, learned counsel has filed Misc. Case No. 14113 of 2016 on behalf of 38 villagers, who are all residents of the 3 villages in question. Sri Chand has supported the case of NHAI and opposes the prayer made in the writ petition, and has submitted that it would be in the public interest that the bridge in question should be constructed at the earliest, as per the already approved designs.

13. On the basis of the facts pleaded above, two issues arise for consideration, namely:

(i) Whether the writ in the nature of public interest litigation is maintainable or not?; and

(ii) Whether the Court has got expertise to interfere with the expert opinion conceded and executed by the authority or not?

Since both the issues are interrelated, they are being dealt with together.

14. As is clear from the facts of this case, some of the residents of Belbahali, Haridapal and Balio villages have filed this writ petition in the nature of Public Interest Litigation, challenging the alignment of road and selection of site for construction of the bridge in question on the National Highway No.215, and its length. But, this writ petition has also been opposed by many of the villagers of the same villages, along with some adjacent villages, by way of filing of miscellaneous applications. Therefore, there are rival claims over the construction of the bridge in question. It is noteworthy

that in course of hearing of the writ petition the petitioners themselves have abandoned the plea of alignment of the road. Further, in course of hearing, they have also not disputed the construction of the bridge at the site, which has been selected by the National Highway Authority of India. Their dispute remains only with regard to the length of the bridge, as the National Highway Authority of India has decided to construct the bridge of length 360 metres, whereas the petitioners claim that the length of the bridge should be 600 metres, if not at least 434 metres, even though the existing old bridge is of only 206 metres in length. The decision so taken is based on the expert opinion, over which, in exercise of the power of judicial review, this Court has got limited scope to interfere. In any case, since the National Highway is constructed under a project, which is a time bound one, to serve the greater public interest of having better connectivity in the State itself, at the instance of a handful of people interfering at this stage, to our opinion, would be unwarranted. In the case of ***Narmada Bachao Andolan*** (supra), the apex Court held as follows:

> "*260. In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration.* ***In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government****. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in Public Interest to require the Court to go into and investigate those areas which are the function of the executive.* ***For any project which is approved after due deliberation the Court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible****. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the Court to go into the matter afresh and, in a way, sit in appeal over such a policy decision."*
>
> ***(Emphasis supplied)***

In view of the judgment of the apex Court, this Court is of the considered view that it cannot sit as an appellate authority over the policy

decision of the Government and interfere with the same at the behest of a handful of people.

Apart from the same, nothing has been produced before this Court by the learned Senior Counsel for the petitioners that before approaching this Court, by way of filing this Public Interest Litigation, the procedure envisaged in Public Interest Litigation Rules, 2010 framed by the Orissa High Court has been duly followed. If the Rules framed by this Court in 2010 have not been followed, in view of the judgment of a Division Bench of this Court in ***Niranjan Tripathy*** (supra), the writ petition is not maintainable.

Reliance has been placed on the decision of the Apex Court in ***Chaitanya Kumar*** (supra) by the learned Senior Counsel for the petitioners, where it has been held that in a Public Interest Litigation those professing to be public spirited citizens cannot be encouraged to indulge in wild and reckless allegations besmirching the character of others but, at the same time, the Court cannot close its eyes and persuade itself to uphold publicly mischievous executive actions which have been so exposed. When arbitrariness and perversion are writ large and brought out clearly, the Court cannot shirk its duty and refuse its writ. Advancement of the public interest and avoidance of the public mischief are the paramount considerations. As always, the Court is concerned with the balancing of interests.

There is no dispute with regard to proposition laid by the apex Court in the aforementioned judgment. But the case before the apex Court was such where contract had been awarded in gross violation of the Rules which had been challenged in a Public Interest Litigation, but on availability of materials, the Court came to the conclusion that the Public Interest Litigation was maintainable, as on the arbitrary and unreasonable exercise of powers, the contract was awarded and, accordingly, interfered with the same. The facts of the said case are totally different from that of the present one. Therefore, this Court is of the considered view that the judgment so relied upon by the learned Senior Counsel for the petitioners is distinguishable and is also not applicable to the present context. Rather, the judgments rendered in ***Narmada Bachao Andolan*** and ***Niranjan Tripathy*** (supra) are squarely applicable to the present case. In any case, without further delving into the question of maintainability in great detail, considering the larger interest of the public, this Court thinks it proper to decide the case on merit.

15. On the materials available on record, i.e., the map (site plan), which has been filed along with the writ petition, it is clear that the existing road

passes through the village, in a zigzag manner. The already existing bridge on the existing road is of 206 metres length, and a perusal of the site plan would make it clear that the zigzag manner in which the road passes through the villages would not be appropriate for a National Highway and thus, by realignment, a straight road is proposed by the National Highway Authority of India, for which a new bridge over the said river is to be constructed. Since the issue of alignment of the road or the location (site) of the Bridge, as per the approved design, is no longer in question, what we have to consider is only the issue with regard to the length of the bridge. The contention of the learned Senior Counsel for the petitioners is that because of the length of the bridge being shorter (360 metres instead of 600 metres) hence, the river water, in case of flood, would flow to the villages in question.

16. Admittedly, there was no embankment where the bridge is being constructed. Hence, in case of flood the river water would flow to areas where it was flowing earlier. Merely because the bridge is being constructed at a different site, it would thus not affect the flow of river water in case of flood. The same river water would now flow under a 360 metres bridge, which till now has been flowing under the existing 206 metres bridge. It is not understood as to how the flood water would be affected by the length of the bridge, especially when the length of the proposed bridge is more than the existing bridge. The river flows in a natural course and in case of flood, the water would flow in the neighbouring areas, which, in our view, would not be affected by the length of the bridge, as the flow of the water would still continue as before, whether the length of the bridge is 206 metres, 360 metres or 600 metres. In any case, the decision with regard to the alignment and width of the road, as well as the length of the bridge was taken up by the technical experts and in terms of the policy as framed by the competent authority, which in the present case is NHAI. Admittedly, the State Government has no direct say in the matter. Such is not even the case of the petitioners that the view of the State Government is final.

17. In the present case, initially a report was submitted by a committee consisting of one Senior Officer of NHAI and two Engineers of the State Government, and in the said report dated 08.01.2015 the issue of length of the bridge was not in question, although the proposed alignment of the road and design the bridge were in issue before the said committee. However, after the submission of the report by the committee of three members, the remaining two members (who are the Engineers of the State Government) submitted two fresh reports dated 25.04.2015 and 29.04.2015, wherein it was

mentioned that the length of the bridge, as proposed at 360 metres, would not be adequate and the same should be 600 metres. Thereafter, a report was submitted by Prof. Dr. G.C. Mitra, who opined that the length of the bridge should be 434 metres. Even though the said reports were not binding on NHAI, still since there was inconsistency in the various opinions with regard to the length of the bridge, a further report was called for from IIT, Kharagpur, which on 26.11.2015 submitted a detailed report stating that the length of the bridge as proposed, i.e., 360 metres, is adequate. All the reports were sent to an Independent Engineer, who also opined and communicated on 15.06.2016 in favour of the original designs of 360 metres.

18. Mr. J. Pattnaik, learned Senior Counsel appearing for the petitioners relied upon ***Jal Mahal Resorts Private Limited*** (supra) paragraph-138 whereof states as follows:

> *"138. However, we hasten to add and do not wish to be misunderstood so as to infer that howsoever gross or abusive may be an administrative action or a decision which is writ large on a particular activity at the instance of the State or any other authority connected with it, the Court should remain a passive, inactive and a silent spectator. What is sought to be emphasised is that there has to be a boundary line or the proverbial "laxman rekha" while examining the correctness of an administrative decision taken by the State or a central authority after due deliberation and diligence which do not reflect arbitrariness or illegality in its decision and execution. If such equilibrium in the matter of governance gets disturbed, development is bound to be slowed down and disturbed specially in an age of economic liberalisation wherein global players are also involved as per policy decision."*

The said Paragraph-138 has been followed by paragraph-137, which states as follows:

> *137. From this, it is clear that although the courts are expected very often to enter into the technical and administrative aspects of the matter, it has its own limitations and in consonance with the theory and principle of separation of powers, reliance at least to some extent to the decisions of the State authorities, specially if it is based on the opinion of the experts reflected from the project report prepared by the technocrats, accepted by the entire hierarchy of the State administration, acknowledged, accepted and approved by one*

Government after the other, will have to be given due credence and weightage. In spite of this if the court chooses to overrule the correctness of such administrative decision and merits of the view of the entire body including the administrative, technical and financial experts by taking note of hair splitting submissions at the instance of a PIL petitioner without any evidence in support thereof, the PIL petitioners shall have to be put to strict proof and cannot be allowed to function as an extraordinary and extra-judicial ombudsmen questioning the entire exercise undertaken by an extensive body which include administrators, technocrats and financial experts. In our considered view, this might lead to a friction if not collision among the three organs of the State and would affect the principle of governance ingrained in the theory of separation of powers. In fact, this Court in M.P. Oil Extraction v. State of M.P., SCC 611 has unequivocally observed that :

"41. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields."

19. Considering the observations made in paragraphs 137 and 138 of ***Jal Mahal Resorts Private Limited*** (supra), there is no iota of doubt that in exercise of power of judicial review by the Court, it has got limited jurisdiction and, at the same time, the Court must bear in mind that the role of judiciary in outstepping its limit by unwarranted judicial activism, which are being very often talked of in these days, there has to be a boundary line (Laxman Rekha) while examining the correctness of the administrative decision taken by the State or a central authority after due deliberation and diligence. In the nature of the present case, when the expert opinions are made available, this Court cannot substitute its view sitting as an appellate authority over such decision in exercise of powers of judicial review in the matter.

Similar view has also been taken by the apex Court in paragraph-24 of the judgment in ***Union of India v. Dr. Kushasla Shetty & Ors.***, 2011 AIR SCW 4460.

With regard to exercise of the power of judicial review in respect of the matters under the domain of executive fiat of the State or the policy of the State, this Court in ***Kalipada Mishra*** (supra), by referring to various judgments of the Apex Court discussed therein, categorically held that the Court will not interfere with the wisdom in a public policy, unless it offends the equality clause or any of the statutory provision. As it appears from the factual matrix of the case in hand, nothing has been brought to the notice of this Court which offends equality clause or enabling statutory provisions governing the field, save and except that it is stated that the site, on which the bridge is going to be constructed, should be of 600 metres or 434 metres in length, instead of 360 metres, which is on the basis of the report given by the expert committee, to which this Court is of the considered view that it cannot sit as an appellate authority over the expert opinion given and executed by the State, here the NHAI.

In ***Delhi Development Authority*** (supra), the apex Court held that the decision of an expert or autonomous body like NEERI supported by materials, scientific and otherwise, placed by other expert bodies cannot be interfered with by Court without adequate contra material. Applying the said text to the present context, since opposite party no.10 has proceeded with and commenced work on the expert opinion accepted by NHAI, which is the competent authority, the same should not be interfered with in exercise of power under Article 226 of the Constitution of India. In addition to the same, in paragraph-52 of the said judgment relying upon ***Narmada Bachao Andolan*** (supra), the apex Court held that PIL should be thrown out at the threshold if it is challenged after the commencement of execution of the project. It was also held that no relief should be given to persons who approach the Court without reasonable explanation under Articles 226 and 32 after inordinate delay. Though, the decision was taken to change the alignment in 2013, even the expert opinion had been given on 25.11.2015 and it was accepted by the Independent Engineers of NHAI on 15.06.2016, but due to filing of this Public Interest Litigation, which even does not comply with the requirements of PIL Rules, delay has been caused which leads to colossal wastage of public money, even though opposite party no.10 has entered into BOT with the NHAI, this Court cannot shut its eyes with regard to the circumstantial situations in causing delay in execution of the work in question. Meaning thereby, delay in execution of the project would lead to escalation of cost of materials, labour and other ancillary things which may enhance the cost of the project for which the agreement was executed, and

ultimately the burden would shift to the general public at large who would bear the same in shape of taxes. Accordingly issues are answered.

20. In view of the aforesaid facts and circumstances, we are of the considered view that the design, as well as length of the bridge over a river, is a technical issue to be decided by the experts. After considering various reports submitted by different Engineers, a policy decision has been taken by the NHAI with regard to the designs and length of the bridge, which, in our opinion, does not call for interference by this Court, as when two opinions are possible and the policy making body has accepted one opinion, it is not appropriate for Courts to interfere with the decision taken by the competent decision making authority.

21. The writ petition is, accordingly, dismissed. No order as to cost.

Writ petition dismissed.

2016 (II) ILR - CUT-760

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

W.P.(C) NO. 13246 OF 2015

BHUPENDRA KUMAR DASH ……..Petition

.Vrs.

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

TENDER – District Tender Committee approved the tender of the Petitiner for grant of contract – Re-opening of the matter after lapse of one month and denial to the petitioner for awarding the contract, in utter disregard to the mandatory procedure laid down in the tender documents – Such re-opening, whether on the basis of complaint or otherwise, can not be justified in law – This Court has justifiable reason to interfere with such action of the authority concerned.

In this case, the petitioner, O.P.Nos. 5 & 6 and others applied for the bid floated by the O.P.-Corporation – All qualified in the technical bid opened on 22.04.2015 – Prior to opening of the price bid on 23.04.2015 workable rate disclosed to the participants qualified in the technical bid – The workable rate as disclosed was 33.21 and after 10% deduction it came to 29.89 – As the bid of the petitioner was 29.94 the

Tender Committee on 23.04.2015 approved and selected the Petitioner for the contract – However on 01.06.2015 such Committee gave a fresh report changing the workable rate from 33.21 to 34.33 and disqualified the petitioner for the contract – Hence the writ petition – Clause 5.3 of the tender document provides that workable rates are to be disclosed prior to opening of the price bid so there was no occasion for the tender committee to change the workable rate on 01.06.2015 i.e. more than one month after approving the tender of the petitioner on 23.04.2015 – Action of the authority is arbitrary and unreasonable – Held, the proceeding of the District Tender Committee Dt. 01.06.2015 and consequential orders passed by the corporation thereafter are quashed – Direction issued to the O.P.-Corporation to accord the benefit of the recommendation made by the District Tender Committee in its report Dt. 23.04.2015 and award the contract in favour of the petitioner for the remaining period. (Paras 4,6,7)

Case Laws Referred to :-

1. AIR 2002 SC 2766 : Kanhaiya Lal Agrawal v. Union of India & Ors.
2. (2008) 8 SCC 92 State Bank of India v. S.N. Goyal.
3. AIR 1966 MP 20 Komalchand v. State of M.P.

For Petitioner : M/s. Tanmay Mishra & S.Senapati

For Opp.parties : M/s. A.K.Mishra, A.K.Sharma & S.Mishra.
Mr. Ramesh Agarwal, Ruchi Rajgarhia.

Decided on : 18.08.2016

JUDGMENT

VINEET SARAN, CJ.

In response to the tender call notice floated by opp. party-Odisha State Civil Supplies Corporation (for short, 'Corporation') on 09.04.2015 inviting tender from Level-II Handling & Transport Contractors for certain work for the years 2015-16 and 2016-17, the petitioner and opp. parties 5 and 6 had applied. The admitted position is that the last date for receipt of the tender was 22.04.2015. The technical bid was to be opened on the same date and the price bid was to be opened on 23.04.2015. The petitioner as well as opp. parties 5 and 6 and others had qualified in the technical bid and the price bid was to be opened on 23.04.2015. As per condition no.5, the workable rate was to be determined by the District Tender Committee after scrutiny of the technical bid and was to be disclosed to the successful tenderers who had qualified in the technical bid on the day of opening of the price bid, before

the price bid was opened. In compliance with the said condition, the workable rate was disclosed to the participants of Binka Block on 23.04.2015, prior to opening of the price bid of the tenderers who had qualified in the technical bid. The workable rate as disclosed was 33.21 and the rate after 10% deduction came to 29.89. The bid of the petitioner was for 29.94. After considering the price bids of all the nine tenderers who were found eligible in the technical bid, the District Tender Committee of the Corporation, on 23.04.2015, approved and selected the petitioner for being given the contract of Binka Unit of the Corporation. Then on 01.06.2015, which is more than a month after the finalization of the tender process, the Tender Committee gave a fresh report with regard to the workable rate and changed the same from 33.21 to 34.33 and found that after the change of the workable rate none of the technically qualified bidders were eligible under the price bid, as the price ought to be within 10% of the workable rate. Opp. parties 5 and 6 had also given their bids and were found to be disqualified. However, the District Tender Committee vide its report dated 01.06.2015, after holding that the petitioner as well as opp. parties 5 and 6 had become disqualified, as the rate quoted by them was below 10% of the workable rate, resolved to tag Binka Unit to the selected tenderers of the nearby Block/Unit, Dunguripali and consequently opp. parties 5 and 6 were engaged as contractors.

2. The submission of the learned counsel for the petitioner is that after the opening of the financial bid, the workable rate could not have been changed as the specific clause 5.3 of the tender document provided that the workable rates were to be disclosed prior to opening of the price bid and the same having been done so on 23.04.2015, and thereafter on opening of the price bid the petitioner having been found to be qualified and his tender approved, there was no occasion for the opp. party-Corporation or the District Tender Committee to change the workable rate on 01.06.2015.

3. In our view, the submission of the learned counsel for the petitioner has force. The conditions in the tender document have to be complied with, which were initially complied with by the opp. party-Corporation, but for the reasons best known, the same were changed inasmuch as the workable rate, which was an essential component of the tender, was changed more than a month after opening of the price bid and finalization of the tender.

4. In **Kanhaiya Lal Agrawal v. Union of India and others,** AIR 2002 SC 2766, the apex Court held as follows:

> *"Court is normally reluctant to intervene in matters of entering into contracts by the Govt. but if the same is found to be unreasonable, arbitrary, mala fide or is in disregard of mandatory procedures it will not hesitate to nullify or rectify such actions."*

As it appears in the present case that the authority has acted unreasonably, arbitrarily and in utter disregard to mandatory procedure laid down in the tender documents, therefore, this Court has justifiable reason to interfere with such action of the authority concerned.

5. The District Tender Committee, after having given the report dated 23.04.2015 and having approved the tender of the petitioner for grant of contract, had become "***functus officio***". The meaning of "***functus officio***" has been elaborately discussed in P Ramanatha Aiyar's Advanced Law Lexicon, 4th Edition, where the Latin phase as mentioned above has a meaning "*no longer having power or jurisdiction*" (because the power has been exercised). An arbitrator who has delivered his award becomes ***functus officio*** i.e., he no longer has power or jurisdiction.

In **Komalchand v. State of M.P.,** AIR 1966 MP 20, 22 (FB), the Madhya Pradesh High Court while considering Section 33(1) and Section 38 of the Indian Stamp Act, 1899 held as follows:

> *"As soon as a registration officer registered a document presented to him for registration, the function in the performance of which the document was produced before him is over and thereafter he becomes Functus Officio, having no power under Section 38 to impound the document."*

In **State Bank of India v. S.N. Goyal,** (2008) 8 SCC 92, the apex Court held as follows:

> "A *quasi*-judicial authority will become *functus officio* only when its order is pronounced, or published/notified or communicated to the party concerned."

6. In view of such position, the District Tender Committee could not have reopened the matter after lapse of more than one month after having given report on 23.04.2015 and having approved the tender of the petitioner for grant of contract. Such reopening, whether it may be on the basis of complaint or otherwise, cannot be justified in law.

7. In view of the aforesaid, denial to the petitioner for awarding the contract cannot be justified in law. The proceeding of the District Tender

Committee dated 01.06.2015 and the consequential order dated 08.06.2015 and 09.06.2015 passed by the opposite party-Corporation, deserve to be quashed, and are accordingly quashed. The opposite party-Corporation is directed to accord the benefit of the recommendation made by the District Tender Committee in its report dated 23.04.2015 and award the contract in favour of the petitioner for the remaining period within two weeks from the date of filing of certified copy of this order before opposite parties No.3 and 4. The writ petition stands allowed to the extent indicated above. No order as to costs.

Writ petition allowed.

2016 (II) ILR - CUT-764

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

WA NO. 88 OF 2016

SARAT CHANDRA MOHANTY .....Appellant

.Vrs.

STATE OF ORISSA & ORS. .....Respondents

ODISHA GRAMA PANCHAYAT ACT, 1964 – S. 115 (1)

Suspension of sarpanch – Procedure – The provision postulates three requirements which are cumulative and in the absence of any one of them the suspension becomes invalid – They are :-

(i) on an enquiry or inspection made by the Collector, or on a report from the concerned Sub-Divisional Officer;

(ii) satisfaction of the Collector that circumstances exist to show that the Sarpanch or the Naib-Sarpanch has wilfully omitted or refused to carry out or violated the provisions of the Act, or the rules or orders made thereunder, or abused the powers, rights and privileges vested in him or acted in a manner prejudicial to the interest of the inhabitants of the Grama; and

(iii) Collector is satisfied that the further continuance of the elected representative in office would be detrimental to the interest of the Grama Panchayat or the inhabitants of the Grama.

Further to attract the provision, the above requirements must not only be present but also the Collector should be satisfied that the alleged delinquency was "wilful" – So even if a sarapanch has committed some mistakes, detrimental to the Grama Panchayat but if such act is not "wilful" i.e. deliberate and intentional and there is no satisfaction of the authority, he will not lose his throne on which he is seated by the people.

In the present case order of suspension only indicates that the appellant has violated the provisions of section 19 of the Act and his continuance was detrimental to the interest of the inhabitants of the Grama Panchayat but it does not indicate the satisfaction of the authority on compliance of the above three requirements – Held, the impugned order of suspension is quashed and the order passed by the learned single Judge Dt. 22.06.2015 is setaside.

(Paras 8,9,10)

Case Laws Relied on :-

1. 62 (1986) CLT 548 : Tarini Tripathy v. Collector, Koraput & Ors.

Case Laws Referred to :-

1. 2004 (I) OLR 206 : Sanatan Jena v. Collector, Balasore and another.
2. 2004 (I) OLR46 : Kulamani Mallik v. The collector, Puri and two others.
3. 92 (2001) CLT 677 : (Smt.) Kanakalata Mallik v. Collector, Kendrapara and others,
4. 2001 (II) OLR 132 : (Smt.) Indumati Swain v. State of Orissa and others,
5. 1999 (II) OLR 264 : Sukanta Bhoi v. State of Orissa & others
6. 2010(1) OLR 909 : Basudev Dandasena v. State of Orissa and others,

For Appellant : M/s. Sanjib Ray, D.S. Ray & S.C. Das,
For Respondents : Mr. B. Bhuyan, Addl. Govt. Advocate

Decided on : 23.08.2016

JUDGMENT

Dr. B.R. SARANGI, J.

The appellant, an elected Sarpanch of Jambu Gram Panchayat under Mahakalapada Block in the district of Kendrapara, approached this Court by filing W.P.(C) No. 1035 of 2015 assailing the order dated 13.01.2015 passed by respondent no.3 under Sub-section (2) of Section 115 of the Orissa Gram Panchayat Act, 1964 (in short "the Act"), whereby, on the allegation of violation of Section 19 of the Act, he was placed under suspension and called upon to explain within 30 days, from the date of its receipt, as to why action

as deemed proper would not be taken against him in accordance with law. The said writ application, by order dated 22.06.2015, came to be disposed of by the learned Single Judge by holding that, charge-sheet having already been submitted against the appellant justifying the suspension, he may participate in the disciplinary proceeding to be taken up pursuant to filing of charge-sheet, and that, the disciplinary proceeding be disposed of as expeditiously as possible, preferably within a period of six months from the date of receipt of a copy of the said order, after giving opportunity of being heard to all the parties concerned. Hence, this intra Court appeal.

2. Mr. S. Ray, learned counsel appearing for the appellant strenuously urged before this Court that before taking a drastic action of suspension against an elected Sarpanch, the mandatory requirements of the provisions of the Orissa Gram Panchayat Act have not been followed. Therefore, the order of suspension passed by the authority cannot sustain in the eye of law. But, the learned Single Judge, without entering into that aspect of the matter, disposed of the writ application by the impugned order with the observation that, since charge sheet had already been filed, it was to be held that the ground of suspension was there to proceed against the appellant in accordance with law. This being an error apparent on the face of the record, interference of this Court, by means of this intra-Court appeal, is sought for.

3. Mr. B. Bhuyan, learned Addl. Government Advocate, on the other hand, urged that since the appellant did not act in consonance with the provisions contained in Section 19 of the Act, the action taken by the authorities against the appellant was justified and, since, by the time the writ petition was taken up for consideration, charge-sheet had already been laid against the appellant, no fault can be found with the learned Single Judge in directing the appellant to participate in the disciplinary proceeding to be taken up pursuant to such charge-sheet.

4. The above being the rival submissions of the parties, it is worthwhile to have a glance on the provisions of Section 19 as well as Section 115(1) and (2) of the Act, for just and proper adjudication of the case.

> *"**S.19 : Powers, duties and functions of Sarpanch**- (1) Save as otherwise expressly provided by or under this Act, the executive powers of the Grama Panchayat for the purpose of carrying out the provisions of this Act, shall be exercised by the Sarpanch, who shall act under the authority of the said Grama Panchayat.*

(2) Without prejudice to the generality of the provisions of Subsection (1) the Sarpanch shall, save as otherwise provided in this Act, or the rules made thereunder and subject to such general or special orders as may be issued from time to time by the State Government in that behalf-

(a) convene and preside over the meetings of the Grama Panchayat and conduct, regulate and be responsible for the proper maintenance of the records of the proceeding of the said meetings;

(b) execute documents relating to contracts on behalf of the Grama Sasan;

(c) be responsible for the proper custody of all records and documents, all valuable securities and all properties and assets belonging to or vested in or under the direction, management or control of the Grama Sasan; (d) be responsible for the proper working of the Grama Panchayat as required by or under this Act;

(e) cause to be prepared all statements and reports required by or under this Act;

(f) exercise supervision and control over the acts and proceedings of all officers and employees of the Grama Panchayat;

(g) be the authority to enter into correspondence on behalf of the Grama Panchayat; and

(h) exercise such other powers, discharge such other duties and perform such other functions as may be conferred or imposed on or assigned to him by or under this Act."

*"**S.115 : Suspension and removal of Sarpanch, Naib- Sarpanch and member** -(1) If the Collector, on an inquiry or inspection made by him or on the report of the Sub-divisional Officer is of the opinion that circumstances exist to show that the Sarpanch or Naib Sarpanch of a Grama Panchayat wilfully omits or refuses to carry out or violates the provisions of this Act or the rules or orders made thereunder or abuses the powers, rights and privileges vested in him or acts in a manner prejudicial to the interest of the inhabitants of the Grama and that the further continuance of such person in office would be detrimental to the interest of the Grama Panchayat or the inhabitants of the Grama, he may, by order, suspend the Sarpanch or Naib-Sarpanch, as the case may be, from office and report the matter to the State Government.*

(2) The State Government, on the report of the Collector under Sub-section (1) shall, or if the State Government themselves are of the opinion that the circumstances specified in the said subsection exist in relation to a Sarpanch or Naib-Sarpanch, then on their own motion, may, after giving the person concerned a reasonable opportunity of showing cause, remove him from the office of Sarpanch or Naib-Sarpanch, as the case may be."

5. Undoubtedly, Section 19 of the Act, as quoted above, deals with the powers, duties and functions of an elected Sarpanch enumerated therein. And the provisions contained in Sub-sections (1) and (2) of Section 115 of the Act envisage suspension of Sarpanch or Naib-Sarpanch in case of any deviation or contravention of the provisions of Section 19 of the Act. But, it is well settled in law that suspension of an elected representative being a drastic action should not be taken recourse to cursorily and in a mechanical manner. If the provisions of Sub-section (1) of Section 115, as extracted above, are read carefully, it postulates three requirements:

(i) on an enquiry or inspection made by the Collector, or on a report from the concerned Sub-Divisional Officer;

(ii) satisfaction of the Collector that circumstances exist to show that the Sarpanch or the Naib-Sarpanch has willfully omitted or refused to carry out or violated the provisions of the Act, or the rules or orders made thereunder, or abused the powers, rights and privileges vested in him or acted in a manner prejudicial to the interest of the inhabitants of the Grama; and

(iii) Collector is satisfied that the further continuance of the elected representative in office would be detrimental to the interest of the Grama Panchayat or the inhabitants of the Grama.

6. The interpretation and scope of Sub-section (1) of Section 115 of the Act had come for consideration by this Court in Tarini Tripathy v. Collector, Koraput and others, 62 (1986) CLT 548. While considering the same, this Court came to hold that all the three requirements, as mentioned above, are cumulative. In absence of any one of them, the suspension is invalid. The Collector must form an opinion on both the counts enumerated in (ii) and (iii) above. The existence of one is not sufficient. Every delinquency or lapse might not satisfy the requirement of (iii). Therefore, while bringing the tenure of an elected representative to an end, either temporarily or permanently, utmost care and circumspection ought to be exercised. Right of an elected

representative to continue in office for the full tenure should not be lightly tinkered with by the Executive.

7. This Court in Baikunthanath Mohanty v. State of Orissa and others, 1987 (II) OLR 391 further considered the provisions of Section 115(1) of the Act. While considering the same, this Court in paragraph-8 and 9 held as follows:

> *"8. It has now become necessary for us to further elucidate the said decision and indicate the ambit of Sec. 115(1). It will be seen that the legislature in its wisdom has used the word 'wilful' in Sec. 115(1). The Collector must not only be of the opinion that the Sarpanch or the Naib- Sarpanch, as the case may be, has omitted or refused to carry out or violated the provisions of the Act, the Rules or the Orders made thereunder and abused and acted in a manner prejudicial to the interest of the inhabitants of the Grama Panchayat or the Grama, but he should also be of opinion that the Sarpanch omitted, refused or violated and abused, as the case may be, 'wilful'. A mere violation, omission, refusal or abuse is not enough. Omission, refusal, violation or abuse must also be willful. The adverb 'wilful' governs and qualifies the conduct of the Sarpanch, namely, that he willfully omitted, refused, violated the provisions of the Act of the Rules or willfully abused the right, and privileges vested in him or willfully acted in a manner prejudicial to the interest of the inhabitants of the Grama Panchayat or the Grama. Unless it is found that he did so willfully the provision would not be attracted. The legislature has not empowered the Collector to take action if the Sarpanch or the Naib-Sarpanch merely omits or refuses to carry out or violates the provisions of the Rules, the Act and the Orders or abuses the rights and privileges vested in him or acts in a manner prejudicial to the interest of the Grama Panchayat unless he so does willfully. The object and purpose appear to the clear.*
>
> *India lives in villages. Panchayatiraj is democracy in action at the grass root level. The little man in the village does not comprehend abstruse political theories. He comprehends best what he sees at his door steps: democracy in operation through the Panchayatiraj system. And that has direct impact on him Panchayatiraj system is the base of the pyramid of democracy. His faith in and commitment to democracy gets strengthened or eroded from what he perceives. An*

iota of disenchantment is likely to destroy the tone of preaching. The stronger we make it, the better for the weal of the polity and the nation. We weaken it at our peril.

It is to be assumed that an errant Sarpanch can trample on the provisions with impunity. Therefore, the provisions in Sec. 115 with adequate safeguards and checks. The legislature in its wisdom has provided that meremistake, or error or violation or abuse is not enough. The delinquency has to be graver. That is why it made 'wilful' delinquency culpable. That is then understood by the word 'wilful' or 'wilfully'.

9. Words and Phrases, Vol. 45 gives the meaning as follows:

Wilful –International; not accidental or involuntarydone, intentionally, knowingly and purposely, without justifiable excuse as distinguished from an act done carelessly; thoughtlessly, heedlessly or inadvertently- in common parlance word 'wilful' is used in sense of intentional, as distinguished from accidental or involuntary, and 'wilfully' refers to act consciously and deliberately done and signifies course of conduct marked by exercise of violation rather than which is accidental, negligent or involuntary.

Black's Law Dictionary defines the word thus:

'Wilfulness' implies an act done intentionally and designedly, a conscious failure to observe care, conscious, knowing, done with stubborn purpose, but not with malice.

Webster's Third New International Dictionary gives the following meaning:

'Governed by will without yielding to reason or without regard to reason; obstinately or perversely selfwilled.

Therefore, the consensus of the meaning of the word 'wilful' is intentional, deliberate, calculated and conscious with full knowledge of legal consequences flowing therefrom (See in this connection S. Sundaram v. V.R. Pattabhiraman, AIR 1985 S.C. 582).'

8. In view of Sub-section (1) of Section 115 of the Act and consequential analysis of the said provisions made by this Court, the three essentials, as indicated in Tarini Tripathy's case (supra), must not only be present, but the Collector should also be satisfied that the alleged delinquency

was 'wilful'. That is to say, the infraction by way of acts or omissions was willful and not accidental or negligent or involuntary, but intentional, deliberate, calculated and conscious, with full knowledge of legal consequences flowing therefrom. The purpose of imposing such restriction under the provisions is only by way of a check on the powers of the executive to dethrone an elected representative of the people from the august office. A Sarpanch may have failed to carry out the provisions of the Acts, or the Rules, may have violated them, certain of his acts may appear to be abuse of the powers, certain acts may appear to be detrimental to the Grama, but if such act, omission or exercise of power is not willful, that is to say, deliberate, calculated, intentional and conscious, the Sarpanch does not lose his throne on which he is seated by the people.

The above reasons have also been reiterated by this Court in **Sanatan Jena v. Collector, Balasore and another, 2004 (I) OLR 206, Kulamani Mallik v. The collector, Puri and two others, 2004 (I) OLR 46, (Smt.) Kanakalata Mallik v. Collector, Kendrapara and others, 92 (2001) CLT 677, (Smt.) Indumati Swain v. State of Orissa and others, 2001 (II) OLR 132, Sukanta Bhoi v. State of Orissa and others, 1999 (II) OLR 264 and Basudev Dandasena v. State of Orissa and others, 2010(1) OLR 909.**

9. Applying the above dictums to the present context, this Court, on perusal of the order of suspension, finds that except mentioning, that the appellant has violated the provisions of Section 19 of the Act and that continuance of the appellant was detrimental to the interest of the inhabitants of the Gram Panchayat, nothing has been indicated with regard to satisfaction of the authority on compliance of the essential ingredients, as enumerated above, to attract the provisions of Sub-section(1) of Section 115 of the Act. No doubt, Sub-section (2) of Section 115 of the Act empowers the State Government to remove a Sarpanch from his office after following due procedure of reasonable opportunity of being heard given to him and the opinion of the State Government has to be culminated on the report of the Collector under Sub-Section (1) of Section 115 of the Act, which requires the compliance of three cumulative conditions mentioned in clauses (i) to (iii), as discussed above. In absence of any of the provisions thereof, the action so taken cannot sustain in the eye of law. In any case, the impugned order of suspension having been passed without following due procedure as envisaged under Sub-sections (1) and (2) of Section 115 of the Act, the same cannot sustain and is liable to be quashed.

10. Resultantly, the writ appeal is allowed, the order dated 22.06.2015 of the learned Single Judge passed in W.P.(C) No.1035 of 2015 vide Annexure-1 is set aside and the order of suspension dated 13.01.2015 passed by respondent no.3 vide Annexure-2 is quashed.

11. While parting with the case, it was brought to notice of this Court by Mr. B. Bhuyan, learned Addl. Government Advocate that following submission of charge sheet, disciplinary proceedings have been initiated against the appellant for taking action under Sub-section (2) of Section 115 of the Act, but this Court does not feel it proper to express any opinion on the same at this stage.

Writ appeal allowed.

2016 (II) ILR - CUT-772

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

W.P.(C) NOS. 9849 & 9847 OF 2016

PRAMOD KUMAR SAHU (in both) ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS. (in both) ……...Opp.parties

TENDER – After settlement of the bid, if it is detected that a mistake has been committed in the process of selection, the authority has got every right to rectify the same and in that case law of estoppel does not apply.

In this case petitioner, a general category contractor became the 1st lowest bidder and he was called upon to deposit the ISD and execute the agreement – Subsequently it was discovered that tender of O.P.No. 6, one SC contractor has not been considered taking into account the price preference as per resolution Dt. 11.10.1977 – Thereafter the authorities cancelled the bid of the petitioner and settled the bid in favour of O.P.No.6 – Hence the writ petitions – While cancelling the bid in favour of the petitioner the authorities failed to comply minimum principles of natural justice so their action is hit by Article 14 of the Constitution of India – Held, direction issued to the

authorities that in stead of settling the works in question in favour of O.P.No.6, they should go for a fresh tender by classifying the terms of the tender call notice and by affording due opportunity to all the parties. (Paras 13,14,15)

Case Laws Referred to :-

1. (2008) 2 SCC 439 : Deva Metal Powders (P) Ltd. -V- Commr. of Trade Tax, U.P.
2. AIR 1964 SC 521 : State of Punjab -V- Jagdip Singh & Ors.
3. (1970) SLR 59 : Sundar Lal & Ors. -V- State of Punjab
4. 1974(1) CWR 587 : Udayanath Jena -V- State of Orissa, represented by the Director of Health Services, Orissa & Ors.
5. (2001) 4 SCC 309 : Union of India -V- Rakesh Kumar & Ors.

For Petitioner : M/s. S.K.Mishra, S.Rout & J.Pradhan
For Opp.parties : Mr. B.P.Pradhan, Addl.Govt. Advocate
M/s. P.K.Muduli & S.P.Panda.
M/s. A.K.Mohanty, S.R.Mohapatra & T.K.Mohapatra

Date of judgemnt : 07.09.2016

JUDGEMNT

DR. B.R. SARANGI, J.

Both the above mentioned writ petitions involve same questions of fact and law excepting the work for which bids were invited and, as such, they are heard together and disposed of by this common judgment.

2. For the sake of convenience and better appreciation, W.P.(C) No. 9849 of 2016 is considered as a lead case and facts of the said case have been referred to.

The Project Administrator, Integrated Tribal Development Agency (ITDA), Baliguda-opposite party no.3 floated a tender vide Bid Identification No.PA(ITDA)-BLGD-3/15-16 Letter No. 485/ITDA, dated 19.02.2016 inviting bids from the eligible contractors for the purpose of execution of different works in the district of Kandhamal. The tender notice itself stipulated terms and conditions with regard to eligibility for offering bids, where it is stated that SC & ST contractors have to submit an affidavit that they have not availed such benefit for more than two works during the current financial year for the purpose of availing price preference. The petitioner, an 'A' Class contractor, belonging to general category offered his bid in respect

of the work "Construction of Ashram School (Academic block & Staff Qtr. 'B' Type) for PVTG Area at Rangaparu under Tamudibandha Block". On consideration of the bids submitted by the petitioner as well as others, the State-opposite parties found the petitioner as L-1 tenderer in respect of the aforesaid work with 5.8 % less. Accordingly, the State-opposite parties vide letter no. 906/ITDA dated 08.04.2016 intimated the petitioner that he being the 1st lowest bidder has to attend the office of opposite party no.3 to execute agreement on his quoted rate with required ISD and original documents within seven days of receipt of the letter and he was also asked to submit his work programme in respect of the project in the form of an affidavit in non-judicial stamp paper of required amount during the time of agreement. The said letter was received by the petitioner on 18.04.2016. In response to the aforesaid letter dated 08.04.2016, the petitioner complied with the entire requirements including the signing of the agreement from his side and also submitted the work programme vide his letter dated 22.04.2016 and requested the State-opposite parties to provide him the copy of the agreement, work order, estimate and lay out for the purpose of commencing execution of the work. Such letter having been acknowledged by opposite party no.4, opposite party no.3 vide letter dated 23.04.2016 intimated that due to some unavoidable circumstances the agreement was to be executed after few days and the next date for signing of agreement will be intimated to him. As per the terms and conditions of the tender call notice, the agreement ought to have been executed within three days following the selection of the petitioner. As the work order was not issued in favour of the petitioner, he approached this Court by filing W.P.(C) No.9127 of 2016 praying therein for direction to the State-opposite parties to issue work order in his favour. While the matter stood thus,, opposite party no.3 vide its letter No. 1223/ITDA dated 24.05.2016, which was received by the petitioner on 27.05.2016, intimated that the selection of the petitioner as L-1 bidder, as communicated vide letter dated 08.04.2016, has been cancelled, and that as per the resolution dated 11.10.1977 opposite party no.6 is entitled to price preference of 10% being S.C. contractor and the OPWD Manual published in the website giving 5% price preference has not yet been finalized and it is only a draft proposal, as clarified by the Under Secretary to the Government, Works Department in its letter dated 06.05.2016. Being aggrieved by such action of opposite party no.3, the petitioner has approached.

