SUPREME COURT OF INDIA

JAGDISH SINGH KHEHAR, J. & S.A. BOBDE, J.

CIVIL APPEAL NO. 213 OF 2013
(WITH BATCH)

STATE OF PUNJAB & ORS. ……..Appellants

.Vrs.

JAGJIT SINGH & ORS. ……..Respondents

(A) SERVICE LAW – Equal Pay for equal work – Whether temporarily engaged employees (daily wage employees, ad-hoc appointees, employees appointed on casual basis, contractual employees and the like), are entitled to minimum of the regular pay scale, alongwith dearness allowance (as revised from time to time) on account of their performing the same duties, which are discharged by those engaged on regular basis, against sanctioned posts ?

The duties and responsibilities discharged by the temporary employees in the present bunch of appeals were the same as were being discharged by regular employees – It is not the case of the appellants that the respondent employees did not possess the prescribed qualifications for appointment on regular basis and they would not be entitled to pay parity – So the principle of "equal pay for equal work" would be applicable to all the concerned temporary employees, so as to vest in them the right to claim wages, at par with the minimum of the pay-scale of regularly engaged Govt. employees, holding the same post – Held, all the concerned temporary employees, in the present bunch of cases, would be entitled to draw wages at the minimum of the pay scale (at the lowest grade, in the regular pay scale), extended to regular employees, holding the same post.

(Paras 57, 58)

(B) SERVICE LAW – Principle of "equal pay for equal work" – Employees engaged on regular basis, claiming higher wages under such principle – "onus of Proof" – Person who claims it, has to proof parity in the duties and responsibilities of the subject post with the reference post alongwith other parameters described in paragraph 42 of the judgment which can be taken into consideration while dealing with the matter. (Para 42)

Case Laws Referred to :-

1. (1982) 1 SCC 618 : Randhir Singh v. Union of India[1]
2. (1983) 1 SCC 304 : D.S. Nakara v. Union of India[2]

3 (1988) 3 SCC 91 : Federation of All India Customs and Central Excise Stenographers(Recognized) v. Union of India. [3]
4. (1989) 1 SCC 121 : State of U.P. v. J.P. Chaurasia. [4]
5. (1989) 2 SCC 235 : Mewa Ram Kanojia v. All India Institute of Medical Sciences.[5]
6. (1991) 1 SCC 619 : Grih Kalyan Kendra Workers' Union v.Union of India[2]
7. (2000) 8 SCC 580 : Union of India v. Pradip Kumar Dey. [7]
8. (2002) 4 SCC 556 : State Bank of India v. M.R. Ganesh Babu.[8]
9. (2002) 6 SCC 72 : State of Haryana v. Haryana Civil Secretariat Personal Staff Association.[9]
10. (2003) 5 SCC 188 : Orissa University of Agriculture & Technology v. Manoj K. Mohanty.[10]
11. (2004) 1 SCC 347 : Government of W.B. v. Tarun K. Roy. [11]
12. (2007) 8 SCC 279 : S.C. Chandra v. State of Jharkhand. [12]
13. (2008) 10 SCC 1 : Official Liquidator v. Dayanand. [13]
14. (2010) 5 SCC 225 : State of West Bengal v. West Bengal Minimum Wages Inspectors Association.[14]
15. (2011) 2 SCC 452 : Union Territory Administration, Chandigarh v. Manju Mathur.[15]
16. (2011) 11 SCC 122 : Steel Authority of India Limited v. Dibyendu Bhattacharya.[16]
17. (2012) 12 SCC 666 : Hukum Chand Gupta v. Director General, Indian Council of Agricultural Research.[17]
18. (2014) 6 SCC 756 : National Aluminum Company Limited v. Ananta Kishore Rout.[18]
19. (1986) 1 SCC 637 : Dhirendra Chamoli v. State of U.P.[19]
20. (1986) 1 SCC 639 : Surinder Singh v. Engineer-in-Chief, CPWD.[20]
21. (1987) 4 SCC 634 : Bhagwan Dass v. State of Haryana. [21]
22. (1988) 1 SCC 122 : Daily Rated Casual Labour Employed under P&T Department through Bhartiya Dak Tar Mazdoor Manch v. Union of India.[22]
23. (1989) 4 SCC 459 : Harbans Lal v. State of Himachal Pradesh [23]
24. (1995) 5 SCC 210 : Ghaziabad Development Authority v. Vikram Chaudhary. [24]
25. (1996) 11 SCC 77 : State of Haryana v. Jasmer Singh.[25]
26. (1998) 9 SCC 595 : State of Punjab v. Devinder Singh.[26]
27. (2003) 6 SCC 123 : State of Haryana v. Tilak Raj.[27]
28. (2006) 4 SCC 1 : Secretary, State of Karnataka v. Umadevi[28]
29. (1990) 2 SCC 396 : Wage Employees Association v. State of Karnataka.[29].
30. (2006) 9 SCC 321 : State of Haryana v. Charanjit Singh. [30]
31. (2006) 9 SCC 337 : State of U.P. v. Putti Lal.[31]

32. (2009) 9 SCC 514 : State of Punjab v. Surjit Singh.[32]
33. (2010) 7 SCC 739 : Uttar Pradesh Land Development Corporation v. Mohd.Khursheed Anwar.[33]
34. (2010) 12 SCC 400 : Surendra Nath Pandey v. Uttar Pradesh Cooperative Bank Ltd.[34]
35. (2010) 4 SCC 179 : Satya Prakash v. State of Bihar[35]

Appellants : Mr. Jagjit Singh Chhabra
Respondents : Mr. S.K.Sabharwal

Date of Judgment : 26.10.2016

JUDGMENT

JAGDISH SINGH KHEHAR, J.

1. Delay in filing and refiling Special Leave Petition (Civil)…. CC no. 15616 of 2011, and Special Leave Petition (Civil)…. CC no. 16434 of 2011 is condoned. Leave is granted in all special leave petitions.