3. In so far as W.P.(C) No.9847 of 2016 is concerned, the same has been filed by the selfsame petitioner in respect of the work "Construction of

Ashram School (Hostel Block) for work PVTG area at-Rangapara under Tumudibandha Block".

4. We have heard learned counsel for the parties and the pleadings between the parties having been exchanged, with the consent of learned counsel for the parties both the matters are disposed of at the stage of admission.

5. Mr. S.K. Mishra, learned counsel for the petitioner urged that though the resolution dated 11.10.1977 grants concession to Schedule Caste and Schedule Tribe Contractors, so far as 10% price preference is concerned, the same has been withdrawn vide Circular dated 24.05.2001 and the Engineer Contractors belonging to SC & ST category are given only5% price preference. Similarly, in the ITDA project at Jaypore, 5% price preference benefit has been given to SC & ST contractors as per the Codal provision of OPWD Manual, which was published in the website in the year 2014. In the instant advertisement, whereby tenders were invited, there was no stipulation with regard to grant of 10% price preference to SC and ST contractors as per Resolution dated 11.10.1977. Therefore, even after declaration of the petitioner as 1st lowest bidder and compliance of all the formalities by him, the subsequent action of the State-opposite parties in cancelling the same, instead of executing the agreement with the petitioner, and selecting opposite party no.6 is violative of Articles 14, 19(1)(g) and 21 of the Constitution of India. It is further urged that the amended Codal provision of OPWD Manual, i.e., clause 3.5.10 having given effect to by the State-opposite parties by their own conduct, subsequently they cannot say that the same has not been given effect to and it is in a draft stage, which is absolutely misconceived one. It is also urged that if by conduct of parties, the revised OPWD manual has come into force, and on that basis, a conscious decision has been taken, parties are bound by the same and any deviation therefrom by the opposite party-authorities is hit by principle of estoppel. Therefore, the work order should be issued in favour of the petitioner, as he was the L-1 bidder and complied with all the formalities or in the alternative direction be given for fresh tender with the change of terms and conditions of the tender call notice.

6. Mr. B.P. Pradhan, learned Addl. Government Advocate appearing for opposite party no.1 states that if the amended Codal provision, i.e., clause 3.5.10(a)(iii) of Draft Revised OPWD Manual available in the website of Works Department is only a draft and meant for inviting comments/suggestions in the matter for finalization, as is evident from letter dated 06.05.2016, in that case, the grant of concession to SC/ST contractors

would be governed by the Works Department Resolution No.27748/W dated 11.10.1977. Applying the same to the present case, opposite party no.6, who belongs to SC category, is entitled to get the price preference of 10%. Therefore, the action taken by the authority in cancelling L-1 bid of the petitioner is wholly and fully justified.

7. Mr. P.K. Muduli, learned counsel for opposite parties no. 2 to 5 though candidly admitted that the petitioner was the L-1 bidder and the State-opposite parties were going to execute the agreement, but taking into consideration the resolution dated 11.10.1977, where a price preference has been granted to the SC/ST contractors, the letter issued on 08.04.2016 in favour of the petitioner has been cancelled vide letter dated 24.05.2016 Annexure-6. The validity of resolution dated 11.10.1977 was challenged before this Court in W.P.(C) No. 607 of 2010, which has been upheld by the judgment dated 26.07.2011. So far as applicability of the amended Codal provision of OPWD code, i.e., Clause 3.5.10 (a) (iii) is concerned, it is stated that the same was in a draft stage. On clarification being sought vide letter dated 26.04.2016, the Government of Odisha, Works Department, which is the competent authority, communicated on 06.05.2016 that the Revised OPWD Manual available in the website of the Works Department is a draft proposal for revision of existing manual meant for inviting comments/suggestions in the matter for finalization and that grant of concession to SC/ST contractors is governed by the department resolution dated 11.10.1977. As per Clause-16 of the detailed tender call notice, it has been specifically mentioned that preference to SC/ST contractors has to be given. In view of that, invoking the resolution dated 11.10.1977 if opposite party no.6 has been selected, no illegality has been committed by the authority so as to warrant interference by this Court. It is urged that if the mistake has been committed by the authority, the same on being detected can be rectified.

8. Mr. A.K. Mohanty, learned counsel appearing for opposite party no.6 argued that the action of the authority is justified and he adopts the argument advanced by learned counsel for opposite parties no.1 and 2 to 5.

9. There is no factual dispute to the extent that pursuant to a tender call notice dated 19.02.2016 issued by opposite party no.3, the petitioner along with others participated in the tender process and being found L-1 bidder was called upon to deposit initial security deposit and differential cost, which he complied on 18.03.2016. Consequentially, he was intimated on 08.04.2016 to execute the agreement on production of original documents within seven

days. Even though he adhered to such conditions on 23.04.2016, he was communicated that the agreement would be executed after few days. When there was delay in execution of the agreement, the petitioner filed W.P.(C) No.9217 of 2016 seeking for direction to the State-opposite parties to issue work order in his favour. At that point of time, he was communicated vide letter dated 24.05.2016 cancelling his selection as L-1 bidder and selecting opposite party no.6 contractor belonging to S.C. category on the basis of the resolution dated 11.10.1977 giving price preference of 10%.

10. Opposite party no.6-contractor has been extended the benefit of price preference of 10% pursuant to resolution dated 11.10.1977. The amendment to the codal provision of OPWD code in Clause 3.5.10, which has been published in the website of the Government, is only available to the contractor belonging to the SC/ST community having 'B', 'C' and 'D' Class licence not to 'A' Class contractors to the extent of price preference at the rate of 5%. The opposite party no.6 being an 'A' Class contractor, this codal provision is not applicable. Further, the said amendment of the codal provision is at draft stage and having not been notified in the official gazette has not come into force. But relying upon this amended OPWD codal provision the benefit has been made applicable to similarly situated organization namely, ITDA, Jeypore which comes under the SC and ST development department, in view of the condition of Clause 5(viii) of the letter dated 17.01.2015. This building has been sponsored by the Central Government, as per the CPWD code price preference up to 5 % may be allowed in favour of individual SC and ST contractors as per the circular dated 02.03.2006 in Annexure-9 series. The Civil Engineering Department of Municipal Council vide its circular dated 15.04.2008 has extended the similar benefit. Consequentially, by conduct of parties if they have accepted the amended provision of OPWD code, they are estopped from changing their version by filing counter affidavit subsequently. Clause 16 of the present contract indicates that the contractor belonging to SC and ST category has to be given preferential treatment. On that basis, the benefit has been extended to opposite party no.6 in view of the resolution dated 11.10.1977. Therefore, selection of opposite party no.6 in consonance with Clause-16 of the DTCN and resolution dated 11.10.1997 cannot be said to be illegal. The mistake which has been committed in selecting the petitioner, which was subsequently detected, the same has been rectified by issuing the order of cancellation impugned before this Court.

11. A mistake which has been committed in the process of selection, the authority has got every right to rectify the same if it has been brought to their notice. The word "*mistake"* is generally used in the law of contracts to refer to an erroneous belief- *'a belief that is not in accord with the facts.'* To avoid confusion, it should not be used, as it sometimes is in common speech, to refer to an improvident act, such as the making of a contract, that results from such an erroneous belief. Nor should it be used, as it sometimes is by Courts and Writers, to refer to what is more properly called a misunderstanding, a situation in which two parties attach different meaning to their language. An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, or a belief in the present existence of a thing material to the contract, which does not exist; some intentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence; in a legal sense, the doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done.

In **Deva Metal Powders (P) Ltd. v. Commr. Of Trade Tax, U.P.,** (2008) 2 SCC 439, 'mistake' means to take or understand wrongly or inaccurately; to make an error in interpreting it; it is an error, a fault, a misunderstanding, a misconception.

If an unconscious, ignorance and forgetfulness of a facts has been taken into consideration and subsequently, it has been detected that a wrong has been committed, the authority has got right to rectify the same.

In **State of Punjab v. Jagdip Singh and Others,** AIR 1964 SC 521, the apex Court held as follows:

> *"The respondents were officiating Tahasildar in the erstwhile State of Pepsu. By notification dated October 23, 1956 made by the Financial Commissioner of Pepsu they were confirmed as Tahasildars with immediate effect. No posts were, however, available at that time in which the respondents could be confirmed. The Supreme Court held that there being no vacancy in which the confirmation could take place, the order of the Financial Commissioner confirming the respondent as permanent Tahasildars must be held to be wholly void. It was further held that where a Government servant has no right to a post or to particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give, he will not in law be deemed to have been validly appointed to the post or given the particular status."*

In case of **Sundar Lal and others v. State of Punjab** (1970) S.L.R. 59 a Full Bench of the Punjab and Haryana High Court held as follows.

> *"If owning to some bona fide mistake the Government has taken a decision regarding confirmation of an officer, it can certainly revise its decision at a subsequent stage, when the mistake comes to its notice."*

In case of **K.B. Sharma v. Transport Commissioner, U.P.,** AIR 1968 Allahabad, 276 the Court held as follows:

> *"an order of confirmation, if passed under some mistake, could certainly be revised with a view to correct the mistake and that such a revision even if it might affect the person confirmed earlier, could by no means attract article 331 of the Constitution."*

Similar view has also been taken by this Court in **Sri Udayanath Jena v. State of Orissa represented by the Director of Health Services, Orissa and others,** 1974(1) C.W.R. 587.

In view of the law laid down by the apex Court as well as various High Courts it is no more *res integra* that the authority, who has committed a mistake, can rectify the same if it is brought to its notice at a subsequent stage.

12. So far as applicability of estoppel is concerned, in **Union of India v. Rakesh Kumar and others**, (2001) 4 SCC 309 the apex Court held no person can claim any right on the basis of the decision which is dehors the statutory rules nor can there be any estoppel.

13. In view of such position, the principle of estoppel will not apply to the present context, inasmuch as if the mistake has been discovered, the same is to be rectified. Accordingly, the action so taken by the authority when it has been discovered, the tender of opposite party no.6 has not been considered taking into account the price preference in view of the resolution dated 11.10.1977, they have rectified it. In that view of the matter, the action taken by the authority cannot said to be illegal.

14. The fact remains that the petitioner had been selected as L-1 and he had been called upon to deposit the ISD amount and he also complied the other provisions. He had then been intimated to execute the agreement, but subsequently the same was cancelled without following due procedure of law. Minimum compliance of principles of natural justice ought to have been

made and in absence of the same, this Court is of the considered view that the entire action taken by the authority is hit by Article 14 of the Constitution.

15. In applying the principles of equity, while exercising the power under Article 226 of the Constitution of India, this Court considers it just and proper that the authority should, instead of settling the works in question in favour of opposite party no.6, go for a fresh tender in respect of the works in question by classifying the terms of the tender call notice and by affording due opportunity to all the parties. Accordingly, it is so directed.

16. In the result, both the writ petitions are allowed to the extent indicated above. No order as to cost.

Writ petitions allowed.

2016 (II) ILR - CUT- 780

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

WA NO. 635 OF 2015

JOGESWAR BHOI & ANR. .....Appellants

.Vrs.

STATE OF ODISHA & ORS. .....Respondents

CIVIL PROCEDURE CODE, 1908 – S. 148-A

Caveat – Appellants lodged caveat with a prayer to give them opportunity of hearing in the event order Dt. 19.10.2015 is assailed – It was the bounden duty of the writ petitioner-respondent No 6 to serve a copy of the petition on the caveator-appellants and opportunity of hearing should have been given to them before the impugned order was passed – Writ petition disposed of without giving adequate opportunity to the caveator-appellants – Held, the impugned order is quashed – Matter is relegated to the stage of fresh admission and remanded back to the learned single Judge to adjudicate the same afresh in accordance with law by affording opportunity of hearing to all the parties. (Paras 13)

Case Laws Referred to :-

1. (2008) 4 SCC 300 : Krishna Kumar Birla v. Rajendra Singh Lodha.
2. AIR 1974 SC 2105 : Babubhai v. Nandalal.

For Appellants : Mr. R.K. Rath, Senior Advocate
M/s D. Mishra & S. Satapathy.

For Respondents : Mr. B.K.Sharma, Standing Counsel
Transport Department.
Mr. J. Patnaik, Senior Advocate
M/s B.Mohanty & T.K. Pattnayak,
Mr. R.K.Mohanty, Senior Advocate
Mr. Sobhan Panigrahi,

Date of Judgment : 19.09.2016

JUDGMENT

DR. B.R.SARANGI,J.

This is an intra-Court appeal preferred by caveator-appellants assailing the order dated 26.10.2015 passed by the learned Single Judge in W.P.(C) No.19266 of 2015 in allowing the writ application on the first day itself at the stage of fresh admission without giving any opportunity of hearing.

2. The factual matrix of the case is that the caveator-appellants, who are elected representatives being the Sarpanchs of Tasaladihi and Tangarpalli Grama Panchayats in the district of Sundargarh, passed a resolution on 02.10.2015 for restricting the movement of multi-axle vehicles through the M.D.R. Road No.27 in the district of Sundergarh from Bankibahal to Sundergarh which includes MDR-27 (22 KMs), MDR-29 (13 KMs) and ODR (5 KMs). The Grama Panchayats are located in schedule areas and are governed by the provisions of Panchayat (Extension to the Scheduled Areas) Act, 1996. The resolutions of the Grama Panchayats were forwarded to the State Government to declare the road between Coalmines and Sundergarh as no traffic zone for the multi-axle vehicles (18/22 wheelers) in view of numerous accidents caused due to narrowness of road, traffic congestion and location of different offices, government establishments and district headquarter hospitals. Considering the number of representations received from the persons/ organizations/Sundergarh Truck Owners' Association, etc. to impose restriction on movement of multi-axle vehicles, especially 18 and 22 wheelers on Sundergarh to Taperia road under R&B Division,

Sundergarh, the State Government in Commerce and Transport Department, vide its letter no.6785 dated 19.10.2015, on the recommendation of the EIC-cum-Secretary to Government, Works Department to impose restriction on plying of multi-axle vehicles (especially trailers of 18 and 22 wheelers or longer dimension) on the road from Sundegarh to Bankibahal considering inadequate crust, dilapidated condition of carriageway/culverts/deficient horizontal curves, etc., requested the Collector-cum-Chairman, RTA, Sundergarh to take immediate appropriate action as per Section 115 and other relevant sections as would be necessary under the M.V. Act, 1988 till improvement of the road. Assailing the said order, respondent no.6-M/s Biswajit Minerals Pvt. Ltd. filed WP(C) No.19266 of 2015 and the said writ petition was disposed of by order dated 26.10.2015, on the first day, without affording opportunity of hearing to the appellants, though the caveat petition lodged by the appellants was on record and the names of the counsel for the caveator-appellants had been shown in the cause list.

3. Mr. R.K. Rath, learned Senior Counsel appearing along with Mr. Digambara Mishra, learned counsel for the caveator-appellants strenuously urged that the appellants, being people's representatives, raised an objection for plying of multi-axle vehicles on the road in question and lodged a caveat before this Court with a prayer to give them opportunity of hearing in the event the order no.6785 dated 19.10.2015 passed by the Joint Secretary to the Government in Department of Commerce and Transport is assailed. It is further urged that the road in question being narrow, due to plying of multi-axle vehicles, the local commuters are facing a lot of difficulties and accidents are being caused frequently and, therefore, plying of such vehicles should be banned on the road in question. The specific submission of the learned Senior Counsel is that the appellants, although entered caveat, have been deprived of opportunity of hearing, inasmuch as, the learned Single Judge by the order impugned has disposed of the matter as a Vacation Judge on the first date of its listing.

4. Mr. B.K. Sharma, learned Standing Counsel for the Transport Department submitted that objection was raised at the time of disposal of the writ application by the learned Single Judge stating, that the writ application was premature in view of the fact that the letter dated 19.10.2015, which was the subject-matter of challenge annexed as Annexure-2, contained suggestion only for exercising jurisdiction under Section 115 of the Motor Vehicle Act, 1988 in case of requirement thereunder is satisfied, but the learned Single Judge without adhering to the same passed the order impugned.

5. Mahanadi Coalfields Ltd., which was not made a party in the writ petition, has been impleaded as respondent no.4 in the present writ appeal. Mr. J. Patnaik, learned Senior Counsel appearing along with Mr. B.Mohanty, learned counsel for respondent no.4 states that large quantity of crushed coal are being transported through multi-axle vehicles to augment revenue for the State as well as respondent no.4. He, however, admits that Mahanadi Coalfields Ltd. was not made a party in the writ application, but states that in view of transportation of large quantity of coal through multi-axle vehicles, the learned Single Judge was justified in passing the order impugned and this Court may not interfere with the same.

6. Mr. R.K. Mohanty, learned Senior Counsel appearing along with Mr.S.Panigrahi, learned counsel for respondent no.6 brought to the notice of the Court by way of filing preliminary counter affidavit that after the order impugned was passed on 26.10.2015, the CRC & Special Secretary to the Government in Commerce and Transport Department communicated letter dated 31.10.2015 to the Collector-cum-Chairman, RTA,Sundergarh requesting not to take any action for the time being since the matter is under reconsideration by the Government so far as movement of multi-axle vehicles (especially trailers of 18 and 22 wheelers) in Sundergarh to Bankibahal. In view of this, he states that no cause of action survives for the parties and accordingly the writ appeal may be disposed of.

7. Having heard learned counsel for the respective parties and upon perusal of the records, this appeal is disposed of at the stage of admission with their consent.

8. There is no dispute that respondent no.6 filed W.P.(C) No.19266 of 2015 assailing the order contained in letter dated 19.10.2015 addressed to the Collector, Sundergarh imposing restriction on plying of multi-axle vehicles (especially trailers of 18 and 22 wheelers) on Sundergarh to Bankibahal road under R&B Division, Sundergarh in exercise of power under Section 115 of the M.V. Act. There is also no dispute that respondent no.6 is engaged in transportation of coal from the Mines to the Thermal Power Plant by using multi-axle vehicles. Mahanadi Coalfields Ltd. has also written a letter requesting the Collector-cum-Chairman, RTA, Sundergarh not to put any restriction on such transport of coals by multi-axle vehicles.

9. The appellants had filed a caveat before this Court to give them opportunity of hearing before passing any order in the matter and the name of the counsel had been shown in the cause list dated 26.10.2015, when the

matter was taken up during Durga Puja holidays for admission. A petition for intervention was also filed by Smt. Mina Bhoi in Misc. Case No.18534 of 2015. The said intervention application was allowed and intervenor-petitioner was permitted to participate in the proceeding by impleading her as opposite party no.4 in the writ application. But, in case of the present appellants, no order was passed nor any opportunity was given nor the copy of the writ application was served on the learned counsel appearing on behalf of the caveator-appellants. But, at the first instance on 26.10.2015, the order dated 19.10.2015 passed by the Joint Secretary to the Government in Commerce and Transport Department has been quashed and the writ application has been disposed of by the learned Single Judge sitting as a Vacation Judge.

10. As would be evident from the order impugned, the Court was conscious about the fact that Mahanadi Coalfields Ltd. was not a party in the writ application, though it was to maintain the road, and direction was given to the Collector of the district to monitor the same. The order impugned also indicates that the said order was passed without issuing notice to the MCL, which was not a party to the said proceeding, and it was left open for the MCL to be impleaded as a party and sought for variance of the order. Even though the order has been passed giving opportunity to the MCL to seek variance of the same, that ipso facto cannot take away the rights of the caveator-appellants to be heard in the matter.

11. Section 148-A of the Civil Procedure Code, which is relevant for the purpose of the case, is extracted hereunder:

> "148A. **Right to lodge a caveat**— (1) Where an application is expected to be made, or has been made, in a suit or proceedings instituted, or about to be instituted, in a Court, any person claiming a right to appear before the Court on the hearing of such application may lodge a caveat in respect thereof.
>
> (2) Where a caveat has been lodged under sub-section (1), the person by whom the caveat has been lodged (hereinafter referred to as the caveator) shall serve a notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be, made, under sub-section (1).
>
> (3) Where, after a caveat has been lodged under sub-section (1), any application is filed in any suit or proceeding, the Court, shall serve a notice of the application on the caveator.

> (4) Where a notice of any caveat has been served on the applicant, he shall forthwith furnish the caveator at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.
>
> (5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of ninety days from the date on which it was lodged unless the application referred to in sub-section (1) has been made before the expiry of the said period.]"
>
> Section 141 of the Civil Procedure Code deals with miscellaneous proceedings. Explanation to Section 141 states as follows:
>
> ***"Explanation –***In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution."

Though the explanation to Section 141, C.P.C. excludes the proceedings under Article 226 of the Constitution of India, in ***Babubhai v. Nandalal***, AIR 1974 SC 2105 it has been pointed out that the words "as far as it can be made applicable" in section 141 makes it clear that in applying the various provisions of the Code to proceedings other than those of a suit, the Court must take into account the nature of these proceedings and the relief sought. The object of Article 226 being to provide quick and inexpensive remedy to aggrieved parties, it was pointed out that if the procedure of a suit had to be adhered to in the case of writ petitions, the entire purpose of having a quick remedy would be defeated. It was further observed that a writ petition being essentially different from suit, it would be incorrect to assimilate and incorporate the procedure of a suit into writ proceeding. The procedure prescribed by the CPC is followed by the High Court in the exercise of its inherent jurisdiction under Article 226 of the Constitution not because of any compulsion to do so but because that procedure accords with the rules of natural justice.

12. The word "Caveat" has been defined in ***Random House Webster's Dictionary of the Law*** as under:

> "caveat, n.
>
> 1. A warning or caution; admonition.
>
> 2. In certain legal contexts, a formal notice of interest in a matter or property; for example, a notice to a Court or public officer to

suspend a certain proceeding until the notifier is given a hearing; a caveat filed against the probate of a will." (Para 62)"

In ***Krishna Kumar Birla v. Rajendra Singh Lodha***, (2008) 4 SCC 300, the apex Court has also adhered to the meaning attached to the word "Caveat" as defined in ***Random House Webster's Dictionary of the Law*** mentioned above.

13. Taking into consideration the meaning attached to the word "caveat" vis-à-vis the applicability of the same to the writ proceeding in view of the provisions contained in the Civil Procedure Code, it is the bounden duty on the part of respondent no.6 to serve a copy of the writ petition on the caveator-appellants and opportunity of hearing should have been given to them before the order impugned was passed. In the instant case, the matter having been disposed on the first day and at the first instance at the stage of fresh admission and adequate opportunity having not been granted to the caveator-appellants, we are of the considered view that the impugned order dated 26.10.2015 (Annexure-1) is liable to be quashed and is hereby quashed. The matter is relegated to the stage of fresh admission and remanded back to the learned Single Judge to adjudicate the same afresh in accordance with law by affording opportunity of hearing to all the parties.

14. The respondent no.6 being aggrieved by the action of the Transport Authority and State Administration in imposing restrictions on plying of multi-axle vehicles on the road in question vide letter dated 19.10.2015 approached this Court by filing W.P.(C) No.19266 of 2015. The learned Single Judge by order dated 26.10.2015, while allowing the writ petition at the first instance without affording opportunity to the caveator-appellants, quashed the said order dated 19.10.2015. But, the State Government in Commerce and Transport Department vide letter dated 31.10.2015 in Annexure-A/6 to the preliminary counter affidavit filed on behalf of respondent no.6 passed an order keeping the letter dated 19.10.2015 in abeyance till the Government takes a decision on reconsideration. Once the order dated 19.10.2015 imposing restriction has been quashed by allowing the writ petition by the learned Single Judge by judicial pronouncement, subsequent order dated 31.10.2015 in Annexure-A/6 for reconsideration of the order dated 19.10.2015 has no meaning at all. Therefore, in our considered view, the consequential order dated 31.10.2015 under Annexure-A/6 to the preliminary counter affidavit filed on behalf of respondent no.6 passed subsequent to order dated 26.10.2015 is also liable to be quashed and is hereby quashed.

15. Resultantly, the writ appeal is allowed. The judgment dated 26.10.2015 of the learned Single Judge passed in W.P.(C) No.19266 of 2015 is hereby quashed and the order dated 19.10.2015 stands revived. Any order (s) passed after 26.10.2015 being nullity is/are hereby quashed. No order as to cost.

Writ appeal is allowed.

2016 (II) ILR - CUT-787

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

W.P.(C) NO. 12579 OF 2016

COAL CARRIERS ……..Petitioner

.Vrs.

THE CHAIRMAN-CUM-MANAGING DIRECTOR, MAHANADI COALFIELDS LTD. & ORS. ……...Opp.parties

TENDER – "Additional performance Security" is inserted in the conditions of contract under clause 4.6 – Whether due to such insertion the petitioner and other similarly situated contractors have been deprived of participating in the tender process and it is violative of Article 14 and 19 (1)(g) of the Constitution of India ? – Held, No.

It is the prerogative of the authority issuing the tender to put suitable conditions to get the work done within the time specified and the court has no jurisdiction to change the same unless it is found arbitrary, un-reasonable or contrary to the provisions of law – In this case clause 4.6 was inserted to discourage unscrupulous, non-serious and financially not so sound bidders in order to prevent any loss to the company in the event of abandoning of work on the plea of low rate quoted by them – In the other hand the above clause would secure the work to be done by a bonafide bidder, who can perform his duty with utmost sincerity and within the time specified in the contract – Held, the writ petition is not only liable to be dismissed on merit but also on technicality as the petitioner had not participated in the tender process.

(Paras 8 to 11)

Case Laws Referred to :-

1. (2008) 9 SCC 299 : Valji Khimji & Company -V- Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. & Ors.

For Petitioner : M/s. S.Mohapatra, A.Patnaik & S.Mohanty
For Opp.parties : M/s. S.D.Das (Sr. Adv.), M.M.Swain, H.K.Behera,S.Biswal, H.Mohanty & J.S.Samal

Date of judgment : 19.09.2016

JUDGMENT

DR.B.R.SARANGI,J.

General Manager (CMC), Mahanadi Coalfields Limited issued a notice inviting tender bearing No.MCL/SBP/GM (CMC), NIT-738/2016/330 dated 25.06.2016 for "**Hiring of Tippers for Mechanical Transportation of crushed coal from Kulda CHP/Stocks to Kanika Railway Siding of Kulda OCP, Basundhara Area for a Total Quantity of 42.00 Lakh Tes**" wherein clause 4.6 of the Conditions of Contract enumerates "Additional performance security", though previously in respect of similar work no such clause was inserted. Therefore, being aggrieved by insertion of clause 4.6 in the present notice inviting tender, the petitioner has filed this writ petition.

2. Mr. A. Patnaik, learned counsel for the petitioner, states that insertion of clause 4.6 in the Conditions of Contract is contrary to the provisions of law, inasmuch as, the petitioner is deprived of participating in the tender process, which violates Articles 14 and 19(1)(g) of the Constitution of India. It is further contended that the doctrine of "level playing field" is an important doctrine embodied in Article 19(1)(g) of the Constitution of India, which provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. By inserting clause 4.6, it is restricting and preventing the present petitioner and other similarly situated bidders/contractors from participating in the tender process. Therefore, the petitioner seeks to quash the said provision of the Conditions of Contract and direct the opposite parties to allow it and other similarly situated contractors/bidders to participate in the tender process for the interest of the public at large.

3. Mr. S.D. Das, learned Senior Counsel appearing for opposite parties no.1 and 2 raises a preliminary objection with regard to maintainability of the writ petition at the instance of the petitioner, who is a non-participant in the tender process. It is contended that the primary objective of insertion of clause 4.6 is to discourage the non-serious and financially not so sound bidders from bidding process and, as such, to prevent any loss to the company in the event of abandoning of work by the contractor on the plea of low rate quoted by him. It is urged that the insertion of clause 4.6 neither

offends the provisions contained in Article 19(1)(g) nor affects Article 14 of the Constitution, rather the same has been inserted to secure the work to be done by a bonafide bidder, who can perform his duty with utmost sincerity and within the time specified in the contract itself. Therefore, the action of opposite parties no.1 and 2 by inserting clause 4.6 in the Conditions of Contract under Annexure-1 dated 25.06.2016 is justified.

4. We have heard Mr. A. Patnaik, learned counsel for the petitioner, and Mr. S.D. Das, learned Senior Counsel along with Mr. H. Mohanty for opposite parties no.1 and 2, and perused the records. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of at the stage of admission.

5. The sole question raised before this Court is, whether due to insertion of clause 4.6 in the Conditions of Contract under Annexure-1 dated 25.06.2016 the petitioner and similarly situated contractors have been deprived of participating in the tender process and, as such, whether it violates Articles 14 and 19(1)(g) of the Constitution of India.

6. Clause 4 of General Terms and Conditions of the Contract deals with Security Deposit. Clause 4.6 thereof, which states about Additional Performance Security, being relevant for the purpose of this case, is quoted hereunder.

> *"4.6 Additional performance security:*
>
> *Additional performance security shall be applicable if the bid price is below 15% of the estimated cost put to tender. The amount of such additional performance security shall be the difference between 85% of the estimated cost put to tender and quoted price.*
>
> *Additional performance security shall be furnished by bidder along with normal performance security. Failure to submit such additional performance security may result into termination of the contract.*
>
> *This additional performance security will not carry any interest and shall be released in the following manner:*
>
> *i) 30% of Additional performance security will be released after 60% of the total work is completed.*
>
> *ii) 50% of Additional performance security will be released after 80% of the total work is completed.*

iii) 100% of Additional performance security will be released after total work is completed.

Additional performance security may be furnished in any of the forms as applicable for performance security."

7. Admittedly, prior to this tender such a condition was not there in the Conditions of Contract. Such clause 4.6 has been inserted as per Manual for e-Procurement of Works & Services/guidelines, circulated by General Manager (Civil) HOD, CIL, Kolkata vide letter dated 13.01.2016 for implementation of Reverse Auction at CIL & Subsidiary Companies and the same has been approved by the MCL Board in its 177th meeting held on 26.05.2016 basing on the Revised Contract Manual circulated by General Manager (Civil) HOD, CIL, Kolkata, vide letter dated 01/02.12.2014. Though such condition has been incorporated in the NIT of Service Tenders floated by MCL recently, the said provision is quite prevalent in other organizations and has been incorporated in the works contracts done under Civil Engineering Manual in MCL. The Central Vigilance Commission in its guidelines published in 2002 for improvement in the award of contract has also pointed out in clause 15 about reasonableness of prices/market rate justification. The primary motive of incorporating this clause is to discourage the non-serious and financially not so sound bidders from bidding process and to prevent any loss to the company in the event of abandoning of work by the contractor on the plea of low rate quoted by him. The experience of the opposite parties that the bidders having no economic, financial viability have participated in the tender, but in the mid way they are leaving the work and they are not able to perform the same with the rate quoted by them. Consequentially, the opposite parties have to face difficulties for conclusion of contract itself and as such the work could not be completed within the time stipulated as per the agreement executed by the bidders, which leads to colossal wastage of money. To prevent the opposite parties from such unscrupulous bidders, such clause has been inserted. Thereby, no illegality or irregularity can be said to have been committed by the opposite parties.

8. The contention raised that the insertion of clause 4.6 in the tender document offends Articles 14 and 19(1)(g) of the Constitution of India depriving the petitioner and other similarly situated bidders to participate in the auction process and the doctrine of "level playing field" are being affected has no justification. The opposite parties are not obliged to insert a condition in the contract itself to allow each and every person to participate in

the tender process, rather considering the nature of work to be performed, time and financial stability, the condition has been imposed only allowing the persons, those who can participate in the bid so as to complete the work as per the terms of the agreement itself.

9. It is the prerogative of the authority issuing the tender to put suitable conditions to get the work done within the time specified. This Court has no jurisdiction to alter the condition of the contract or change the same at any point of time and the Court has only to examine as to whether the conditions stipulated in the contract itself are arbitrary, unreasonable or contrary to the provisions of law in exercise of power of judicial review. But the present case does not come within the ambit, domain or jurisdiction of this Court to interfere with the conditions stipulated in clause 4.6 of the contract itself. The reasons for inserting clause 4.6 in the contract itself to save the company from financial loss, time and unscrupulous bidders those who are leaving the work causing loss to the organization.

10. An objection was raised that the writ petition is not maintainable at the instance of the petitioner, as he is not a participant in the tender itself. It is not the case of the petitioner that there was no adequate publicity in inviting tender from the bidders. Therefore, if anyone wanted to make bid in the auction he should have participated in the said auction and made his bid. The petitioner having not participated in the auction and made its bid, merely filing a representation stating that the insertion of clause 4.6 in the contract is not justified, cannot sustain in the eye of law and, as such, the petitioner being non-participant, at its instance the writ petition is not maintainable in view of the judgment rendered by the apex Court in ***Valji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited and others***, (2008) 9 SCC 299.

11. In view of the above facts and circumstances of the case, we are of the considered opinion that the writ petition at the instance of the petitioner, who is a non-participant in the tender process, is not maintainable. More so, the insertion of clause 4.6 with regard to performance security neither affects Article 14 nor Article 19(1)(g) of the Constitution of India. Accordingly, the writ petition merits no consideration and the same is hereby dismissed.

Writ petition dismissed.

2016 (II) ILR - CUT-792

VINOD PRASAD, J. & BISWANATH RATH, J.

CRIMINAL APPEAL NO. 417 OF 2005

NARAYAN PRADHAN ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

CRIMINAL TRIAL – Murder case – No eye witness account – Prosecution case rests only upon last seen evidence – Last seen theory is convincingly incriminating if no plausible explanation is coming from the accused creating a doubt in the prosecution edifice – In this case deceased was last seen with the company of the appellant when the appellant had taken the deceased in his cycle from her parents home in the night and since next day morning the deceased was untraceable – In the other hand, though the appellant was married and blessed with children had kept illicit relationship with the deceased who became pregnant and delivered a male child – So it was for the appellant to come out with a plausible and acceptable explanation for missing of the deceased, who was an impediment in his family life – In view of the above evidence, alongwith the elopement of the appellant from the village, blood on the attires of the appellant, this court comes to an irresistible conclusion that it is only the appellant and none else, who has murdered the deceased – Impugned judgment of conviction and sentence is affirmed. (Paras 16,17)

For Appellant : Mrs. C.Kasturi
For Respondent : Sri J.Katikia, Addl.Govt.Adv.

Date of hearing : 02.03.2016
Date of judgment: 19.08.2016

JUDGMENT

VINOD PRASAD, J.

Appellant Narayan Pradhan, has been convicted of offences u/Ss 302 and 493 I.P.C. by Ad-hoc Additional Sessions Judge (Fast Track), District Sambalpur, in S.T.Case No. 391/13 of 2004-05, State of Orissa versus Narayan Pradhan, and has been sentenced to undergo imprisonment for life with fine of Rs. 5000/-(Rs. Five Thousand) and in default of payment of fine to undergo 1 year(One year) further RI on the first count, 2 years(Two years) RI with fine of Rs. 1000/-(One Thousand) and in default of payment of fine to serve additional RI for 6(Six) months vide impugned judgment and order dated 12.8.2005. Learned trial Judge has further directed both the sentences

to run concurrently while also conferring benefit of set off to the appellant for the period of imprisonment undergone by him. Challenged in this appeal by the appellant convict is to the aforesaid judgment and order.

2. While eschewing not so important factual happenings and evidences, the adumbrated prosecution allegations against the appellant, which are discernible from the prosecution evidences led in the Sessions trial, it is revealed that informant Subal Pradhan/ PW5 and Indu Pradhan/ PW7, both residents of village Haldi Nali, P.S.Charmal, district Sambalpur, had two sons (names not disclosed) and two daughters, Lata Pradhan(deceased) and Bhumi. Both the sons are younger to both the daughters. Appellant Narayan Pradhan is their co-villager and was a married man having a family including three children. The village has a place Bhagabat Gudi, where the village meetings are convened. Lata Pradhan, the deceased, was having an illicit love affair with the appellant, from whom she conceived and later on gave birth to a male child, but fact of illicit relationship came to the knowledge of the informant and his wife, PWs 5 & 7, just two months prior to their daughter attaining a motherhood. Informant convened a village meeting whereupon, the appellant took the deceased and her son to his house and kept them in a cowshed. However due to malnutrition supplied to the mother, the son lost his life just two days after his birth. Appellant, thereafter, kept the deceased in the cowshed for another eight days and thereafter assaulted and kicked her out. Deceased having no other choice returned to her parental house. Eight days thereafter the appellant came and promised to keep the deceased with him after getting a room constructed for her but did not abide by his promise. Prior to the date of the incident of her murder, a Wednesday, informant/ PW5 had gone to his sister's house. Taking advantage of his absence appellant came to the informant's house on Wednesday night and, on a false promise to keep the deceased away from his first wife, who was opposing their relationships, and to maintain her from his earned wages, took the deceased on his cycle, albeit PW7 vainly requested him to wait till the arrival of the informant/PW5. At that time deceased was wearing a *maxi, saya,* and had carried her *duppata and shawl.* Next day morning, on Thursday 27.5.2004, the mother/PW7 saw the accused going to *Hata* but the deceased was not to be located. On query by the mother she was informed by the appellant that she had been kept at a proper place. At 10 a.m. informant/PW5 returned to his house and was narrated by PW7 about the past night happening and non-tracing of the daughter. Parents, PWs 5 &7, accompanied with Mohan Pradhan/PW8, fruitlessly searched for their daughter.

3. When the matter stood thus, one Kartik Nag, Railway keyman/PW9 of Charmal Railway Station, in-charge of 54.0 km to 59.0 km, while on duty, located the dead body of a girl lying near the railway track with bleeding injuries on her face between 54.8 to 54.9 k.m. He therefore, reported the matter to Rajan Kumar Das/PW1, Jr. Engineer, East Coast Railway, the same day at about 9.20/9.30 a.m. In turn the matter was reported to Saumya Ranjan Biswal/PW2, Station Master, Charmal Railway Station. PW2 consequently informed Narendra Kumar Sarangi, O.I.C., Police Station Charmal/PW21 through a written information/ Ext.1, which was received to the O.I.C. at 10.30 a.m. on 27.5.04. As a follow up action, PW21 registered U.D. P.S. case No. 3 of 2004 and commanded Constables C/605 P. Munda and C/691 S.C.Majhi/ PW12 to guard the corpse vide command certificate/Ext.10. PW21 personally proceeded for the spot at 10.45 a.m. where he found dead body of a female aged about 19 years stained with blood. Some blood stained stones were also lying at the spot. PW21, through requisition sent to S.P. Sambalpur, sought services of scientific team and also of dog squad which arrived at 1 p.m. Inquest on the deceased cadaver vide inquest report/Ext 2 was conducted. From Mugpal Railway Crossing deceased's blood stained slippers (*chappal*/M.O. VIII) were seized vide seizure list Ext.3. Vide seizure list Ext.4, blood stained stones (M.O. III to VII) and shawl/M.O. IX, of the deceased were seized. Hair of deceased, blood stained and plain earth, collected by DFSL were seized by PW21 vide Exts.19 and 20. Spot Map/Ext. 21 was prepared and by 7 p.m. corpse of the deceased was dispatched to V.S.S. Medical College, Burla for autopsy purpose through constables C/605 P. Munda and C/691 S.C.Majhi/ PW12 along with command certificate/ Ext.10 and dead body chalan/ Ext 11.

4. Reverting back to the case of the informant/ PW5, he, at Karadapal, received a message concerning discovery of a girl's dead body near the railway line in Mugapal. After collecting some more villagers namely, Ghasu Pradha, Jhatu Pradha, Rajan Pradhan, Mohan Pradhan, and others, informant went to the spot of discovery of dead body where he saw the corpse of his daughter, the deceased, at Charmal Chak in a police van inflicted with bleeding injuries on her face and hand. At the request by PW5, Pushparaj Rout/ PW13, a shop keeper, scribed the FIR/Ext.5 which was lodged with PW21 at 8 p.m. arraigning the appellant as the sole perpetrator of the crime, who had murdered the daughter of the informant. This information resulted in registration of P.S. Case No. 33 of 2004 and slating down of formal FIR/ Ext.22. Investigation was commenced immediately during course of which

informant and witnesses were interrogated and their statements were inked. Appellant was arrested on 28.5.2004 at 4 p.m. who confessed his guilt and concealing of his cycle vide Ext.6. Accused thereafter led the police party to the place of concealment in village Haldi Nali and got the cycle recovered which was seized vide memo/ Ext. 7. Same day wearing apparels of the accused, one Lungi/ M.O.X and one Ganjee/ M.O.XI were also seized vide Ext.8. Attires of the deceased handed over by the autopsy doctor, brought by aforementioned two constables were also seized vide seizure memo 9. Cloths of the deceased are M.O.I and II and hair of the deceased, envelopes containing material exhibits are M.O. XV to XVII. Appellant was also got medically examined vide Ext. 17 and his physical body collections are seized through list Ext. 15. Blood stained materials were sent for forensic science examination Ainthappalli through SDJM, Rairakhol vide Ext 23. Further investigation into the crime was conducted by Atul Chandra Mohanti/ PW17 since PW21 was transferred. After examining some more witnesses PW17 laid charge sheet against the appellant for the murder of the deceased.

5. Autopsy on the dead body was conducted by Dr. Sudeepa Das/ PW 15 on 28.5.2004 who noted following ante mortem injuries on the deceased cadaver:-

i) There is fracture of maxilery bone.

ii) Lacerated wound of size 4 c.ms x 2 c.m x bone deep with a depressed fracture of the frontal bone is present over the left eye, just left to the midline of forehead.

iii) Lacerated wound of size 9 c.ms at the widest part x 3 c.ms bone deep is present with comminuted fracture of the corresponding bone present just above the right eye.

iv) Lacerated wound of size 5 c.ms x 2 c.ms x bone deep is present on the middle of the forehead near the hair line.

v) The right ear has been avulsed.

vi) Lacerated wound of size 11 c.ms x 3 c.ms bone deep with corresponding fracture of temporal bone is present over the left side of the skull.

vii) Lacerated wound of size 6 c.ms x 2 c.ms x bone deep is present over the left parietal area.

viii) Lacerated wound of size 3 c.ms x 2 c.ms x bone deep is present over left parietal area 2 c.ms below the external injury no.vii.

ix) Lacerated wound of size 8 c.ms x 2 c.ms x bone deep (fracture of temporo-occipital bones on the right side) temporo occipital area.

x) Lacerated wound of size 3 c.ms x 1 c.m x bone deep is present slightly towards the left of symphysis menti.

xi) Lacerated wound of size 2 c.ms x 1 c.m x 1 c.m is present over the left side of the face, 4 c.ms lateral to the left angle of mouth.

xii) Lacerated wound size 4 c.ms x 2 c.ms x 1 c.m is present over the left side of the face 1 c.m above external injury no. xi.

xiii) Lacerated wound of size 15 c.ms x 10 c.ms x skin deep is present over the upper part of the chest.

On internal dissection PW 15 found following internal damages/ injuries:-

i) Skull-Scalpal hematoma is diffusely present over the entire skull.

ii) The fracture line is running a length of 42 c.ms around the skull from the left side of left eye socket to the right eye socket above the mastoid process, encircling the occipital bones. The calvarium is separated at the level of both the ears.

iii) Massive subdural hematoma is present. The brain has started to liquefy.

All the above injuries were ante mortem and were inflicted by heavy hard and blunt force. 72 hours had lapsed since the deceased had demised and death had occurred due to cranio cerebral injuries. No spermatozoa was found and victim was habitual to sexual inter course. Sustained external and internal injuries were sufficient on ordinary course of nature to cause death which was homicidal in nature.

6. SDJM , Rairakhol, on the strength of submitted charge sheet against the appellant took cognizance of the offence and registered C.T. No. 361 of 2004 and after observing due legal formalities committed the case to the Sessions Court and forwarded the accused to be tried there. In the Sessions Court S.T. Case No. 391/13 of 2004-05, State of Orissa versus Narayan Pradhan was registered and learned trial Judge/ Ad-hoc Additional Sessions Judge charged the appellant with offences u/Ss 302/ 493 I.P.C. on 1.3.2005 and since the appellant abjured those charges, pleaded not guilty and claimed to be tried that his trial commenced.

7. Prosecution, in the Session's trial, produced oral evidences of 21 of its witnesses, tendered 25 documentary evidences and 17 material objects/

exhibits. Out of witnesses examined PWs 1, 2 & 9 are Railway witnesses, PWs 3,5, 7,8 and 11 are fact witnesses, PWs 8 and 14 are seizure witnesses, PWs 6 and 10 are witnesses of confession of the accused appellant, PW 13 is scribe of the FIR, PW 15 is autopsy doctor , whereas PW 19 has medically examined the appellant and had taken samples of his body parts, PWs 12 and 16 are constables who had performed various investigatory functions entrusted to them. PW18 is scientific officer who had collected material from the spot,PWs 17, 20 and 21 are the investigating Officers.

8. Plea of the appellant is of total denial and false implication. He has also pleaded that because of some factual rivalry he has been falsely implicated.

9. Learned trial Judge, believed prosecution witnesses, guilt of the appellant convincingly anointed and established to the hilt that it convicted the appellant and sentenced him as has already been mentioned in the opening para of this judgment and hence challenge in this appeal is to the aforesaid conviction and sentence by the sole convicted accused- appellant.

10. We have heard Mrs. C. Kasturi, learned advocate for the appellant and Sri J. Katikia, learned AGA for the State and have vetted through the entire trial court record and evidences searchingly and analytically.

11. Learned counsel for the appellant harangued incisively that prosecution has failed to impute any motive to the appellant to murder the deceased and the entire prosecution case rests upon last seen evidence only and hence, the bedrock of entire prosecution edifice therefore is circumstantial evidence. There is no eye witness account. There is no evidence that under false promise to marry that the appellant sexually assaulted the deceased and hence conviction u/s 493 I.P.C. is unsustainable. All the witnesses are interested and belong to the group of the informant. Deceased was a trollop and she was murdered by unknown person and appellant has been falsely implicated. FIR version is a figment of imagination without having any ring of truth in it. No recovery was made at the instance of the appellant nor he had made any confessional statement. Investigation is shoddy, truncated and inept. No weapon of crime was imputed to the appellant and hence prosecution has miserably failed to bring home appellant's guilt who deserves acquittal hence appeal be allowed and appellant be acquitted after setting aside the impugned judgment and order.

12. Traversly, learned AGA lend credence to the impugned judgment and urged that there is nothing to absolve the appellant of the crime committed by

him. Last seen evidence is convincingly incriminating if no plausible explanation is coming forth from the accused creating a doubt in the prosecution edifice. No reason was attributed to the parents of the deceased to arraign the appellant sans any motive. Relationship alone is insufficient to discard the testimony of those witnesses who had no reason to be a perjurer. Most of the credible facts nailing the Appellant are unchallenged and, in absence of any offered explanation by the appellant, they must be taken to be proved beyond all reasonable doubts. Medical evidence leads only to one irresistible conclusion that the deceased was murdered in the most diabolical manner without any compassion and since she had no other person who could have any motive to annihilate her except the appellant, that the present appeal being devoid of merit must be dismissed and conviction and sentence of the appellant be confirmed.

13. After bestowing our thoughtful considerations to the rival submissions and after critically examining the record it transpires that the motive attributed to the appellant is well established without any shred of doubt. It will be too naïve to conceive and accept defence plea that no motive has been attributed to the appellant to commit deceased murder. To even think that the parents, to bring most scurrilous faux pas to the entire family, will level concocted allegations of their daughter having extra marital relationship with a married man having three children and bringing a disrepute to their own daughter will be ludicrous. Defence has not been able to demolish the confidence inspiring evidences of the parents on this score in as much as testimonies of none of the parents were challenged on these facts in issue. Defence, in fact, concedes the appellant being a married person having three children and his first wife being alive and appellant being in illicit relationship with the deceased. Both the sides are residents of the same village and very well acquainted with each other and consequently it could not have been a case of mistaken identity nor any such plea has been raised by the appellant. Deceased falling in love with the appellant because of her youthful age is also a fact which cannot be termed as unnatural or surreal. Appellant had not at all questioned seriously his illicit relationship with the deceased except giving bald suggestions to PW5 and that too without any attending facts. Neither the father/PW5 nor the mother/PW7, who are best witnesses to disclose clandestine infatuated relationship of their daughter, were challenged on the said aspect for the reasons best known to the defence. In fact from the suggestions given to PW5, it becomes evident that the deceased definitely had conceived and had given birth to a male child from

the appellant and this fact in issue therefore stands established by the defence suggestion itself. There does not exist any reason to implicate an unconcerned person sparing real culprit by the most loved once. Entire cross examination of both the parents seems to be wholly misdirected and is clogged with trivial and insignificant aspects having no direct nexus with the real issues. Most of the cross examination is inchoate and facetious. Other residents of the village have also lend credence to the prosecution version and hence the same cannot be discarded. Alleged motive for the appellant to commit the crime therefore is real and proved.

14. FIR Ext.5 was lodged by the father/PW5 with promptness without any delay. Defence has also not challenged lodging of the same at the time it is alleged to have been lodged nor it has challenged its authenticity except to put some insignificant omissions to PW5 which do not rob the prosecution of its genuine versions. This is an added incriminating circumstance against the appellant. Coming to the investigation at this point it is to be noted that the appellant's counsel has failed to convincingly argue that the same is a remiss and he was unable to bring out any reason, on the basis of which, the entire prosecution case be discarded. It is apparent from the evidences of all the I.Os./PWs 17, 20 and 21, that the defence has not been successful in dislodging their testimonies and therefore the irresistible conclusion is that investigation has been conducted assiduously and is not languid. No inconsistencies or incongruities have surfaced on the record to interdict it. Otherwise also clumsiness in investigation is no reason to discard entire prosecution version unless it is established that the same shakes the core issues and create a genuine doubt in the mind regarding truthfulness of the prosecution story.

15. Medical evidences of post mortem doctor PW15 and that of PW19 who had examined the appellant leaves little to doubt the prosecution story. Injuries inflicted and sustained by the deceased by its very nature depict the gruesome manner in which the deceased was done to death. Internal damages to the cranium and other parts invigorates prosecution of its charge that the deceased was annihilated by the appellant and therefore prosecution story cannot be baulked of its reality.

16. Deceased was last seen on the company of the appellant who had brought her from her parental house, when the mother of the deceased was present. PW 7, the mother did try to dissuade the appellant to wait for the arrival of the informant but the appellant did not agree to such a request. It was in the night that the appellant had taken the deceased and since next day

morning that the deceased was untraceable. It was for the appellant to come out with a plausible and acceptable explanation for missing of the deceased, who was an impediment in his family relationships and was a cause of family feud. Examined in the backdrop of what had transpired between the appellant and the deceased in the earlier days taking of the deceased by the appellant, without any second thought, is the most incriminating circumstance against him. Being oblivious of the fact that every case is to be judged on the peculiar facts involved therein and no hard and fast rule of an unimpeachable nature can be laid down, when we grokingly vet through the evidences it evinces that the prosecution has been successful in weaving the entire fabric of its version into a complete whole. Relationship of illicit nature between the appellant and the deceased because of which family life of the appellant, who was a married man, was disturbed, deceased getting pregnant with the appellant, giving birth to a male child and his demise, returning of the deceased to his parental home, taking of the deceased on a false pretext on his cycle by the appellant a night previous to the discovery of cadaver of the deceased, discovery of corpse of the deceased near a railway track with sustained fatal injuries , elopement of the appellant from his village, blood on the attires of the appellant , all these factors cumulatively are pointer to only one irresistible conclusion that it is only the appellant, and none else, who had murdered the deceased.

17. Concluding thus we find no force in this appeal, which is dismissed in toto. Impugned judgment and order of conviction and sentence is affirmed. Appellant is in jail. He shall remain in Jail to serve out remaining part of his sentence.

18. Let the trial court be informed.

Appeal dismissed.

2016 (II) ILR - CUT- 801

INDRAJIT MAHANTY, J. & BISWAJIT MOHANTY, J.

W.P.(C) NO. 13021 OF 2005

UNION OF INDIA & ORS. .....Petitioners

.Vrs.

KISHORE MOHAN SAHU & ORS. .....Opp.parties

SERVICE LAW – Advertisement to fillup a post reserved for OBC category – It stipulates to file necessary papers by the last date for application – Neither the Court nor the authorities have power to relax the eligibility conditions fixed in the advertisement – If a candidate does not furnish the required certificate by the last date and puts in the application an undertaking to submit the relevant certificate afterwards, such application can not be held to be complete in all respects and as such the same is liable to be rejected.

In this case Govt. of India in the Ministry of Defence made an advertisement Dt. 02.09.2000 to fill up two posts of Technician "A" (Welder) fixing 22.09.2000 as the last date for application – Present controversy relates to one post reserved for OBC category – O.P.Nos. 1 & 2 applied for the post – O.P.No.2 did not submit OBC Certificate by 22.09.2000 but he was allowed to participate in the interview after submitting an undertaking and got appointment on 14.09.2001 and produced OBC certificate on 01.10.2001 – O.P. No. 1 challenged the appointment of O.P.2 before the Tribunal – Tribunal set aside the appointment of O.P.2 and directed for appointment of O.P. No. 1 in the post – Hence the writ petition – Admittedly O.P.No.2 produced OBC certificate much after his appointment which amounts to relaxing the requirements of the advertisement, not permissible under law – Moreover the plea taken by O.P. No 2 that concession granted to SC & ST candidates by the Government memorandum Dt. 17.04.1953 be extended to OBC candidates cannot be accepted – Held, there is no infirmity in the impugned order passed by the Tribunal – Writ petition is liable to be dismissed. (Paras 7, 9)

Case Laws Relied on :-

1. (2005) C.L.T. 577 Dr. Sudipta Pattanaik v. State of Orissa & Ors. 2. Anup
2. 2004 (Suppl.) O.L.R. 378 : Kumar Behera v. State of Orissa & Ors.

For Petitioners : Mr. Saroj Kumar Das (Central Govt. Counsel)
For Opp.parties : Mr. B.B.Mohanty
Mr. M.Sahoo, Addl. Standing Counsel

Date of Judgment: 31.08.2016

JUDGMENT

BISWAJIT MOHANTY, J.

This writ application has been filed by the Union of India and its officers praying for quashing of order dated 12.5.2005 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.138 of 2003 under Annexure-1.

2. The brief facts of this case are that on 2.9.2000, Government of India in Ministry of Defence Research & Development Organisation Proof & Experimental Establishment, Chandipur, Balasore, Orissa published an employment notice in the daily newspaper "Sambad" in order to fill up certain posts, which were lying vacant vide Annexure-2. The relevant post involved in this case is Technician 'A' in the subject of Welder. Vide that advertisement, applications were invited to fill up two posts of Technician 'A' (Welder). One post was under Unreserved category and another post was under OBC category. Here, the controversy relates to the one post, which was reserved for OBC category. The said employment notice under Annexure-2 further made it clear that 22.9.2000 was the last date fixed for receipt of applications which should be complete in all respect as per specified application form. It also required that a photocopy of each of the certificates in support of date of birth, caste, qualification and experience, etc. should be submitted along with the application form. It further made clear that the application form should contain informations relating to the post applied for, name of the candidate, father's name, address for communication, date of birth and most importantly, the category/caste to which the applicant belonged (whether SC/ST/OBC). It also indicated that the date and place of interview/test would be intimated to the short listed candidates after scrutiny. The authorities also sent a copy of requisition to the Employment Officer, District Employment Exchange, Balasore. While the name of Kishore Mohan Sahu (opposite party no.1) was sponsored by the Employment Officer, District Employment Exchange, Balasore (opposite party no.3) as a candidate belonging to OBC category, Tapan Kumar Barik (opposite party no.2) applied for the said post along with a xerox copy of caste certificate indicating that he belonged to Socially and Educationally Backward Class (SEBC) being a member of 'Bhandari' community. It is also clear that Tapan Kumar Barik (opposite party no.2) never submitted the required OBC

certificate by the last date for receipt of application. However, vide letter dated 12.3.2001, Tapan Kumar Barik was directed to appear at the interview and he was also directed to bring all his certificates including caste certificate in original. Pursuant to such call letter, Tapan Kumar Barik was allowed to participate in the test after submitting an undertaking under Annexure-6 that he would produce OBC Certificate within a month from his appointment to office. Accordingly, he prayed that he be allowed to appear in the interview for the post of Technician 'A' (Welder) under OBC category based on his SEBC certificate under Annexure-3. Accordingly, Tapan Kumar Barik was allowed to participate in the interview/test. On 11.9.2001 said Tapan Kumar Barik (opposite party no.2) was offered appointment to the post of Technician 'A' (Welder). On 14.9.2001, said Tapan Kumar Barik was appointed in his post and within a month from the date of the appointment, he produced the OBC caste certificate dated 1.10.2001, which is annexed as Annexure-10 to the writ application. A perusal of Annexure-10 would show that 'Bhandari' community has been recognised as Backward Class under the Government of India vide Notifications dated 10.9.1993, 19.10.1994, 20.05.1995 and 09.03.1996. Challenging the appointment of Tapan Kumar Barik (opposite party no.2), Kishore Mohan Sahu (opposite party no.1) filed O.A. No.138 of 2003 before the Central Administrative Tribunal, Cuttack Bench, Cuttack with a prayer to quash the appointment of Tapan Kumar Barik (opposite party no.2) and for a direction to appoint him (opposite party no.1) in the post of Technician 'A' (Welder). The learned Tribunal allowed the said Original Application on 12.05.2005 declaring the selection of Tapan Kumar Barik as Technician 'A' (Welder) under OBC category as null & void and that Kishore Mohan Sahu (opposite party no.1) having scored highest marks among the OBC candidates, was entitled to offer of employment under the reserved category to the post of Technician 'A' (Welder). However, at the same time, learned Tribunal observed that since Tapan Kumar Barik (opposite party no.2) has been working as Technician 'A' (Welder) since 14.9.2001, he might have become overaged for fresh employment under the Central Government and in the circumstances, the present petitioners may consider the case of Tapan Kumar Barik (opposite party no.2) for granting him an alternative employment against a reserved vacancy as may be available in the organisation subject to his fulfilling the qualifications for the post. In coming to the above noted conclusion, the learned Tribunal has held that a candidate cannot claim the benefit of reservation before he is certified by the authorised officer to be eligible to be treated as a reserve category citizen. Tapan Kumar Barik (opposite party no.2) got the OBC certificate

much after the last date fixed for receipt of application from the eligible candidates, i.e., 22.9.2000. Thus, he was not eligible to apply for the post as OBC candidate. Besides this, learned Tribunal has also noted that Tapan Kumar Barik appeared in the interview/recruitment test claiming benefit under reservation when his caste was not enlisted as OBC for the purpose of employment in Central Government. In such background, the learned Tribunal has held that Tapan Kumar Barik (opposite party no.2) was not eligible to apply for the post as OBC candidate. Thus, the present petitioners went wrong in treating him as OBC candidate as they did not have the authority under law to determine the caste of any candidate.

3. Challenging the order of the learned Tribunal dated 12.5.2005, Tapan Kumar Barik filed W.P.(C) No.7405 of 2005 and the present petitioners filed the present writ application before this Court. In W.P.(C) No.7404 of 2005 vide order dated 9.6.2005, operation of the impugned order of the learned Tribunal was stayed.

4. Heard Mr. S.K. Das, learned Central Government Counsel, Mr. B.B. Mohanty, learned counsel for opposite party no.1 and Mr. M. Sahoo, learned Additional Standing Counsel for opposite party no.3.

None appeared on behalf of opposite party no.2.

5. Mr. S.K. Das, learned Central Government Counsel submitted that the finding of the learned Tribunal that opposite party no.2 appeared in the interview/recruitment test claiming the benefit under reservation when his caste was not enlisted as OBC for the purpose of employment in Central Government is totally incorrect as 'Bhandari' caste has been enlisted under OBC category since 1993-94. He also attacked the finding of the learned Tribunal that opposite party no.2 has not been declared as OBC category in the Central List on the ground that such list which has been in force since 1993 also shows 'Bhandari' to be under the heading OBC category. Lastly, he submitted that certain concessions are allowed in the matter of initial appointment under Central Government to the candidates belonging to Scheduled Castes and Scheduled Tribes vide Ministry of Home Affairs Office Memorandum No.42/34/52-NGS dated 17.4.1953. According to him, the said concessions stipulate that where candidates claming to belong to Scheduled Castes and Scheduled Tribes, are unable to produce a certificate from one of the prescribed authorities, they should be appointed provisionally on the basis of whatever prima facie evidence, they are able to produce in support of their claim to be belonging to Scheduled Castes or Scheduled

Tribes. Thereafter, such claim is verified through the District Magistrates of the places where they and/or their families are ordinarily residents in the prescribed manner. If in any particular case the verification reveals that the candidate's claim is false, then his services should be terminated. The same concession has been reiterated subsequently in 1960 and 1975 vis-à-vis Scheduled Castes and Scheduled Tribes candidates vide various Office Memoranda issued by the Ministry of Home Affairs. However, Mr. Das candidly submitted that though the case of OBC has not been included in the concessions as indicated above, however, the petitioners on the basis of analogy drawn from the above Office Memoranda extended the said concessions to opposite party no.2. In such background, Mr. Das submitted that the learned Tribunal has erred in passing the impugned order, which is liable to be quashed.

6. Per contra, Mr. Mohanty, learned counsel for opposite party no.1 submitted that notwithstanding the observations made by the learned Tribunal here and there in the impugned order relating to non-enlisting of the caste of opposite party no.2 under OBC category, the learned Tribunal has come to a clear finding that a candidate cannot claim benefit under reservation unless he is certified by the authorised officer as one belonging to reserved category. Here, it is not disputed that much after the appointment, Tapan Kumar Barik (opposite party no.2) produced the OBC certificate. Therefore, no fault can be found with the impugned order. Secondly, he submitted that since opposite party no.2 did not submit the OBC certificate by the last date along with the application form, i.e., 22.9.2000, his application ought to have been thrown out at the threshold. In this context, Mr. Mohanty relied on two decisions of this Court in the cases of **Dr. Sudipta Pattanaik** v. **State of Orissa and others** reported in **100 (2005) C.L.T. 577** and **Anup Kumar Behera** v. **State of Orissa & others** reported in **2004 (Suppl.) O.L.R. 378.** Thirdly, he submitted that opposite party no.2 should not have been allowed to participate in the interview on the basis of an undertaking under Annexure-6 given on 30.3.2001 to produce the certificate at a later date. In this context, he placed reliance upon two letters dated 3.9.2004 and 27.2.2004, which are found to be at Page Nos.67 and 68 of the writ application. Both these letters emanate from the Government of India, Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training. From the two letters, it is crystal clear that OBC certificate of a candidate is essential for the vacancies reserved for OBC category in a Central Government Department though the caste/community of the candidate is common to the both the lists,

i.e., SEBC List and OBC List. Further, it make clear that an OBC certificate should be produced to get the benefit of reservation and undertaking for producing such a certificate will not work. Lastly, Mr. Mohanty contended that the selecting authorities/appointing authorities have no power to relax the conditions of eligibility as fixed in the advertisement. In such background, he submitted that learned Tribunal has done no wrong in passing the impugned order in favour of opposite party no.1 after setting aside the appointment of opposite party no.2.

7. Considering the submissions made, we are of the view that there is no legal error apparent on the face of impugned order under Annexure-1 for our interference except the fact that the learned Tribunal at the beginning of Paragraph-5 of the impugned order has made a slightly incorrect observation relating to the caste of opposite party no.2 as not being enlisted as OBC for the purpose of employment in Central Government. However, the learned Tribunal has correctly come to hold that a candidate cannot claim benefit of reservation unless he is certified by the authorised officer to be eligible to be treated as a reserve category person. The learned Tribunal has rightly held that by the last date fixed for receipt of application, i.e., 22.9.2000, opposite party no.2 was not eligible to apply for the post as OBC candidate as he got that certificate only during December 2001. Thus, his selection under OBC category was/is legally vulnerable. Now coming to the submissions of Mr. S.K. Das, learned Central Government Counsel, that it was wrong on the part of the learned Tribunal to have come to a finding that the caste of opposite party no.2 was not enlisted as OBC for the purpose of employment in Central Government and that opposite party no.2 was not declared as a candidate under OBC category in Central List, nothing much turns on that as a reading of the entire Paragraph-5 of the impugned order indicates that what the learned Tribunal meant was that by the time opposite party no.2 put him his application form under OBC category, he had never been declared as a candidate belonging to OBC category by appropriate authority. Accordingly, the learned Tribunal has rightly held that opposite party no.2 was not eligible to apply for the post of Technician 'A' (Welder) as OBC candidate. So far as the last contention of Mr. Das relates to the concessions granted to opposite party no.2 on the analogy of concessions granted to Scheduled Castes and Scheduled Tribes candidates under Annexure-8 series, we cannot accept the same. This is because, concessions covered under Annexure-8 series only apply to Scheduled Castes and Scheduled Tribes candidates not to anybody else. Mr. Das fairly submitted that OBC has not been included in the

concession applicable for Scheduled Castes and Scheduled Tribes candidates. Therefore, the petitioners went wrong in using the analogy of concessions applicable to Scheduled Castes and Scheduled Tribes candidates for extending the same to OBC category candidates. This amounted to relaxing the requirements of advertisement, which is not legally permissible. Further, the two letters dated 3.9.2004 & 27.2.2004 reliance on which was placed by Mr. Mohanty, learned counsel for opposite party no.1 make it clear that OBC Certificate of a candidate is essential for posts reserved for OBC category in Central Government though the caste and community of the candidate is common to both "SEBC List" of State and "OBC List" prepared by Central Government. The letters make it clear that an OBC certificate should be produced to get the benefit of reservation and an undertaking would not work.

8. It may be noted here that 'Bhandari' caste was enlisted under OBC category during 1993-94. By the time of advertisement under Annexure-2 came out in 2000, almost six to seven years have passed from such enlistment under OBC category. Therefore, Tapan Kumar Barik (opposite party no.2) had with him all time to get the OBC certificate from the Tahasildar, Balasore, who has issued Annexure-10 in order to submit a complete application form. Even, he got 20 days from the date of advertisement to the last date of application within which time he could have applied and got the OBC certificate. However, as per Annexure-6, he took a chance to produce the OBC certificate in case he was selected.

9. Further, the decisions relied by Mr. Mohanty make it clear that if a candidate does not furnish the required certificate by the last date and puts in the application with an undertaking to submit the relevant certificate afterwards, such an application cannot be held to be complete in all respects and, therefore, is liable to be rejected.

10. For all these reasons, we find that the writ application is without any merit and the same is accordingly dismissed. No costs.

Writ petiton dismissed.

2016 (II) ILR - CUT- 808

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

W.P.(C) NO. 18923 OF 2014

STATE OF ODISHA & ANR. ……..Petitioners

.Vrs.

SMT. SANJITA DAS & ORS. ……Opp. Parties

SERVICE LAW – Promotion – DPC found O.P.No.1 suitable for promotion on 05.11.2012 – Due to vigilance case against O.P.No.1 her case was kept in sealed cover awaiting report of the Crime Branch – O.P.No.1 filed O.A. – Tribunal directed to open the sealed cover and allow her promotion from the date her juniors got promoted – Hence the writ petition – In view of the Government Circular Dt. 04.07.1995 the petitioners should have considered the case of O.P.No.1 for giving her ad hoc promotion since the vigilance case is still pending – Held, the impugned order passed by the learned Tribunal is set aside – Direction issued to the petitioners to consider the case of O.P.No.1 for ad hoc promotion from the date her juniors got promoted.

(Paras 15,16)

Case Laws Referred to :-

1. (1991) 4 SCC 109 : Union of India & Ors. -V- K.V.Jankiraman & Ors.

For Petitioners : Mr. M.Sahoo, Addl. Govt. Advocate
For Opp. Parties : Miss D.Mohapatra & S.Parida

Date of hearing : 27.07.2016
Date of judgment: 09.08.2016

JUDGMENT

DR. D.P.CHOUDHURY, J.

Challenge has been made to the order dated 15.5.2014 of the learned Odisha Administrative Tribunal (hereinafter called 'the Tribunal') passed in O.A. No.2541 of 2013 whereunder the Tribunal has passed order to accord promotion to the opposite party no.1 from the date her juniors got promoted.

FACTS

2. The shorn off unnecessary details of the case of the petitioner are that the opposite party no.1 is a member of Odisha Administrative Service of 1987 batch. It is stated that while the opposite party no.1 was working in the cadre of OAS, Senior Branch, on 5.11.2012, Departmental Promotion

Committee (hereinafter called 'the DPC') was convened and she was found suitable for promotion to the rank of OAS (super time scale) along with her juniors. Though the proceeding of DPC meeting held on 5.11.2012 was finalized and recommendation was issued, no notification effecting promotion on implementation of recommendation was issued till 28.5.2013, but by notification No.14382 dated 28.5.2013, others were promoted to the rank of OAS (super time scale) ignoring the recommendation of the DPC in respect of the opposite party no.1. In the meantime, there was a criminal case filed against the opposite party no.1 alleging involvement of the present opposite party no.1 as per the report of the Superintendent of Police, CID CB, Odisha, Cuttack. It was intimated by the Crime Branch that cognizance of the offence has been taken against the opposite party no.1 on 14.5.2012 by the concerned Court. It is the further case of the opposite party no.1 that while the proposal was submitted to Government to promote her along with other junior officers, her case was kept in sealed cover in view of the report of the Crime Branch. The opposite party no.1 challenged the sealed cover procedure and filed O.A. No.2541 of 2013 before the Tribunal and the Tribunal, relying upon the decision of the Hon'ble Supreme Court in the case of ***Union of India and others –V- K.V.Jankiraman and others; reported in (1991) 4 SCC 109,*** allowed her Original Application on the ground that charge sheet in the criminal case was not served on the opposite party no.1 by the date of meeting of the Selection Board on 5.11.2012 nor on 28.5.2013 when the recommendation of the Selection Board was implemented and others were given promotion. The Tribunal passed order to open the sealed cover and issue order of promotion in her favour from the date her juniors got promoted. Being aggrieved by such order passed by the Tribunal, the present writ petition has been filed by the State-petitioners.

SUBMISSIONS

3. Mr.Sahoo, learned Additional Government Advocate submitted that the order of the Tribunal is illegal, improper and against the instructions of the Government in General Administration Department. According to him, an officer whose name is recommended for promotion to the Screening Committee but in whose case any of the circumstances mentioned in paragraph-3 of the Office Memorandum dated 18.2.1994 arise after the recommendations of the Screening Committee are received before he is actually promoted, will be considered as if his cases had been placed in a sealed cover by the Screening Committee. Paragraph-3 of such Office Memorandum dated 18.2.1994 is placed below:

"3.Promotion of officers to the various posts/services

At the time of consideration of cases of officers for promotion, details of such officers in the zone of consideration falling under the following categories should be specifically brought to the notice of the concerned Screening Committee.

(i) Government servants under suspension;

(ii) Government servants in respect of whom a charge-sheet has been issued and disciplinary proceeding are pending; and

(iii) Government servants in respect of whom prosecution for criminal charge is pending."

4. Mr.Sahoo, learned Additional Government Advocate stressed on the words **"criminal charge pending".** He submitted that when the proposal was mooted to the Government for promotion of opposite party no.1 and before the actual promotion order issued, the cognizance of the offence in a criminal case filed by the Crime Branch has been taken by the concerned Court and in such case, the present opposite party no.1 was later added as an accused. So, on the date of promotion, there was criminal case pending against the opposite party no.1 for which learned Tribunal has failed to understand the real object behind the aforesaid Office Memorandum and superficially by putting stress on the decision reported in ***Union of India and others –V- K.V.Jankiraman and others (supra)***.

5. Mr.Sahoo, learned Additional Government Advocate further submitted that the order of the Tribunal is without application of judicial mind and the Tribunal has passed the order that since there was no criminal case pending against the opposite party no.1 on the date of DPC convened the meeting recommending her name, she is entitled to get promotion, but not without following the sealed cover procedure. The Tribunal has failed to understand the real object of sealed cover procedure. So, he submitted that the order of the Tribunal be set aside by allowing the writ petition.

6. Miss D.Mohapatra, learned counsel for the opposite party no.1 submitted that on 5.11.2012 when the selection committee found the opposite party no.1 suitable for promotion and recommended her case, there was no criminal case pending against her on that date. According to her on 14.5.2012, a charge sheet was filed against six accused persons and the name of the opposite party no.1 was does not find place. She further stated that later on the present opposite party no.1 along with others were charge

sheeted on 21.3.2013 which is much after the selection committee recommended the name of opposite party no.1 for promotion. According to her, the Hon'ble Supreme Court in ***Union of India and others –V- K.V.Jankiraman and others (Supra)*** passed order that sealed cover procedure can be resorted to only after charge-memo/charge-sheet is issued and the pendency of the preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. So, she submitted that since there was no criminal case pending under law on the date of her recommendation for promotion, purportedly she has been promoted on that day and no way can it be said that the criminal case is pending on the date of her promotion. She supported the judgment of the learned Tribunal absolutely and further submitted that as per notification dated 4.7.1995 issued by the Government of Odisha in General Administration Department which is still in force, the opposite party no.1 can be allowed ad hoc promotion when her promotion is not in public interest by holding another DPC. So, in alternative, she submitted that ad hoc promotion should be given to the opposite party no.1 in case regular promotion is not desired by the employer till the criminal case is not disposed of.

DISCUSSION

7. It is admitted fact that the opposite party no.1 was a member of the Odisha Administrative Service, Senior Branch cadre and the DPC was held on 5.11.2012 for promotion to the cadre of Selection Grade and accordingly proposal was sent to the State Government recommending her case for promotion. It is also admitted fact that there was a criminal case pending against the opposite party no.1 in the Court of the learned S.D.J.M., Cuttack Sadar, Cuttack. It is also not in dispute that finally charge sheet was submitted against three accused persons including the present opposite party no.1, but before that on 11.5.2012, charge sheet has been submitted against six accused persons. It is also admitted fact that the concerned criminal Court took cognizance of the offence on 14.5.2012 against six accused persons whose names have been already revealed in the preliminary charge sheet dated 11.5.2012, but the supplementary charge sheet dated 21.3.2013 against present opposite party no.1 was tagged to the original case record wherein the cognizance of offence has been taken on 14.5.2012.

8. Learned Additional Government Advocate placed notifications vide Annexure-2 of the Government. From paragraph-3 of the notification dated

18.2.1994**,** it appears that at the time of consideration of the cases for promotion, it should be brought to the notice of the concerned Screening Committee against Government servant in respect of whom a charge-sheet has been issued and disciplinary proceeding are pending and Government servant in respect of whom prosecution for criminal charge is pending. Again in the said notification at paragraph-9, it has been clearly stated that after the recommendations of the Screening Committee are received but before promotion if there is criminal charge pending then sealed cover procedure would be adopted by the Screening Committee. It is made clear that as long as actual promotion not made but Screening Committee recommendation is there, the sealed cover procedure would be adopted subject to suitability for promotion and as such sealed cover will be opened on conclusion of disciplinary case or criminal prosecution. It is further found from paragraph-9 that in case of complete exoneration from the case, he will get all arrear benefits with the promotion.

9. Mr.Sahoo, learned Additional Government Advocate brought to the notice of the Court the notification of the State Government issued on 28.5.2012 in General Administration Department which states as follows:

> "xxx xxx xxx
>
> However, in a criminal case, charge sheet is not issued but is served on the accused after cognizance is taken by the Court which presupposes filing of charge sheet. As there is possibility of the accused evading summons after charge sheet has been filed by the prosecution and/or taking adjournment which can cause delay in serving the charge sheet on the accused, it is now further clarified that sealed cover procedure shall be adopted in all criminal cases where cognizance has been taken by the Court.
>
> xxx xxx xxx"

10. In view of the aforesaid Government instructions, it is clear that sealed cover procedure shall be adopted in all criminal cases where cognizance has been taken by the Court. In the instant case, cognizance of the offence has been taken on 14.5.2012 as per admitted fact but it was not brought to her knowledge as long as the opposite party no.1 has not received the copy of the charge sheet. No doubt the supplementary charge sheet against her was filed in 2013. Since cognizance of offence has been taken tagging the case to the original charge sheet and it dates back to 14.5.2012, without going to the further merits of the case, we are of the view that sealed

cover procedure has been rightly adopted in this case for the sake of the Government instructions as discussed above.

11. Keeping the issue as to whether the sealed cover procedure should be adopted by applying the decision of the Hon'ble Supreme Court in the case of ***Union of India and others –V- K.V.Jankiraman and others (Supra)*** open in a peculiar circumstance of this case where charge sheet has not been issued, we may dwell upon the further Government circular issued in 1995. Learned counsel for the opposite party no.1 relied upon such Government Office Memorandum dated 4.7.1995 issued by the General Administration Department:

"GENERAL ADMINISTRATION DEPARTMENT
OFFICE MEMORANDUM

The 4th July 1995

Subject :- Promotion of Government Servants against whom disciplinary/criminal proceedings are pending procedure to be followed.

No. 14640-Gen. – The procedure to be adopted by the D.P.C., while selecting Employees for promotion to the next higher grade when any Disciplinary/Criminal Proceedings is pending has been laid down in G. A. Department Office Memorandum No. 3928-Gen., dated the 18th February 1994. It has come to the notice of the Government that difficulties are being experienced in the cases where disciplinary proceeding/criminal prosecutions against the Government Servants are pending for a long period without being disposed of. The delay is unfairly depriving of such Government Servants from getting promotions to the next higher grade.

2. The Government, after careful consideration of all the aspects and in partial modification of the instructions contained in G.A. Department Office Memorandum No. 3928-Gen., dated the 18th February 1994 referred to above, have been now pleased to decide as follows :-

(i) xxx xxx xxx

(ii) xxx xxx xxx

(iii) In the cases, where criminal prosecution/disciplinary cases against the delinquent Government employees, have not come to an

end even after the expiry of two years from the date of the meeting of the first Departmental Promotion Committee, the Appointing Authority may review the withheld promotion cases (provided the delinquent Government employees are not under suspension) to consider the desirability of giving the *ad hoc* promotion keeping in view the following aspects :-

(a) Whether the promotion of the employee will be against the public interest

(b) Whether the charges are grave enough to warrant continued denial of promotion

(c) Whether there is likelihood of the case coming to a conclusion in the near future

(d) Whether the delay in the finalisation of the proceedings, departmental or in a Court of Law, is not directly or indirectly attributable to the employee concerned.

(e) Whether there is any likelihood of misuse of the Official position, that the employee may occupy after *ad hoc* promotion, which may adversely affect the conduct of the departmental case/criminal prosecution.

In case the Appointing Authority considers that it would not be against the public interest to allow *ad hoc* promotion to the employee concerned, his case should be placed before the next D.P.C. to be held in the normal course to decide whether the employee is suitable for promotion on *ad hoc* basis. If the employee is considered suitable, on the basis of the totality of his record of service, without taking into account the pending disciplinary case/criminal prosecution against him, an order of promotion may be issued making it clear that :-

(i) the promotion is being made purely on *ad ho*c basis and the *ad hoc* promotion will not confer nay right for regular promotion; and

(ii) the *ad hoc* promotion shall survive until further orders.

(iii) If should also be indicated in the orders that the Government reserve the right to cancel the *ad hoc* promotion at any time and revert the employee to the post from which he was promoted without assigning any reason therefor.

All other conditions contained in the aforesaid Office Memorandum remain unchanged.

Sd/-SANTOSH KUMAR
Special Secretary to Government**"**

12. For our clarification, the General Administration Department through Mr.Sahoo, learned Additional Government Advocate informed that such circular is also in force being not recalled or modified so far. The Government has also admitted that it would be applied in the case of the present opposite party no.1.