2. A division bench of the Punjab and Haryana High Court, in State of Punjab & Ors. v. Rajinder Singh & Ors. (LPA no. 337 of 2003, decided on 7.1.2009), set aside, in an intra-court appeal, the judgment rendered by a learned single Judge of the High Court, in Rajinder Singh & Ors. v. State of Punjab & Ors. (CWP no. 1536 of 1988, decided on 5.2.2003). In the above judgment, the learned single Judge had directed the State to pay to the writ petitioners (who were dailywagers working as Pump Operators, Fitters, Helpers, Drivers, Plumbers, Chowkidars etc.), minimum of the pay-scale, revised from time to time, with permissible allowances, as were being paid to similarly placed regular employees; arrears payable, were limited to a period of three years, prior to the date of filing of the writ petition. In sum and substance, the above mentioned division bench held, that temporary employees were not entitled to the minimum of the pay-scale, as was being paid to similarly placed regular employees.

3. Another division bench of the same High Court, in State of Punjab & Ors. v. Rajinder Kumar (LPA no. 1024 of 2009, decided on 30.8.2010), dismissed an intra-Court appeal preferred by the State of Punjab, arising out of the judgment rendered by a learned single Judge in Rajinder Kumar v. State of Punjab & Ors. (CWP no. 14050 of 1999, decided on 20.11.2002), and affirmed the decision of the single Judge, in connected appeals preferred by employees. The letters patent bench held, that the writ petitioners (working as daily-wage Pump Operators, Fitters, Helpers, Drivers, Plumbers,

Chowkidars, Ledger Clerks, Ledger Keepers, Petrol Men, Surveyors, Fitter Coolies, Sewermen, and the like), were entitled to minimum of the pay-scale, alongwith permissible allowances (as revised from time to time), which were being given to similarly placed regular employees. Arrears payable to the concerned employees were limited to three years prior to the filing of the writ petition. In sum and substance, the division bench in State of Punjab & Ors. v. Rajinder Kumar (LPA no. 1024 of 2009) affirmed the position adopted by the learned single Judge in Rajinder Singh & Ors. v. State of Punjab & Ors. (CWP no. 1536 of 1988). It is apparent, that the instant division bench, concluded conversely as against the judgment rendered in State of Punjab & Ors. v. Rajinder Singh (LPA no. 337 of 2003), by the earlier division bench.

4. It would be relevant to mention, that the earlier judgment rendered, in State of Punjab & Ors. v. Rajinder Singh & Ors. (LPA no. 337 of 2003) was not noticed by the later division bench – in State of Punjab & Ors. v. Rajinder Kumar (LPA no. 1024 of 2009). Noticing a conflict of views expressed in the judgments rendered by two division benches in the above matters, a learned single Judge of the High Court, referred the matter for adjudication to a larger bench, on 11.5.2011. It is, therefore, that a full bench of the High Court, took up the issue, for resolving the dispute emerging out of the differences of opinion expressed in the above two judgments, in Avtar Singh v. State of Punjab & Ors. (CWP no. 14796 of 2003), alongwith connected writ petitions. The full bench rendered its judgment on 11.11.2011. The present bunch of cases, which we have taken up for collective disposal, comprise of a challenge to the judgment rendered by the division bench of the High Court in State of Punjab & Ors. v. Rajinder Singh & Ors. (LPA no. 337 of 2003, decided on 7.1.2009); a challenge to the judgment, referred to above, in State of Punjab & Ors. v. Rajinder Kumar (LPA no. 1024 of 2009, decided on 30.8.2010); as also, a challenge to the judgment rendered by the full bench of the High Court in Avtar Singh v. State of Punjab & Ors. (CWP no. 14796 of 2003, decided on 11.11.2011). This bunch of cases, also involves challenges to judgments rendered by the High Court, by relying on the judgments referred to above.

5. The issue which arises for our consideration is, whether temporarily engaged employees (daily-wage employees, ad-hoc appointees, employees appointed on casual basis, contractual employees and the like), are entitled to minimum of the regular pay-scale, along with dearness allowance (as revised from time to time) on account of their performing the same duties, which are discharged by those engaged on regular basis, against sanctioned posts. The

full bench of the High Court, while adjudicating upon the above controversy had concluded, that such like temporary employees were not entitled to the minimum of the regular pay-scale, merely for reason, that the activities carried on by daily wagers and the regular employees were similar. However, it carved out two exceptions, and extended the minimum of the regular pay to such employees. The exceptions recorded by the full bench of the High Court in the impugned judgment are extracted hereunder:-

"(1) A daily wager, ad hoc or contractual appointee against the regular sanctioned posts, if appointed after undergoing a selection process based upon fairness and equality of opportunity to all other eligible candidates, shall be entitled to minimum of the regular pay scale from the date of engagement.

(2) But if daily wagers, ad hoc or contractual appointees are not appointed against regular sanctioned posts and their services are availed continuously, with notional breaks, by the State Government or its instrumentalities for a sufficient long period i.e. for 10 years, such daily wagers, ad hoc or contractual appointees shall be entitled to minimum of the regular pay scale without any allowances on the assumption that work of perennial nature is available and having worked for such long period of time, an equitable right is created in such category of persons. Their claim for regularization, if any, may have to be considered separately in terms of legally permissible scheme.

(3) In the event, a claim is made for minimum pay scale after more than three years and two months of completion of 10 years of continuous working, a daily wager, ad hoc or contractual employee shall be entitled to arrears for a period of three years and two months."

6. The issue which has arisen for consideration in the present set of appeals, necessitates a bird's eye view on the legal position declared by this Court, on the underlying ingredients, which govern the principle of 'equal pay for equal work'. It is also necessary for resolving the controversy, to determine the manner in which this Court has extended the benefit of "minimum of the regular pay-scale" alongwith dearness allowance, as revised from time to time, to temporary employees (engaged on daily-wage basis, as ad-hoc appointees, as employees engaged on casual basis, as contract appointees, and the like). For the aforesaid purpose, we shall, examine the above issue, in two stages. We shall first examine situations where the principle of 'equal pay for equal work' has been extended to employees

engaged on regular basis. And thereafter, how the same has been applied with reference to different categories of temporary employees.