13. The relevant portion of the impugned order passed by the Tribunal is quoted below:

> **"6.**Considering the submissions made by the learned counsel for both parties, as it appears it is the admitted case of the State respondents that in the meeting of the Selection Board held on 5.11.2012 the applicant was found suitable for promotion and accordingly the Selection Board recommended the applicant, along with other officers, including respondent Nos.4 and 5 for their promotion to O.A.S(Super-time scale). The recommendation of the Selection Board was implemented by issuing orders of promotion in favour of respondent Nos.4 and 5 vide order 28.5.2013, (Annexure-2). Since cognizance in the criminal case filed against the applicant was taken on 21.4.2013, deemed sealed cover has been adopted in respect of the applicant retrospectively.
>
> **7.** Since charge sheet in the criminal case was not served on the applicant by the date of meeting of the Selection Board on 5.11.2012 nor on 28.5.2013 when the recommendation of the Selection Board was implemented and respondent Nos.4 and 5, who are junior to the applicant, were given promotion, I am of the considered view, the deemed sealed cover procedure adopted retrospectively in the case of applicant, on the plea that cognizance has been taken on 21.4.2013, is not legal and justified, keeping in view the decision of the Hon'ble Supreme Court.
>
> **8.** In view of the above and since the applicant has already been recommended by the Selection Board in their meeting dated 5.11.2012 has charge sheet in the criminal case, was not served on the applicant by that date, as admitted in the counter filed by the respondents, respondent No.1 and 2 are directed to open the sealed cover in respect of the applicant and issue order of promotion in her favour from the date her juniors got such promotion with all

consequential and service benefits within a period of one month from the date of communication of this order, if there is no other legal impediment."

14. From the aforesaid paragraphs of the impugned orders, it appears that the Government Notification of 1994 and subsequent to the notification of 1995 having not been taken into consideration, the Tribunal has passed the above order. We are, therefore, of the considered view that the impugned order of Tribunal lacks of brevity and application of proper procedure as declared by the State Government. So, we do not agree with the view taken by the learned Tribunal.

15. In view of the aforesaid analysis, since the cognizance of the offence has been taken on 14.5.2012 although the supplementary charge sheet was submitted in 2013 against the present opposite party no.1 and fact that the Screening Committee held its DPC on 5.11.2012, the sealed cover procedure should be adopted, but in view of the Government circular dated 4.7.1995, the petitioners should consider the case of the present opposite party no.1 for giving ad hoc promotion when the DPC held on 5.11.2012 recommending her suitable for promotion and the fact that the vigilance case is still pending.

16. In the result, we allow the writ petition by setting aside the order dated 15.5.2014 of the learned Tribunal passed in O.A.No.2541 of 2013 and direct the petitioners to consider the case of the opposite party no.1 for ad hoc promotion by following the Government Circular dated 4.7.1995 from the date when her juniors got promoted. The entire exercise should be completed within a period of eight (8) weeks from today. The writ petition is disposed of accordingly.

Writ petition allowed.

2016 (II) ILR - CUT-817

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

O.J.C. NO. 3322 OF 1992

BINOD BIHARI SINGH (DEAD) & ORS. ……..Petitioners

.Vrs.

THE DISTRICT TRANSPORT MANAGER (ADMN.) ORISSA STATE ROAD TRANSPORT CORPORATION, BHADRAK & ORS. ……...Opp.parties

SERVICE LAW – Compulsory retirement – To be in public interest – When can be interfered – Judicial interference can only be made when an order suffers from non-application of mind, malafide, arbitrary, perverse and is based on no evidence.

In this case, even though, the learned Labour Court had an occasion to assess the service books of the petitioners, there was no finding that compulsory retirement of the petitioners was for public interest – Neither the authorities under OSRTC have applied their mind while passing the order of premature retirement nor the learned Labour Court has assigned any reason while holding it to be justified – Held, the impugned award passed by the Labour Court is setaside.

(Paras 8,9,10)

For Petitioners : M/s. R.K.Bose
For Opp.parties : Sankarsan Rath

Date of Order :13.07.2016

ORDER

S.PANDA, J

The petitioners in this writ petition assail the award dated 20.11.1991 passed by opposite party No.2- Presiding Officer, Labour Court, Bhubaneswar in I.D. Case No.57 of 1989.

2. The petitioners were employees of Odisha State of Road Transport Corporation (for short, 'OSRTC'). They were made to retire prematurely on 20.09.1986 on attaining the age of 50 years. Such decision of premature retirement of the petitioners was taken by the OSRTC in the public interest. The schedule of reference for adjudication before the learned Labour Court was as follows:

> "Whether the pre-mature retirement of (i) Sri Binod Bihari Singh, Asst. Station Master, (2) Sri Banchanidhi Jena, Conductor (3) Sri

Rama Chandra Singh, Conductor of O.S.R.T.C., Bhadrak with effect from 20.09.1986 in legal and/or justified? If not, to what relief are they entitled?"

3. Both the parties (the petitioners as well as the opposite party Nos.1 and 3) filed written statements in support of their stand. Learned Labour Court by its award dated 20.11.1991 (Anexure-11) held the compulsory retirement of the petitioners to be legal and justified. He further held that the petitioners are not entitled to the benefits claimed by them. Assailing the same, the petitioners have filed the present writ petition. During pendency of the writ petition, petitioner Nos.1 and 3 died and were substituted by their legal heirs.

4. Though several grounds were taken in the writ petition assailing the correctness of the award passed under Annexure-11, learned counsel for the petitioners assailed the finding of the learned Labour Court with regard to premature retirement of the petitioners on "public interest". He strenuously contended that neither the order of retirement as passed under Annexure-1 series reflects that the compulsory retirement of the petitioners was on 'public interest' nor the impugned award spells out the nature of 'public interest' for which petitioners were made to retire prematurely. He further submitted that retirement of the petitioners was arbitrary and the finding to that effect arrived at by the learned Labour Court is perverse. He also relied upon three unreported decisions of this Court in OJC No.2803 of 1984 disposed of on 17.07.1990, OJC No.1176 of 1988 disposed of on 27.06.1991 and OJC No.3970 of 1989 disposed of on 23.11.1997 and submitted that the petitioners in the said writ petitions were also made to retire prematurely on 'public interest'. This Court considering the provisions under Regulation-118 of the OSRTC Employees (Classification, Recruitment and Conditions of Service) Regulations, 1978 (for short, 'Regulations 1978'), came to a conclusion that it was incumbent upon the Corporation to satisfy the Court as to what 'public interest' was sought to be achieved by superannuating the petitioners prematurely. In the case at hand, neither the OSRTC has spelt out the 'public interest' achieved on such premature retirement of the petitioners in the order passed under Annexure-1 series nor the learned Labour Court has given any finding to that effect. Hence, he prayed to quash the impugned order under Annexure-11 and to grant consequential benefits to the legal heirs of the petitioners.

5. Mr.Sahoo, learned counsel for opposite parties 1 and 3-OSRTC refuted such submissions and strenuously urged that the ground of premature retirement need not be spelt out in the order of superannuation. Thus, no fault can be found with the OSRTC for non-mentioning of the ground of premature retirement under Annexure-1 series. Further, learned Labour Court while answering issue No.1 has discussed the materials available on record in threadbare and came to a categorical finding that the premature retirement of the petitioners was on 'public interest'. The said finding being supported by materials available on record, this Court in exercise of jurisdiction under Article-227 of the Constitution of India should not sit over the impugned award as an appellate Court. He also relied upon the unreported decision of this Court in OJC No.1213 of 1987 disposed of on 08.08.1990. Further, relying upon the decision of the Hon'ble Supreme Court in the case of ***Shri Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another***, reported in 73 (1992) CLT 665 (SC), he contended that when the termination is on public interest and the learned Labour Court satisfies the grounds enumerated at paragraph-32 of the said decision (supra), this Court should not interfere with the order of termination. Hence, he prayed for dismissal of the writ petition.

6. Having heard learned counsel for the parties and on perusal of the case record, it reveals that the OSRTC in exercise of power conferred under Regulation-118 of the Regulations, 1978 can superannuate an employee prematurely in public interest.

In *Shri Baikuntha Nath Das' case (supra),* the Hon'ble Supreme Court while dealing with the assessment of compulsory retirement held as follows:

"32. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they

are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary-in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course attaching more importance to record of and performance during the later years.The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interfere. Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 29 to 31 above."

Judicial interference can only be made when an order of compulsory retirement suffers from non-application of mind, mala fide, arbitrary, perverse and is based on no evidence. The order of compulsory retirement passed in respect of petitioners has to be scrutinized keeping in view the aforesaid principles.

7. Learned Labour Court while answering the reference framed two issues, which are as follows:-

1) Whether the premature retirement of (1) Sri Binod Bihari Singh, Asst. Station Master (2) Sri Banchanidhi Jena, Conductor, (3) Sri Rama Chandra Singh, Conductor of Orissa State Road Transport Corporation, Bhadrak with effect from 20.9.86 is legal/and/or justified ?

2) To what relief the workmen are entitled?

8. After going through the discussions as made above and on perusal of the finding on issue No.1, it is apparent that the grounds on which the petitioners suffered the order of compulsory retirement are conspicuously absent therein. No material is either produced before the learned Labour

Court or before this Court to come to a conclusion that the order of premature retirement of the petitioners was on 'public interest'. On the other hand, it is the admitted case of the parties that the petitioners have crossed the efficiency bar and have received increments. Learned Labour Court, while discussing issue No.(1) has rightly held that the employees, who are turned dead wood or no way useful to be retained in service, can be made to retire prematurely on public interest and for that crossing efficiency bar cannot immune them from compulsory retirement. However, there is no finding to the effect that continuance of the petitioners in service is not in public interest, as they are turned dead wood and no way useful for the OSRTC. Learned counsel for the OSRTC relying upon the decision of this Court in OJC No.1213 of 1987 disposed of on 08.08.1990 contended that change of condition of service of a workman by dispensing with his services prematurely on completion of 50 years of age cannot be said to be withdrawal of customary concession or privilege or change in usage. Thus, he contended that application of Regulation-118 of Regulations, 1978 in the present case cannot be said to be in contravention of provisions under Section 9-A of the Industrial Disputes Act, 1947. The said decision has no application to the case at hand for the reason that learned counsel for the petitioners has not raised any grievance with regard to change of service conditions of the petitioners by effecting compulsory retirement. Further, review committee had taken into consideration that the petitioners therein were placed under suspension for adopting dishonest tactics. But, in the instant case, ground of premature retirement of the petitioners is conspicuously absent in the order of superannuation as well as in the impugned award. Though learned Labour Court had an occasion to assess the service books of the petitioners, no material was brought out which would justify the compulsory retirement of the petitioners was for the public interest. On the other hand, the two unreported decisions relied upon by learned counsel for the petitioners (supra) are squarely applicable to the case at hand, wherein it has been categorically held that power of compulsory retirement being available to be exercised in the event of public interest only and the same having not been challenged, it was incumbent upon the Corporation to satisfy the Court below as to what 'public interest' was achieved by superannuating the petitioners prematurely. Apparently, no material was produced before the learned Labour Court to come to a conclusion that premature superannuation of petitioners were in public interest. Moreover, learned Labour Court being swayed away by the principles that adverse remarks need not be communicated to the petitioners for superannuating them prematurely on public interest, that review

committee has taken a decision for compulsory retirement of the petitioners, and that the petitioners were given three months' notice as a pre-condition to pass the order of compulsory retirement, came to a conclusion that order of compulsory retirement of the petitioners was justified.

9. Having heard learned counsel for the parties as well as on perusal of the case record, it is apparent that neither the authorities under OSRTC have applied their mind while passing the order of compulsory retirement nor the learned Labour Court has assigned any reason for holding it to be legal and justified.

10. In that view of the matter, the impugned award dated 20.11.1991 passed by opposite party No.2- Presiding Officer, Labour Court, Bhubaneswar in I.D. Case No.57 of 1989 under Annexure-11 is not sustainable in law. Accordingly, the same is set aside, but in the circumstances, without any order of costs.

Writ petition allowed.

2016 (II) ILR - CUT- 822

SANJU PANDA, J. & S.N. PRASAD, J.

W.P.(C) NO. 13843 OF 2016

M/S. GLAXO SMITHKLINE PHARMACEUTICALS LTD. .....Petitioner

.Vrs.

PRESIDING OFFICER, LABOUR COURT & ANR. .....Opp.parties

INDUSTRIAL DISPUTES ACT, 1947 – S.36(4)

Whether a legal practitioner (Lawyer) can appear before an Industrial Tribunal without the consent of the opposite party and leave of the Tribunal ? – Held, No.

In this case application filed by the petitioner-management to engage a legal practitioner was rejected by the Labour Court since O.P.No.2-workman has not given consent – Order of the Labour Court challenged on the ground that since O.P.No.2-workman was represented by an advocate it can be treated as implied consent by the workman and the Labour Court should not have rejected its application

– Consent has to be clear and positive and the concept of "implied consent" cannot be imported to the provision since consent of the other parties to the proceeding and the leave of the Tribunal are mandatory pre-conditions for representation of a party by a legal practitioner – Held, there is no illegality in the impugned order passed by the Labour Court, calling for interference by this Court.

(Paras 8,12)

Case Laws Referred to :-

1. AIR 1977 SC C 36 : Paradip Port Trust, Paradip -v- Their Workmen.
2. 1999(1) LLJ 1306 : Prasar Bharathi Broadcasting Corporation of India – v- Suraj Pal Sharma & anr.
3. LPA No.212 of 2008 : M/s Bhagat Brothers –vs- Paras Nath Upadhyay.
4. LPA No.250 of 2009 : M/s Hygienic Foods Malerkotla -vs- Jasbir Singh & Ors.

For Petitioner : M/s. Sanjay Ku. Mishra & S.S.Sahoo
For Opp.parties : None

Date of hearing : 10.8.2016
Date of judgment: 10.8.2016

JUDGMENT

S.N.PRASAD,J.

This writ petition has been preferred by the Management of M/s Glaxo Smithkline Pharmaceuticals Ltd., assailing the orders passed by the Labour Court, Bhubaneswar dated 26.3.2016 and dated 30.7.2016 in I.D.Case No.4 of 2015.

2. By order dated 26.3.2016 the petition filed by the petitioner on 15.2.2016 for engagement of legal practitioners to represent on their behalf before the Labour Court is rejected, while the order dated 30.7.2016 of the Labour Court is to review the order dated 26.3.2016 is rejected.

3. Brief facts of the case in narrow compass is that an industrial dispute case has been initiated being I.D.Case No.4 of 2015 at the instance of the opposite party no.2 who was working as Medical Business Associate-II in the petitioner-company. On being dismissed for proved misconduct in a departmental proceeding, opposite party no.2 raised an industrial dispute questioning the legality of the action of the Management in terminating his service w.e.f. 1.2.2013, conciliation being failed, appropriate government made a Reference to the opposite party no.1 on 22.1.2015, which was registered as I.D.Case No.4 of 2015 by the Labour Court, Bhubaneswar.

Petitioner has entered their appearance on being noticed by the Labour Court, filed its written statement inter alia challenged maintainability of the case and lack of jurisdiction of the Labour Court to try the lis. After completion of pleadings and settlement of issues, the petitioner Management filed two petitions in the case on 15.2.2016, one for recasting the issues and take up the fairness of domestic enquiry as a preliminary issue and another petition under section 36(4) of the Industrial Disputes Act,1947 stating therein that the authorized representative of the petitioner Management is not aware of the legal procedural aspects and do not have experience and exposure in handling industrial dispute matters effectively for which they may be prejudiced. Petitioner Management has no offices throughout the State of Orissa and it is managing the case date wise through its local Officer, who has been arrayed as Management No.3 in the said Reference till the said date to handle the matter. It is also impracticable and an expensive affair on the part of the petitioner-Management to conduct the case by deputing its Authorized Representatives from Mumbai. Petitioner has got no objection if the other side is being represented through a legal practitioner namely Debasis Patnaik and his Associate.

The opposite party no.2 filed objections to the petitions and prayed for rejection. The Labour Court after hearing the parties has rejected the applications on the ground that the expressed provision in this regard legislated by the Legislation under Section 36(4) of the Industirla Act and as such since the opposite partyno.2 has not given consent to allow the petitioner to contest their case through legal representative, hence it cannot be allowed and accordingly it has been rejected.The petitioner being aggrieved with the order is before this Court by way of the writ petition on the ground that the Tribunal has rejected the application without considering the grounds mentioned in the petition and also without considering various judgments pronounced by Court wherein provision of Section 36(4) of the I.D.Act has been said to be not mandatory.

4. This Court has taken up the writ petition and decided to dispose of the same since legal question has been raised by the petitioner.

Before answering the issue it would be appropriate to refer to the provisions of Section 36 of the Industrial Disputes Act,1947 which contains the provision ‘representation of parties’.

“S-36. Representation of parties.-

(1) A workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by—

(a) any member of the executive or office bearer] of a registered trade union of which he is a member:

(b) any member of the executive or other office bearer of a federation of trade unions to which the trade union referred to in clause (a) is affiliated;

(c) where the worker is not a member of any trade union, by [2] any member of the executive or other office bearer] of any trade union connected with, or by any other workman employed in, the industry in which the worker is employed and authorized in such manner as may be prescribed.

(2) An employer who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by—

(a) an officer of an association of employers of which he is a member;

(b) an officer of a federation of association of employers to which the association referred to in clause (a) is affiliated;

(c) where the employer is not a member of any association of employers, by an officer of any association of employers connected with, or by any other employer engaged in,the industry in which the employer is engaged and authorized in such manner as may be prescribed.

(3) No party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceedings under this Act or in any proceedings before a Court.

(4) In any proceeding [1] before a Labour Court, Tribunal or National Tribunal], a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and [2] with the leave of the Labour Court, Tribunal or National Tribunal, as the case may be."

It is evident that Section 36 of the ID Act seeks to regulate representation of the parties to a dispute raised under this Act. Sub-section (1) of Section 36 entitles a workman to be represented by (i) any member of the executive or other office bearer of a registered trade union of which he is a member; (b) any member of the executive or other office bearer of a

federation of trade unions to which the trade union referred to in clause (i) is affiliated; and (c) where the workman is not a member of any trade union then a workman has been given a wholesome right of being represented by any member of the executive or office bearer of any trade union connected with the industry in which the worker is employed or by any other co-worker employed in such industry.

The language of sub-section (1) is quite different in its phraseology from the language used in sub-section (2) of Section 36 of the ID Act. There would be hardly any difficulty to discover a member of the executive or an office bearer of a trade union or a federation of trade unions to which the trade union referred to above is affiliated. As long as a representative answers the prescription of any of the provisions of sub-section (1) of Section 36 of the ID Act, it would not make any difference even if he is a legal practitioner. It follows that such a representative would not be required to satisfy the conditions envisaged by Section 36(4) of the ID Act, namely, to secure consent of the other party and leave of the Court because Section 36(4) would not simply apply because an office bearer or a member of the executive would cover even a legal practitioner or an advocate enrolled under the Advocates Act. It is significant to point out that there is no bar against a legal practitioner becoming a member of the executive or office bearer of a trade union or a federation of trade unions under the Advocates Act or any rules framed thereunder. By virtue of becoming member of the executive or an office bearer of trade union no relationship of employee and employer between the advocate or the trade union into being. In sub-section (2) of Section 36 of the ID Act, the expression 'Officer' has been retained. A legal practitioner enrolled as an advocate under the Advocates Act would be covered by the expression 'any member of the executive or other office bearer' but he may not be able to answer all the attributes of an 'Officer' of an association of employer of which he is a member or an officer of federation of association of employers to which such an association is affiliated. A perusal of sub-section (2) of Section 36 of the ID Act would further reveal that the employer is entitled to be represented in any proceedings under the ID Act by an officer of an association of employer of which he is a member or an officer of a federation of association of employers to which the association of the employer is affiliated. Sub-section (3) of Section 36 of the ID Act in un-mistakable terms states that no party to a dispute is entitled to be represented by a legal practitioner either in any conciliation proceedings under the ID Act or in any other proceedings before a Court. There is, thus, a

complete bar created by sub-section (3) of Section 36 of the ID Act to be represented by a legal practitioner in two types of proceedings, namely, any conciliation proceedings which are defined in clause (e) of Section 2 of the ID Act or in any proceedings before a Court which means a Court of Inquiry constituted under the ID Act as defined in sub-section (f) of Section 2. Thus, there is complete bar on the parties to be represented by a legal practitioner in the aforesaid two types of proceedings. However, a perusal of sub-section (4) of Section 36 of the ID Act on the other hand would show that a party to the dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Labour Court, Tribunal or National Tribunal, as the case may be.

5. Before dealing with the issue it would be relevant to go to the background of the insertion of the provision of Section 36 of the Industrial Disputes Act,1947 which has been incorporated under the statute by virtue of the Act 48 of 1950. The legislation history of Section 36 show that in 1947 when the original section 36(3) was enacted by a party to an industrial dispute could be represented by a legal practitioner in any proceeding before a Court or a Tribunal. Thus there was absolute freedom for representation by lawyers. The 1950 Act imposed restrictions on legal practitioners in their appearance even before an Appellate Tribunal. Section 33(3) of the 1950 Act laid down that a party to a proceeding under that Act may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Appellate Tribunal. The restriction was imposed for the first time and that again even in respect of an Appellate Tribunal. Consistent with the aforesaid objective the same restriction was extended to appearance before original Tribunals and consequently the Industrial Disputes Act was amended by the amendments in the Schedule in the 1950 Act. 1950 Act put serious restrictions on the appearance of lawyers. The issue regarding allowing parties to be represented by legal practitioners before the Labour Court or the Tribunal fell for consideration before the Division Bench of this Court in the case of **M/s Orissa Ceramic Industries Ltd. –v- GS,Orissa CW Union**, 1973 Lab.I.C 622 wherein their Lordships has been pleased to take into consideration of various aspects of the matter that if the parties will not be allowed to be represented through legal representative it will create hardship and also power of the court and dealt with provision of section 36(4) by discussing in detail that as to whether in absence or consent of the parties, can the Presiding Officer or the adjudicator grant leave. Their Lordships has been pleased to discuss the insertion of the word ‘and’ in Section 36(4) in between the consent of the parties and leave

of the court and after discussing in details it has been held there that if presuming that hardship will be caused to the parties but it is not up to the court to look into this matter rather is up to the legislature to see. Their Lordships has been pleased to hold that the word 'and' will be conjunctive and the consent and leave of the court will depend upon each other. Thereafter, plea taken by the Management to allow them to represent through legal representative has been rejected by affirming order of the Presiding Officer of the Labour Court.

Hon'ble Apex Court in the case of **Paradip Port Trust, Paradip – v- Their Workmen**, reported in AIR 1977 Supreme Court 36 it has been held by their Lordship at paragraphs 15,21,22,23 and 26 which is being referred hereunder.

> "15. The parties, however, will have to conform to the conditions laid down in section 36(4) in the matter of representation by legal practitioners. Both the consent of the opposite party and the leave of the Tribunal will have to be secured to enable a p arty to seek representation before the Tribunal through a legal practitioner qua legal practitioner. This is a clear significance of section 36(4) of the Act.
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> 21. We have given anxious consideration to the above submission. It is true that "and" in a particular context and in view of the object and purpose of a particular legislation may be read as "or" to give effect to the intent of the Legislature. However, having regard to the history of the present legislation, recognition by law of the unequal strength of the parties in adjudication proceedings before a Tribunal, intention of the law being to discourage representation by legal practitioners as such, and the need for expeditious disposal of cases, we are unable to hold that "and" in section 36(4) can be read as "or".
> 22. Consent of the opposite part is not an idle alternative but a ruling factor in section 36(4). The question of hardship, pointed out by the Solicitor General, is a matter for the legislature to deal with and it is not for the courts to invoke the theory of injustice and other consequences to choose a rather strained interpretation when the language of section 36 is clear and unambiguous.
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> 23. Besides, it is also urged by the appellant that under section 30 of the Advocates Act, 1961, every advocate shall be entitled "as of right" to practise in all courts, and before only tribunal section 30(i)

and (ii). This right conferred upon the advocates by a later law will be properly safeguarded by reading the word "and" as "or" in section 36(4), says counsel. We do not fail to see some difference in language in section 30(ii) from the provision in section 14(1) (b) of the Indian Bar Councils Act, 1926, relating to the right of advocates to appear before courts and tribunals. For example, under section 14(1) (b) of the Bar Councils Act, an advocate shall ;be entitled as of right to practise save as otherwise provided by or under any other law in any courts (other than High Court) and tribunal. There is, however, no reference to "any other law" in section 30(ii) of the Advocates Act. This need not detain us. We are informed that section 30 has not yet come into force. Even otherwise, we are not to be trammelled by section 30 of the Advocates Act for more than one reason. First, the Industrial Disputes Act is a special piece of legislation with the avowed aim of labour welfare and representation before adjudicatory authorities therein has been specifically provided for with a clear object in
view. This special Act will prevail over the Advocates Act which is a general piece of legislation with regard to the subject matter of appearance of lawyers before all courts, tribunals and other authorities. The Industrial Disputes Act is concerned with representation by legal practitioners under certain conditions only before the authorities mentioned under the Act. Generalia Specialibus Non Derogant. As Maxwell puts it:

"Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language ..... or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. In the absence of these conditions, the general statute is read as silently excluding from its operation the cases which have been provided for by the special one."

26. A lawyer, simpliciter, cannot appear before an Industrial Tribunal without the consent of the opposite party and leave of the Tribunal merely by virtue of a power of attorney executed by a party. A lawyer can appear before the Tribunal in the capacity of an office bearer of a registered trade union or an officer of associations of employers and

no consent of the other side and leave of the Tribunal will, then, be necessary."

Hon'ble Supreme Court has interpreted section 36 of the Industrial Disputes Act. Views of the Hon'ble Supreme Court, which we have gathered after going through various paragraphs, may be summarised as

(i) Section 36(1) confers an 'unbartered' and 'absolute right' upon the workman to be represented by a member of the executive or an office bearer of the registered trade unions. Likewise, the employer is also placed at par with the workman in the matter of representation before the Labour Courts, Industrial Tribunals and National Tribunals. Consequently, an employer may also be represented by an 'Officer' of the association of employer of which the employer is a member. The right is extended to representation by an Officer of the federation of employer to which the association of employer is affiliated.

(ii). The rights of representation under Section 36(1) of the ID Act are unconditional and are not subject to the conditions laid down in Section 36(4) of the ID Act. Both the sub-sections are independent and stand by themselves.

(iii). Section 36 of the ID Act is not exhaustive in the sense that beside the person specified therein, there can be other lawful mode of appearance of the parties as such (para 13). Such an eventuality has been envisaged by Section 36(2)(c) in case of an employer, who is not a member of an association of employers. The device of representation provided therein would not fit in the case of a Government Department or a Public Corporation as an employer.

(iv). A legal practitioner, who is appointed as an officer of Company or Corporation can represent them subject to certain conditions. The first condition is that he must be on their pay rolls and under their control. The second is that if a legal practitioner is appointed as an officer of a company or corporation then the mere fact that he was earlier a legal practitioner or he has a law degree to his credit was not to stand in the way of the Company or the Corporation being represented by such a person. Section 36(3) of the ID Act imposes a complete embargo on representation by a legal practitioner by either party to the dispute before the Court or in any conciliation proceedings under the Act.

(v). In the matter concerning representation by a legal practitioner the parties are required to conform to the conditions laid down in Section 36(4) of the

ID Act. The consent of the opposite party and the leave of the Labour Court or Tribunal have to be secured to enable a party to seek representation before the Tribunal through a legal practitioner.

(vi). If a legal practitioner becomes an officer of an association of employer or a federation of such association of employer which is affiliated to such a federation within the meaning of sub-Section 2(a) and 2(b), then he can represent an employer.

(vii). No advocate could claim a right to practice by placing reliance on Section 30 of the Advocates Act. That Act has to give way to ID Act because it is a special piece of legislation with the avowed aim of labour welfare.

Thus, it is evident after perusing the judgment rendered by the Hon'ble Apex Court in the case of of **Paradip Port Trust, Paradip –v- Their Workmen** (supra) having been rendered by the three Bench Judges of the Hon'ble Supreme Court, provision of section 36(4) of the I.D. Act has exhaustively been dealt with and it has been held there that A lawyer, simpliciter, cannot appear before an Industrial Tribunal without the consent of the opposite party and leave of the Tribunal.

6. Hon'ble Delhi High Court in the case of **Prasar Bharathi Broadcasting Corporation of India –v- Suraj Pal Sharma and another**, reported in 1999(1) LLJ 1306 has discussed this issue in detail and after placing reliance of the judgment rendered by the Hon'ble Apex Court in the case of **Paradip Port Trust, Paradip –v- Their Workmen** (supra) has been pleased to hold that the party will have to be conform in section 36(4) of the Industrial Disputes Act,1947 in the matter of representative by legal practitioner and both consent of the opposite party and leave of the tribunal will have to be secured to enable a party to seek representative before the Tribunal through legal practitioner.

Moreover, judgment rendered by the Hon'ble Delhi High Court in the case of **Prasar Bharathi Broadcasting Corporation of India –v- Suraj Pal Sharma and another**(supra) has been reversed by the judgment rendered by subsequent Division Bench of the Hon'ble Delhi High Court in the case of **M/s Bhagat Brothers –vs- Paras Nath Upadhyay** in LPA No.212 of 2008, delivered on 13.8.2008 but we, after going through the judgment rendered by the Division Bench of Hon'ble Delhi High Court in the case of **Bhagat Brothers –v- Paras Nath Upadhyay**(supra) have found that the Hon'ble Delhi High Court has not taken into consideration the judgment rendered by the Hon'ble Apex Court in the case of **Paradip Port**

Trust, Paradip –v- Their Workmen (supra), hence we decline to approve the view of the Delhi High Court after taking into consideration the judgment rendered by the Hon'ble Delhi High Court in the case of **Prasar Bharathi Broadcasting Corporation of India –v- Suraj Pal Sharma and another**(supra) in which issue has been discussed taking into consideration the ratio laid down by the Hon'ble Apex Court in the case of **Paradip Port Trust, Paradip –v- Their Workmen** (supra) which still hold the field having binding precedence under Article 141 of the Constitution of India.

We have gone through the judgment rendered by Hon'ble Punjab-Haryana High Court in the case of **M/s Hygienic Foods Malerkotla –vs-Jasbir Singh and others**, rendered in LPA No.250 of 2009 in C.W.P.No.4322 of 2007 decided on 13.11.2009 by its Full Bench, it has been held after taking into consideration the law laid down by the Hon'ble Apex Court in the case of **Paradip Port Trust, Paradip –v- Their Workmen** (supra) that legal practitioner cannot appear before the Industrial Tribunal or Labour Court or National Tribunal without consent of the parties and without leave of the Tribunal.

We have also gone through the judgment rendered by Madurai Bench of Madras High Court in the case of **The National Horticultural –vs-The Government of India** passed on 2.11.2012 in Writ Petition (MD) No.11249 of l2012 and Writ petition (MD) No.11249 of 2012 wherein Hon'ble Madras High Court after taking into consideration the proposition laid down in the case of **Paradip Port Trust, Paradip –v- Their Workmen** (supra) and after having discussed the impact of Section 30 of the Advocates Act, has been pleased to hold that the legal practitioner cannot be allowed to be represented in the Tribunal, or Labour Court or National Tribunal without consent of other party and without leave of the Tribunal, Labour Court or National Tribunal.

After having gone through in detail we find that the proposition laid down by the Hon'ble Punjab-Haryana High Court in the case of M/s Hygienic Foods Malerkotla –vs- Jasbir Singh and others is under consideration before the Hon'ble Apex Court with respect to the constitutional validity of Section 36(4) of the Industrial Disputes Act.

Thus, constitutional validity of Section 36(4) of the Industrial Disputes Act is under consideration before the Hon'ble Apex Court and as such the judgment rendered by the Hon'ble Apex Court in the case of **Paradip Port Trust, Paradip –v- Their Workmen** (supra) having been

delivered by larger Bench consists of Hon'ble Three Judges is still holds the field.

7. It is settled that if there is any statutory provision without any ambiguity it has to be followed in its strict sense and the court of law has got no jurisdiction to interpret the statutory provision since question of interpretation by the court of law will only arise if the statute is not expressed and explicit. After going through the provisions of Section 36 of the Industrial Disputes Act,1947, in our considered view, there is no ambiguity in the same and as such no interpretation is required to be done with respect to the statutory provision as incorporated by the Legislation under section 36(4) of the Industrial Disputes Act,1947.

8. So far as case in hand is concerned, the dispute has arisen when application filed by the petitioner-Management on 15.2.2015 for allowing them to engage legal practitioner on their behalf which has been rejected by the Labour Court since the opposite party no.2-workman has not given consent which has been challenged by the petitioner on the ground that the opposite party no.2-workman since has represented by an Advocate, hence it will be said to be implied consent on his behalf, hence petitioner has right to be represented through legal practitioner and if he will not be allowed to be represented through legal representative it will prejudice his case.

However, it is not in dispute that the workman has been represented by his Advocate but it has not been pleaded in the writ petition that whether the petitioner has ever made objection with reference to engagement of Advocate by the opposite party no.2-workman to represent him and on this ground the petitioner seeks permission to represent him through legal practitioner on the basis of principles of 'implied consent' but this argument of the petitioner cannot be accepted for the reason that section 36(4) of the I.D. Act permits representation of a party by a legal practitioner only with the consent of the other parties to the proceeding and with the leave of the Tribunal , as such the consent has to be clear and positive. There should be positive act or conduct on the part of the party indicating his consent. To consider the failure or inaction of a party in raising the objection at the early stages of the proceeding as implied consent and to deny him the right to object to the representation of the other party by a legal practitioner, will be against the spirit and content of the provisions of Section 36 of the I.D.Act. The concept of 'implied consent' cannot be imported to the provision in Section 36(4) of the I.D.Act. As per Section 36(4) the consent of the other parties to the proceeding and the leave of the Tribunal are mandatory

preconditions for the representation of a party by a legal practitioner. Thus, the Labour Court/Tribunal will have to follow a reasonable and fair procedure for giving effect to the provisions of Section 36(4) of the I.D.Act. The procedure has to be in tune with the principles underlying the particular provision and also in furtherance of the objection of the provision. Hence, if a party to the proceeding intends to engage a legal practitioner, he should specifically seek leave of the tribunal and the Tribunal, after ascertaining and considering the stand of the other parties, should record its decision, granting or refusing leave. In this process, the other parties to the proceeding will get an opportunity to positively express their consent or objection to the representation of a party by a legal practitioner. The record of the proceedings before the Tribunal will also disclose whether the other parties to the proceeding have given their consent or not. Thus the occasion for giving consent by the other parties to the proceeding arises only when a party formally seeks leave of the Tribunal for representation by legal practitioner and when the said request is considered by the Tribunal. If a party to the proceeding has given his consent in the manner stated above he may be precluded from revoking the consent already given. But in the absence of any consent given in the manner stated above the question of revocation of consent does not arise, reference in this regard may be made to the judgment rendered by the Hon'ble Delhi High Court at paragraph-8 in the case of **Prasar Bharathi Broadcasting Corporation of India –v- Suraj Pal Sharma and another**(supra). In view of the reason mentioned in the proceeding paragraphs, there is no force on the argument of the learned counsel for the petitioner regarding having 'implied consent'.

9. Learned counsel for the petitioner has argued that after coming into effect of Section 30 of the Advocates Act with effect from 9.6.2011, Advocate cannot be debarred from appearing in any court of law but after having discussed the authoritative pronouncement and dictum hereinabove, it is evident that the provision of section 36(4) has been legislated by the Legislature in the Industrial Disputes Act,1947 which is a special piece of legislation with the avowed aim of labour welfare. The mode of representation before adjudicatory authorities has been regulated by keeping that object in view. Moreover, the matter is not to be viewed from the point of view of a legal practitioner but from that of the employer and the workmen, who are the principal contestants in an industrial dispute. In ID Act, restriction is upon a party as such and the occasion to consider the right

of the legal practitioner to practise before every court as per provisions of Section 30 of the Advocates Act would not arise.

In view thereof, the argument advanced by learned counsel for the petitioner in this regard is not worthy to be accepted and accordingly it is not accepted.

10. Learned counsel for the petitioner has submitted that by not allowing the petitioner to be represented through legal practitioner, it will prejudice their cases, but on the basis of discussions made above, in our conscious view, this Court is to see that the provision of enactment is to be followed in its strict sense and after going through the provisions of Section 36(4) of the Industrial Disputes Act, since there is impediment in engaging legal practitioner and as such it cannot be said that the Legislature has legislated the provision of Section 36(4) is merely for formality. It is also settled that if anything has been incorporated by the Legislature by way of legislation, there must be some purpose behind it and it cannot be said to be redundant. Moreover, we sitting under Article 226 of the Constitution of India is to see as to whether order is in accordance with the statute or not and we, after appreciating the factual aspects and legal position, found that there is no infirmity in the order impugned.

11. So far as the order dated 30.7.2016 is concerned, it is settled proposition that the power of review/revision/appeal is creation of statute. There is no provision in the Industrial Disputes Act which confers power to the adjudicator to review its own order and as such applying this principle the Labour Court has rightly refused to review/recall the order dated 26.3.2016 by passing the order dated 30.7.2016

12. After having discussed the fact and legal position, in our considered view, there is no illegality in the impugned orders passed by the Labour Court, Bhubaneswar dated 26.3.2016 and dated 30.7.2016 in I.D.Case No.4 of 2015 and accordingly, we decline to interfere with the same. The writ petition fails and dismissed.

Writ petition dismissed.

2016 (II) ILR - CUT- 836

S.C. PARIJA, J.

W.P.(C) NO. 17197 OF 2015

KAILASH CHANDRA PANDA ……..Petitioner

.Vrs.

CENTRAL INFORMATION COMMISSION & ORS. ……..Opp.parties

RIGHT TO INFORMATION ACT, 2005 – Ss 3,8

Right to information – Petitioner prayed for disclosure of number of mobile connections working in Odisha Circle as well as for similar other informations – Application rejected on the ground that information sought for is not in larger public interest – Order confirmed by the 1st appellate authority as well as 2nd appellate authority – Hence the writ petition – Prayer made by the petitioner is irrelevant, vague, impractical unrelated to transparency and accountability and to reduce corruption – Any direction to provide the details sought for by the petitioner would be counter productive, as it will adversely affect the efficiency of the administration and result in disproportionately diverting the resources of the public authority – Held, there is no infirmity in the impugned order warranting interference by this Court.

(Paras 9 to12)

Case Laws Referred to :-

1. (2011) 8 SCC 781 : Institute of Chartered Accountants of India v. Shaunak H. Satya & Ors.
2. (2011) 8 SCC 497 : Central Board of Secondary Education and another v. Aditya Bandopadhyay & Ors.

For Petitioners : M/s. Kshirod Ku. Rout T.K.Nyak, J.Naik & S.K.Rout

For Opp.parties : M/s. J.K.Panda, S.Panigrahi, & P.K. Das.

Date of Judgment: 19.08.2016

JUDGMENT

S.C. PARIJA, J.

This writ petition has been filed for quashing of the order of the Central Information Commission dated 13.2.2015 (Annexure-4) and to direct the Central Public Information Officer (opposite party no.3) to provide the required information sought for by the petitioner.

2. The brief facts of the case is that the petitioner, who is an employee of Bharat Sanchar Nigam Limited ('BSNL' for short), made an application under Section 6 of the Right to Information Act, 2005 ('RTI Act' for short) to the Central Public Information Officer (opposite party no.3), seeking information as detailed in Annexure-1 to the application, which reads as under:

"I. How many prepaid mobile connections are working in Odisha Circle as on 31.12.2013.

II. Kindly provide the particulars of prepaid connections working in Odisha Circle without data entry (Name & Address etc.) as on 31.12.2013. (To be provided in DVD).

Sl.	Mobile No.	Date of Activation	SIM card issued to customer by whom

III. Kindly provide particulars of activation of 'Hello Tune' on prepaid mobiles in the month of October 2013 as per following format (To be provided in DVD).

Sl.	Mobile No.	Date of Activation of 'Hello Tune'	Activated by whom	Amount deducted

IV. Kindly provide the stay particulars of all the staff working in the G.M. (CMTS) unit as per the following format.

Sl.	Name	Desgn	Station	Date since working"

3. No action having been taken by the opposite party no.3 for supply of the information sought for, the petitioner preferred appeal under Section 19(1) of the RTI Act before the 1st appellate authority (opposite party no.2), praying for a direction to the opposite party no.3 to furnish the information sought for by the petitioner. As the 1st appellate authority did not take any steps in the matter, the petitioner filed second appeal under Section 19(2) of the RTI Act, before the Central Information Commission (opposite party no.1), who vide its order dated 13.2.2015 (Annexure-4), has held that the information sought for by the petitioner is not in larger public interest and therefore, the same cannot be provided. The operative portion of the order reads as under:

> "The appellant's representative has not established any larger public interest, which would warrant a directive to the respondent to collect and compile the information, sought by him, even at the cost of diverting their resources from day to day work. In the above circumstances we are unable to provide any relief."

4. Learned counsel for the petitioner submits that the impugned order passed by the Central Information Commission is wholly improper and illegal, inasmuch as, there is no provision in the RTI Act for rejecting the application in larger public interest.

5.Learned counsel for the petitioner with reference to Sections 3 and 4 of the RTI Act submits that the petitioner has the right to have access to the information sought for by him and the opposite party no.3 has the corresponding obligation to provide all such information and therefore, the rejection of the petitioner's application on the plea that the same is not in larger public interest cannot be sustained in law.

6. Learned counsel for the opposite party no.3 with reference to the counter affidavit submits that the information sought for by the petitioner is huge and voluminous, contained in several files and it is not possible to compile the details of information in the format designed by the petitioner, without disproportionately diverting the resources of the public authority. It is submitted that the information sought for by the petitioner is unrelated to transparency and accountability and/or eradication of corruption and that such information has been sought for, only to harass the public authority. It is further submitted that the petitioner is an employee of BSNL and has a service related grievance and he has been filing numerous RTI applications in the garb of seeking information, only to settle personal scores and to put the concerned officers to unnecessary harassment.

7. It is accordingly submitted that the Central Information Commission having considered the matter in its proper perspective and come to find that the information sought for by the petitioner is not connected with any larger public interest and providing such huge and voluminous information would disproportionately divert the resources of the public authority, the same cannot be faulted.

8. The RTI Act was enacted in order to ensure smoother, greater and more effective access to information and provide an effective framework for effectuating the right to information recognized under Article 19 of the Constitution. The Preamble to the Act declares the object sought to be achieved by the RTI Act thus:

> "An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.
>
> Whereas the Constitution of India has established democratic Republic;
>
> And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;
>
> And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;
>
> And whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;"

2. In ***Central Board of Secondary Education and another v. Aditya Bandopadhyay and others,*** (2011) 8 Supreme Court Cases 497, the apex Court while analyzing the provisions of sections 3 and 8 of the RTI Act, has come to hold that the said RTI Act seeks to bring a balance between the provisions of Section 3, which empowers the citizens with the right to information and Section 8, which is in the nature of an exception to Section

3, as harmony between them is essential for preserving democracy. While one is to bring about transparency and accountability by providing access to information under the control of public authorities, the other is to ensure that the revelation of information, in actual practice, does not conflict with the other public interests, which include efficient operation of the Governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information.

Accordingly, the Hon'ble Court has proceeded to observe as under:

> "Indiscriminate and impractical demands or directions under the RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counterproductive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritizing "information furnishing", at the cost of their normal and regular duties."

10. One of the objects of democracy is to bring about transparency of information to contain corruption and bring about accountability. But achieving this object does not mean that other equally important public interests including efficient functioning of the governments and public authorities, optimum use of limited fiscal resources, preservation of confidentiality of sensitive information, etc. are to be ignored or sacrificed. The object of the RTI Act is to harmonise the conflicting public interests, that is, ensuring transparency to bring in accountability and containing corruption on the one hand, and at the same time ensure that the revelation of information, in actual practice, does not harm or adversely affect other public interests which include efficient functioning of the governments, optimum

use of limited fiscal resources and preservation of confidentiality of sensitive information, on the other hand.

11. Similar views have been expressed by the apex Court in ***Institute of Chartered Accountants of India v. Shaunak H. Satya and others,*** (2011) 8 SCC 781, wherein the Hon'ble Court has held that it is necessary to make a distinction in regard to information intended to bring transparency, to improve accountability and to reduce corruption, falling under Sections 4(1)*(b)* and *(c)* of the RTI Act and other information which may not have a bearing on accountability or reducing corruption. The competent authorities under the RTI Act will have to maintain a proper balance so that while achieving transparency, the demand for information does not reach unmanageable proportions affecting other public interests, which include efficient operation of public authorities and the Government, preservation of confidentiality of sensitive information and optimum use of limited fiscal resources.

12. In the present case, from the nature of information sought for by the petitioner as detailed above, it is quite evident that the same is irrelevant, vague and vexatious, wholly unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption. Any direction to provide the details sought for by the petitioner would be counterproductive, as it will adversely affect the efficiency of the administration and result in disproportionately diverting the resources of the public authority.

For the reasons as aforestated, I do not find any infirmity in the impugned order so as to warrant any interference. The writ petition being devoid of merits, the same is accordingly dismissed. No costs.

Writ petition dismissed.

2016 (II) ILR - CUT- 842

B.K. NAYAK, J.

CRLMC NO. 3643 OF 2014

CHINMAYA KUMAR MOHAPATRA ……Petitioner.

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 – S. 482

Quashing of order taking cognizance – Offence under section 418,420,468/120-B IPC – Dispute between the parties arises out of a contract – Substance of the complaint petition shows that there was no allegation of any fraudulent and dishonest intention of the accused persons from the beginning of the transaction – Held, dispute between the parties being civil in nature, arising out of breach of contract, the impugned order taking cognizance is quashed.

(Paras 8,9)

For petitioner : Mr. Patitapaban Panda
For opp. Parties : Mr. Devashis Panda

Date of hearing : 04.07.2016
Date of judgment: 02.08.2016

JUDGMENT

B.K.NAYAK, J.

In this application under Section 482, Cr.P.C. the petitioner prays for quashing the order dated 12.05.2014 passed by the learned S.D.J.M., Puri in I.C.C. No.262 of 2013 taking cognizance of the offences under Sections 418/420/468/120-B of the I.P.C. and directing issuance of summons to the accused persons including the petitioner.

2. Initially the complainant filed a complaint, registered as I.C.C. No.262 of 2013, against the petitioner and another which was forwarded under Section 156(3) of the Cr.P.C. and registered as Puri Seabeach P.S. Case No.119 of 2013. Upon investigation the police submitted final report dated 23.10.2013 stating that the allegations in the F.I.R. amount to breach of contract and, therefore, the dispute is of the civil nature. Thereupon, the complainant-opposite party filed protest petition and his initial statement was recorded and enquiry under Section 202, Cr.P.C. was conducted, whereafter the impugned order of cognizance has been passed.

3. Learned counsel appearing for the petitioner submits that the allegations made in the complain and the terms of the agreement executed between the School Authority and the complainant-Society clearly go to show that the dispute is one of civil nature and, therefore, no prosecution for the offences for which cognizance has been taken would lie and, hence the order of cognizance should be quashed.

Learned counsel appearing for the opposite party-complainant submits that though the dispute arises out of a contract, it cannot be said to be of civil nature and that the allegations, and that the materials prima facie make out the offences.

4. The complainant is a Society represented through its President and it conducts computer training programme for the purpose spreading computer literacy in and outside the State. The petitioner is the Principal of DAV Public School, Puri and his co-accused is the Regional Director of DAV Institutions.

5. The allegations in the complaint are as follows :

The DAV School Management through its Regional Director entered into an agreement with the complainant-Society for taking computer training programme for the students of DAV Public School, Puri. As per the contract, the volunteers of the complainant Society were to train the School students as well as staff of the school for the use of computers by providing and installing in the school premises, the computer appliances, hardware as well as software and this contract was to subsist for a period of ten years commencing from 01.04.2004. The Society was to be paid "service charges" @ 90% of the total collection from students on monthly basis. In terms of the contract, the Society provided all computer appliances in the school and had been providing computer education to the staff and students as per approved curriculum and that as per the term of the contract, the Principal of the school was authorized by the Regional Director of DAV Institutions to make payment of 'service charges' to complainant. It is alleged that with malafide intention, the payment of service of charges has not been made to the Society from April,2011 onwards till the date of filing of the complaint, i.e., 24.07.2013, even though the agreement between the complainant-Society and the school has not been rescinded and the complainant-Society was still continuing to take classes in the School by using the computer appliances installed in the school. In the process, the arrear dues of the complainant's towards 'service charges' has been calculated at Rs.4,83,208.74/- (Rupees

four lakh eight three thousand two hundred eight & seventy four paisa only). In spite of repeated approach by the complainant, the accused persons are not making the payment and thereby they have committed the offences under Sections 418/420 and 406 of the I.P.C.

It is also alleged in the protest petition that during the course of investigation by the police on the complaint, accused no.1 (present petitioner) produced a circular no.11/395 said to have been issued on 30.07.2011 by the Regional Director wherein it has been mentioned that the existing agreement has to be terminated latest by 30.03.2012 and the collection from students have been stopped and the school has made it's own arrangements for imparting computer training to students.

6. A copy of the agreement entered into between the complainant and the DAV School authorities has been filed, which goes to show that under the agreement the complainant was to prepare the lesson plans as prescribed by the DAV/CBSE authorities regularly and get them duly signed by the Principal of the School, for the guidance of the concerned school faculty. The agreement also provided that the agreement can be terminated with one year notice from either side on mutually agreed compensation terms and that any dispute between the parties shall be mutually settled and in the event of failure of conciliation, the decision of the DAV College Managing Committee, New Delhi shall be final and binding upon both the parties.

7. The main offences alleged against the petitioner and the co-accused are under Sections 403 & 406 of the I.P.C. for criminal breach of trust.

In the case of ***Udai Shankar Awasthi v. State of U.P. & Anr.: 2013 (1) Supreme-590*** where the works contract was granted to respondent no.2 therein by 'IFFCO' for the purpose of conducting repairs in their plant and the said work order was subsequently cancelled by IFFCO, whereupon respondent no.2 filed complaint case under Sections 403 and 406 of the I.P.C. for criminal breach of trust against 'IFFCO', the Hon'ble apex Court held that the case is one of civil nature arising out of breach of contract and that taking cognizance, issuing summons to the appellants (IFFCO) and continuance of criminal proceeding was an abuse of process of court.

In the case of ***Anil Mahajan v. Bhor Industries TD: (2005) 10 SCC 228,*** the Hon'ble Supreme Court held that the mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent and dishonest intention is shown at the beginning of the transaction. To deceive is to induce

a man to believe that a thing is true which is false and which the person practicing the deceit knows or believes to be false. If from examining the complaint it would be found that the ingredients of the offences are wanting and the dispute is of civil nature between the parties, no criminal prosecution lies.

8. On examination of the complaint in the instant case, it is clear from its substance that there is no allegation of any fraudulent and dishonest intention of the accused persons at the beginning of the transaction. Admittedly, there is existence of a letter of Regional Director of the DAV School addressed to the Principal of the School for termination of the service contract with the complainant from a particular date, though the learned counsel for the complainant submits that the said letter/circular is not a genuine document. Further even though it is alleged that since April, 2002 the School Authority has not paid the dues of the complainant in spite of repeated demands, it is alleged that the complainant still continues to render service even on the date of filing of the complainant, which does not inspire confidence. It is also an admitted position that for realizing the dues, which the complainant claims to have not been paid by the School authorities, it has filed Civil Suit (III) No.1000 of 2015 in the Court of the learned 3rd Additional Civil Judge (Senior Division), Cuttack, which is said to be still pending.

9. In the aforesaid scenario, this Court holds that the dispute between the parties is one of civil nature, arising out of breach of contract and, therefore, the impugned order of taking cognizance cannot be sustained, which is hereby quashed. The CRLMC stands disposed of accordingly.

CRLMC disposed of.

2016 (II) ILR - CUT- 846

B. K. NAYAK, J.

W.P.(CRL) NO. 1595 OF 2013

SRIKANT PANDA ……..Petitioner

.Vrs.

ANITA PANDA ……...Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.125 (4)

Whether section 125 (4) Cr.P.C. is a bar for a wife to claim maintenance under the code, where she is living separately from her husband because of a decree of divorce by mutual consent ? Held, there being subsistence of marriage between the parties and the wife does not live in adultery, section 125(4) is not a bar for the opposite party-divorced wife for claiming maintenance from the petitioner-husband as long as she is not remarried. (Para 5)

Case Laws Referred to :-

1. 2005 (1) OLR 642 : (Santosh Nayak –vrs.-State of Oissa and another)
2. 1986 (2) OLR 379 : (Snehalata Biswal-vrs.Saroj Kumar Biswal
3. 2004(1) OLR 305 : (Narendra Mohapatra-vrs.Manorama Mohapatra.)
4. AIR 2000 S.C. 952 : Rohtash Singh-vrs.-Ramendri and others

For Petitioner : M/s.Bijaya Ku.Parida-2
For Opp.Party : Mr.Bhagaban Pradhan

Date of Order 26.08.2016

ORDER

B. K. NAYAK, J.

Heard learned counsel for the parties.

2. The petitioner in this writ application prays for quashing the proceeding under section 125 of the Code of Criminal Procedure filed by the opposite party in the Family Court, Berhampur, which has been registered as Cr..P.No.109 of 2013, on the ground that the said maintenance proceeding is not maintainable in terms of sub-Section (4) of Section 125 Cr.P.C. as because a decree of divorce between the parties by mutual consent under section 13-B of Hindu Marriage Act has already been passed by judgment dated 24.09.2011 by the learned Civil Judge (Senior Division), Dharamgarh in Mat Case No.32 of 2011 and that the said decree has become final.

3. Section 125(4) Cr.P.C. reads as follows:

> "(4) No wife shall be entitled to receive an (allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be) from her husband under this Section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent."

4. Learned counsel for the petitioner relies on the 3rd circumstance contemplated under sub-Section (4) of Section 125 Cr.P.C. which disentitles a wife from claiming maintenance, i.e., where the wife and the husband are living separately by mutual consent. Learned counsel for the petitioner in this respect relies on a decision of this Court reported in **2005 (1) OLR 642 : (Santosh Nayak –vrs.-State of Oissa and another)**

Learned counsel for the opposite party on the other hand relies on the decisions of this Court reported in **1986 (2) OLR 379 : (Snehalata Biswal-vrs.Saroj Kumar Biswal and 2004(1) OLR 305 (Narendra Mohapatra-vrs.Manorama Mohapatra.)**

5. The decision cited by the learned counsel for the petitioner has no application to the present case inasmuch as in the cited decision there was no dissolution of marriage between the husband and wife, but they had only entered into a written agreement for living separately and in pursuance thereof they were living separately. The decisions cited by the learned counsel for the opposite party apply with full force to the facts of the present case.

The matter has however already been settled by the Hon'ble Supreme Court in **AIR 2000 S.C. 952, Rohtash Singh-vrs.-Ramendri and others** where regarding applicability of sub-Section (4) of Section 125 Cr.P.C. Hon'ble apex Court in paragraph-6 held as follows:

> "6. Under this provision, a wife is not entitled to any Maintenance Allowance from her husband, if she is living in adultery or if she has refused to live with her husband without any sufficient reason or if they are living separately by mutual consent. Thus, all the circumstances contemplated by Sub-Section (4) of Section 125, Cr.P.C. presuppose the existence of matrimonial relations. The provision would be applicable where the marriage between the parties subsists and not where it has come to an end. Taking the three circumstances individually, it will be noticed that the first

circumstance on account of which a wife is not entitled to claim Maintenance Allowance from her husband is that she is living in adultery. Now, adultery is the sexual intercourse of two persons, either of whom is married to a third person. This clearly supposes the subsistence of marriage between the husband and wife and if during the subsistence of marriage, the wife lives in adultery, she cannot claim Maintenance Allowance under Section 125 of the Cr.P.C."

In view of the aforesaid legal position, it must be held that sub-Section (4) of Section 125 Cr.P.C. is not a bar for the opposite party (divorced wife) in the present case for claiming maintenance from the petitioner as long as she is not remarried. W.P.(Crl.) is therefore dismissed. Interim order of stay stands vacated and the learned court below is directed to dispose of the proceeding expeditiously.

Writ petition dismissed.

2016 (II) ILR - CUT- 848

S. K. MISHRA, J.

ARBA NO. 2 OF 2012

UNION OF INDIA ……..Appellant

.Vrs.

Md. JOBER ALI ……...Respondent

(A) ARBITRATION AND CONCILIATION ACT, 1996 – Ss. 31(7), 34

Arbitral award – Whether arbitrator can grant interest upon interest, interest on costs and interest for the pre-reference period ? Held, No – The award not being in accordance with the public policy of India, is modified. (Paras 24, 25)

(B) ARBITRATION AND CONCILIATION ACT, 1996 – Ss. 31(7), 34

Arbitral award – Award of interest – Amount of interest should be award keeping in view the current commercial rate of interest generally given by the banks on fixed deposits – Held, in this case 12% interest P.A., not being reasonable, is reduced to 7.5% P.A.

(Para 25)

Case Laws Referred to :-

1. 2006(Supp.I) OLR-961 : Hyder Consulting Ltd. -V- The Governor for the State of Orissa
2. 2006 (Supp.II) OLR-440 : M/s.Samantaray Construction Pvt. Ltd. & Anr. -V- State of Orissa
3. 2014(4) Arb, LR 1(SC) : Swan Gold Mining Ltd.-V- Hindustan Copper Ltd.
4. 2014(4) Arb, LR 307 (SC) : Associate Builders -V- Delhi Development Authority
5. 2009(3) Arb, LR 140 (SC) : State of Rajasthan & Anr. -V- Ferro Concrete Construction Pvt. Ltd.
6. (1992) 1 SCC 508 : Secretary,Irrigation Dept., Govt. of Orissa -V- G.C.Roy
7. (2001) 2 SCC 721 : Executive Engineer, Dhenkanal Minor Irrigation Division -V- N.C.Budharaj
8. (2005) 6 SCC 462 : Bhagawati Oxygen Ltd. -V- Hindustan Copper Ltd.
9. 2015 (5) Arb. LR 93 (Orissa) : State of Odisha & Ors. -V- Pratima Kanungo & Ors.

For Appellant : Asst. Solicitor General of India
For Respondent : M/s. S.K.Sanganeria, P.C.Nayak & A.Sanganeria.

Date of judgment: 16.07.2016

JUDGMENT

S.K.MISHRA,J.

This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act" for brevity) preferred by the Union of India (hereinafter referred to as to the "UOI" for brevity) assailing the judgment passed by learned District Judge, Khurda at Bhubaneswar, in ARBP No.36/2009, dismissing the petition filed by the UOI under Section 34 of the Act as per the judgment dated 22.12.2011.

2. The facts leading to filing of this appeal may be succinctly stated as follows:-

Pursuant to the invitation of tender by the UOI and submission of the offer by claimant-respondent, the work of construction of Regional Training Centre, C.I.S.F., Mundali, Cuttack (Odisha) S.H.: site Development and Bulk Services (Civil & Electrical) SW: Construction of one lakh litre capacity 20 Mt staging height R.C.C. overhead tank and one lakh litre capacity R.C.C. underground sump was awarded on 5.1.2001 for

Rs.22,65,646 with a stipulated date of start of the works on 15.1.2001 and the stipulated date of completion as 14.10.2001, the time of completion being nine months. Within the scope of work the construction of one overhead tank and one underground sump, both of one lakh litre capacity each, were included.

It is further borne out from the record that the work could not be completed within the stipulated period and after expiry of the stipulated date of completion on 14.10.2001, the contract was allowed to be continued without fixing any further date of completion. The contract thereafter was rescinded on 8.4.2004 under Clause-3 of the contract with the aim of completing the balance work by other agencies at the risk and cost of the claimant(respondent in this case). At time of rescission the underground sump was almost complete and the overhead tank was constructed upto first and second bracings. The entire work was got completed through other agencies on or about 2.11.2005, i.e. nearly nineteen months after the rescission.

Though the work of the claimant-respondent was rescinded on 8.4.2004 and the balance work was also got completed on 3.11.2005, yet neither the accounts of the claimant-respondent were finalized nor the final bill of the work done by the claimant-respondent was passed. The claimant-respondent invoked the Arbitration clause on 8.6.2004 and the disputes were referred to the Arbitrator on 16.7.2004 for arbitration by the sole Arbitrator.

Additionally, it is noted that as per the terms and conditions of the contract, the appellant (UOI) was to issue 30.98 MT of the steel at the recovery rate of Rs.18,110 per MT from the their Bhubaneswar Stores. The appellant, accordingly, issued about 18,110 per MT from their Bhubaneswar Stores, but they did not have the balance quantity of the various required diameters as per specifications. The UOI, i.e the appellant, at the same time were having a huge quantity of about 50 MT of surplus steel lying at Koraput for a very long time, which were to be brought to Bhubaneswar. Accordingly, they directed the claimant-respondent to transfer the same (entire quantity) to the site of work, for which a separate work order for the transportation was issued to the claimant-respondent(contractor). Accordingly, the surplus steel lying at Koraput was transported to the site of the work and the payment of the transportation was made to the claimant-respondent separately and the same was issued to the claimant-respondent separately.

It is further noted that though the total requirement of steel for the entire work was 30.98 MT, out of which 18 MT was already issued from Bhubaneswar Stores and the only balance quantity of about 13 MT was required to be issued, yet the appellant-UOI in order to avoid the maintaining of their own stores, issued and order to transport the entire surplus quantity lying at Koraput to the site. As such, against the total requirement of 30.98 MT of steel, the respondent issued about 68.8 MT of the steel to the claimant-respondent. As a result thereof, at the time of rescission, huge quantity of steel rods remained unused lying at the site of the work along with the other materials and T and P of the claimant-respondent(contractor).

It is further borne out from the record that though such huge quantity was lying at the site of the work, yet the appellant did not enter the same in to their account and on the contrary proposed penal recovery for 50.96 MT amounting to Rs.18,45,771/- in the final bill prepared and submitted to the Arbitrator on 26.8.2006. The appellant's argument against the steel lying at the site were that the same was issued to the claimant-respondent(contractor) and that they failed to return the balance steel and hence penal recovery under Clause 42 was justified, even though the same was lying at the site and after the rescission was obviously in the custody of the appellant. The claimant-respondent's objections were that such huge quantity was not required and the same was thrust on them by the appellant and after the rescission of the contract, all the materials lying at site whether belonging to the Contractor or the department were in the custody of the department. As such the question of penal recovery for the very materials lying at the site under the custody of the appellant does not arise.

Subsequently, under the directions of the Arbitrator, the mater was reconciled and it was decided that the appellant would remove the steel lying at the site of the work, account and adjust the same in the bill. It was also agreed that the claimant-respondent would remove their materials and the T & P like mixer and vibrators etc. lying at the site. Accordingly, this process was completed during June, 2007. This fact has been recorded in the minutes of the 7th hearing held on 24.7.2007, the steel lying at site and removed by the appellant was found to be 9.86 MT and Mild Steel and 24.52 MT of Tor Steel, totaling 34.38 MT on the basis of the scale weight i.e. weighted in Trucks. However, as per report date 8.10.2007 enclosed with the final bill submitted on 10.10.2007, the quantity is 33.574 MT. Accordingly, the appellant in the final bill has reduced the penal recovery of steel from 50.96 MT to 16.58 MT.

It is clarified by the appellant that though surplus steel was available at the site after the rescission, yet to the new agency, they had issued the steel from the new consignment arranged independently, because of pendency of the litigation. Though the stipulated date for completion of the contract was 14.10.2001, the appellant has rescinded the contract on 8.4.2004, i.e. after the stipulated date. It is further borne out from the record that both parties were blaming each other for the delay.

3. Admittedly, in course of arbitral proceeding, no oral evidences were led by examining witnesses. Only documents were placed and submissions were made. The sole Arbitrator having considered each claim item decided the mater and awarded that the appellant shall pay a sum of Rs.22,33,380/- plus interest amount of Rs.10,94,356/- totaling Rs.33,27,736/- along with a cost of Rs.1,50,000/- within a period of three months. The appellant will also pay a further interest on the total amount of Rs.34,77,736/- from 8.2.2009 @ 12% per annum till the date of actual payment.

4. Aggrieved by the arbitral award, the UOI preferred an Arbitration Petition being ARBP No.36/2009 under Section 34 of the Act before the learned District Judge, Khurda at Bhubaneswar. As per judgment dated 22.12.2011 the learned District Judge, Khurda has come to the conclusion that this is not a case where the arbitral award suffers from illegality of going against public policy of India. The learned District Judge also held that there is no restriction in awarding interest to the claimant-contractor and hence dismissed the petition. Such judgment of the learned District Judge, Khurdha has been challenged in this appeal.

5. The learned Asst. Solicitor General arguing on behalf of the UOI assailed the impugned judgment and the award confirmed by it that the award in question is hit by the principles of "Case of No Evidence" as the respondent has not adduced any oral evidence to substantiate the case and on the other hand the arbitrator through have reached some conclusion yet they are bereft of any particulars and most importantly not based on any documentary evidence.

The next contention raised by the learned counsel for the UOI is that the award in question is against public policy of India and non-consideration of the pleadings of the department by the Arbitrator is akin to ignoring the due process and allowing them item with regard to steel in contravention with Clause-42 is beyond jurisdiction.

Thirdly, it was argument by the learned counsel for the UOI that there is no clause regarding awarding of interest in favour of any of the parties in the contract entered into between the parties and, therefore, awarding of interest in favour of the contractor-respondent is beyond jurisdiction. Alternatively, he argues that the rate of interest awarded in this case is unusually high and it should have been a lesser rate.

6. Learned counsel for the respondent, on the other hand, supports the finding recorded by the learned District Judge and the reasonings given by the Sole Arbitrator. He, in course of his argument, submits that that the arbitral award has been prepared by the technical person. He is not conversant with the legal language and intricate provisions of law and, therefore, there may be certain errors where this Court may come to a different conclusion, but this Court is not supposed to sit as a court of appeal over the award and decide the same as if it is hearing in appeal against the arbitral award.

7. Learned counsel for the respondent submits that it is within the jurisdiction of the Arbitrator to award interest in favour of any of the successful parties if he feels that injustice has been done to the party and the contract could not be executed because of the lackadaisical attitude of the department.

8. An arbitral award can be set aside by the learned District Judge under Section 34 of the Act. Sub-clause (1) (e)-(i) of Section 2 of the Act provides that in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes. It is the definition of Court within the meaning as provided in the Act. Sub-clause (e)-(ii) of the Act is not relevant for the purpose of this case.

9. Sub-section (2) of Section 2 of the Orissa Civil Court's Act, 1984 provides that the court of the District shall be the principal court of original civil jurisdiction in the district. In the expression it is provided that for the purpose of this section the expression District Judge shall not include the Addl. District Judge. So a petition under Section 34 of the Act does lie to the court of learned District Judge, but the scope of such challenge of any arbitral award is limited to the provision of section 34 of the Act appearing in

Chapter-VII of the Act. It is appropriate to take note of the exact words used by the Parliament. The said section reads as follows:

"34. Application for setting aside arbitral award. - (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) of sub-section (3).

(2) An arbitral award may be set aside by the Court only if –

(a) the party making the application furnishes proof that –

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not even proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or;

(b) the Court finds that –

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

[

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.]

(3) xxx
(4) xxx
(5) xxx
(6) xxx."

10. At this Stage, it is clear that the appellant's main thrust in challenging the arbitral award that is in conflict with the public policy of India. Explanation 1 of sub-section (2) of Section 34 of the "Act clarified that an award is in conflict with the public policy of India, only if,- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

11. Sub-section (2-A) provides that An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award. Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

12. In this case the major thrust that has been given by the appellant is that neither any oral evidences led nor any documentary evidences properly supplied to the Arbitrator. As the first contention is concerned, there is no

dispute that none of the parties led any oral evidence before the sole Arbitrator. However, the documents are concerned, many documents have been laid before the sole Arbitrator on the basis of which he has come to the conclusion. The contention of the learned Asst. Solicitor General is that no evidence was led (oral evidence) and arbitral award suffers from illegality against public policy.

13. However, it is seen that Chapter-V of the Act provides for conduct of arbitral proceedings. Section 18 of the Act provides that the parties shall be treated with equality and each party shall be given a full opportunity to present his case. Section 19 of the Act provides for determination of rules of procedure. Sub-section (1) of Section 19 of the Act provides that the arbitral tribunal shall not be bound by the Code of Civil Procedure,1908 or the Indian Evidence Act, 1872. Sub-section (2) of Section 19 of the Act provides that subject to that Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. Sub-section (3) of Section 19 of the Act provides that failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate. Sub-section (4) of Section 19 of the Act provides that the power of the arbitral tribunal under sub-section(3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Section 20 of the Act provides for place of arbitration. Section 21 of the Act provides for commencement of arbitral proceeding. Section 22 of the Act provides for language to be used in the arbitral proceeding. Section 23 of the Act provides for statement of claim and defence. Section 24 of the Act provides for hearings and written proceedings. Sub-section (1) of the Section 24 of the Act provides that unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. It is further provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held. The said section further provides that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause. Sub-section (2) of Section 24 of the Act provides the parties shall be given sufficient

advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods or other property. Sub-section (3) of Section 24 of the Act provides that all statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. Section 25 of the Act provides for default of a party. Section 26 of the Act provides for appointment expert by arbitral tribunal. Section 27 of the Act provides for Court assistance in taking evidence.

14. So from a careful examination of the provision of Chapter-V, it is clear that unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearing for the presentation of evidence or for oral arguments, or whether the proceeding shall be conducted on the basis of documents and other materials. Moreover, on the top of it, the provisions of Code of Civil Procedure, 1908 and Indian Evidence Act, 1872 are not applicable to the arbitral proceedings. Hence, as the parties agreed that they shall not adduce oral evidence before the sole Arbitrator, no illegality has been committed and as most of the facts are admitted in this case, the Arbitrator did not commit any error on record or exceeded his jurisdiction basing his findings on documentary evidence. So the contention raised by the learned Asst. Solicitor General that this is a case of no evidence of the award should be set aside is not acceptable.

15. The second contention that the arbitral award suffers from award is against the public policy of India, it has been held by this Court in the case of ***Hyder Consulting Ltd. V. The Governor for the State of Orissa***; 2006(Supp.-I) OLR-961 that an award can be set aside if it is against the public policy of India, that is to say, if it is contrary to (a) fundamental policy of Indian law, or (b) the interest of India or (c) justice or morality, or (d) if it is patently illegal.

16. Similarly reliance has been placed on the reported case of ***M/s. Samantaray Construction Pvt. Ltd. & another V. State of Orissa***; 2006 (Supp.-II) OLR-440, for advancing the argument that the concept of public, error apparent on the face of the record, error of law and fact constituting misconduct of the Arbitrator and total perversity are the only reasons on the basis of which an arbitral award case be set aside.

17. Applying this principle as borne out from Section 34 of the Act and the aforesaid two cases, this Court, after careful examination, finds that the arbitral proceeding and the award were not against the fundamental policy of Indian law. The learned Asst. Solicitor General failed to point out which Act of Indian Law has been flouted by the Arbitrator. It is not the case that the arbitral award is against the interest of India as the arbitral tribunal has categorically found that the delay has been caused because of the latches of the department in supplying steel rods etc. and there has been an inordinate delay in rescission of the contract awarded in favour of the respondent. The award can not also be stated to be against basic notion of morality or justice. This Court comes to the conclusion that the award passed by the Sole Arbitrator, which has not been interfered by the learned District Judge is not in conflict with the public policy of India. Admittedly, there is no violation of Section 75 or Section 81 of the Act. Furthermore, the proviso to sub-Section (2-A) of Section 34 of the Act laid down that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

18. Interpreting this provision the Hon'ble Supreme Court in the case of ***SWAN GOLD MINING LTD. V. HINDUSTAN COPPER LTD***.; 2014(4) Arb. LR 1 (SC) has held that the arbitrator's decision is generally considered binding between the parties and, therefore, the power of the court to set aside the award would be exercised only in cases whether the court finds that the arbitral award is on the face of it erroneous or patently illegal or in contravention of the provisions of the Arbitration and Conciliation Act, 1996. The Hon'ble Supreme Court further held that when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the arbitrator or by the court would be erroneous or illegal. The Hon'ble Supreme Court further held that the arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him. In the aforesaid case, the Hon'ble Supreme Court held that the interpretation of the contract is matter for the arbitrator, who is a judge chosen by the parties to determine and decide the dispute. The court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy.

19. Similarly in the case of ***ASSOCIATE BUILDERS V. DELHI DEVELOPMENT AUTHORITY***; 2014(4) Arb.LR 307 (SC), the Hon'ble

Supreme Court has laid down that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors or fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts. The Hon'ble Supreme Court further held in the aforesaid case that an arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a terms of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do. The Hon'ble Supreme Court further held that the expression "justice" when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court.

20. Applying these principles to the present, this Court finds that there is no reason to disturb the findings recorded by the sole Arbitrator, which has been refused to set aside by the learned District Judge. In other words, there are concurrent findings of facts. However, it appears to the court that awarding interest to contractor needs reconsideration. It is apparent from the record that the sole Arbitrator having considered each claim item decided the matter and awarded that the appellant shall pay a sum of Rs.22,33,380/- plus interest amount of Rs.10,94,356/- totaling Rs.33,27,736/- along with a cost of Rs.1,50,000/- within a period of three months. The appellant will also pay a further interest on the total amount of Rs.34,77,736/- from 8.2.2009 @ 12% per annum till the date of actual payment.

21. In course of hearing, learned counsel for the respondent submitted that awarding of interest is not illegal and in support of such contention raised at the bar he has relied upon certain reported cases of the Supreme Court. In the case of ***State of Rajasthan and another Vs. Ferro Concrete Construction Pvt. Ltd***; 2009(3) Arb. LR 140 (SC); wherein at paragraphs 30, 31 and 32 of the Hon'ble Supreme Court has held that even if there is no provision in the contract for payment of interest on any of the amount payable to the contractor, in absence of an express bar, the arbitrator has the

jurisdiction and authority to award interest vide decisions of the Constitution Bench in ***Secretary, Irrigation Department, Government of Orissa vs. G.C.Roy,*** *(1992) 1 SCC 508****, Executive Engineer, Dhenkanal Minor Irrigation Division vs. N.C. Budharaj,*** *(2001) 2 SCC 721* and subsequent decision in ***Bhagawati Oxygen Ltd. vs. Hindustan Copper Ltd.,*** *(2005) 6 SCC 462.* In this case there is no express bar in the contract between the parties in regard to interest. Hence the arbitrator was well within his jurisdiction to award interest.

In the aforesaid case of ***State of Rajasthan and another Vs. Ferro Concrete Construction Pvt. Ltd*** (supra), the Hon'ble Supreme Court further held that the legal position underwent a change after the enactment of Interest Act, 1978. Sub-section (1) of Section 3 of the said Act provided that a court (as also an arbitrator) can in any proceedings for recovery of any debt or damages, if it thinks fit, allow interest to the person entitled to the debt or damages at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,-

(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings.

22. As far as the present petitioner is concerned, there is no written agreement regarding payment of interest. Moreover, this is not a proceeding where a debt is to be payable. Clause (b) will be attracted in this case and though it is contended that the petitioner is entitled to interest from the date of raising of the dispute or referring the case to arbitration, learned counsel for the respondent failed to point out any pleadings regarding the date mentioned about the interest in a written notice by the person entitled to the person liable to pay interest. So in such a situation where interest is payable for the pre-reference period is a question remains to be decided.

23. In the case of ***State of Odisha and others Vs. Pratima Kanungo and others***; 2015 (5) Arb. LR 93 (Orissa), this Court has held that Section 31(7) of the Arbitration and Conciliation Act, 1996 makes no reference to payment of compound interest or payment of interest upon interest. Nor does it require the interest which accrues till the date of the award, to be treated as

part of the principal from the date of award for calculating the post-award interest. The use of words "where and insofar as an arbitral award is for the payment of money" and use of the words "the arbitral tribunal may include in the sum for which the award is made, interest …. on the whole or any part of the money" in clause (a) and use of the words "a sum directed to be paid by an arbitral award shall ….. carry interest," in clause (b) of sub-section (7) of Section 31 clearly indicates that the section contemplates award of only simple interest and not compound interest or interest upon interest.

24. Thus, in view of the aforesaid ratio decidendi in aforesaid cases, i.e. by the Hon'ble Supreme Court and High Court of Orissa, this Court is of the opinion that (1) no interest is to be awarded for any pre-reference period as it does not satisfy the requirement of law as discussed above and (2) no interest upon interest or compound interest can be awarded.

25. Granting interest on interests and on costs awarded are not in accordance with the public policy of India. Moreover, the amount of interest should be awarded keeping in view the current commercial rate of interest generally given by the Banks on fixed deposits. The award was passed on 8th November, 2008. In the year 2008, the interest on fixed deposit was 7% to 8% per annum. The said interest is also simple. So this Court is of the opinion that the operative portion of the order passed by the sole Arbitrator requires modification. As per the main award amount of Rs.22,33,380/- is concerned, this Court is not inclined to interfere with the same. It is also not inclined to interfere with the awarding of costs of Rs.1,50,000/-. However, the award of interest amount of Rs.10,94,356/- and the award of 12% interest per annum on the total interest accrued and the costs are set aside. The appellant is directed to pay Rs.22,33,380/- (rupees twenty two lakhs thirty three thousand and three hundred eighty) with simple interest @ 7.5% per annum from the date of reference of the dispute to arbitration i.e. from 16.7.2004 till the actual payment. The appellant shall also pay costs of Rs.1,50,000/-(rupees one lakh fifty thousand), but it is not required to pay any interest thereon.

26. With such modification of the operative portion of the order, the appeal stands partly allowed.

27. Keeping in view the facts of the case, there shall be no orders with regard to costs.

Appeal allowed in part.

2016 (II) ILR - CUT- 862

DR. A.K. RATH, J.

S.A. NO. 160 OF 1998

MANOJ KUMAR MISHRA ……..Appellant

.Vrs.

STATE OF ORISSA & ORS. ……..Respondents

(A) LIMITATION ACT, 1963 – S.5

Condonation of delay – Delay is 657 days – Applicant failed to provide "sufficient cause" for the delay – Grounds urged in the application for condonation of delay are fanciful – Conduct of the appellant is not bonafide and he was not prosecuting the lis diligently – Held, the learned District Judge was justified in rejecting the application for condonation of such inordinate delay.

(Para 8)

(B) LIMITATION ACT, 1963 – S.5

Condonation of delay – "Sufficient cause" – How to establish ? – Courts are required to consider the following principles while considering an application for condonation of delay.

(1) There should be a liberal, pragmatic, justice oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(2) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(3) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis

(4) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(5) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact

(6) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the

courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(7) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(8) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(9) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(10) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(11) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(12) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(13) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

(14) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(15) An application for condonation of delay should not be dealt within in a routine manner on the base of individual philosophy which is basically subjective.

(16) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort

for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(17) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters.

Case Laws Referred to :-

1. (2013) 12 SCC 649 : Esha Bhattacharjee -V- Managing Committee of Raghunathpur Nafar Academy & Ors.

For Appellant : Mr. B.C.Panda
For Respondents : Ms. S.Mishra, A.S.C.

Date of Hearing : 25.08.2016
Date of Judgment:31.08. 2016

JUDGMENT

DR. A.K.RATH, J.

This appeal challenges the correctness of the order dated 26.3.1998 passed by the learned District Judge, Khurda, Bhubaneswar in Title Appeal No.84/33 of 1997/1995 refusing to condone the delay and thereby dismissing the appeal.

2. The appellant as plaintiff instituted Title Suit No.264 of 1998 for declaration of title in the court of the learned Additional Civil Judge (Jr.Division), Bhubaneswar impleading the respondents as defendants. The suit was dismissed. Assailing the judgment and decree dated 25.9.1993 and 9.10.1993 respectively passed by the learned Additional Civil Judge (Jr.Division), Bhubaneswar, he filed Title Appeal No.84/33 of 1997/1995 before the learned District Judge, Bhubaneswar. Since there was delay of 657 days, an application under Section 5 of the Limitation Act was filed to condone the delay. By order dated 26.3.1998, the learned appellate court dismissed the application for condonation of delay and, consequently the appeal was dismissed.

3. This appeal was admitted on the following substantial question of law :

"Whether the learned District Judge, Khurda, Bhubaneswar was justified in rejecting the application under Section 5 of the Limitation Act filed by the appellant for condonation of delay?"

4. Mr.Panda, learned Advocate for the appellant, submitted that the appellant was prevented by sufficient cause in not filing the appeal in time. In

the application for condonation of delay, the appellant had vividly described the cause of delay, but then the learned appellate court without considering the matter in its proper perspective, rejected the application for condonation of delay.