7. **Randhir Singh v. Union of India[1], decided by a three-Judge bench**: The petitioner in the instant case, was holding the post of Driver-Constable in the Delhi Police Force, under the Delhi Administration. The scale of pay of Driver- Constables, in case of non-matriculates was Rs.210-270, and in case of matriculates was Rs.225-308. The scale of pay of Drivers in the Railway Protection Force, at that juncture was Rs.260-400. The pay-scale of Drivers in the non-secretariat offices in Delhi was, Rs.260-350. And that, of Drivers employed in secretariat offices in Delhi, was Rs.260-400. The pay-scale of Drivers of heavy vehicles in the Fire Brigade Department, and in the Department of Lighthouse was Rs.330-480. The prayer of the petitioner was, that he should be placed in the scale of pay, as was extended to Drivers in other governmental organizations in Delhi. The instant prayer was based on the submission, that he was discharging the same duties as other Drivers. His contention was, that the duties of Drivers engaged by the Delhi Police Force, were more onerous than Drivers in other departments. He based his claim on the logic, that there was no reason/justification, to assign different pay-scales to Drivers, engaged in different departments of the Delhi Administration.

(ii) This Court on examining the above controversy, arrived at the conclusion, that merely the fact that the concerned employees were engaged in different departments of the Government, was not by itself sufficient to justify different pay-scales. It was acknowledged, that though persons holding the same rank/designation in different departments of the Government, may be discharging different duties. Yet it was held, that if their powers, duties and responsibilities were identical, there was no justification for extending different scales of pay to them, merely because they were engaged in different departments. Accordingly it was declared, that where all relevant considerations were the same, persons holding identical posts ought not to be treated differently, in the matter of pay. If the officers in the same rank perform dissimilar functions and exercise different powers, duties and responsibilities, such officers could not complain, that they had been placed in a dissimilar pay-scale (even though the nomenclature and designation of the posts, was the same). It was concluded, that the principle of 'equal pay for equal work', which meant equal pay for everyone irrespective of sex, was deducible from the Preamble and Articles 14, 16 and 39(d) of the

[1] (1982) 1 SCC 618

Constitution. The principle of 'equal pay for equal work', was held to be applicable to cases of unequal scales of pay, based on no classification or irrational classification, though both sets of employees (- engaged on temporary and regular basis, respectively) performed identical duties and responsibilities.

(iii) The Court arrived at the conclusion, that there could not be the slightest doubt that Driver-Constables engaged in the Delhi Police Force, performed the same functions and duties, as other Drivers in the services of the Delhi Administration and the Central Government. Even though he belonged to a different department, the petitioner was held as entitled to the pay-scale of Rs.260-400.

8. **D.S. Nakara v. Union of India[2], decided by a five-Judge Constitution Bench:** It is not necessary for us to narrate the factual controversy adjudicated upon in this case. In fact, the main issue which arose for consideration pertained to pension, and not to wages. Be that as it may, it is of utmost importance to highlight the following observations recorded in the above judgment:-

> "32. Having succinctly focused our attention on the conspectus of elements and incidents of pension the main question may now be tackled. But, the approach of court while considering such measure is of paramount importance. Since the advent of the Constitution, the State action must be directed towards attaining the goals set out in Part IV of the Constitution which, when achieved, would permit us to claim that we have set up a welfare State. Article 38 (1) enjoins the State to strive to promote welfare of the people by securing and protecting as effective as it may a social order in which justice - social, economic and political shall inform all institutions of the national life. In particular the State shall strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities. Art. 39 (d) enjoins a duty to see that there is equal pay for equal work for both men and women and this directive should be understood and interpreted in the light of the judgment of this Court in Randhir Singh v. Union of India & Ors., (1982) 1 SCC 618. Revealing the scope and content of this facet of equality, Chinnappa Reddy, J. speaking for the Court observed as under: (SCC p.619, para 1)

[2] (1983) 1 SCC 304

"Now, thanks to the rising social and political consciousness and the expectations aroused as a consequence and the forward looking posture of this Court, the under-privileged also are clamouring for the rights and are seeking the intervention of the court with touching faith and confidence in the court. The Judges of the court have a duty to redeem their Constitutional oath and do justice no less to the pavement dweller than to the guest of the five-star hotel."

Proceeding further, this Court observed that where all relevant considerations are the same, persons holding identical posts may not be treated differently in the matter of their pay merely because they belong to different departments. If that can't be done when they are in service, can that be done during their retirement? Expanding this principle, one can confidently say that if pensioners form a class, their computation cannot be by different formula affording unequal treatment solely on the ground that some retired earlier and some retired later. Art. 39 (e) requires the State to secure that the health and strength of workers, men and women, and children of tender age are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Art. 41 obligates the State within the limits of its economic capacity and development, to make effective provision for securing the right to work, to education and to provide assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. Art. 43 (3) requires the State to endeavour to secure amongst other things full enjoyment of leisure and social and cultural opportunities."

It is however impossible to overlook, that the Constitution Bench noticed the Randhir Singh case1, and while affirming the principle of 'equal pay for equal work', extended it to pensionary entitlements also.

9. **Federation of All India Customs and Central Excise Stenographers (Recognized) v. Union of India [3], decided by a two-Judge bench**: The petitioners in the above case, were Personal Assistants and Stenographers attached to heads of departments in the Customs and Central Excise Department, of the Ministry of Finance. They were placed in the pay-scale of Rs.550-900. The petitioners claimed, that the basic qualifications, the method, manner and source of recruitment, and their grades of promotion were the same as some of their counterparts (Personal Assistants and Stenographers) attached to Joint Secretaries/Secretaries and other officers in

[3] (1988) 3 SCC 91

the Central Secretariat. The above counterparts, it was alleged, were placed in the pay-scale of Rs.650-1040. The petitioners' contention was, that their duties and sponsibilities were similar to the duties and responsibilities discharged by some of their counterparts. Premised on the instant foundation, it was their contention, that the differentiation in their pay-scales, was violative of Articles 14 and 16 of the Constitution of India. The petitioners claimed 'equal pay for equal work'.

(ii) The assertions made by the petitioners were repudiated by the Union of India. Whilst acknowledging, that the duties and work performed by the petitioners were/was identical to that performed by their counterparts attached to Joint Secretaries/Secretaries and other officers in the secretariat, yet it was pointed out, that their counterparts working in the secretariat, constituted a class, which was distinguishable from them. It was asserted, that the above counterparts discharged duties of higher responsibility, as Joint Secretaries and Directors in the Central Secretariat performed functions and duties of greater responsibility, as compared to heads of departments, with whom the petitioners were attached. It was contended, that the principle of 'equal pay for equal work' depended on the nature of the work done, and not on the mere volume and kind of work. The respondents also asserted, that people discharging duties and responsibilities which were qualitatively different, when examined on the touchstone of reliability and responsibility, could not be placed in the same payscale.

(iii) While adjudicating upon the controversy, this Court arrived at the conclusion, that the differentiation of the pay-scale was not sought to be justified on the basis of the functional work discharged by the petitioners and their counterparts in the secretariat, but on the dissimilarity of their responsibility, confidentiality and the relationship with the public etc. It was accordingly concluded, that the same amount of physical work, could entail different quality of work, some more sensitive, some requiring more tact, some less. It was therefore held, that the principle of 'equal pay for equal work' could not be translated into a mathematical formula. Interference in a claim as the one projected by the petitioners at the hands of a Court, would not be possible unless it could be demonstrated, that either the differentiation in the pay-scale was irrational, or based on no basis, or arrived at mala fide, either in law or on fact. In the light of the stance adopted by the respondents, it was held that it was not possible to say, that the differentiation of pay in the present controversy, was not based on a rational nexus. In the above view of the matter, the prayer made by the petitioners was declined.

10. ***State of U.P. v. J.P. Chaurasia*** [4]***, decided by a two-Judge bench***: Prior to 1965, Bench Secretaries in the High Court of Allahabad, were placed in a pay- scale higher than that allowed to Section Officers. Bench Secretaries were placed in the pay-scale of Rs.160-320 as against the pay-scale of Rs.100-300 extended to Section Officers. A Rationalization Committee, recommended the pay-scale of Rs.150-350 for Bench Secretaries and Rs.200-400 for Section Officers. While examining the recommendation, the State Government placed Bench Secretaries in the pay-scale of Rs.200-400, and Section Officers in the pay-scale of Rs.515-715. Dissatisfied with the apparent down-grading, Bench Secretaries demanded, that they should be placed at par with Section Officers, even though their principal prayer was for being placed in a higher pay-scale. The matter was examined by the Pay Commission, which also submitted its report. The Pay Commission refused to accept, that Bench Secretaries and Section Officers could be equated, for the purpose of pay-scales. The Pay Commission was of the view, that the nature of work of Section Officers was not only different, but also, more onerous than that of Bench Secretaries. It also expressed the view, that Section Officers had to bear more responsibilities in their sections, and were required to exercise control over their subordinates. Additionally, they were required to prepare lengthy original notes, in complicated matters. The Pay Commission therefore recommended, the pay-scale of Rs.400-750 for Bench Secretaries and Rs.500-1000 for Section Officers. Thereupon, the Anomalies Committee, while rejecting the claim of Bench Secretaries for being placed on par with Section Officers, suggested that 10 posts of Bench Secretaries should be upgraded and placed in the pay-scale of Rs.500-1000 (the same as, Section Officers). Those Bench Secretaries, who were placed in the pay-scale of Rs.500-1000 were designated as Bench Secretaries Grade-I, and those placed in the pay-scale of Rs.400-750, were designated as Bench Secretaries Grade-II.

(ii) This Court while adjudicating upon the controversy, examined the matter from two different angles. Firstly, whether Bench Secretaries in the High Court of Allahabad, were entitled to the pay-scale admissible to Section Officers? Secondly, whether the creation of two grades with different pay-scales in the cadre of Bench Secretaries despite the fact that they were discharging the same duties and responsibilities, was violative of the principle of 'equal pay for equal work'?

(iii) While answering the first question this Court felt, that the issue required evaluation of duties and responsibilities of the respective posts, with

[4] (1989) 1 SCC 121

which equation was sought. And it was concluded, that on the subject of equation of posts, the matter ought to be left for determination to the executive, as the same would have to be examined by expert bodies. It was however held, that whenever it was felt, that expert bodies had not evaluated the duties and responsibilities in consonance with law, the matter would be open to judicial review. In the present case, while acknowledging that at one time Bench Secretaries were paid more emoluments than Section Officers, it was held, that since successive Pay Commissions and even Pay Rationalization Committees had found, that Section Officers performed more onerous duties, bearing greater responsibility as compared to Bench Secretaries, it was not possible for this Court to go against the said opinion. As such, this Court rejected the prayer of the Bench Secretaries as of right, to be assigned a pay-scale equivalent to or higher than that of Section Officers.

(iv) With reference to the second question, namely, whether there could be two scales of pay in the same cadre, of persons performing the same or similar work or duties, this Court expressed the view, that all Bench Secretaries in the High Court of Allahabad performed the same duties, but Bench Secretaries Grade-I were entitled to a higher pay-scale than Bench Secretaries Grade-II, on account of their selection as Bench Secretaries Grade-I, out of Bench Secretaries Grade-II, by a Selection Committee appointed under the rules, framed by the High Court. The above selection, was based on merit with due regard to seniority. And only such Bench Secretaries Grade-II who had acquired sufficient experience, and also displayed a higher level of merit, could be appointed as Bench Secretaries Grade-I. It was therefore held, that the rules provided for a proper classification, for the grant of higher emoluments to Bench Secretaries Grade-I, as against Bench Secretaries Grade-II.

(v) In the above view of the matter, the claim raised by the Bench Secretaries for equal pay, as was extended to Section Officers, was declined by this Court.