5. Per contra, Ms.Mishra, learned Additional Standing Counsel for the respondents, supported the order passed by the learned appellate court.

6. The apex Court in the case of Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and others, (2013) 12 SCC 649 enunciated the principles to be taken into account while considering the application for codnonation of delay. Paragraphs 21 and 22 of the report are quoted hereunder:-

> "**21.** From the aforesaid authorities the principles that can broadly be culled out are :
>
> **21.1.** *(i)* There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
>
> **21.2.** *(ii)* The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.
>
> **21.3.** *(iii)* Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.
>
> **21.4.** *(iv)* No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.
>
> **21.5.** *(v)* Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.
>
> **21.6.** *(vi)* It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.
>
> **21.7.** *(vii)* The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. *(viii)* There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. *(ix)* The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. *(x)* If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. *(xi)* It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12. *(xii)* The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. *(xiii)* The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

22.1 ***(a)*** An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2. ***(b)*** An application for condonation of delay should not be dealt within in a routine manner on the base of individual philosophy which is basically subjective.

22.3. **©** Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

> **22.4.** ***(d)*** the increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."

7. On the anvil of the decision cited supra, the case of the appellant may be examined. In an application for condonation of delay, it is stated that the appellant was serving in the Military. He used to stay at frontier areas. Therefore, it was not possible on his part to keep track of the case. He had executed a power of attorney in favour of his younger brother. The deposition of the power of attorney holder was recorded on 22.2.1993. It is further stated that his younger brother was a Senior Sales Executive in Godrej India, who used to travel in most part of the month. Since there was delay in delivering the judgment, he instructed the Advocate's Clerk to inform him about the delivery of the judgment. He was under the bona fide impression that the Advocate's Clerk would intimate him promptly about the delivery of the judgment, but then the Advocate's Clerk lost his address. Finally, on 3.7.1995, he went to the Advocate's Clerk and enquired about the matter. The Advocate's Clerk replied that he was unable to communicate him as he lost the address. The certified copy of the decree was obtained on 18.7.1995. Thereafter the power of attorney holder tried to contact the appellant and in the process fifteen days was consumed. The instruction was obtained on 4.8.1995. After obtaining the instruction, the power of attorney holder contacted the lawyer on 5.8.1995. After preparing grounds of appeal on 6.8.1995, the same was presented on 7.8.1995.

8. The assertion of the appellant is that he had executed a power of attorney in favour of his younger brother. A stand had been taken that the power of attorney holder was a Senior Sales Executive of Godrej of India and used to travel through out the country for which he could not keep track of the case. The deposition of the power of attorney holder was recorded on 22.2.1993. The suit was dismissed on 25.9.1993. The appeal was filed on 7.8.1995. It is difficult to believe that the power of attorney holder was travelling the country for near about one year nine months day in and day out and he could not keep track of the case. The grounds urged in the application for condonation of delay are fanciful. To say the least, the conduct of the appellant is not bona fide. The appellant was not prosecuting the lis diligently. There was inordinate delay of 657 days in filing the application for condonation of delay. No cause, much less any sufficient cause, had been shown. The learned appellate court had rightly dismissed the application for

condonation of delay. The substantial question of law is answered in positive against the appellant.

9. Accordingly, the Second Appeal is dismissed. No costs.

Appeal dismissed.

2016 (II) ILR - CUT- 868

DR. A.K.RATH, J.

S.A. NO. 264 OF 1986

RADA JAGGA RAO .....Appellant

.Vrs.

RADA KAKAMMA (SINCE DEAD) AFTER HER PADA KAKAMMA & ORS. .....Respondents

(A) EVIDENCE ACT, 1872 – S.111

Burden of proof – Suit for declaration that the sale deed executed by the plaintiff, an old, deaf and illiterate Telgu woman, in favour of defendant No.1 is not valid and binding on the plaintiff – Both the courts below held, defendant No. 1 failed to discharge the burden that the sale deed was readover and explained to the plaintiff and after understanding the contents therein she put her LTI – Mere statement, that contents of the deed was readover and explained to her was not sufficient – Held, the sale transaction not being valid is not binding on the plaintiff and she is entitled to the relief of recovery of possession – Appeal filed by defendant No. 1 having no merit is dismissed.

(Paras 15, 19)

(B) CIVIL PROCEDURE CODE, 1908 – S.100

Second appeal – Suit for declaration that the sale deed executed by the plaintiff, an illiterate woman, in favour of defendant No.1 is not valid and binding on her – Since defendant No.1 claims tenancy right, whether section 67 of the OLR Act bars jurisdiction of the civil court ? – Both the courts below concurrently held that the defendant No. 1 was not a tenant within the meaning of OLR Act in respect of the suit schedule property – Held, the same being a finding of fact this court has no jurisdiction to entertain the same in second appeal.

(Para 18)

For Appellant : Mr. T.K.Pattanayak
For Respondents : None

Date of hearing : 16.09.2016
Date of judgment: 28.09.2016

JUDGMENT

DR. A.K.RATH, J

Defendant no.1 is the appellant against a confirming judgment in a suit for declaration that the sale deed executed by the plaintiff in favour of defendant no.1 and agreement for sale in favour of defendant no.2 are not valid and binding on the plaintiff, delivery of possession and mesne profit.

2. The facts shortly stated are thus:

R. Byragi is the husband of the plaintiff and father of defendant no.1. During life time of her husband, there was a partition of the joint family properties between him and his two sons on 4.5.1969 and the same was registered in the office of the Sub-Registrar, Parlakhemundi. On 7.8.1973, her husband executed a will and bequeathed all his properties in her favour. While the matter stood thus, to press her legal necessities, she intended to alienate some properties to one G.Chinammi. Defendant no.1 also wanted to sell his land measuring an area of Ac.0.69 cents to G.Chinammi. Both executed the registered sale deed on 13.8.1975 in favour of G.Chinammi for a valid consideration. The consideration amount was proportionately divided between them. But the defendant had obtained the registered sale deed bearing no.2511/75 by playing fraud on her in respect of item no.1 of the suit schedule property. She was not aware of the execution of the sale deed. She is an old and illiterate lady. She is hard of hearing. After death of her husband, she entrusted the management of the properties to defendant no.1. She had implicit faith on him. It is further stated that defendant no.1 proposed to sell some land that fell to his share to defendant no.2 adjoining to her land. He made a misrepresentation to her that she would be an attesting witness to the deed of agreement. Believing his version, she put her LTI on the agreement for sale executed in favour of defendant no.2 in respect of schedule of item no.2 property. She had not received the advanced consideration. Defendant no.1 delivered the possession of the land to the defendant no.2. It is further stated that she is a member of Scheduled Caste. Defendant no.2 belongs to General Category. No prior permission was obtained from the competent authority by the plaintiff. The agreement for

sale was tainted with fraud. The plaintiff further asserts that defendant no.1 is in forcible possession of schedule of item no.3 property without paying usufructs of the same to her. Item nos.1 to 3 properties are part of the properties bequeathed by her husband in her favour. Defendants have no semblance of right, title and interest over the same. It is apt to state here that during pendency of the appeal, respondent no.1-plaintiff died; whereafter her legal heirs representatives have been substituted.

3. Pursuant to issuance of summons, defendant nos.1 and 2 entered appearance and filed separate written statements. Defendant no.1 has not disputed the factum of partition and execution of the will by his father in favour of his mother on 7.8.1973. His case is that he has purchased Ac.0.36 cent of land from the plaintiff for a consideration of Rs.1200/- on 13.8.1975 by means of registered sale deed. After sale, he exercised all acts of ownership over the land. No fraud was played on her. With regard to agreement for sale, it is stated that the plaintiff had executed an agreement for sale in favour of defendant no.2 and received the advanced consideration. There was no question of fraud or misrepresentation. With regard to item no.3 of the suit properties, it is stated that he is in possession of Ac.0.36 cents of land bequeathed to the plaintiff and used to pay usufructs to her. It is further stated that the suit is barred by time inasmuch as the plaintiff had knowledge the execution of the sale deed on 13.8.1975. The suit was not filed within three years from the date of execution of the sale deed.

4. Defendant no.2 took the same plea to that of defendant no.1. The case of the defendant no.2 is that agreement for sale with regard to item no.2 property was executed on 25.1.1978 by the plaintiff on receipt of advanced consideration amount with her full knowledge and consent. The plaintiff and defendants applied before the S.D.O., Parlakhemundi seeking permission under Section 22 of the OLR Act to sell the land.

5. On the basis of inter se pleadings of the parties, learned trial court struck eleven issues, which are as follows;

> "1. Whether the sale proceeds received from G.Chinammi regarding the sale of land measuring Ac.0.34 cents belonging to the plaintiff was received by him?
>
> 2. Whether by misrepresentation and playing fraud upon the plaintiff the defendant no.1 got the sale deed Dt.13.8.1975 in his favour from the plaintiff and whether the said sale is valid and binding upon the plaintiff?

3. Whether the consideration covered by the agreement for sale in favour of Defendant No.2 was received by the plaintiff, and whether the plaintiff put her L.T.I on the alleged agreement for sale having full knowledge of the contents hereof.

4. Whether the Defendant no.1 has not been managing the lands of the plaintiff ?

5. Whether the defendant no.1 was inducted as tenant into the plaintiff's land measuring Ac.0.36 cents and whether he delivered bhag to the plaintiff for the year 1978-79 and 1979-80?

6. Whether the defendant no.1 cleared off his father's debts and whether he is entitled to be reimbursed from out of the lands of the plaintiff ?

7. whether there is cause of action ?

8. Whether the plaintiff is not entitled to recover possession of her lands?

9. Whether the suit is in time ?

10. To what relief ?

11. Whether the suit is bad for mis-joinder of cause of action ?"

6. To substantiate the case, the plaintiff had examined four witnesses including herself and on her behalf, two documents were exhibited. Defendant no.1 had examined four witnesses and on his behalf, seven documents were exhibited. Defendant no.2 had examined one witness and on his behalf two documents were exhibited.

7. On an anatomy of the pleadings and the evidence on record, learned trial court came to hold that defendant no.1 has failed to discharge the burden that the sale deed vide Ext.E was read over and explained to the plaintiff and after understanding the contents of the same, she put her LTI. The plaintiff being an illiterate woman, burden of proof lies heavily on the defendant no.1. Defendant no.1 has not discharged that burden and, therefore, the sale deed vide Ext.E is not valid and binding on the plaintiff and answered issue no.2 in favour of the plaintiff.

8. The learned trial court further held that neither defendant no.1 nor the legal guardian of defendant no.2 in their evidence stated that after execution of Ext.A/1, the same was read over and explained to the plaintiff and she having understood the contents and full application of mind put her LTI.

They have not stated that the scribe of the deed read over and explained the contents of the deed to the plaintiff. It further held that D.W.3, the scribe of the deed of agreement for sale, deposed that he read over and explained the contents of the same to the plaintiff but he has not stated that he explained the deed in Telgu language and the plaintiff understood the contents of the deed. There is no endorsement in Ext.A/1 that it was explained to the plaintiff and she understood the same. It is only stated that the same was read over. The plaintiff is a Telgu woman. There is no presumption that she understands Oriya language. That apart, she is deaf. Therefore, extra caution ought to have been taken by the scribe as well as defendant no.1 and guardian of defendant no.2 while executing the document. The scribe has admitted in his cross-examination that he has not mentioned in the deed that he explained the same in Telgu language. Therefore, the transaction made vide Ext.A/1 cannot be sustained as it is not genuine. The defendants have not discharged the burden successfully. The agreement for sale is not genuine and, as such, not binding on the plaintiff. The learned trial court further held that defendant no.1 is not in possession of the land under item no.3 as a tenant. Defendant no.1 is not in possession of the property. Thus the plaintiff is entitled to recover the possession. Learned trial court further held that the suit was filed within the time and answered issue no.9 in favour of the plaintiff.

9. Assailing the judgment and decree passed by the learned trial court, defendant no.1 filed Title Appeal No.46 of 1984 before the learned District Judge, Ganjam, Berhampur, which was transferred to the court of learned 1st Addl. District Judge, Ganjam, Berhampur and re-numbered as Title Appeal No.13 of 1985. Learned lower appellate court concurred with the findings of the learned trial court with regard to all issues except issue no.9 and dismissed the appeal. Learned lower appellate court held that the suit for declaration of sale deed dated 13.8.1975 is invalid and barred by law of limitation. It was further held that even if without granting relief to the plaintiff, she is entitled to recover possession of suit item no.1 property, since defendant no.1 has not acquired any valid title over the same as she has prayed for recovery of possession.

10. Heard Mr.T.K. Pattnaik, learned counsel on behalf of Mr. J.Pattnaik, Senior Advocate for the appellant. None appears for the respondents.

11. While admitting the appeal, ground Nos.A and B of the memorandum of appeal were formulated as substantial questions of law. The same are as follows:

"**A.** As to whether when a party cannot challenge a registered sale deed executed in favour of another party, if prayer for recovery of possession can be granted to such party?

B. As to whether when prima facie one of the parties claims tenancy right in respect of agricultural property, it is to be considered whether Section 67 of the Orissa Land Reforms Act bars the jurisdiction of the Civil Court in investigating the question of relationship of landlord and the tenant ?"

12. Mr. Pattnaik, learned counsel for the appellant, submitted that the plaintiff, to press the legal necessities, executed the sale deed vide Ext.E in favour of defendant no.1 for a valid consideration. The contents of the deed were read over and explained to the plaintiff whereafter she put her LTI. Both the courts below committed patent error of law in placing the burden of proof on defendant no.1. The finding with regard to execution of Ext.E is perverse. He further submitted that defendant no.1 is a tenant and, as such, the suit is hit under Section 66 of the OLR Act.

13. The scope and extent of protection to which an illiterate woman is entitled to have been succinctly stated by the apex Court in the case of Mst. Kharbuja Kuer v. Jangbahadur Rai, AIR 1963 SC 1203. The same is locus classicus on the subject. Taking a cue from the decisions of the Privy Council in the case of Mst. Farid-Un-Nisa v. Mukhtar Ahmad, AIR 1925 PC 204, Geresh Chunder Lahoree v. Mst. Bhuggobutty Debia, 13 Moo Ind App 419 (PC), Kali Bakhsh v. Ram Gopal, 41 Ind App 23 and Hemchandra v. Suradhani Debya, AIR 1940 PC 134, the apex Court in para 5 and 6 held as follows:

"5. It is settled law that a High Court has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact. In the instant case, the learned Munsif and, on appeal, the learned Subordinate Judge found concurrently that the two widows put their thumb marks without understanding the true import of the document. Imam, J., in second appeal reversed the said findings on the ground that they were vitiated by an erroneous view of the law in the matter of burden of proof. The judgment, if we may say so with respect, consists of propositions which appear to be contradictory. The learned Judge, after reviewing the case law on the subject, concludes his discussion by holding that it was the duty of the plaintiff to prove that there was fraud committed and that, as that had not been

established, the question whether the document was read over and explained to the plaintiff, in his opinion, in the circumstances, did not arise. This proposition, in our view, is clearly wrong and is contrary to the principles laid down by the Privy Council in a series of decisions. In India, pardahnashin ladies have been given a special protection in view of the social conditions of the time; they are presumed to have an imperfect knowledge of the world, as, by the pardah system they are practically excluded from social intercourse and communion with the outside world. In Farid-Un-Nisa v. Mukhtar Ahmad, 52 Ind App 342 at p. 350: (AIR 1925 PC 204 at p.209, Lord Sumner traces the origin of the custom and states the principle on which the presumption is based. The learned Lord observed:

"In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind."

The learned Lord also points out:

"Of course fraud, duress and actual undue influence are separate matters".

It is, therefore, manifest that the rule evolved for the protection of pardahnashin ladies shall not be confused with other doctrines, such as fraud, duress and actual undue influence, which apply to all persons whether they be pardanashin ladies or not.

(6) The next question is what is the scope and extent of the protection. In Geresh Chunder Lahoree v. Mst. Bhuggobutty Debia 13 Moo Ind App 419 (PC) the Privy Council held that as regards documents taken from pardanashin women the court has to ascertain that the party executing them has been a free agent and duly informed of what she was about. The reason for the rule is that the ordinary presumption that a person understands the document to which he has affixed his name does not apply in the case of a pardanashin woman. In Kali Baksh v. Ram Gopal,43 Ind App 23 at p.29 (PC), the Privy Council defined the scope of the burden of a person who seeks

to sustain a document to which a pardanashin lady was a party in the following words :

"In the first place, the lady was a pardanashin lady, and the law throws round her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor. In such case it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor".

The view so broadly expressed, though affirmed in essence in subsequent decisions, was modified, to some extent, in regard to the nature of the mode of discharging the said burden. In 52 Ind App 342 at p.352 : (AIR 1925 PC 204 at p.210) it was stated :

"The mere declaration by the settlor, subsequently made, that she had not under stood what she was doing, obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settler or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them".

While affirming the principle that the burden is upon the person who seeks to sustain a document executed by a pardanashin lady that she executed it with a true understanding mind, it has been held that the proof of the fact that it has been explained to her is not the only mode of discharging the said burden, but the fact whether she voluntarily executed the document or not could be ascertained from other evidence and circumstances in the case. The same view was again reiterated by the Judicial Committee, through Sir George Rankin, in Hem Chandra v. Suradhani Debya, AIR 1940 PC 134 . Further citation is unnecessary. The legal position has been very well settled. Shortly it may be stated thus : The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardanashin lady to establish that the said document was executed by

her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial."

14. The principles which govern the proof of execution of documents taken from pardanashin woman equally apply to the documents taken from an illiterate woman as has been held by this Court in Agadhei Malikani and another v. Abhimanyu Mallik and others, ILR 1968 Cut. 576.

15. Admittedly the plaintiff is an illiterate Telgu woman. She is deaf. Heavy burden lies on the defendants, who seek to sustain transactions, that the documents in question, i.e., Ext.E and A/1 had been executed by the plaintiff after the same were read over and explained to her, she clearly understood the nature of transactions and contents of the deed. On an anatomy of the pleadings and evidence, both oral and documentary, both the courts below held that defendant no.1 has failed to discharge the burden that the sale deed vide Ext.E was read over and explained to the plaintiff and after understanding the contents of the same, she put her LTI. Therefore the sale deed vide Ext.E is not valid and binding on the plaintiff.

16. On a bare perusal of the sale deed vide Ext.E, it is found that there is no endorsement to the effect that the plaintiff executed the sale deed after understanding the contents of the same. It is merely stated that the said deed was read over and explained to her. D.W.3, scribe of the deed, has not stated that the contents of the deed were understood by the executant and after understanding the same, she executed the deed. The same do not specify the test enunciated by the apex Court in the case cited supra with regard to the documents executed by the illiterate executant. Both the courts below have rightly held that the sale transaction is not valid and not binding on the plaintiff.

17. Learned trial court came to hold that the suit is in time and answered issue no.9 in favour of the plaintiff. But then, the learned lower appellate court upset the same and held that the suit is barred by limitation and even if the issue of limitation is decided against the plaintiff instead of defendant no.1, then also she is entitled to relief of recovery of possession as she has prayed for the same. The finding of the learned lower appellate court that the suit is barred by limitation is not correct. Issue no.9 has been correctly decided by the trial court; but on untenable and unsupportable grounds, the

learned lower appellate court reversed the same. Thus the substantial question of law enumerated in Ground No.A is answered in favour of plaintiff by holding that the suit was filed within the prescribed period of limitation.

18. Both the courts below concurrently held that the defendant no.1 was not a tenant within the meaning of OLR Act in respect of item no.3 the suit schedule property. The same is essentially a finding of fact. There is no perversity in the findings of the courts below. Accordingly, Ground No.B of substantial question of law is answered.

19. The inescapable conclusion is that appeal, sans merit, deserves dismissal. Accordingly, the same is dismissed. There shall be no order as to costs.

Appeal dismissed.

2016 (II) ILR - CUT- 877

DR. A.K. RATH, J.

C.M.P. NO. 1172 OF 2016

PURANDARA SAHU ……..Petitioner

.Vrs.

LAND ACQUISITION ZONE OFFICER, TALCHER SAMBALPUR RAIL LINK, ANGUL & ORS. ……...Opp.parties

LAND ACQUISITION ACT, 1894 – S.18

Whether a land acquisition reference can be dismissed for non-prosecution ? – Held, No

In this case the claimant-petitioner made an application U/s. 18 of the Act for higher compensation – Case dismissed for default – Application under order 9, Rule 4 C.P.C. was also dismissed – Hence this application – Held, the impugned order is quashed and the reference case is restored to file.

(Para 6)

Case Law Relied on :-

1. AIR 1991 ORISSA 283 : Jogi Sahu & Anr. -V- Collector, Cuttack

For Petitioner : Mr. B.R.Barick
For Opp.parties : A.S.C.

Date of Hearing : 31.08.2016
Date of Judgment: 31.08.2016

JUDGMENT

DR. A.K. RATH, J.

This petition challenges the order dated 11.04.2016 passed by the learned Civil Judge (Sr. Divn.), Athamalik in C.M.A. No.50 of 2011. By the said order, learned trial court rejected the application filed by the petitioner under Order 9 Rule 4 C.P.C. for restoration of L.A. Misc. Case No.90 of 2011 to file.

02. The petitioner is a land oustee. A piece of land belonging to the petitioner was acquired by the State of Orissa. The petitioner filed an application under Section 18 of the Land Acquisition Act, 1894 before the Land Acquisition Collector, Angul for higher compensation. The said case was referred to the learned Civil Judge (Sr. Divn.), Athamalik and registered as L.A. Misc. Case No.90 of 2001. While the matter stood thus, the matter was dismissed for default. Thereafter the petitioner filed an application under Order 9 Rule 4 C.P.C. for restoration, which was eventually dismissed.

03. Heard Mr. B.R. Barick, learned counsel for the petitioners and learned A.S.C. for the opposite parties.

04. The sole question arises for consideration as to whether a reference made under Section 18 of the Land Acquisition Act, 1894 can be dismissed for non-prosecution ?

05. The subject matter of dispute is no more res integra. An identical matter came up for consideration before this Court in the case of *Jogi Sahu and another vs. Collector, Cuttack,* AIR 1991 ORISSA 283. This Court held :

"xxx xxx xxx

> **When a claimant does not accept the award of the Collector, on an application under Section 18 of the Land Acquisition Act, 1894 (in short 'the Act') being filed the Collector makes a reference being made, the claimant does not become plaintiff or petitioner before the Court. As provided under Section 20 of the Act, the Court has to serve notice on the claimant on whose application reference has been made under Section 18 of the Act. After the notice, the Court is required to make an award in terms of Section 26(1) of the Act and this award is deemed to be a decree under Section 26(2). It is, therefore, impermissible to dismiss a case for default. The dismissal for default is not in**

terms of Order 9, Rule 8, C.P.C. since the land acquisition reference cannot be dismissed for non-appearance of the claimant under Order 9, Rule 8, C.P.C. and Section 53 of the Act shall not operate to this case. This view has been consistently taken by several High Courts. (See Abdul Karim v. State of Madhya Pradesh through the Collector, Bilaspur, AIR 1964 MP 171; B. Munda v. D. Oraon, AIR 1970 Patna 209 and S.S. Sahai v. State, AIR 1974 Patna 176. This Court had also occasion to consider the question and a similar view was expressed. (see Gopal Charan Sahu v. Collector, Cuttack, 1976(1) CWR 1). In that case it was also held that the provisions of Order 9, Rule 8, C.P.C. were not applicable. It was held that an application for restoration under Order 9, Rule 8, C.P.C. is not maintainable; but the impugned order can be set aside by invoking the inherent powers of the Court under Section 151, C.P.C. Therefore, the reference Court was justified in rejecting the applications which were filed under Order 9, Rule 9, C.P.C. but the petitions under Section 151, C.P.C. were maintainable. Such a petition was maintainable as held by this Court in Gopal Charan Sahu's case (supra). The view expressed in Gopal Chran Sahu's case (supra) was followed in Nabaratna Khamari v. State of Orissa, 60(1985) CLT 234. A person whose land was being acquired is entitled to compensation therefor, and this entitlement should not be denied except on very compelling reasons. To deprive a person from his due entitlement on a technical plea would be a negation of the rule of law….."

(emphasis laid)

06. In view of the authoritative pronouncement of this Court in the case of *Jogi Sahu (supra)* that a land acquisition reference cannot be dismissed for non-prosecution, the learned trial court fell into patent error in dismissing L.A. Misc. Case No.90 of 2011 for non-prosecution. Accordingly, the order dated 11.04.2016 passed by the learned Civil Judge (Sr. Divn.), Athamalik in C.M.A. No.50 of 2011 is quashed. L.A. Misc. Case No.90 of 2011 is restored to file. Learned trial court shall do well to dispose of the same expeditiously. The petition is disposed of.

Petition disposed of.

2016 (II) ILR - CUT- 880

D. DASH, J.

S.A. NO. 302 OF 1990

PRAFULLA CH. PANDA & ORS. ……..Appellants

.Vrs.

KANCHANABALA SARANGI & ORS. ……Respondents

PARTITION ACT, 1893 – S.4

A co-sharer is entitled to exercise his right of re-purchase U/s. 4 of the Partition Act, only when the stranger-transferee has sued for partition of his/her purchased property.

In this case the transferee has not filed the suit for partition for allotment of his/her purchased property – Sustainability of the finding of the trial court as affirmed by the lower appellate Court on the question of non-applicability of section 4 of the Act when evidence led by the plaintiff regarding jointness of the parties qua-dwelling house ? Held, right of re-purchase of property U/s. 4 of the Partition Act is not available to the plaintiff in the present suit.

(Paras 10 to 13)

Case Laws Relied on :-

1. AIR 2000 SC 2684 : Babulal -V- Babibnoor Khan (dead) by L..Rs. & Ors.
2. AIR 2001 SC 61 : Goutam Paul -V- Debi Rani Paul & Ors.

Case Laws Referred to :-

1. AIR 1971 Orissa 127 : Alekha Mantri -V- Jagabandhu Mantri

For Appellants : M/s. B.H. Mohanty, B. Das, J.K. Bastia,S.C. Mohanty,R.K. Nayak, R.N. Panda

For Respondents :M/s. S.P. Misra. A.R. Dash, A.K. Misra, B.P. Mohanty, M. Mishra,S.K. Mohanty, S. Barik, A.K. Panda.

Date of hearing : 29.06.2016
Date of judgment : 12.09.2016

JUDGMENT

D. DASH, J.

In this appeal, the appellants have called in question the judgment and decree passed by the learned 2nd Addl. District Judge, Cuttack in Title Appeal

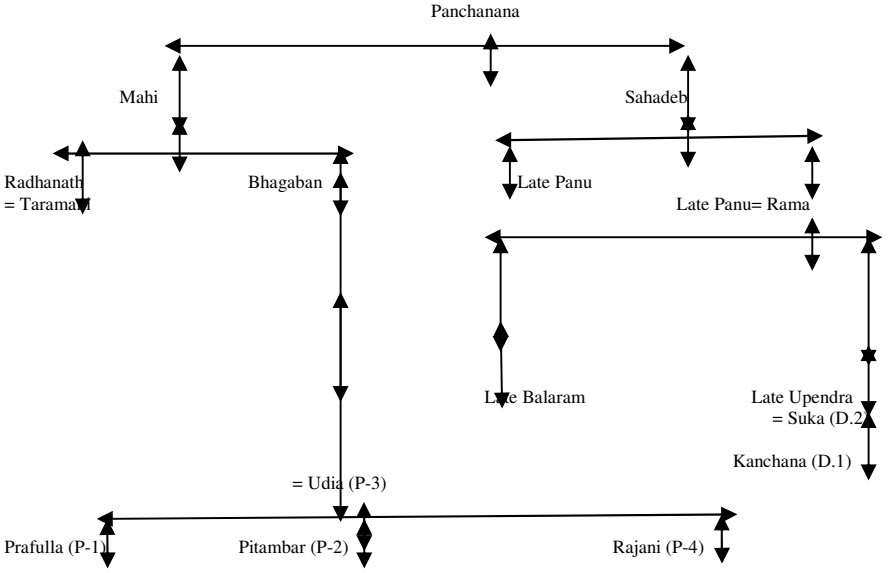
No. 20 1989 confirming the judgment and decree passed by the learned Subordinate Judge, Cuttack (as it was then) Title Suit No. 193/300 of 1983/87.

The appellant as the plaintiff had filed the suit for partition of the suit schedule properties per share noting in the C.S. record of right specifically claiming under section 4 of the Partition Act the relief as regards the properties purchased by the respondent no. 3 (defendant no. 4) by Kabala (sale deeds) dated 06.03.1962 and 24.07.1965 with the declaration that the sale-deed dated 04.05.1968 executed in favour of the respondent no. 1 (defendant no. 1) and consequently the sale-deed dated 27.05.1980 executed by said respondent no. 1 (defendant no. 1) in favour of respondent no. 2(defendant no. 3) as inoperative. The appellants (plaintiffs) had also prayed for relief of permanent injunction against respondent no. 2 (defendant no. 3).

The suit having been dismissed, they filed an appeal under section 96 of the Code of Civil Procedure. There the result of the dismissal of the suit having been confirmed now the move is before this Court by filing the second appeal under section 100 of the Code.

2. For the sake of convenience as also to avoid confusion and bring in clarity, the parties hereinafter have been described as per their position and as arraigned in the trial court.

3. The inter se relationship between the parties as described in the plaint in schedule A with later amendment runs as follows:-



* (Supplied by this Court on going through the pleadings)

It is stated that the properties under sabik plot no. 3278-Ac. 0.04 decimals; plot no. 3276-Ac. 0.02 decimals and plot no. 3275-Ac.0.04 decimals totaling to Ac. 0.38 decimals described in schedule –B of the plaint are the joint family homestead land of the parties over which the joint family dwelling house stands and those lie in a compact block. In the record of right of the year 1930-31 it stood recorded as such with the share, noting of the recorded tenants namely Radhanath and Bhagaban having 8 annas, and 8 pahis of share and Fakir as well as Panu having 7 annas 4 pahis. The allegation is that on 06.03.1962, Rama widow of Panu, Balaram and Suka, the original defendant no. 2 (since dead) sold the undivided share of land out of plot no. 3275 and 3278 to the extent of Ac. 0.04 decimals and Ac. 08 decimals totaling Ac. 0.12 decimals to defendant no. 4 by registered sale-deed, Ext. 8 and then again Balaram, Suka, the original defendant no. 2 sold Ac. 0.02. $1^{1/2}$ kadis of land from plot no. 3278 to that defendant no. 4 on 24.07.1965 by registered sale-deed under Ext. 9. Thus, it is stated that the branch of Panu out of their interest of 7 annas 4 pahis have sold Ac. $0.14.1^{1/2}$ kadis as against their entitlement standing at Ac. 0.17.4 kadis, thus being left with Ac. $0.03.3^{1/2}$ kadis. During these transactions, the plaintiffs claim to be the minors under the care of custody of the mother guardian who being a pardanashine lady was then also old. Thus, they were not aware of the transactions and that was also the situation during the hal settlement operation. It is stated that Balaram and Suka on 04.05.1968 again sold 5 kadis of land from out from plot no. 3276 and Ac. $09.3^{1/2}$ kadis of land from plot no. 3278 to defendant no. 1 by registered sale-deed under Ext. 10. Thus, they sold their undivided interest in the joint family that too in excess of their share which after the alienations till then was having the balance of only Ac. $0.03.3^{1/2}$ kadis to their credit. The sale-deed Ext. 10 is challenged to be a nominal one as such to have not been acted upon also being not followed by delivery of possession It is said to be a part and parcel of co-parcenery property and as to have been sold without the consent of the plaintiffs. The hal settlement entry is said to have been erroneously made in favour of defendant no. 1 in respect of hal plot no. 3124 corresponding to sabik plot no. 3278. It is next stated that the defendant no. 1 declared to have entered into an agreement with defendant no. 3 who is a stranger to the family for sale of the land as purchased by her on 11.01.1980 under Ext. 10. So, having made enquiry they came to know about erroneous settlement entries of land under plot no. 3124 corresponding to sabik plot no. 3278. It is alleged that

Kanchan, the defendant no. 1 has finally sold the lands covered under Ext. 10 i.e. the purchased portions of sabik plot no. 3278 corresponding to hal plot no. 3124 and 3227 to defendant no. 3 on 27.05.1980 vide Ext. 11 which is invalid.

4. The defendant no. 1 and 3 in their written statement pleaded a complete partition in metes and bounds between the two branch i.e., Mahi and Sahadeb about 40 years back.

It is stated that in the said partition, Ac. 0.12 decimals from south-eastern side of sabik plot no. 3278 with a residential house and the entire land under sabik plot no. 3277 fell to the share of the members representing the branch of Mahi, whereas the members of Sahadeb's branch got the remaining portion of land of sabik plot no. 3278 with a residential house and the entire land under sabik plot no. 3275. It is further stated that they got three decimals of land more than the branch of Mahi as sabik plot no. 3275 was a tank. The land under sabik plot no. 3276 being connected with the house of both the parties, the same remained joint. It is further stated that Mahi's branch constructed a compound wall around their dwelling house and accordingly members of each branch possessed their respective portions separately. Thus they claim the transactions under Ext. 8 and 9 as valid. It is stated that defendant no. 4 possessed the land covered under Ext. 8 and 9 having filled up the tank under plot no. 3275 and constructing a pucca house over the purchased land pertaining to plot no. 3275 and 3278 corresponding to hal settlement plot no. 3120 under Khata no. 788 standing recorded in her name. It is also asserted that the sale-deed Ext. 10 and 11 are all valid and the defendant no. 3 is the rightful owner on the basis of those sale transactions. The defendant no. 4 has adopted the written statement of defendant no. 1 and 3.

5. The defendant nos. 1 and 3 in their written statement pleaded a complete partition by metes and bounds between the two branches i.e. Mahi and Sahadeb about forty years back.

6. Faced with such pleadings, the trial court framed eight issues. It has recorded a finding on going through the evidence as also the conduct of the parties as available from evidence viewing side by side the circumstances emerging from evidence that there has been prior partition of the lands between the parties. The above finding has practically resulted the dismissal of the suit disentitling the plaintiffs from all the reliefs that they had sought for.

The lower appellate court on an independent assessment of evidence has found no justifiable reason to record its disapproval to the finding of the trial court as regards the prior partition.

In so far as the relief under section 4 of the Partition Act is concerned, the same has been mainly been refused in view of the positive evidence of P.W. 2 (plaintiff no. 2) that they have not prayed for partition in respect of homestead land.

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

> "Whether the conclusion of the courts below on the question of non-applicability of the section 4 of the Partition Act at all can be sustained since the evidence of the plaintiff that the parties are joint qua-dwelling house has not at all been considered?"

8. Heard the learned counsel for the parties. In order to address the above substantial question as formulated in this appeal for being answered, at first, it is felt the need to take note of reliefs claimed by the plaintiff in the suit which are reproduced as those find mention:-

(a) The suit property be partitioned in accordance with the share noted in C.S. Khatian and defendant no. 4 be directed to re-transfer in favour of the plaintiffs. The share of properties which she has purchased from Balaram Panda, Suka and Rama Didya by different kabala dated 06.03.1962 and 24.07.1965 under section 4 of the Partition Act for a price to the determination by the court.

(b) let, it be declared that defendant no. 1 has not acquired any title or possession to the land purchased by her on 04.05.1968 from late Balaram Panda and Suka Didya (deceased) defendant no.2.

(c) alternatively, if it is held that the defendant no. 1 has acquired any title to the land by Kabala dated 04.05.1968 which she has already transferred in favour of defendant no. 3 on 27.05.1980, she or defendant no. 3 as the case may be directed to transfer the same in favour of the plaintiff under section 4 of the Partition Act for a price to be determined by the court.

(d) the defendant no. 3 be permanently restrained from intruding upon schedule-B land or from any interference in the in joint possession of the plaintiff over the same.

(e) the cost of the suit be decreed in favour of the plaintiffs.

(f) plaintiff be given such other relief or reliefs.

9. The land as described in Schedule –'B' of the plaint is the suit land. The land standing recorded under sabik Khata no. 702 vide plot no. 3275-Ac.0.04 decimals; sabik plot no. 3275-Ac.0.02 decimals; sabik plot no. 3278-Ac.0.32 decimals, thus in total, Ac. 0.38 decimals is the first item of Schedule-'B'. The next item is in relation to Khata no. 482, plot no. 3277-Ac. 0.11 decimals which corresponds to hal plot nos. 3120, 3126, 3125, 3126, and 3127.

When all the reliefs as claimed are read conjointly, it is seen that the plaintiff while claiming those reliefs have asserted their right of re-purchase in consonance with the provisions contained in section 4 of the Partition Act. As per the admitted genealogy, the plaintiff no. 1 and 2 are the sons of Bhagaban and grandson of Mahi, whereas plaintiff no. 4 is their sister and plaintiff no. 3 is their mother. It may be stated here that courts below have recorded a concurrent finding of prior partition amongst the parties.

The substantial question of law posed for being answered by this Court is "Whether the parties are joint qua-dwelling house or not so as to be entitled to exercise the right of re-purchase as provided under section 4 of the Partition Act."

10. Law is now well settled that a co-sharer is entitled to exercise his right of re-purchase under section 4 of the Partition Act only when the transferee has sued for partition of his / her purchased property by filing a suit for partition. In the instant case, the transferee/ transferees have not filed the suit for partition and for allotment of his / their purchased extent of property towards the share of his vendor and for adjustment in accordance with the same.

It is pertinent to state here that the views of different High Courts were divergent on this point. In the case of ***Alekha Mantri vrs. Jagabandhu Mantri***, AIR 1971 Orissa 127, in a suit filed by the plaintiff (a member of the joint family) for partition and separate possession of his undivided share, the question before the Court was whether alienee from the co-owner who was already defendant No.1 could be subjected to proceedings under Section 4 of the Partition Act by the plaintiff. The Court had to examine the question whether the person who had brought the suit for partition was himself not the stranger purchaser but one who was a member of the family and when he is seeking to purchase the share of the vendee from the co-owner alienating his share in favour of a stranger purchaser and when such a vendee was himself a party to the suit as defendant No.1, could make such a vendee defendant answerable under Section 4 of the Act or not. In the background of this fact

situation, the Court observed in para-13 of the report that Section 4 of the Partition Act would also be applicable where the suit for partition was brought by a member of the undivided family against the stranger transferee, and that it is not necessary that the latter should have filed the suit. He being a defendant could have specifically claimed a share in the residential house. Now, it must be noted that in a partition suit even defendants are as good as plaintiffs and the Court has to ascertain their respective shares in the joint property and subsequently has to separate them by metes and bounds.

This was the position of law enunciated by this Court when the present suit as well as the first appeal came to be decided. So, naturally the point was neither raised nor canvassed that in the suit filed by the plaintiff with the defendant-purchaser could not be subjected to proceedings under section 4 of the Partition Act at the instance of the plaintiff. This was also the position when this second appeal was admitted by formulating the substantial questions of law.

11. In the case of ***Babulal v. Habibnoor Khan (dead) by L.Rs and Others***, reported in AIR 2000 Sc 2684, the Hon'ble Supreme Court held as follows:-

> "10. Therefore, one of the basic conditions for applicability of Section 4 as laid down by the aforesaid decision and also as expressly mentioned in the section is that the stranger-transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned. It is, of course, true that in the said decision it was observed that even though the stranger-transferee of such undivided interest moves an execution application for separating his share by metes and bounds it would be treated to be an application for suing for partition and it is not necessary that a separate suit should be filed by such stranger-transferee. All the same, however, before section 4 of the Act can be pressed into service by any of the other co-owners of the dwelling house, it has to be shown that the occasion had arisen for him to move under Section 4 of the Act because of the stranger-transferee himself moving for partition and separate possession of the share of the other co-owner which he would have purchased……."