11. **Mewa Ram Kanojia v. All India Institute of Medical Sciences[5], decided by a two-Judge bench:** The petitioner in this case, was appointed against the post of Hearing Therapist, at the AIIMS, with effect from 3.8.1972. At that juncture, he was placed in the pay-scale of Rs.210-425. Based on the recommendations made by the Third Pay Commission (which were adopted by the AIIMS), the payscale for the post of Hearing Therapist was revised to Rs.425-700, with effect from 1.1.1973. The petitioner

[5] (1989) 2 SCC 235

accordingly came to be paid emoluments in the aforesaid revised pay-scale. The petitioner asserted, that the post of Hearing Therapist was required to discharge duties and responsibilities which were similar to those of the posts of Speech Pathologist and Audiologist. The said posts were in the pay-scale of Rs.650-1200. Since the claim of the petitioner for the aforesaid higher pay-scale (made under the principle of 'equal pay for equal work') was not acceded to by the department, he made a representation to the Third Pay Commission, which also negatived his claim for parity, as also, for a higher pay-scale. It is therefore that he sought judicial intervention. His main grievance was, that Hearing Therapist performed similar duties and functions as the posts of Senior Speech Pathologist, Senior Physiotherapist, Senior Occupational Therapist, Audiologist, and Speech Pathologist, and further, the qualifications prescribed for the above said posts were almost similar. Since those holding the above mentioned comparable posts were also working in the AIIMS, it was asserted, that the action of the employer was discriminatory towards the petitioner.

(ii) Whilst controverting the claim of the petitioner it was pointed out, that the post of Hearing Therapist was not comparable with the posts referred to by the petitioner. It was contended, that neither the qualifications nor the duties and functions of the posts referred to by the petitioner, were similar to that of Hearing Therapist. In the absence of equality between the post of Hearing Therapist, and the other posts referred to by the petitioner, it was asserted, that the claim of the petitioner was not acceptable under the principle of 'equal pay for equal work'.

(iii) During the course of hearing, the petitioner confined his claim for parity only with the post of Audiologist. It was urged, that educational qualifications, as well as, duties and functions of the posts of Hearing Therapist and Audiologist were similar (if not the same). It was contended, that a Hearing Therapist was required to treat the deaf and other patients suffering from hearing defects. A Hearing Therapist is required to help in the rehabilitation of persons with hearing impairments. It was also pointed out, that an Audiologist's work was to coordinate the separate professional skills, which contribute to the study, treatment and rehabilitation of persons with impaired hearing. As such it was submitted, that a person holding the post of an Audiologist, was a specialist in the non-medical evaluation, habilitation and rehabilitation, of those who have language and speech disorders. On the aforesaid premise, the petitioner claimed parity with the pay-scale of Audiologists.

(iv) This Court held, that there was a qualitative difference between the two posts, on the basis of educational qualifications, and therefore, the principle of 'equal pay for equal work', could not be invoked or applied. It was further held, that the Third Pay Commission had considered the claim of Hearing Therapists, but did not accede to the grievances made by them. Since the Pay Commission was in better position to judge the volume of work, qualitative difference and the reliability and responsibility required of the two posts, this Court declined to accept the prayer made by the petitioner, under the principle of 'equal pay for equal work'.

12. **Grih Kalyan Kendra Workers' Union v. Union of India [6], decided by a two-Judge bench:** The workers' union in the above case, had approached this Court, in the first instance in 1984, by filing writ petition no. 13924 of 1984. In the above petition, the relief claimed was for payment of wages under the principle of 'equal pay for equal work'. The petitioners sought parity with employees of the New Delhi Municipal Committee, and employees of other departments of the Delhi Administration, and the Union of India. They approached this Court again by filing civil writ petition no. 869 of 1988, which was disposed of by the judgment cited above.

(ii) The petitioners were employees of Grih Kalyan Kendras. They desired the Union of India to pay them wages in the regular pay-scale, on par with other employees performing similar work under the New Delhi Municipal Committee, or the Delhi Administration, or the Union of India. It would be relevant to mention, that the petitioner- Workers' Union was representing employees working in various centres of the Grih Kalyan Kendras, on ad-hoc basis. Some of them were being paid a fixed salary, described as a honorarium, while others were working on piece-rate wages at the production centres, without there being any provision for any scale of pay or other benefits like gratuity, pension, provident fund etc.

(iii) In the first instance, this Court endeavoured to deal with the question, whether the employers of these workers were denying them wages as were being paid to other similarly placed employees, doing the same or similar work. The question came to be examined for the reason, that unless the petitioners could demonstrate that the employees of the Grih Kalyan Kendras, were being discriminated against on the subject of pay and other emoluments, with other similarly placed employees, the principle of 'equal pay for equal work' would not be applicable. During the course of the first adjudication in writ petition no. 13924 of 1984, this Court requested a former Chief Justice

[6] (1991) 1 SCC 619

of India, to make recommendations after taking into consideration, firstly, whether other similarly situated employees (engaged in similar comparable posts, putting in comparable hours of work, in a comparable employment) were being paid higher pay, and if so, what should be the entitlement of the agitating employees, so as not to violate the principle of 'equal pay for equal work', and secondly, if there was no other similar comparable employment, whether the remuneration of the agitating employees, deserved to be revised on the ground, that their remuneration was unconscionable or unfair, and if so, to what extent. In the report filed by the former Chief Justice of India, it was concluded, that there was no employment comparable to the employment held by those engaged by the Grih Kalyan Kendras, and therefore, they could not seek parity with other employees working either with the New Delhi Municipal Committee, or the Delhi Administration, or the Union of India.

(iv) Based on the aforesaid factual conclusion, this Court held that the concept of 'equal pay for equal work' implies and requires, equal treatment for those who are similarly situated. It was held, that a comparison could not be drawn between unequals. Since the workers who had approached the Court in the present case, had failed to establish that they were situated similarly as others, it was held, that they could not be extended benefits which were being given to those, with whom they claimed parity. In this behalf this Court also opined, that the question as to whether persons were situated equally, had to be determined by the application of broad and reasonable tests, and not by way of a mathematical formula of exactitude. And therefore, since there were no other employees comparable to the employees working in the Grih Kalyan Kendras, this Court declined to entertain the prayer made by the petitioners.

13. **Union of India v. Pradip Kumar Dey[7], decided by a two-Judge bench**: It was the case of the respondent, that he was holding the post of Naik (Radio Operator), in which capacity he was discharging similar duties as those performed in the Directorate of Coordination Police Wireless, and other central government agencies. It was also the claim of the respondent, that the duties performed by him as Naik (Radio Operator) were more hazardous than those performed by personnel with similar qualifications and experience in State services, and other organizations. Even though a learned single Judge dismissed the writ petition, an intra-Court appeal preferred by the respondent, was allowed.

[7] (2000) 8 SCC 580

(ii) The Union of India raised three contentions, in its appeal to this Court. Firstly, that the pay-scale claimed by the respondent, was that of the post of Assistant Sub-Inspector of Police. It was pointed out, that the respondent was holding an inferior post - of Naik (Radio Operator). It was highlighted, that the post of Assistant Sub-Inspector of Police, was a promotional post, for the post held by the respondent. Secondly, it was asserted on behalf of the Union of India, that the respondent had not placed any material before the Court, on which the High Court could have arrived at the conclusion, that the essential qualifications of the post against which the respondent claimed parity, as also, the method of recruitment thereto, were the same as that of the post held by the respondent. Thirdly, the post of Naik (Radio Operator) held by the respondent was extended the benefit of special pay of Rs.80/- per month, and that, there was nothing on the record of the case to show, that Radio Operators in the Central Water Commission or the Directorate of Police Wireless, were enjoying similar benefits.

(iii) This Court while accepting the contentions advanced at the hands of the Union of India held, that the pay-scale claimed by the respondent was that for the post of Assistant Sub-Inspector, which admittedly was a promotional post for Naik (Radio Operator), i.e., the post held by the respondent. And as such, the claim made by the respondent, of parity with a post superior in hierarchy (to the post held by him), was not sustainable. Furthermore, this Court arrived at the conclusion, that there was no material on the record of the case to demonstrate, that the essential qualifications and the method of recruitment for, as also, the duties and responsibilities of the post held by him, were similar to those of the post, against which the respondent was claiming parity.

14. **State Bank of India v. M.R. Ganesh Babu[8], decided by a three-Judge bench:** Entry into the management cadre in banking establishments, is Junior Management Grade Scale-1. The said cadre comprises of Probationary Officers, Trainee Officers and other officers who possess technical skills (specialized officers), such as Assistant Law Officers, Security Officers, Assistant Engineers, Technical Officers, Medical Officers, Rural Development Officers, and other technical posts. All the posts in the Junior Management Grade Scale-1 cadre, were divisible into two categories – generalist officers, and specialist officers. Under the prevalent rules – the 1979 Order, the benefit of a higher starting pay, was extended only to Probationary Officers and Trainee Officers (i.e. to generalist officers), while Rural Development Officers and other specialist officers like Assistant Law

[8] (2002) 4 SCC 556

Officers, Security Officers, Assistant Engineers etc., were not entitled to a higher starting pay. Rural Development Officers, agitated their claim for similar benefits, as were extended to Probationary Officers and Trainee Officers (i.e. to the generalist officers). The question of viability of the claim raised by Rural Development Officers, was referred to the Bhatnagar Committee. The Bhatnagar Committee made its recommendation, in favour of Rural Development Officers, finding that they were required to shoulder, by and large, the same duties and responsibilities, as Probationary Officers and Trainee Officers, so far as agricultural advances were concerned. The Committee accordingly recommended, that it was a fit case for removal of the anomaly in their salary fitment. It recommended that, Rural Development Officers be allowed the same fitment of salary at the time of appointment, as was extended to Probationary fficers and Trainee Officers (i.e. to the generalist officers). The recommendation made by the Bhatnagar Committee was accepted, and accordingly, Rural Development Officers were extended the same fitment of salary, as generalist officers.

(ii) Since the benefit of additional increment was denied to other specialist officers, they also made a grievance and claimed the benefit of additional increments, as had been extended to Rural Development Officers. Since the State Bank of India did not accede to their request, they approached the Karnataka High Court. The specialist officers claimed, that in all respects, they performed similar duties and responsibilities, as Rural Development Officers, and therefore, they were entitled to the benefit of additional increments, at the time of their appointment, as had been extended to Rural Development Officers. A learned single Judge of the High Court, on being impressed by the fact, that some of the Rural Development Officers, who had not opted for absorption in the generalist cadre (but had continued under the specialist cadre), were also extended the benefit of higher starting pay, accepted the claim of the specialist officers. Appeals preferred against the judgment rendered by the learned single Judge, were dismissed by a division bench of the High Court.

(iii) This Court while examining the challenges, narrated the parameters on which the benefit of 'equal pay for equal work' can be made applicable, as under:-

> "16. The principle of equal pay for equal work has been considered and applied in many reported decisions of this Court. The principle has been adequately explained and crystalised and sufficiently reiterated in a catena of decisions of this Court. It is well settled that

> equal pay must depend upon the nature of work done. It cannot be judged by the mere volume of work; there may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. One cannot deny that often the difference is a matter of degree and that there is an element of value judgment by those who are charged with the administration in fixing the scales of pay and other conditions of service. So long as such value judgment is made bona fide, reasonably on an intelligible criterion which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination. The principle is not always easy to apply as there are inherent difficulties in comparing and evaluating the work done by different persons in different organizations, or even in the same organization. Differentiation in pay scales of persons holding same posts and performing similar work on the basis of difference in the degree of responsibility, reliability and confidentiality would be a valid differentiation. The judgment of administrative authorities concerning the responsibilities which attach to the post, and the degree of reliability expected of an incumbent, would be a value judgment of the authorities concerned which, if arrived at bona fide reasonably and rationally, was not open to interference by the court."