12. A similar view has also been taken in a decision in the case of ***Goutam Paul v. Debi Rani Paul and Others***, reported in AIR 2001 SC 61, wherein the Hon'ble Supreme Court in paragraph 23 held as follows:-

‘”23. We are in agreement with this opinion. There is no law which provides that co-sharer must only sell his/her share to another co-sharer. Thus strangers / outsiders can purchase shares even in a dwelling house. Section 44 of the Transfer of Property Act provides that the transferee of a share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case Section 4 of the Partition Act comes into play. Except for Section 4 of the Partition Act there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus before the right of pre-emption, under Section 4, is exercised the conditions laid down therein have to be complied with. As seen above, one of the conditions is that the outsider must sue for partition. Section 4 does not provide the co-sharer a right to pre-empt where the stranger / outsider does nothing after purchasing the share. In other words, Section -4 is not giving a right to a co-sharer, the pre-empt and purchase the share sold to an outsider anytime he/she wants. Thus even though a liberal interpretation may be given the interpretation cannot be one which gives a right which the legislatures clearly did not intend to confer. The legislature was aware that in a suit for partition, the stranger/outsider, who has purchased a share, would have to be made a party. The legislature was aware that in a suit for partition the parties are interchangeable. The legislature was aware that a partition suit would result in a decree for partition and in most cases a division by metes and bounds. The legislature was aware that on an actual division, like all other co-sharers, the stranger / outsider would also get possession of his share. Yet the legislature did not provide that the right for pre-emption could be exercised “in any suit for partition”. The legislature only provided for such right when the “transferee sues for partition”. The intention of the legislature is clear. There had to be initiation of proceedings or the making of a claim to partition by the stranger/outsider. This could be by way of initiating a proceeding for partition or even claiming partition in execution. However, a mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of preemption. There is a difference

between a mere assertion that he has a share and a claiming for possession of that share. So long as the stranger purchaser does not seek actual division and possession, either in the suit or in execution proceedings, it cannot be said that he has sued for partition. The interpretation given by Calcutta, Patna, Nagpur and Orissa High Courts would result in nullifying the express provisions of Section 4, which only gives a right when the transferee sues for partition. It that interpretation were to be accepted then in all cases, where there has been a sale of a share to an outsider, a co-sharer could simply file a suit for partition and then claim a right to purchase over that share. Thus even though the outsider may have, at no stage, asked for partition and for the delivery of the share to him, he would be forced to sell his share. It would give to a co-sharer a right to pre-empt and purchase whenever he/she so desired by the simple expedient of filing a suit for partition. This was not the intent or purchase of section 4. Thus the view taken by Calcutta, Patna, Nagpur and Orissa High Courts, in the aforementioned cases, cannot be said to be good law".

13. The above settled legal position as it now stands cuts at the very root of the case of the plaintiffs and without further delving on the sustainability of the finding of the trial court as affirmed by the lower appellate court in so far as the jointness of the parties qua-dwelling house, the answer comes that the right of re-purchase of property under section 4 of the Partition Act is not available to the plaintiffs in the present suit. The substantial question of law for this appeal in this way is answered against the appellants.

14. Resultantly, the appeal stands dismissed. No order as to cost is passed in the facts and circumstances of the case.

Appeal dismissed.

2016 (II) ILR - CUT- 889

S. PUJAHARI, J.

CRA NO. 233 OF 1991

SRIBATSH ROUT ……..Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

PENAL CODE, 1860 – S. 304, Part-II

Criminal trial – Appreciation of evidence – Evidence on record discloses that the appellant from a close distance assaulted the deceased by a piece of brick which struck at his head – Nothing on record to show that it was a rash and negligent act, rather it can be said that it was intended by the appellant to cause such injuries which in ordinary course would have been sufficient to cause death as found by the doctor conducting post mortem examination – The aforesaid act of the appellant could have been amounted to murder for which he was charged but considering the fact that there was no pre-meditation and the appellant had been to the spot without being armed with any weapon and the assault was perpetrated by a piece of brick the same comes under exception 4 to section 300 IPC and as such is covered by the exception of "culpable homicide", not amounting to murder – Since the appellant intended the injuries, the conviction of the appellant should have been made U/s. 304, Part-I IPC instead of section 304-Part II IPC – However since no appeal is preferred against the said conviction this court is not in a position to convert the same but confirms the conviction U/s. 304-Part II. (Para 11)

Case Laws Referred to :-

1. AIR 1975 SC 1962 : Balaka Singh vrs. State of Punjab
1958 AIR 465 : Virsa Singh vrs. The State of Punjab.

For Appellant : Mr. A. Tripathy (Amicus Curiae)
For Respondent: Addl. Standing Counsel

Date of Judgment : 09.12.2015

JUDGMENT

S.PUJAHARI, J.

The appellant herein calls in question the judgment of conviction and order of sentence passed against him in S.T. No.216 of 1990 on the file of the Sessions Judge, Sundergarh. The learned Sessions Judge, Sundergarh vide

the impugned judgment and order while acquitting the appellant and other accused persons of the charge under Sections 148, 323/149 and 302/149 of the Indian Penal Code (for short "the I.P.C.", held the appellant guilty of the charge under Section 304, Part-II of I.P.C. and sentenced him to undergo imprisonment for five years.

2. Prosecution case placed before the trial court is that on 08.02.1990 at about 1.30 p.m., when the informant – Binod Khes (P.W.1) and the deceased Pradeep Kumar Kindo along with their other friends numbering about 8 to 9 were coming out of the hotel of Rajanikant Patnaik after taking their lunch, the appellant along with other accused persons forming an unlawful assembly appeared there. The appellant then caught hold of the hand of the deceased and challenged him about the previous incident in the College and thereafter he was assaulted by fist and kick blows by 4 to 5 others and so also he was assaulted by a lathi on his shoulder by the appellant. One among the accused persons, namely, Saroj Kumar Naik also assaulted the informant by an iron rod causing injuries on his hand. Then when the injured party members were proceeding to the Police Station to report the matter, they met one of their friends, namely, Gyanaranjan Hota on their way, which was at a distance of 150 meters from the spot where they were assaulted. When they were talking with him, the appellant and other accused persons arrived there and the appellant brick-bated at the deceased from a distance of about 10 feet which struck his head, and thereby the deceased sustained injuries and was shifted to the hospital. The informant also sustained injury and was shifted to the hospital. After discharge from the hospital, the informant reported the matter in Town Police Station, Sundargarh and pursuant to the said report, Sundargarh Town P.S. Case No.11 of 1990 was registered under Sections 148, 323/149 of I.P.C. and during course of investigation, when the deceased died while undergoing treatment, the case turned to one under Section 302/149 of I.P.C. On completion of investigation, police found substance in the investigation and placed charge-sheet against the appellant and other accused persons under Sections 148, 323/149 and 302/149 of I.P.C. Accordingly, cognizance was taken by the S.D.J.M., Sundergarh and the case was committed to the Court of Sessions. The trial court placing reliance on such case of the prosecution, framed charge against the appellant and other accused persons, as stated earlier. As the appellant and other accused persons have pleaded not guilty to the charge, trial was held in course of which the prosecution examined as many as eight witnesses and exhibited certain documents, so also the Material Objects to bring home the charge. In their

defence, the appellant and other accused persons, though did not produce any oral evidence, but exhibited the casualty memo sent to the police in support of their case.

3. It appears that on conclusion of the trial, the trial court placing reliance on the version of the witnesses to the occurrence, so also the postmortem examination report though acquitted all the accused persons of the aforesaid charges, but returned the judgment of conviction and order of sentence against the appellant, as stated earlier.

4. Learned counsel for the appellant submits that the versions of the witnesses to the occurrence being not in conformity with one another and they having improved the case of the prosecution from time to time, the trial court erred in placing reliance on their evidence to come to a conclusion that the appellant brick-bated the deceased, for which the deceased sustained the injuries and succumbed to the injuries while undergoing treatment in the hospital. Since the prosecution witnesses are unworthy of credence and defence has also made out a case through elicitation from one of the doctors that the injury contributing to the death of the deceased was possible by a fall, the trial court could not have held the death of the deceased to be homicidal in nature or that the same was authored by the appellant. In such premises, he submits that the appellant is entitled to an order of acquittal. Alternatively, he submits that the materials on record do not make out a case under Section 304, Part-II of I.P.C., but at best an act of rashness or negligence punishable under Section 338 of I.P.C. or a case of grievous hurt, and as such the conviction of the appellant under Section 304, Part-II of I.P.C. is liable to be modified, and considering the circumstances in which the occurrence occurred and the tender age of the appellant should be dealt with under the Probation of Offenders Act.

5. In response, learned Addl. Standing counsel submits that there being clear, cogent and convincing evidence to the effect that the deceased was brick-bated by the appellant, for which he sustained injuries on his head which resulted in his death, and as such the death of the deceased was homicidal one. He further submits that since the appellant brick-bated at the deceased from a close proximity striking to his head and causing the injuries, it cannot be treated as a rash or negligent act, rather it can very well be said that the appellant intending the resultant injuries brick-bated at the deceased and injuries received by the deceased were proved to be fatal, and hence, no fault can be found with the conviction recorded against him by the trial court.

In such premises, the sentence imposed also being commensurate with the facts and circumstances, the same needs no interference of this Court.

6. From the materials available on record, it appears that P.Ws.1, 2, 3 and 6 in no uncertain terms deposed that on the date of occurrence, when they were coming out of the hotel of Rajanikant Patnaik after taking their lunch, the appellant along with his associates appeared there, challenged deceased Pradeep Kumar Kindo and there the deceased was assaulted by fist and kick blows, so also assaulted on his shoulder, alike one of them also assaulted the informant and when the informant and his other friends were going to report the matter, near veterinary hospital, the appellant and his associates chased them and the appellant brick-bated from a distance of ten feet to the deceased which struck at his head and he sustained injuries. No doubt, as from the materials on record, it was found that the version of the witnesses with regard to the first occurrence was full of improvement and material contradictions and also they did not attribute any role to any of the accused persons or named any of the accused persons and also did not identify them to have participated in the incident, the trial court discarded the first part of the occurrence to have been proved, but accepted the second part of the prosecution case in so far as it related to the assault on the deceased by the appellant, while disbelieving the others accused persons to have shared any common object with the appellant much less in forming any unlawful assembly. As held by the trial court, it was the lone act of the appellant, and the other accused persons had not contributed in any manner to the death of the deceased.

7. Needless to say that the maxim of "falsus in uno, falsus in omnibus" is not a sound rule for appreciation of the evidence in criminal cases by the Courts in India, inasmuch as it is hard to come across a witness in India whose evidence does not contain a ring of falsehood while deposing about the occurrence. The Hon'ble Apex Court as such have refused to apply the aforesaid maxim to discard the evidence of the witnesses in entirety whose evidence are false in one part. It is true that the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not

apply. The aforesaid position of law has been settled by the Hon'ble Apex Court in a line of decisions, one of which is reported in the case of ***Balaka Singh vrs. State of Punjab,*** reported in AIR 1975 SC 1962.

8. In such view of the matter, when in this case, P.Ws.1, 2, 3 and 6 have categorically deposed that the deceased was brick-bated by the appellant, for which he sustained the injuries and was taken to the hospital and immediately the F.I.R., Ext.1 was also lodged by P.W.1 which discloses the same, this Court sees no apparent reasons to reject the finding of the trial court that the injuries on the head of the deceased which contributed to his death, as revealed from the postmortem examination report of P.W.5, was caused by the appellant. The doctor, P.W.4, who had examined the deceased first, has also deposed that the injuries caused to be homicidal one. No doubt, from the version of the doctor, P.W.4, who had first examined the deceased and given first-aid to him, it was elicited that the injuries could be possible by a fall on the pitch road, but he has not ruled out the possibility of the injuries being caused by the brick-bat. The doctor (P.W.5), who conducted the postmortem examination over the dead body of the deceased, has categorically deposed that the injuries sustained by the deceased are homicidal in nature, and no foundation fact having been laid or other evidence adduced showing or suggesting the deceased to have fallen down and sustained injuries or that the injuries were not caused by the appellant, it cannot be said that the appellant has proved his case by the standard of preponderance of probabilities that the deceased sustained the injury accidentally and as such the version of the eyewitnesses to this part of the occurrence was unreliable.

9. In view of the aforesaid, I see no apparent and plausible reason to discard the finding of the trial court that the appellant brick-bated at the head of the deceased which proved to be fatal and resulted in the death of the deceased.

10. Now, coming to the second contention of the learned counsel for the appellant that even if it is accepted that the appellant is said to have brick-bated at the deceased from a close distance, it cannot be said that he intended the same, and it might have been the outcome of the rash and negligent act, such contention of the appellant appears to this Court to be devoid of merit, inasmuch as there is enough material disclosing the fact that the appellant from a close distance brick-bated at the deceased which struck at his head. Therefore, it is not an act of rashness or negligence, rather with an intention to cause the injuries to the deceased, he (appellant) brick-bated him (deceased). The same is more so in view of the proven fact that the appellant

caused the injuries intending to do so, the onus was on him to show that the injuries were not intended by him. In this regard, reliance can be placed on an oft quoted decision of the Hon'ble Apex Court which has become locus classicus, i.e., the case of **Virsa Singh vrs. The State of Punjab, reported in 1958 AIR 465,** wherein it has been held as follows;

"xxxxx xxxxxx xxxxx

> Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional.

11. Therefore, when the evidence on record discloses that the appellant from a close distance brick-bated at the deceased which struck at his head and there is nothing on record to show that the aforesaid was a rash and negligent act, it can very well be said that the appellant intending the injuries caused the injuries on the head of the deceased which in the ordinary course of nature was found to be sufficient to cause the death as found by the doctor conducting postmortem examination. The aforesaid act of the appellant could have been amounted to murder, for which he was charged, but considering the fact that there was no pre-mediation on the part of the appellant and during an altercation between them owing to the previous day's incident in the college the quarrel ensued, and the appellant had been to the spot without being armed with any weapon and the assault was perpetrated by a piece of brick, the same comes within the exception 4 to Section 300 of I.P.C. and, as such, is covered by the exception of "culpable homicide" not amounting to murder. The conviction of the appellant, therefore, should have been made under Section 304, Part-I of I.P.C. instead of Section 304, Part-II of I.P.C. as he intended the injuries. But, no appeal having been preferred against the said conviction, this Court is not in a position to convert the same, and as such confirms the conviction and does not want to interfere with the sentence imposed which appears to be commensurate with the facts and circumstances of the case.

12. Hence, this criminal appeal is devoid of merit and, as such, stands dismissed. The impugned judgment of conviction and order of sentence are hereby confirmed.L.C.R. received be sent back forthwith along with a copy of this Judgment.

Appeal dismissed.

2016 (II) ILR - CUT- 895

BISWANATH RATH, J.

W.P.(C) NO. 18993 OF 2014

PRAVAT KUMAR BISWAL ……..Petitioner

.Vrs.

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

SERVICE LAW – Petitioner was appointed as a D.L.R. peon on 14.02.1994 – While continuing as such he was appointed against a sanctioned vacant post of Peon-cum Night watchman in a duly constituted selection process on 31.03.2010 – Petitioner's prayer for drawal of salary was rejected on the ground that his initial appointment was after the ban order Dt 12.04.1993 –Hence the writ petition – Resolution of the Finance Department Dt 15.05,1997 shows that while filling up regular vacant posts preference shall be given to workcharged employees first and in the absence of suitable workcharged employees preference shall be given to N.M.R./D.L.R./Job contract workers - No pleading by the opposite parties taking away the effect of such resolution – The petitioner having been appointed against a sanctioned regular post, the conditions of ban following austerity measures for the financial difficulties faced by the State has no application to the petitioner's claim – Held, the impugned order disapproving the engagement of the Petitioner as Peon-cum Night watchman in Konark Notified Area Council is set aside – Direction issued to the opposite parties to treat the Petitioner as Peon-cum-Night Watchmen w.e.f. 05.10.2010 and release his salary and other consequential benefits with interest at the rate of 6% per annum.

(Paras 4, 5)

For Petitioner :Mrs. Nibedita Mohanty

For Opp.parties :Mr. S.Dash, Addl.Standing Counsel
M/s. S.B.Jena, S.Behera, A.Mishra & S.S.Mohanty.

Date of hearing : 08.09.2016
Date of judgment:15.09.2016

JUDGMENT

BISWANATH RATH, J.

This is a writ petition filed seeking the following relief:

> "It is therefore, humbly prayed that, your Lordship be graciously pleased to admit this writ application, issue notice to the Opposite Parties and after hearing the parties quash the order under Annexure-1 and direct the Opposite Party No.1 to approve the appointment of the petitioner on regular basis in the post of Peon-cum-Night Watchman and further direct the Opposite Parties to release his salary from the date of his joining against the post of Peon-cum-Night watchman vide order dated 05.10.2010(Annexure-6) to the writ petition."

2. The fact involved in the writ petition is that the petitioner was initially appointed as a D.L.R. peon on 14.2.1994 under the Konark Notified Area Council -opposite party no.2. As the petitioner's dues were not released in appropriate time, the petitioner moved this Court in W.P.(C) No. 847 of 2013 seeking necessary direction against the opposite parties to consider his grievance for release of outstanding dues. This Court while disposing the writ petition, indicated hereinabove, on 21.1.2013 directed the opposite party no.1, Secretary, Housing & Urban Development Department to take a decision on the proposal within a period of two months. The said order having not been complied with within the stipulated period of time, as fixed by this Court in disposal of the earlier writ petition, the petitioner was constrained to file a contempt petition vide CONTC No.1079 of 2013, which is claimed to be pending. In the meantime, the opposite party no.1 vide Order No.7690 dated 31.3.2014, as appearing at Annexure-1, rejected the petitioner's prayer for drawl of the salary indicating that the appointment of the petitioner being irregular, is not admissible. In assailing the order under Annexure-1, Mrs. Mohanty, learned counsel appearing for the petitioner contended that the petitioner was initially appointed in the year 1994 as a D.L.R. peon and has rendered continuous service for more than two decades. Considering his unblemished long continuance thereafter, he was given appointment against a regular vacancy in the post of Peon-cum-Night Watchman since 5.10.2010 after following due process of selection and considering his sincerity and devotion in his working. The petitioner claims

that the opposite party no.1 is the authority to approve the appointment of the petitioner against the sanctioned vacancy and the financial implication is to be borne by the Notified Are Council, which is an autonomous body. Similarly, the impugned order passed by the opposite party no.1 rejecting the claim of release of the salary of the petitioner on the pretext of ban order is illegal, arbitrary and prejudicial and the petitioner having discharged his duty as D.L.R. peon for more than two decades, has a right to claim permanency and arrear salary. It is in these premises, learned counsel appearing for the petitioner contended that the impugned order is bad in law and ought to be interfered with and set aside.

3. On the other hand, on their appearance, the Konark Notified Area Council- opposite party no.2 filed a counter. Sri Jena, learned counsel appearing for the opposite party no.2 referring to its counter affidavit submitted that in the rejection of their proposal by the State, being the competent authority, they had no option to accede to the prayer of the petitioner in absence of the approval of the State. While stating so, the Notified Area Council has admitted that the petitioner, who was initially appointed as a peon in D.L.R. basis in the office of the Notified Area Council, Konark from February, 1994 is also continuing as a Peon-cum-Night watchman since 5.10.2010 being appointed as against a regular vacancy. Similarly, on their appearance, the State-opposite party no.1 by filing a counter affidavit through the Under Secretary, Housing Urban & Development Department submitted that for the reasons assigned in Annexure-1, there is no illegality at the instance of the opposite party no.1 in declining the relief claimed by the petitioner. In substantiating its objection, the State counsel submitted that the petitioner's initial appointment remain contrary to ban on the recruitment of D.L.R./N.M.R./ Job contract with effect from 12.4.1993 and further continuance of the petitioner is also illegal in view of the restriction imposed vide Memorandum No.10954 dated 14.3.2001 restricting filling up the base level vacant post. The appointment of the petitioner admittedly taken place after the ban order imposed on 12.4.1993 and the appointment of the petitioner was regularized against a regular vacancy during operation of the restriction in the year 2010 when the austerity measure was in vague. Thus, the claims are not sustainable in the eye of law. The request of the petitioner cannot be acceded to looking to the circular of the Finance Department directing absorption of the service of the D.L.R/N.M.R/Job contract in regular work charge establishment prior to 12.4.1993, the petitioner's case for regularization, having been appointed in 1994, is not permissible in any circumstance.

4. Considering the rival contentions of the learned counsel appearing for the respective parties, this Court finds that there is no dispute that the petitioner was initially appointed as a D.L.R. peon on 14.2.1994 and while continuing as such, he was continuing uninterruptedly for about 16 years. The petitioner was again appointed against a sanctioned vacant post of Peon-cum-Night Watchman in a duly constituted selection process in the year 2010 which fact not only been confirmed through Annexure-5, page-18 of the writ petition but there is no denial to the above fact by any concern. Hence, it is confirmed that the petitioner is still some short of employees for over two decades as on date and he is subsequently selected as against a regular vacancy in the year, 2010. Now looking to the submissions of the learned counsel appearing for the opposite parties, this Court on perusal of the ban order dated 12.4.1993, as appearing at Annexure-A/1, this Court finds that the State Government in the appropriate Department refereeing to some of the Finance Department letters dated 1.11.1973, 18.1.1974,10.3.1975, 25.11.1981 and 14.9.1981 directed the Secretary to Government in All Departments to strictly follow the ban on the recruitment to the work-charged and N.M.R. establishment and also warned all the Secretaries that any recruitment thereafter will be treated as unauthorised and personal responsibility shall be fixed on the Officers making such engagement and disbursing wages on account of unauthorised engagement. Looking to the documents vide Annexure-B/1, filed at the instance of the opposite party no.1, Government of Orissa, Finance Department Office Memorandum dated 14.3.2001, as an austerity measures, the Government not only restricted main recruitment but also provided measures right sizing the working strength with rider for filling up of the base level vacant post in the highly urgently required areas. In Clause-3, in issuing instruction for applicability of the circular, 2001 on the aided institutions/ PSUs/ Cooperatives/ autonomous organizations extended the recommendation. In clause-2 therein, extended instruction to all Aided Institutions/Public Sector Undertakings/ Cooperatives/ Autonomous etc. On perusal of the documents vie Annexure- C/1, a resolution of the Finance Department, this Court finds Clause-8 of the said resolution as relevant and the same is quoted hereunder:

> 8. While filling up the regular vacant posts preference shall be given to work-charged employees first. Where no suitable work –charged employees are available to man the post, preference shall be given in the following order i.e. N.M.R./ D.L.R./ Job Contract workers and others."

There is no pleadings forthcoming by any of the opposite parties taking away the effect of the resolution dated 15th May, 1997 resolution, the Finance Department from his own considering the direction of Hon'ble Supreme Court, High Court and Orissa Administrative Tribunal in different cases bringing down the scope in filling up the regular vacant posts by giving preference at the first instance to the work-charged employees and in the second instance in the event work-charged employees are not available to man the post, preference shall be given in the order of N.M.R./D.L.R./Job Contract workers and others. Looking to the resolution of the Finance Department dated 15th May, 1997, as available at Annexure-C/1, to the counter affidavit of opposite party no.1 this Court finds the scheme prepared therein is not to be affected by either notification under Annexure-1 or the office memorandum under Annexure-B/1. The admitted fact involved in the case is that the petitioner was initially engaged as a D.L.R. peon in the year 1994 and subsequently was appointed as a Peon-cum-Night Watchman against a sanctioned regular post of Peon-cum-Night watchman on the retirement of a regular incumbent, namely, Sri Sarbeswar Jena on 31.3.2010. The conditions of ban following austerity measures for the financial difficulties faced by the State has no application to the petitioner's claim.

5. Under the circumstance, this Court finds that the office order dated 31.34.2014, appearing at Annexure-1 disapproving the engagement of the petitioner as Peon-cum-Night Watchman in Konark Notified Area Council with effect from 31.1.2010 is based on wrong and erroneous observation and also on wrong application of circular/ office memorandum, which have no application to the petitioner's case. Further, looking to the engagement of the petitioner, who was continuing as a D.L.R. peon since 1994 and based on a selection process appointed in the post of Peon-cum-Night Watchman with effect from 31.3.2010 being covered under the resolution of the Government of Odisha under Annexure-C/1 issued by the Finance Department, the petitioner cannot be deprived from the benefits of salary and other benefits attached to the regular post at least with effect from 31.1.2010. Consequently, while setting aside the order under Annexure-1, this Court directs the opposite parties to treat the petitioner as Peon-cum-Night watchman with effect from the date of his joining i.e. from 5.10.2010, as appearing at Annexure-6 and release all his consequential benefits with interest at the rate of 6% per annum all through. In the result, the writ petition succeeds. However, there is no order as to cost.

2016 (II) ILR - CUT-900

BISWANATH RATH, J.

W.P.(C) NO. 3160 OF 2012

BHAGABAN NATH & ORS. ……Petitioners

.Vrs.

COLLECTOR, BHADRAK & ORS. ……Opp.Parties

ODISHA CONSOLIDATION OF HOLDINGS & FRAGMENTATION OF LAND ACT, 1972 – Ss. 2(m), 34, 35

"Fragment" – Meaning of – Compact parcel of agricultural land held by the land-owner by himself or jointly with others comprising an area which is less than (i) one acre in the district of Cuttack, Puri, Balasore, Ganjam and Anandapur Sub-Division in the district of Keonjhar and (ii) two acres in the rest of the areas of the state.

Whether sale of Ac. 0.36 decimals out of the whole chaka of Ac. 1.52 decimals, when the rest area remains Ac. 1.16 decimals in the present district of Bhadrak i.e. undivided district of Balasore being in excess of one acre comes within the fold of "fragment" so as to declare the sale invalid in view of the prohibition U/s. 34 of the Act ? – Held, No – The consolidation Misc. Case No. 7 of 2009 challenging the sale is not maintainable, hence the impugned order passed by the Collector being invalid is set aside.

(Para 19)

Case Laws Referred to :-

1. AIR 19709 SC.1778 : State of West Bengal v. The Dalhousie Institute Society.
2. 2012 (1),OLR, 902 : Jogendra Jena v. Krushna Jena
3. 2015 (I) OLR.CUT-646 : Sutar Chemical Pvt. Ltd. & Anr v. Collector, Balasore & Ors.
4. 2010 (II) OLR.486 : Rama Chandra Parida and Ors. v. Pramod Kumar Padhiary & Ors.
5. 2015 (I) OLR 394 : Sutar Chemical Private Limited & Anr. v. Collector, Balasore & Ors.

For Petitioners : M/s. S.K.Nayak-2, S.S.K.Nayak, B.Rout & K.Jena.

For Opp.parties : Sri S.Das, A.G.A. D.Mahapatra, M.Mahapatra, G.R.Mohapatra & A.Dash.

Date of Hearing : 11.08.2016
Date of Judgment: 26.08.2016

JUDGMENT

BISWANATH RATH,J.

This writ petition has been filed assailing the order dated 30.12.2012 passed by the Collector, Bhadrak in O.C.H. & P.F.L. Act Misc. Case No.7 of 2009.

2. Facts admitted by both the sides remain that originally Chaka No.435, Plot No.1895, area Ac.1.52 decimals under Consolidation Khata No.447 of Mouza Atto was recorded in the name of Sri Mahendra Bhanja-opposite party no.2. Opposite party no.2 transferred a portion of the aforesaid land in favour of opposite party no.3 by way of Registered Sale Deed No.891 dated 2.3.1994 in respect of area A.0.36 decimals out of total patch of Ac.1.52 decimals appertaining to Chaka No.435. Further, admitted case, as reveals, is that opposite party no.3 in the meantime sold the disputed land to the present petitioners vide Registered Sale Deed No.761 dated 24.3.2000. After the aforesaid sale, the petitioners mutated the land in their favour and also obtained rent receipt on payment of rent.

3. While the matter stood thus, opposite party no.2 filed O.C.H & P.F.L. Miscellaneous Case No.7 of 2009 before the Collector to declare the Registered Sale Deed No.891 dated 2.3.1994 in favour of opposite party no.3 as void and also to evict the opposite party no.3 from the disputed land. Subsequently, the opposite party no.2 also filed an amendment application for impletion of the present petitioners as parties for the reason of execution of a further sale deed on the disputed land in favour of them by the opposite party no.3. Petitioners on their appearance filed objection stating that opposite party no.3 purchased Ac.0.36 decimals of land out of Ac.1.52 decimals of Chaka No.435 through Registered Sale Deed No.891 dated 2.3.1994. Subsequently, opposite party no.3 sold the disputed land to the petitioners through Registered Sale Deed No.761 dated 24.3.2000. It is their further case that after the aforesaid sale, the petitioners also mutated the disputed land in their favour with the knowledge of opposite party nos.2 and 3 and on payment of rent, are obtaining rent receipt all through. The petitioners further claimed that they are the contiguous land owners of the opposite party no.2's plot. Further, the petitioners also claimed that the Miscellaneous Case at the instance of the opposite party no.2 was also barred

by limitation. The petitioners had also an alternate case that they have possessed the property for more than 15 years and thus the opposite party no.2 lost his title as the petitioners acquired title by way of adverse possession. O.C.H. & P.F.L. Miscellaneous Case No.7 of 2009 was decided on contest whereby the Collector not only declared the sale deeds as void but also issued direction for eviction of the petitioners from the disputed land under the premises that their vendor-present opposite party no.3 had no right, title and interest over the property and further directed to hand over possession of the same. Consequent upon which, the Collector declared the mutation in favour of the subsequent purchasers i.e. opposite party nos.2 to 6 therein the present petitioners as illegal.

4. In assailing the order passed by the Collector in exercise of power under Section 35 of the O.C.H. & P.F.L. Act, 1972, as appearing at Annexure-1, the petitioners, who were the subsequent purchasers from the present opposite party no.3, took the stand that the impugned order is against law. Further, since there was no creation of fragmentation in chaka of the opposite party no.2, there was no illegality on the part of the opposite party no.2 in selling the land in favour of opposite party no.3 and the learned Collector failed to appreciate the aforesaid legal aspect, consequently passed the erroneous order. It is then contended that the sale at the instance of the opposite party no.3 since did not contravene the provision under Section 36 of the O.C.H & P.F.L. Act, the order of eviction and declaring the sale deed as void is bad. The Collector also has failed to appreciate the question raised by the petitioners with regard to long lapse of time in agitating the issue.

5. Learned counsel for the petitioners while reiterating the stand taken before the Collector cited a decision in the case of ***State of West Bengal v. The Dalhousie Institute Society***, *AIR 1970 SC.1778*, particularly referring to paragraphs-16 and 17 submitted that the question of accrual of adverse possession has not been gone into properly. It is thus claimed that the finding of the Collector so far it relates to limitation as well as adverse possession, is all wrong and erroneous.

6. Sri D.Mohapatra, learned counsel appearing for the opposite party no.2 opposing the grounds raised by the petitioners submitted that following the provision contained in Section 34 of the O.C.H. & P.F.L. Act, particularly restriction on the fragmentation, alleged transfer was void and hence claimed that this view of the learned counsel has the support of a decision of this Court in the case of ***Jogendra Jena v. Krushna Jena,*** *2012 (1),OLR, 902*. It is further contended by Sri Mohapatra, learned counsel for the opposite party

no.2 that a Single Bench of this Court even though held that limitation of 12 years would apply in such matters but subsequently the Division Bench in the case of ***Sutar Chemical Pvt. Ltd. & Anr v. Collector, Balasore & Ors.*** and as reported in 2015 (I) OLR.CUT-646 at paragraph-23, came to hold that since no period of limitation has been prescribed in Section 35 of the Act, exercise of power by the Collector to evict the transferee from a portion of chaka in contravention of Section 34 of the Act, such power of the Collector cannot be cribbed, cabined or confined by providing a period of limitation by judicial interpretation otherwise, the legislative intention behind the act will be frustrated. Sri Mohapatra, learned counsel further claimed that in paragraph-27 of the judgment this High Court has further held that sale deed executed in contravention of Section 34 is not only void but it is invalid on nativity and no legal relation came into being from the sale deed offending the Act. Sri Mohapatra, learned counsel for the opposite party no.2 also contended that the claim of the petitioners that they are contiguous chaka holder is far from truth. There is no material establishing the said claim. On the petitioners claim on the question of fragmentation before this Court, in course of argument, learned counsel for the opposite parties contended that such question was not available in the court below and being raised for the first time in this Court, cannot be taken into account at this level. In course of argument, the petitioner has also referred to a decision reported in the case of ***Rama Chandra Parida and others v. Pramod Kumar Padhiary and others***, *2010 (II) OLR. 486.*

7. Before proceeding to decide on other issues, it is now necessary to answer on the question of limitation, being raised by the present petitioners, this ground being a question of law can be agitated at any point of time. Consequently, this Court turns down the objection of Sri Mohapatra, learned counsel appearing for the opposite party no.2 that such ground being raised for first time in the writ petition cannot get the scope of adjudication.

8. Upon hearing the parties and in considering their rival contentions, this Court finds that Section 2(m) and Section 34 (1) and (2) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 reads as follows:

> 2 (m)**"fragment"** means a compact parcel of agricultural land held by a land-owner by himself or jointly with others comprising an area which is less than-
>
> (i) one acre in the district of Cuttack, Puri,Balasore and Ganjam and in the Anandpur subdivision in the district of Keonjhar, and

(ii) two acres in the other areas of the State."

"34. (1) No agricultural land in a locality shall be transferred or partitioned so as to create a fragment.

(2) No fragment shall be transferred except to a land-owner of a contiguous Chaka:

Provided that a fragment may be mortgaged or transferred in favour of the State Government, a Co-operative Society, a scheduled bank within the meaning of the Reserve Bank of India Act, 1934 (2 of 1934) or such other financial institution as may be notified by the State Government in that behalf as security for the loan advanced by such Government, Society. Bank or institution, as the case may be."

Section 35 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 which is relevant is quoted hereunder:

"35. (1) A transfer or partition in contravention of the provisions of Section 34 shall be void.

(2) A person occupying or in possession of any land by virtue of a transfer or partition which is void under the provisions of this Act, may summarily evicted by the Collector."

9. Looking to the case and counter case of the respective parties, the sole question to be decided now is as to whether the sale at the instance of the opposite party no.2 remains valid in view of limitation point and also from the point of view of prohibition under Section 34 of the O.C.H. & P.F.L. Act, 1972. Undisputed fact remains that originally the entire land comprises of Ac.1.52 decimals and the land sold by petitioner no.2 to petitioner no.3 and subsequently by petitioner no.3 to the present petitioners is Ac.0.36 decimals out of the above whole patch. There is no dispute with regard to the sale of the above land by opposite party no.2 to the opposite party no.3 by virtue of sale deed bearing No.891 dated 2.3.1994 and the O.C.H. & P.F.L. Misc. Case No.7 of 2009 was filed in the year 2009 after a long lapse of time. Chapter-V of the O.C.H. & P.F.L. Act has no prescription of limitation for initiating a proceeding under Section 35 of the said Act. Be that as it may, question of limitation for initiating a proceeding under Section 35 of the Act has already stood the test of law and in deciding a case in between ***Sutar Chemical Private Limited and another v. Collector, Balasore and others***, *2015 (I) OLR 394*, this Court has already come to hold categorically that not only

there is no prescription of limitation in the particular chapter of the Act but the power of the Collector also cannot be cribbed, cabined or confined by providing a period of limitation by judicial interpretation and further in the event of any period of limitation prescribed by judicial interpretation then the legislative intention of the Act would be frustrated. Considering that, the question of limitation in initiating such proceeding having been settled by an authority of this Court, this Court now proceeds to determine the other point as to whether fragment involved in the present case become void for being affected by the provision of Section 2(M) read with Section 34 of the O.C.H. & P.F.L. Act, 1972? Looking to the admitted fact narrations made to the effect that the whole patch of land remains Ac.1.52 decimals and the land sold and under adjudication of the present dispute remains Ac.0.36 decimals of land, the provision under Section 2(M), as quoted hereinabove, completely indicating fragment means a compact parcel of agricultural land held by the land owner himself or jointly with others comprising area less than one acre in the undivided district of Balasore, the land presently situates in the district of Bhadrak is carved out from undivided district of Balasore, restriction in the act does not apply. From the description of the land hereinabove, the whole patch of land, as it is apparent, being in excess to one acre cannot come under the fold of fragment. Consequently, there will neither have any application of Section 34 nor section 35 of the O.C.H. & P.F.L. Act. Consequently, this Court holds the O.C.H. & P.F.L. Miscellaneous Case No.7 of 2009 was not maintainable and resulting the final order passed therein also becomes invalid being against law.

11. Under the circumstances, this Court while allowing the writ petition, sets aside the impugned order under Annexure-1.Parties are to bear their respective costs.

Writ petition allowed.

2016 (II) ILR - CUT- 906

S. N. PRASAD, J.

W.P.(C) NOS. 13207 & 11275 OF 2011

ANUPAMA SAHOO ……..Petitioner

.Vrs.

COLLECTOR, KHURDA & ORS. ……...Opp.parties

SERVICE LAW – Anganwadi Helper – Appointment – Petitioner-Anupama challenged the engagement of one Binodini Baliarsing on the ground that she being a widow, entitled to be appointed in view of the preferential clause under clause 1(v) of the guidelines Dt. 24.11.1997 – Sub-Collector declared the appointment of Binodini illegal and declared the selection process void – Hence the writ petitions – Preference can only be considered when candidates are on similar footing – Since Mahila Sabha of the village has casted more votes in favour of Binodini, as per clause 2 of the guidelines, the selection committee has not committed any illegality in appointing Binodini – Held, writ petition filed by Binodini is allowed.

(Paras 10 to 13)

Case Law Relied on :-

1. (2003) 5 SCC 341 : Secy., A.P.Public Service Commission -V- Y.V.R.Srinivasulu & Ors.

For Petitioner : M/s. R.N.Dasmohapatra, D.K.Das, B.Mohanty-5 & S.K.Biswal
M/s. J.Sahoo & B.R.Sahoo

For Opp.parties : Mr. Amit Pattnaik, A.G.A.

Date of judgment : 12.07.2016

JUDGMENT

S.N.PRASAD, J.

In both these writ petitions since common issues are involved, they are heard together and disposed of by this common judgment.

2. The matter pertains to engagement of Anganwadi Helper in respect of Odagaon Anganwadi Centre. The fact of the case of the petitioner in W.P.(C) No. 13207 of 2011 is that she being a widow candidate ought to have been selected as Anganwadi Helper in view of the preferential clause given in the guideline dated 24.11.1997, but ignoring her case, Binodini Baliarsingh (petitioner in W.P.(C) No. 11275 of 2011), who is a general category

candidate has been engaged. The petitioner being aggrieved with the selection of Binodini Baliarsingh has approached the Sub-Collector, Khurda vide Miscellaneous Case No. 38 of 2009, but the Sub-Collector after going through the materials and considering the fact that on the basis of voting, another candidate, namely, Binodini Baliarsingh had been selected and engaged, observed that the authorities have not followed the preferential clause given in the guideline dated 24.11.1997 and as such, declared the selection process void and in consequence thereof, the C.D.P.O., Begunia had been directed to disengage the helper and engage another helper as per the guideline. The petitioner has filed this writ petition seeking for a direction to engage her in the vacant post of Anganwadi Helper in Odagaon Anganwadi Centre.

3. Binodini Baliarsingh, petitioner in W.P.(C) No. 11275 of 2011 has prayed to quash the order dated 25.03.2011 whereunder the Sub-Collector, Khurda has held her appointment illegal. The petitioner has assailed the said order on the ground that merely on the ground of preference, no appointment can be given, rather, preference can only be considered if two candidates are on similar footing. But in the present case, the selection committee on the basis of voting of the Mahila Sabha had found that the Binodini Baliarsingh is most suitable and as such, she was selected ignoring the candidature of the widow candidate, namely, Anupama Sahoo (petitioner in W.P.(C) No. 13207 of 2011). Hence, there is no illegality in the selection process.

4. Learned counsel for the opposite parties-State has argued that although there is a condition mentioned in the guideline dated 24.11.1997 regarding preference to be given to orphan, widow, separated, divorced or deserted women, but that does not mean that merit will be given a go bye. It has further been submitted that as per the procedure for selection of Anganwadi Helper, the same is to be made by a Committee with the consultation of the Women Group of the village and since the Women Group of the village have casted more votes by showing faith upon Binodini Baliarsingh (petitioner in W.P.(C) No. 11275 of 2011), she has rightly been selected as Anganwadi Helper in respect of Odagaon Anganwadi Centre.