Based on the aforesaid parameters, this Court considered the acceptability of the claim of the specialist officers, for parity with the generalist officers. This Court recorded its conclusion, as under:-

> "19. We have carefully perused the order of the Bank and find that several reasons have been given for non-acceptance of the respondents' claim. It has been highlighted that the Probationary Officers/Trainee Officers are being recruited from market/promoted from clerical staff by the Bank by means of all-India written test and interview to get the best talent from the market and within, with a view to man the Bank's top management in due course. Leaned counsel for the respondents submitted that the same is also true of specialist officers. However, it is contended on behalf of the appellant Bank that the generalist officers are exposed to various assignments including mandatory rural assignments. Unlike them, the services of Assistant Law Officers are utilized as in-house advisors on legal matters in administrative offices. The duties and responsibilities of Probationary Officers/Trainee Officers are more onerous while the

specialist officers are not exposed to operational work/risk. It is, therefore, quite clear that there exists a valid distinction in the matter of work and nature of operations between the specialist officers and the general category officers. The general category officers are directly linked to the banking operations whereas the specialist officers are not so linked and they perform the specified nature of work. RDOs were given similar fitment as the generalist officers since it was found that they were required to shoulder, by and large, the same duties and responsibilities as Probationary Officers and Trainee Officers in so far as conducting Bank's agricultural advances work was concerned. This was done on the basis of the recommendations of the Bhatnagar Committee and keeping in view the fact that the decision has been taken that there would be no future recruitment of RDOs and the existing RDOs were proposed to be absorbed in general banking cadre. The recruitment of RDOs has been discontinued since 1985. Taking into account the nature of duties and responsibilities shouldered by the respondents the Bank has concluded that the duties and responsibilities of the respondents are not comparable to the duties and responsibilities of the RDOs, the Probationary Officers or the Trainee Officers.

20. Learned counsel for the respondents submitted that specialist officers are also recruited from the open market and are confirmed after successfully completing the probation of 2 years. Before the Order of 1979 came into force, they were similarly being granted benefit of additional increments at the time of appointment in the same manner as the generalist officers. However, after the order of 1979 they have been deprived of this benefit. Subsequently that benefit was extended to RDOs but not to the respondents and others like them. We have earlier noticed that the RDOs were given the benefit of advance increments on the basis of the report of an Expert Committee which justified their classification with the generalist officers, having regard to the nature of duties and responsibilities shouldered by them. However, on consideration of the case of the respondents, the Bank as reached a different conclusion. The Bank has found that their duties and responsibilities are not the same as those of Probationary Officers/Trainee Officers/RDOs. It is no doubt true that the specialist officers render useful service and their valuable advice in the specialised fields is of great assistance to the Bank in its

> banking operations. The officers who belong to the generalist cadre, namely the officers who actually conduct the banking operations and who take decisions in regard to all banking works are advised by the specialist officers. There can be no doubt that the service rendered by the specialist officers is also valuable, but that is not to say that the degree of responsibility and reliability is the same as those of the Probationary Officers, the Trainee Officers, and the RDOs, who directly carry on the banking operations and are required to take crucial decisions based on the advice tendered by the specialist officers.The Bank has considered the nature of duties and responsibilities of the various categories of officers and has reached bona fide decision that while generalist officers take all crucial decisions in banking operations with which they are directly linked, and are exposed to operational work and risk since the decisions that they take has significant effect on the functioning of the bank and quality of its performance, the specialist officers are not exposed to such risks nor are they required to take decisions as vital as those to be taken by the generalist officers. They at best render advice in their specialized field. The degree of reliability and responsibility is not the same. It cannot be said that the value judgment of the Bank in this regard is either unreasonable, arbitrary or irrational. Having regard to the settled principles and the parameters of judicial interference, we are of the considered view that the decision taken by the Bank cannot be faulted on the ground of its being either unreasonable, arbitrary or discriminatory and therefore judicial interference is inappropriate."

On account of the reasons recorded above, specialist officers could not substantiate their claim of parity. They were held not entitled to benefit of the principle of 'equal pay for equal work'

15. ***State of Haryana v. Haryana Civil Secretariat Personal Staff Association,[9] decided by a two-Judge bench***: The respondent Association in the above case, filed a writ petition before the Punjab and Haryana High Court, seeking a direction to the appellant herein, to grant Personal Assistants in the Civil Secretariat, Haryana, the pay-scale of Rs.2000-3500 + Rs.150 as special pay, which had been given to Personal Assistants working in the Central Secretariat. The aforesaid prayer was made in the background of the fact, that the State of Haryana had accepted the recommendations of the Fourth Central Pay Commission, with regard to revision of pay-scales, with

[9] (2002) 6 SCC 72

effect from 1.1.1986. The case of Personal Assistants before the High Court was, that prior to 1986, Personal Assistants working in the Civil Secretariat, Haryana, were enjoying a higher scale of pay, than was extended to Personal Assistants working in the Central Secretariat. On the receipt of Fourth Central Pay Commission report, the Central Government revised the pay-scale of Personal Assistants to Rs.2000- 3500 with effect from 1.1.1986. It was pointed out, that even though the Government of Haryana had accepted the recommendation of the Fourth Central Pay Commission, and had also implemented the same, in respect of certain categories of employees, it did not accept the same in the case of Personal Assistants. The pay-scale of Personal Assistants in the Civil Secretariat, Haryana, was revised to Rs.1640-2900 + 150 as special pay.

(ii) It was also the contention of Personal Assistants, that in respect of certain categories of employees of different departments of the State of Haryana, like Education, Police, Transport, Health and Engineering and Technical staff, the State Government had fully adopted the recommendations of the Fourth Central Pay Commission, by granting them the pay-scale of Rs.2000-3500. The claim of the Personal Assistants was also premised on the fact, that Personal Assistants working in the Civil Secretariat, Haryana, discharged duties which were comparable with that of Personal Assistants in the Central Secretariat. And so also, their responsibilities.