5. Heard the learned counsel for the parties. On perusal of the documents available on record, it is evident that the writ petitioners in both the writ petitions are contesting for engagement as Anganwadi Helper in respect of the centre in question. Anupama Sahoo, writ petitioner in W.P.(C) No. 13207 of 2011 being a widow candidate has questioned the selection of Binodini Baliarsingh (petitioner in W.P.(C) No. 11275 of 2011) on the

ground that in pursuance of the conditions provided in the guideline dated 24.11.1997 that preference should be given to orphan, widow, separated, divorced or deserted women, she being a widow, ought to have been selected, but ignoring her candidature, the selection and engagement of Binodini Baliarsingh (petitioner in W.P.(C) No. 11275 of 2011) as Anganwadi Helper is absolutely illegal and the Sub-Collector after taking into consideration this aspect of the matter, has rightly held that the engagement of Binodini Baliarsingh is illegal.

6. Before adjudicating this issue, it would be relevant to bring on record the provisions of the guideline dated 24.11.1997, which contains a provision of eligibility and procedure for selection, which reads as follows :

> "1. Eligibility:- To be eligible for selection as Helper for an Anganwadi Centre the following eligibility criteria must be fulfilled:
>
> (i) She must be a lady of the locality and acceptable to the Anganwadi Worker,
>
> (ii) She should not be of less than 18 years of age.
>
> (iii) She can continue in the job till she discharges her duty efficiently.
>
> (iv) The C.D.P.O. is competent to appoint and discharge the Helper.
>
> (v) Preferences should be given to an Orphan, Widow, Separated Divorced or Deserted Woman.
>
> 2. Procedure for selection
>
> Helper will be selected by a Committee consisting of the following persons :
>
> (i) C.D.P.O. of the Project … Chair-person
> (ii) Supervisor in-charge of the area … Member
> (iii) A.N.M. in-charge of the area … Member
>
> The above committee should select the Helper in consultation with the Women Group of the village. In case, for any reasons, to be ordered in writing, it is not possible to make the selection in a particular village, the selection may be made in the Project Headquarters by the above named committee. However, the candidate selected should fulfill all the eligibility criteria as mentioned at para-1 above. Though the Orissa Reservation of Vacancy Rule (ORV) not applicable in this selection, in the villages

predominantly covered in SC, ST and population the helper selected may be from these community is in majority."

7. Under the eligibility criteria, preferential clause has been provided, which stipulates that preference should be given to orphan, widow, separated, divorced or deserted women. As per Clause 2 of the aforesaid guideline, the selection of Anganwadi Helper shall be conducted under the Chairperson of C.D.P.O. of the project and in consultation with the Women Group of the village. Now in the light of this provision, the fact of the case is to be appreciated. The fact, which is not in dispute in this case is that both the petitioners in the writ petitions had participated in the selection process for engagement as Anganwadi Helper in respect of Odagaon Anganwadi Centre and as per the procedure, the candidatures of both the petitioners along with others had been placed before the Committee and the Committee in order to consult the Women Group of the village, referred the matter to the Mahila Sabha and the Mahila Sabha had casted more votes to Binodini Baliarsingh and as such, she was selected. By casting more votes, it suggests that the writ petitioner in W.P.(C) No. 11275 of 2011 is more suitable in the eye of the Committee and the Mahila Sabha and since she has been shown to be more suitable, she has been selected.

8. So far as the case of the writ petitioner in W.P.(C) No. 13207 of 2011 is concerned, she being a widow, she ought to have been selected as a matter of course by giving preference. But it is the settled proposition of law that benefit of preference can only be given in case two candidates are found in equal footing. At this juncture, it is necessary to refer to the judgments of the Hon'ble Apex Court in the case of **Secretary, A.P.Public Service Commission-v. Y.V.V.R. Srinivasulu and others**, reported in (2003) 5 SCC 341 wherein at paragraph-10 it has been held that preference envisaged has to be given only when claims of all candidates who are eligible are taken for consideration and when any one or more of them are found equally positioned, by using the additional qualification as a tilting factor, in their favour vis-à-vis others in the matter of actual selection.

9. Applying the same principle, preference cannot be given as a matter of right and the guideline suggests to give preference to orphan, widow, divorced or deserted woman for extending monetary help for the purpose of making them independent so that these categories of candidates may survive on their own leg but for getting this benefit this category of candidate has to substantiate that they are actually in need of preference otherwise there will be no meaning to give preference if it will be given to these categories of

candidate who are financially sound. For example, there may be of situation in this category that if a candidate is widow, there may be circumstances that husband might have left substantial means for her survival, in case of divorcee or deserted women after decree of divorce has been passed by the competent court of law, she must have got some alimony for maintenance, meaning thereby merely being in the category of widow, separated divorced or deserted woman, benefit of preference cannot be given and if candidate wants to take benefit of preference they have to come out with specific case that they are in actual need of help, but even then there would not be any compromise with the quality, efficiency and merit, due to the settled principle of law that benefit of preference can only be given if two candidates are on same footing otherwise not.

Applying the same principle to the case at hand, merely because Aupama Sahoo (writ petitioner in W.P.(C) No.13207 of 2011) is a widow, cannot claim as a matter of right the benefit of preference by engaging her unless and until she proves that she is actually in need of engagement.

10. Thus, the settled position of law is that preference can only be given when candidates are on similar footing. If a candidate although is not on same footing with respect to suitability and if on the basis of preference engagement has been made, then it will certainly lead to inefficiency in discharge of duty and will be compromising with the efficiency.

11. In view of the aforesaid settled proposition of law and considering the fact that the Mahila Sabha has casted more vote in favour of Binodini Baliarsingh (writ petitioner in W.P.(C) No. 11275 of 2011) and as such, the Selection Committee has not committed any illegality, but the Sub-Collector without appreciating the settled proposition of law as hereinabove, has passed the order. Hence, in my considered opinion, the order passed by the Sub-Collector is not proper and as such the same is quashed.

12. In the result, W.P.(C) No. 13207 of 2011 is dismissed and W.P.(C) No. 11275 of 2011 is allowed.

13. This Court in Misc. Case No. 6719 of 2011 arising out of W.P.(C) No. 11275 of 2011 has passed interim order staying the operation of the order dated 25.3.2011 passed by the Sub-Collector, Khordha and it has been informed that by virtue of the interim order, Binodini Sahoo (writ petitioner in W.P.(C) No. 11275 of 2011) is performing her duty. Hence, the interim order dated 25.3.2011 passed by this Court in W.P.(C) No. 11275 of 2011 is made absolute. Writ petitions disposed of.

2016 (II) ILR - CUT- 911

K. R. MOHAPATRA, J.

R.F.A. NO. 140 OF 2009

SARASWATI DEI @ JENA .....Appellant

.Vrs.

SRI GOPINATH JEW AT ADHANGA, JAGATSINGHPUR & ORS. .....Respondents

(A) LIMITATION ACT, 1963 – ART. 65

Whether the plaintiff can claim adverse possession in the property of the Deity-respondent No. 1 ?

Doctrine of "adverse possession" is available in respect of the properties over which the true owner has the right of voluntary alienation – Held, since the deity is a perpetual minor and has no voluntary alienable right over its property/endowment, no title over the immovable property of a deity or religious institution can be acquired by applying the principles of adverse possession.

(Paras 15, 16)

(B) ODISHA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 – S.25

Deity's property alienated unlawfully – Deity need not file any suit but to file an application U/s. 25 of the Act for recovery of the suit property.

In this case, Commissioner of Endowments, Odisha rightly exercised power U/s. 25 of the Act and evicted the plaintiff from the suit land – Hence the plaintiff filed suit to declare his right over the suit land by way of adverse possession – Suit dismissed – Hence this appeal – No period of limitation is provided for initiation of a proceeding U/s. 25 of the Act – Right of the deity is not affected under the provisions of the Limitation Act, 1963 as OHRE Act being a Special Statute overrides the provisions of the Limitation Act 1963 – No illegality in the impugned judgement passed by the trial court calling for interference by this Court. (Paras 15,16,17)

Case Laws Reffered to :-

1. (2003) 5 SCC 341 : Secretary, A.P.Public Service Commission-v. Y.V.V.R. Srinivasulu and others.

For Appellant : M/s. P.Kar, G.D.Kar, A.K.Mohanty, R.N.Prusty & N.R.Satapathy

For Respondents : M/s. P.K.Rath, S.Barik, S.Swain, S.M.Ali,
Miss S.Sahoo & S.Mohanty
M/s.S.P.Das & Mr. A.K.Nath
Miss S.Mishra, ASC.

Date of judgment: 24. 06.2016

JUDGMENT

K.R. MOHAPATRA, J.

This appeal has been filed assailing the judgment and decree dated 30.10.2008 and 15.11.2008 respectively passed by the learned Civil Judge (Senior Division), Jagatsinghpur in C.S. No.208 of 2004 dismissing the suit. The suit was filed for declaration of right, title and interest of the plaintiff by way of adverse possession; to declare the order dated 06.04.2004 passed by the Commissioner of Endowments, Odisha, Bhubaneswar (defendant No.2) in O.A. No.128 of 1995 (II) under Section 25 of the Orissa Hindu Religious Endowments Act, 1951 (for short 'the OHRE Act') as *null* and *void* and for permanent injunction.

2. Case of the plaintiff in a nut shell is that the suit land, i.e., Consolidation Khata No.15, Plot No.236 measuring an area of Ac.0.32 decimal, corresponding to Sabik Settlement Khata No.17, Plot No.274, measuring an area Ac.0.32 decimal in Mouza: Anakhia, in the district of Jagatsinghpur stood recorded in the name of Sri Gopinath Jew, Bije at Adhanga, district-Jagatsinghpur (defendant No.1) (for short, 'the deity'). The then Managing Trustee of the deity, Sri Harekrushna Tripathy sold the suit land to the plaintiff vide Registered Sale Deed No.3919 dated 11.07.1959 for valuable consideration and delivered possession thereof. Since then, the plaintiff has been in peaceful possession over the same exercising all manners of right, title and interest thereon. The alienation was made without obtaining prior permission under Section 19 of the OHRE Act. However, the Managing Trustee did not take any step to recover possession of the suit land from the plaintiff within the statutory period of 12 years. Thus, the plaintiff has acquired title over the suit land through adverse possession. Her possession over the suit land has been recognized in the Record of Right in Major Settlement published on 06.04.1983 and Consolidation ROR finally published on 30.12.1991 recording her illegal possession in the remarks column. On 04.12.1995, the Managing Trustee of the deity filed a petition under Section 25 of the OHRE Act for recovery of possession of the suit land in O.A. No.128 of 1995 (II). The plaintiff could not contest the said case due to her

old age. As such, the defendant No.2 vide order dated 06.04.2004 directed eviction of the plaintiff from the suit land and sent requisition to the Collector, Jagatsinghpur (defendant No.3) to deliver vacant possession of the suit land to the deity. On receipt of the requisition, the Tahasildar, Jagatsinghpur (defendant No.4) sent notice to the plaintiff for execution of the requisition of defendant No.2. On receipt of the notice, the plaintiff apprehending her dispossession filed the suit for aforesaid relief.

3. Defendant Nos.3 and 4 neither filed any written statement nor contested the suit; hence, they were set *ex parte*. Defendant No.2 did not file any separate written statement, but supported the case of defendant No.1 by filing a memo dated 23.03.2006. Defendant No.1 in his written statement contended that the defendant No.1 is a Hindu Public Religious Institution (deity) and one Harekrushna Tripathy was the Managing Trustee of the deity till 1985. Said Harekrushna Tripathy, the then Managing Trustee of the deity, executed a nominal sale deed dated 11.07.1959 in favour the plaintiff. However, no delivery of possession was made to the plaintiff pursuant to such sale. The sale being in contravention of Section 19 of the OHRE Act is void *ab initio*. The deity, defendant No.1 being a perpetual minor, its right cannot be extinguished under Section 27 of the Limitation Act, 1963. The status of the plaintiff is that of a trespasser in respect of the suit land. Thus, the plaintiff has never acquired any title over the suit land by adverse possession. When one Narayana Tripathy was appointed as the Managing Trustee of the deity and came to know about the illegal possession of the plaintiff over the suit land, he filed a petition (OA No.128 of 1995) under Section 25 of the OHRE Act for recovery of possession. The plaintiff preferred not to contest the said case. Accordingly, the defendant No.2 following due procedure of law rightly directed for eviction of the plaintiff from the suit land vide his order dated 06.04.2004. Thus, he contended that the suit is not maintainable and prayed for dismissal of the same.

4. Taking into consideration the rival pleadings of the parties, learned Civil Judge (Senior Division), Jagatsinghpur framed the following issues:

(i) Whether the suit is maintainable?

(ii) Whether the plaintiff has got cause of action to file this suit?

(iii) Whether the plaintiff has acquired title over the suit land by way of adverse possession?

(iv) Whether plaintiff is entitled to get the relief of permanent injunction?

(v) Whether the plaintiff is entitled to any other relief or reliefs as prayed for?

5. In order to substantiate their respective case, the plaintiff examined five witnesses including herself as PW-4. PW-5 was her son. PWs. 1, 2 and 3 were witnesses in support of the possession of the plaintiff over the suit land. She also adduced documentary evidence including Ext.1, the registered sale deed dated 11.07.1959, Ext.2, the Sabik ROR., Exts.3 and 4, certified copies of the MS ROR and Consolidation ROR respectively. Though the Managing Trustee examined himself as DW-1, he preferred not to adduce any documentary evidence in support of his case.

6. On consideration of issue No.(iii), which is the vital issue for consideration in this case, learned Trial Court came to a conclusion that the plaintiff has not acquired any title in respect of the suit land by way of adverse possession. Consequently, learned Trial Court refused to grant relief of permanent injunction against the defendants while answering issue No.(iv).

7. Mr.G.D.Kar, learned counsel for the for the appellant strenuously urged that the petition under Section 25 of the OHRE Act, i.e., O.A. No.128 of 1995 is hit by Section 27 read with article 65 of the Limitation Act, 1963. He further submitted that the sale deed under Ext.1 is void *ab initio* in the eye of law as alienation was made without obtaining permission from defendant No.2, namely, the Commissioner of Endowments under Section 19 of the OHRE Act. Relying upon a decision in the case of ***N. Varada Pillai vs Jeevarathnammal***, reported in AIR 1919 PC 44, which was subsequently followed in the case of ***Collector of Bombay Vs. Municipal Corporation of State of Bombay*****,** reported in AIR 1951 SC 469 and the case of ***State of W.B. v. Dalhousie Institute Society,*** reported in (1970) 3 SCC 802, he submitted that possession on the basis of an invalid transaction is adverse *per se*. The possession of the plaintiff over the suit land is uninterrupted, open, in hostile animus to the interest of the true owner and beyond the statutory period provided under article 65 of the Limitation Act, 1963. Thus, right, if any of the defendant No.1 in respect of the suit property, is extinguished at the determination of the period provided under article 65 of the Limitation Act, 1963. Learned Trial Court committed error of law in applying article 96 of the Limitation Act, 1963, which is not applicable to the case at hand. He also placed reliance on a decision of this Court in the case of ***Govinda Jew Thakur and another Vs. Surendra Jena and others***, reported in AIR 1961 Orissa 102, in which it is held that if the sales or the transfers are void *ab*

initio, then the transferees' possession becomes adverse from the date of the transfer, inasmuch as the transferees had no right in respect of the properties at all. They were mere trespassers; and if by a continuous period of 12 years they have matured their rights, then the rights would be available not only as against the transferor but against the whole world including the deity. Thus, he prayed to set aside the impugned judgment and decree.

8. Mr.A.K. Nath, learned counsel for the Commissioner of Endowments (respondent No.2) vehemently opposed the submission of Mr.Kar and contended that article 96 of the Limitation Act, 1963, clearly stipulates that a suit or proceeding can be instituted by the Manager of a Hindu Religious and Charitable Endowment within 12 years from the date of appointment of the plaintiff as Manager (Managing Trustee) to recover possession of the immovable property comprised in the endowment, which has been transferred by the previous Manager for valuable consideration. He contended that Sri Harekrushna Tripathy was the Managing Trustee of the deity till 1985, who alienated the suit land in favour of the plaintiff in the year 1959. After him, Sri Narayana Tripathy became the Managing Trustee in the year 1986. At his instance, the proceeding under Section 25 of the OHRE Act was initiated in the year 1995. Thus, the proceeding under Section 25 of the OHRE Act was well within the statutory period provided in article 96 of the Limitation Act, 1963. Consequently, Section 27 of the Limitation Act has no application to the case at hand. He further contended that the suit is not maintainable in the eye of law and the learned Trial Court has rightly answered the issued Nos. (iii) and (iv) against the plaintiff. Accordingly, he prayed for dismissal of the appeal.

9. Mr.P.K.Rath, learned counsel for the respondent No.1 supported the stand taken by Mr.Nath. He further contended that the possession of the plaintiff, irrespective of its length does not confer any title on the plaintiff by adverse possession. As the deity is a perpetual minor, the right of the deity doesn't extinguish in terms of Section 27 of the Limitation Act, 1963. Thus, the appeal merits no consideration and is liable to be dismissed.

10. From the rival contentions of the parties and discussions made by learned Civil Judge (Senior Division), Jagatsinghpur in the impugned judgment, the issue that crops up for consideration in this appeal is whether the plaintiff can claim adverse possession against the deity (defendant No.1).

Article-65 of the Limitation Act, 1963 provides that a suit for possession of immovable property or any interest thereon based on title can

be filed within 12 years, when the possession of the defendants become adverse to the plaintiff. Article 96, on the other hand, provides that a suit can be launched by the Manager of the Hindu Religious and Charitable Endowment to recover possession of the immovable property comprised in the endowment, which has been transferred by a previous Manager for a valuable consideration within 12 years from the date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as Manager of the endowment, whichever is later. As emanates from the case record, one Harekrushna Tripathy, who alienated the property in favour of the plaintiff in the year 1959, was the Managing Trustee of the deity till 1985. It is also not disputed that Sri Narayana Tripathy, who launched the proceeding under Section 25 of the OHRE Act assumed his charge in the year 1986. The proceeding under Section 25 of the OHRE Act was launched in the year 1995 [O.A. No.128/95(II)]. Mr.Kar submitted that article 65 of the Limitation Act, 1963 is applicable to the case at hand. The proceeding under Section 25 of the OHRE Act, being initiated in the year 1995, is barred by limitation, as by that date, the plaintiff had perfected his title over the suit land by adverse possession. Mr.Rath as well as Mr.Nath, on the other hand, submitted that the proceeding is within the period of limitation, in view of application of article 96 of the Limitation Act, 1963. Admittedly, no period of limitation is provided for initiation of a proceeding under Section 25 of the OHRE Act.

11. In order to substantiate his case, Mr.Kar relied upon the decision of this Court in *Govinda Jew Thakur and another (supra)*. In the said case, Hon'ble Division Bench of this Court has held that article 134-B of the Limitation Act, 1908 which came to the statute book in the year 1929 by virtue of Amendment Act, 1929 (Article 96 in the Limitation Act, 1963) will apply only to cases where the sales can be avoided by the succeeding Mahanta (trustee); but if the sale or the transfer is void *ab initio,* then the transferee's possession becomes adverse from the date of transfer, inasmuch as the transferee had no right in respect of the properties at all. A similar view has also been taken by the Hon'ble Division Bench of this Court in the case of ***Chintamani Sahoo (dead) and after him Subodh Kumar Sahoo and others Vs. Commissioner of Orissa Hindu Religious Endowments, Orissa and others***, reported in (56) 1983 CLT 47, while dealing with the applicability of Article 96 of the Limitation Act, 1963, this Court held as follows:-

> "12. This Article refers to a transfer for valuable consideration. A transfer which is void ab initio is, in the eye of law, no transfer at all

> and hence will not cornel within the scope of this Article. This Article obviously applies to cases where the transfer can be avoided or is voidable. But if the transfer is void ab initio then Article 65 of the new Limitation Act would apply. The transferee's possession since the date of the transfer becomes adverse from the date of the transfer inasmuch as the transferee had no right in respect of the property at all and he was a mere trespasser."

Thus, in view of the ratio *decidendi* in the aforesaid two case laws, it emanates that voidable transaction is only covered under article 96 of the Limitation Act, 1963 and not a transaction, which is void *ab initio*. There can be no quarrel over the position of law that alienation without prior sanction of the Commissioner of Endowments under Section 19 of the OHRE Act is void *ab initio*.

12. At this stage, it would be profitable to read few lines of the decision in the case of ***Amrendra Pratap Singh v. Tej Bahadur Prajapati and others***, reported in AIR 2004 SC 3782, at paragraph-25 of which the Hon'ble Supreme Court while dealing with applicability of Limitation Act, 1963 to a proceeding under paragraph 3-A of the Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulations, 1956 (for short, 'Regulations, 1956') held as follows:-

> 25.….A provision has been made by para 3-A of the 1956 Regulations for evicting any unauthorised occupant, by way of trespass or otherwise, of any immovable property of a member of a Scheduled Tribe, the steps in regard to which may be taken by the tribal or by any person interested therein or even suo motu by the competent authority. The concept of locus standi loses its significance. The State is the custodian and trustee of the immovable property of tribals and is enjoined to see that the tribal remains in possession of such property. No period of limitation is prescribed by para 3-A. The prescription of the period of twelve years in Article 65 of the Limitation Act becomes irrelevant so far as the immovable property of a tribal is concerned. The tribal need not file a civil suit which will be governed by the law of limitation; it is enough if he or anyone on his behalf moves the State or the State itself moves into action to protect him and restores his property to him. To such an action neither Article 65 of the Limitation Act nor Section 27 thereof would be attracted." (emphasis supplied)

Applicability of the principles laid down by the Hon'ble Supreme Court herein above to the case at hand can be adjudged by reading the relevant provisions of law. Paragraph-3-A of the Regulations, 1956 reads as follows:-

"3-A **Eviction of person in authorized occupation of property-**

(1) Where a person is found to be in unauthorized occupation of any immovable property of a member of the Scheduled Tribes by way of trespass or otherwise, the competent authority may, either on application by the owner or any person interested therein, or on information received from the Gram Panchayat] or on his own motion, and after giving the parties concerned an opportunity of being heard, order ejectment of the person so found to be in unauthorized occupation and shall cause restoration of possession of such property to the said member of the Scheduled Tribe or to his heirs.

(2) The provisions contained in sub-sections (2), (3) and (4) of section 3 shall, mutatis mutandis, apply to the proceedings instituted or initiated under subsection (1).

(3) In every case after finalization of the proceedings under sub-section (1), the competent authority shall make a report to the concerned Grama Panchayat about the order of ejection passed in respect of any person in unauthorized occupation of any immovable property of a member of a Scheduled Tribe and the restoration of possession of the property to such member on his heirs and in case of failure of such restoration, the reasons for such failure."

The aforesaid provision has been incorporated in the Regulations, 1956 because a tribal is considered by the Legislature not to be capable of protecting the right over his own immovable property.

13. Likewise, the OHRE is a benevolent statute to protect the rights and properties of Hindu Religious Institutions of the State. The deity is a perpetual minor. It is incapable of protecting its rights over the endowment attached to it. Thus, all religious institutions are being managed by trustee (hereditary or non-hereditary) upon whom the administration of the religious institutions and its endowments are vested. The Legislature has consciously and diligently made different provisions under the OHRE Act to achieve its object and purpose. Section 25 of the OHRE Act, 1951 reads as follows:-

> **"Section 25 - Recovery of immovable trust property unlawfully alienated-** (1) In case of any alienation, in contravention of Section 19 of this Act or Section 51 of the Orissa Hindu Religious Endowments Act, 1939, or in case of unauthorised occupation of any immovable property belonging to or given or endowed for the purpose of any religious institution, the Commissioner may, after summary enquiry as may be prescribed and on being satisfied that any such property has been so alienated or unauthorisedly occupied send requisition to the Collector of the district to deliver possession of the same to the trustee of the institution or a person discharging the function of the said trustee.
>
> (2) The Collector in exercising his powers under Sub-section (1), shall be guided by rules made under this Act.
>
> (3) Any person aggrieved by the action of the Collector may institute a suit in the Civil Court to establish his rights."

14. The scope and intention of Section 25 of the OHRE Act is akin to the provision under paragraph 3-A of the Regulations, 1956. Admittedly, no period of limitation is provided for institution/ initiation of a proceeding under Section 25 of the OHRE Act. On a conjoint reading of the provisions of Section 25 of the OHRE Act and the principles laid down in paragraph-25 of the *Amrendra Pratap Singh (supra)* by the Hon'ble Supreme Court, there can be no iota of doubt that the prescription of period of limitation as provided in article 65 or article 96 of the Limitation Act, 1963 becomes irrelevant so far as recovery of immovable property of the religious institutions is concerned. The deity or the religious institution, as the case may be, need not file a Civil Suit to recover the property unlawfully alienated or occupied. The deity can recover the property by filing a petition under Section 25 of the OHRE Act before the Commissioner of Endowments, Odisha, Bhubaneswar. Thus, the restrictions of the Limitation Act, 1963 have no application to the proceedings under Section 25 of the OHRE Act. When the Legislature consciously has not imposed any restriction or prescribed period of limitation to initiate a proceeding under Section 25 of the OHRE Act, any restriction for initiation of the proceeding under such provision by applying the provisions of the Limitation Act will make the provision itself nugatory and the object of the same will be frustrated. The OHRE Act being a special statute overrides the provisions of the Limitation Act,1963.

15. The concept of adverse possession has undergone a radical change in recent days. The Hon'ble Supreme Court has shown repulsion to the concept of acquiring title through adverse possession. Recently, the Hon'le Apex Court in the case of ***Gurudwara Sahib Vs. Gram Panchayat Village Sirthala & Anr,*** reported in (2014)1 SCC 669, at paragraph-7 held as follows:-

> "7. In the Second Appeal, the relief of ownership by adverse possession is again denied holding that such a suit is not maintainable. There cannot be any quarrel to this extent the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

In the case of *Amrendra Pratap Singh (supra)*, while dealing with concept of adverse possession in connection with paragraph 3-A of the Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulations, 1956 (for short, 'Regulations, 1956), Hon'ble Supreme Court at paragraph-23 held as follows:-

> "23. The nature of the property, the nature of title vesting in the rightful owner, the kind of possession which the adverse possessor is exercising, are all relevant factors which enter into consideration for attracting applicability of the doctrine of adverse possession. <u>The right in the property ought to be one which is alienable and is capable of being acquired by the competitor. Adverse possession operates on an alienable right. The right stands alienated by operation of law, for it was capable of being alienated voluntarily and is sought to be recognised by the doctrine of adverse possession as having been alienated involuntarily</u>, by default and inaction on the part of the rightful claimant, who knows actually or constructively of the wrongful acts of the competitor and yet sits idle. Such inaction or default in taking care of one's own rights over property is also capable of being called a manner of "dealing" with one's property which results in extinguishing one's title in property and vesting the same in the wrongdoer in possession of property and thus amounts to "transfer of immovable property" in the wider sense assignable in the context of social welfare legislation enacted with the object of protecting a weaker section." (*emphasis supplied*)

It is thus clear from the aforesaid observation that the doctrine of 'adverse possession' is available in respect of the properties over which the true owner has the 'right of voluntary alienation'.

16. The deity is a perpetual minor and has no voluntary alienable right over its property and/or endowment. A trustee can alienate the property of the deity only with the prior sanction of the Commissioner of Endowments, Odisha, Bhubaneswar under Section 19 of the OHRE Act. Thus, applying the principles as quoted and discussed above, it can be safely said that no title over the immovable properties of a religious institution can be acquired by applying principles of adverse possession.

The Hon'ble Supreme Court in the case of ***A.A. Gopalakrishnan vs Cochin Devaswom Board & Ors,*** reported in AIR 2007 3162, at paragraph 10 held as follows:-

> "10. The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their Trustees/Archaks/ Sebaits/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the concerned authorities. Such acts of 'fences eating the crops' should be dealt with sternly. The Government, members or trustees of Boards/Trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."

In view of the discussions made above, the case law reported in *Govinda Jew Thakur and another (supra)* and *Chintamani Sahoo (dead) and after him Subodh Kumar Sahoo and others (supra)* have no application to the present case.

17. Mr.Rath, learned counsel for the respondent No.1 in support of his case placed reliance upon a decision in the case of ***Sarbeswar Mounaty Vs. Chintamani Sahoo (Dead) by Lrs.,*** reported in 88 (1999) CLT 433 (SC), wherein it is held that a possession is adverse only if in fact one holds possession by denying title of the lessor or by showing hostility by act or words or in cases of trespassers as the case may be as against lessor or other owner of the property in question. The Hon'ble Supreme Court in the said

case denied the appellant to have acquired title by adverse possession as the possession of the appellant was that of a lessee, which was permissive one. The fact involved in the said case is distinguishable inasmuch as the transaction herein this case involves a void sale and not a lease. Thus, while accepting the ratio decided, I am of the opinion that the decision is not applicable here. Admittedly, the deity or its Managing Trustee has not filed any suit for recovery of the suit land from the plaintiff. Moreover, and rightly so, the deity need not file any suit for recovery of the suit property unlawfully alienated. Section 25 of the OHRE Act takes care of the same to which the provisions of the Limitation Act are not applicable. In that view of the matter, the order dated 06.04.2004 passed by the Commissioner of Endowments, Odisha, Bhubaneswar (defendant No.2) in O.A. No.128 of 1995 (II) cannot be held to be illegal and void. The Commissioner had jurisdiction to entertain such an application filed by the defendant No.1 and he has rightly directed for eviction of the plaintiff from the suit land. In that view of the matter, this Court finds no infirmity in the findings rendered by the learned Trial Court while answering issues (iii) and (iv) as the plaintiff has not acquired any title by adverse possession over the suit land. Thus, the plaintiff has no cause of action to file the suit. Resultantly, the findings of learned trial Court on other issues needs no interference.

18. Accordingly, the appeal merits no consideration and the same is dismissed, but in the circumstances there shall be no order as to cost.

Appeal dismissed.

2016 (II) ILR - CUT-922

J. P. DAS, J.

CRLREV NO. 446 OF 2016

PRANAB KISHORE RATH ……..Petitioner

.Vrs.

SUNITA RATH ……Opp.Party

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Ss. 12, 19, 23

Whether residence order passed as an interim measure U/s. 23 of the Act is correct as has been passed in this case by the learned trial Court and confirmed by the learned appellate court ? Held, No –

Residence order can only be passed U/s. 19(1) of the Act while finally disposing of an application U/s. 12(1) of the Act, after being satisfied that domestic violence has taken place – Held, the impugned interim order passed by the learned SDJM, Cuttack and confirmed by the learned Sessions Judge Cuttack is set aside. (Paras 8 to12)

For Petitioner : M/s. S. Jena, G.B. Jena & S.Mohanty
For Opp.Party : M/s. D.Panda, N.K.Nanda, P.Mishra, Ch.S.Mishra, Ch.S.Mishra & S.Kanungo

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Date of Hearing : 25. 08.2016
Date of Judgment : 09.09.2016

JUDGMENT

J.P.DAS, J

Assailed herein is the order dated 25.05.2016 passed by the learned Sessions Judge, Cuttack in CRLA No.26 of 2016 confirming the interim order passed by the learned S.D.J.M., Cuttack on 21.01.2016 in D.V. Misc. Case No.309 of 2015 under Section 23 of the Protection of Women from Domestic Violence Act, 2005 ("D.V.Act", in short) directing the present petitioner to provide a specific residence to the present opposite party in a proceeding under the D.V.Act filed by the present opposite party.

2. The proceeding under the D.V.Act was initiated by the present opposite party with the submissions that she married the present petitioner on 26.06.1991 and was blessed with two daughters: one in the year 1993 and the other in the year 2000. She alleged that from the day one of her marriage, she was ill-treated by the present petitioner and was physically and mentally tortured by the petitioner as well as by her in-laws. Narrating different instances of torture and assault, she alleged that on 13th March, 2014 she was driven out of the official quarters at Bhubaneswar by the present petitioner after being assaulted mercilessly and she came back to Cuttack to stay with her parents with her younger daughter. Again she visited her husband, the present petitioner at his official residence to see the well being of the elder daughter who was staying with the petitioner, but the alleged humiliation and torture continued. Ultimately, on 23.09.2015 since she was again assaulted and abused by the present petitioner-husband, she came back to her father's house at Cuttack and is residing there since then with her younger daughter.

3. The petitioner-husband filed objection denying the allegation of torture and assault with the further submission that the opposite party –wife is a quarrelsome female and did not want to stay with her in-laws for which in the year 1996, he has to take a government quarters since he was posted at Bhubaneswar by then to stay separately with his wife, the opposite party, and since last twenty years, the petitioner and opposite party were not staying with the joint family which falsified the allegation that she was tortured and humiliated by her in-laws. The present petitioner-husband denying the allegations submitted certain instances of the arrogancy of the opposite-party wife and contended that the allegations of domestic violence were absolutely false.

4. Subsequent thereto the present opposite party-wife filed a petition under Section 19(1)(f) read with Section 23 of the D.V.Act submitting that the husband was residing in a government quarters at OUAT Colony, Bhubaneswar, but has his own house at C-126, HIG Housing Board Colony Barmunda, Bhubaneswar where she along with her husband and other in-laws lived for a period of six years after their marriage in the year 1991 whereafter she resided along with her husband in the allotted Government quarters. She submitted that since the said house of her husband at Housing Board Colony at Barmunda is lying vacant and she was driven out of the company of her husband, she prayed for an interim order to reside in the said house, having no other alternate accommodation for herself. She also filed another petition claiming interim maintenance. The opposite party-husband therein filed counters to both the applications. He pleaded that although the house at Barmunda belonged to him, still it is presently occupied by some of his relations as because he along with his wife have been staying in government quarters since last twenty years and his parents are staying separately with his younger brother in Laxmisagar area of Bhubaneswar. He also pleaded that their younger daughter was reading in a school at Bhubaneswar but the petitioner-wife got her transferred to D.A.V. School, Cuttack without his knowledge and only to satisfy her ego she was asking for an order to stay in the specific house at Baramunda. Learned trial court by a common order dated 21.01.2016 allowed the prayers of the petitioner-wife directing the opposite party-husband to pay a monthly sum of Rs.20,000/- towards the maintenance of his wife and her minor daughter including medical expenses and the school fees. In the same order, the learned Magistrate also allowed the prayer of the petitioner-wife directing the respondent-husband to provide separate accommodation to the wife and

minor daughter in their shared household at Housing Board Colony, Barmunda, Bhubaneswar. The said order was challenged before the learned Sessions Judge, Cuttack in Criminal Appeal No.21 of 2016 and by order dated 20th May, 2016, the learned Sessions Judge confirmed the order passed by the learned S.D.J.M., both in respect of the interim maintenances and residence order.

5. Submitting that the present petitioner-husband has been paying the interim monthly maintenance of Rs.20,000/- as directed, the present revision has been filed assailing the order of learned Sessions Judge, passed in respect of the residence confirming the direction of the learned S.D.J.M., Without going to the factual aspects of the case, the learned counsel for the petitioner submitted that a residence order as has been passed by the learned S.D.J.M., could not have been passed as an interim measure under Section 23 of the D.V.Act. It was submitted that the provision under Section 23 of the D.V.Act empowers the learned Magistrate to pass such interim order taking into consideration the urgency of the situation and a residence order can only be passed under Section 19(1) of the D.V.Act while finally disposing of an application under Sub-Section 1 of Section 12 of D.V.Act and not before that. It was submitted that the learned trial court erred in law by passing a final order as an interim relief under Section 23 of the D.V.Act, more so in absence of any emergent situation in the given circumstances.

6. Per contra, it was submitted by the learned counsel appearing on behalf of the respondent that Section 23(1) of the D.V.Act empowers the Magistrate to pass any interim order as it deems just and proper and in the given circumstances of the present case there was absolutely no illegality in the impugned order so as to be interfered with in this revisional forum.

7. The factual matrix not being much in dispute, the only point raised to be considered is as to whether the direction for specific residence could have been given as an interim measure in the proceeding, as has been done by the learned trial court and confirmed by the learned appellate court. In order to consider the rival contentions on the issue, it would be convenient to bring on record the relevant provisions in the D.V Act.

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> **Section 2 (p)** "residence order" means an order granted in terms of sub-section(1) of section 19;
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Section 2 (s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;

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Section 17 Right to reside in a shared household.-

(1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

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Section 19 Residence orders

(1) while disposing of an application under sub-section(1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order-

(a) Restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) Directing the respondent to remove himself from the shared household;

(c) Restraining the respondent or any of his relatives from entering any portion of the shared house hold in which the aggrieved person resides;

(d) Restraining the respondent from alienating or disposing off the shared household or encumbering the same;

(e) Restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(f) Directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause(b) shall be passed against any person who is a woman.

(2) The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person.

(3) The Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence.

(4) An order under sub-section(3) shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 (2 of 1974) and shall be dealt with accordingly.

(5) While passing an order under sub-section(1), sub-section(2) or sub-section(3), the court may also pass an order directing the officer in-charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

(6) While making an order under sub-section(1), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties.

(7) The Magistrate may direct the officer in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order.

(8) The Magistrate may direct the respondent to return to the possession of the aggrieved person her *stridhan* or any other property or valuable security to which she is entitled to.

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23. Power to grant interim and ex parte orders-

(1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.

8. It is the undisputed position that the petitioner and the opposite party had stayed in the specific house at Baramunda, Bhubaneswar for about six years after their marriage in the year 1991, where after they have continued staying in the government quarters allotted in favour of the present petitioner. It is also the admitted fact that the opposite party left the company of the petitioner either being forced to or out of her own in the year 2015 while staying with the petitioner in the government quarters at Bhubaneswar and is staying with her parents at Cuttack and has got her younger daughter admitted in a school at Cuttack. The opposite party filed an application for interim order under sec. 19 (1) (f) read with sec. 23 of the D.V Act. Sec. 19 (1) (f) provides for direction to the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require. But in her petition she claimed for specific residence at Baramunda submitting that the said house was lying vacant. On the contrary it was pleaded by the respondent husband that the said house was under occupation of his relations. It was oath against oath at the preliminary stage of the case, there being no evidence led on behalf of either side.

9. The impugned order was passed by the learned Magistrate under section 23 (1) of the D.V Act since it was not an *ex parte* order and was passed after hearing both the sides. Sec. 23 (1) empowers the Magistrate to pass such interim order as he deems just and proper in a proceeding before him under the D.V Act. Any Residence order can be passed under the provisions of sec.19 of the D.V Act and sec. 19 (1) mandates that while disposing of an application under section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order. Thus it refers to the stage of final disposal of the application

and not before that, as has been submitted on behalf of the petitioner. Of course the aggrieved person has a right to stay in the shared household as per the provisions of section 17 of the DV Act. But in my considered opinion, that can only be considered at the time of final disposal of the proceeding.

10. It would not be out of place to mention that the D.V Act is a social beneficial legislation to protect the aggrieved persons victimised by domestic violence to get their rights protected and for being saved from vagary and destitution. Like any civil or matrimonial proceeding, provisions for interim arrangements have been mandated in the D.V Act to save the victims of domestic violence from any imminent danger or sustaining irreparable loss till the final settlement of the disputes. An interim arrangement is made to temporarily settle some allegedly unsettled situation, if found out prima facie or to maintain the *status quo*, but it cannot be for unsettling a presumably settled position. Thus, in the given circumstances of the positions of the parties, as detailed herein before, I am of the view that the order directing the present petitioner to provide a specific residence to the opposite party, where she shared the household 20 years back, as an interim measure was not correct, either legally or factually. Of course there is no doubt that any such order can be passed at the time of final disposal of the proceeding, if found just and proper, on appreciation of the materials placed before the court in course of hearing.

11. It was submitted by the learned counsel for the petitioner at the time of hearing that the petitioner is prepared to secure same level of alternate accommodation as enjoyed by the opposite party in the shared household, if so directed as per the provisions of section 19 (1) (f) of the D.V Act, but excepting the bare submission there is nothing on record in that regard.

12. However, in view of my aforesaid discussions and findings, while setting aside the impugned interim order dated 21.01.2016 passed by the learned SDJM, Cuttack in D.V Misc. Case no. 309 of 2015 and confirmed by the learned Sessions Judge, Cuttack in CRLA No. 26 of 2016 by his order dated 25.05.2016, the learned trial court is directed to pass any such other interim order, if so applied for, as deemed just and proper, after giving both the parties opportunity of fresh hearing. Learned trial court would do well to finally dispose of the matter complying the direction given in section 12 (5) of the D.V Act, which would be in the interest of both the parties. The Revision application is disposed of accordingly.

Revision disposed of.