(iii) The High Court allowed the claim of the Association. It held, that Personal Assistants working in the Civil Secretariat, Haryana, were entitled to the pay scale of Rs.2000-3500, with effect from 1.1.1986. The State of Haryana approached this Court. This Court, while recording its consideration, expressed the view, that the High Court had ignored certain settled principles of law, while determining the claim of Personal Assistants, by applying the principle of parity. This Court felt, that the High Court was persuaded to accept the claim of Personal Assistants, only because of the designation of their post. This, it was held, was a misconceived application of the principle. In its analysis, it was recorded, that the High Court had assumed, that the assertions made at the behest of the Personal Assistants, that they were discharging similar duties and responsibilities as Personal Assistants in the Central Secretariat, had remained unrebutted. That, this Court found, was factually incorrect. The State of Haryana, in its counter affidavit before the High Court, had adopted the specific stance, that there was no comparison between the Personal Assistants working in the Civil Secretariat, Haryana,

and Personal Assistants working in the Central Secretariat. It was highlighted, that the qualifications prescribed for Personal Assistants in the Central Secretariat, were different from those prescribed for Personal Assistants in Civil Secretariat, Haryana. The High Court was also found to have erred in its determination, by not making any comparison of the nature of duties and responsibilities, or about the qualifications prescribed for recruitment. This Court accordingly set aside the order passed by the High Court, allowing parity.

(iv) In order to delineate the parameters, on the basis of which the principle of 'equal pay for equal work' can be made applicable, this Court observed as under:-

> "10. It is to be kept in mind that the claim of equal pay for equal work is not a fundamental right vested in any employee though it is a constitutional goal to be achieved by the Government. Fixation of pay and determination of parity in duties and responsibilities is a complex matter which is for the executive to discharge.While taking a decision in the matter several relevant factors, some of which have been noted by this Court in the decided case, are to be considered keeping in view the prevailing financial position and capacity of the State Government to bear the additional liability of a revised scale of pay. It is also to be kept in mind that the priority given to different types of posts under the prevailing policies of the State Government is also a relevant factor for consideration by the State Government. In the context of complex nature of issues involved, the farreaching consequences of a decision in the matter and its impact on the administration of the State Government courts have taken the view that ordinarily courts should not try to delve deep into administrative decisions pertaining to pay fixation and pay parity. That is not to say that the matter is not justiciable or that the courts cannot entertain any proceeding against such administrative decision taken by the Government. The courts should approach such matters with restraint and interfere only when they are satisfied that the decision of the Government is patently irrational, unjust and prejudicial to a section of employees and the Government while taking the decision has ignored factors which are material and relevant for a decision in the matter. Even in a case where the court holds the order passed by the Government to be unsustainable then ordinarily a direction should be given to the State Government or the authority taking the decision to reconsider the matter and pass a proper order. The court should avoid

giving a declaration granting a particular scale of pay and compelling the government to implement the same. As noted earlier, in the present case the High Court has not even made any attempt to compare the nature of duties and responsibilities of the two sections of the employees, one in the State Secretariat and the other in the Central Secretariat. It has also ignored the basic principle that there are certain rules, regulations and executive instructions issued by the employers which govern the administration of the cadre."

16. ***Orissa University of Agriculture & Technology v. Manoj K. Mohanty[10], decided by a two-Judge bench***: The respondent in the above case, was appointed as a Typist in 1990, on a consolidated salary of Rs.530/- per month, against a vacancy of the post of Junior Assistant. It was his averment, that even though in the appointment order, he was shown to have been appointed against the post of Typist, he had actually been working as a Junior Assistant, in the Examination Section of the institute. In order to demonstrate the aforesaid factual position, the respondent placed reliance on two certificates dated 4.12.1993 and 25.3.1996, issued to him by the Dean of the institute, affirming his stance. Despite the passage of five years since his induction into service, he was paid the same consolidated salary (referred to above), and was also not being regularized. It was also pointed out, that another individual junior to him was regularized against the post of Junior Assistant. The respondent then approached the Orissa High Court by way of a writ petition, seeking appointment on regular basis. The High Court disposed of the said writ petition, by directing, that the respondent be not disengaged from service. The High Court further directed, that the respondent be paid salary in the regular scale of pay admissible to Junior Assistants, with effect from September, 1997. A review petition filed against the High Court's order dated 11.9.1997, was dismissed. Dissatisfied with the above orders, the Orissa University of Agriculture & Technology approached this Court. While dealing with the question of 'equal pay for equal work', this Court, noticed the factual position as under:-

"10. The High Court before directing to give regular pay-scale to the respondent w.e.f. September, 1997 on the principle of "equal pay for equal work" did not examine the pleadings and facts of the case in order to appreciate whether the respondent satisfied the relevant requirements such as the nature of work done by him as compared to the nature of work done by the regularly appointed Junior Assistants,

[10] (2003) 5 SCC 188

> the qualifications, responsibilities etc. When the services of the respondent had not been regularized, his appointment was on temporary basis on consolidated pay and he had not undergone the process for regular recruitment, direction to give regular pay-scale could not be given that too without examining the relevant factors to apply the principle of "equal pay for equal work". It is clear from the averments made in the writ petition extracted above, nothing is stated as regards the nature of work, responsibilities attached to the respondent without comparing them with the regularly recruited Junior Assistants. It cannot be disputed that there were neither necessary averments in the writ petition nor any material was placed before the High Court so as to consider the application of principle of "equal pay for equal work".

Based on the fact, that the respondent had not placed sufficient material on the record of the case, to demonstrate the applicability of the principle of 'equal pay for equal work', this Court set aside the order passed by the High Court, directing that the respondent be paid wages in the regular scale of pay, with effect from September, 1997.

17. ***Government of W.B. v. Tarun K. Roy*** [11]***, decided by a three-Judge bench***: There were two technical posts, namely, Operator-cum-Mechanic and Sub- Assistant Engineer, in the Irrigation Department, of the Government of West Bengal. In 1970, the State Government revised pay-scales. During the aforesaid revision, the pay-scale of the post of Operator-cum-Mechanic, which was initially Rs.180-350, was revised to Rs.230-425, with effect from 1.4.1970. The pay-scale of the post of Sub-Assistant Engineer was simultaneously revised to Rs.350-600, with a higher initial start of Rs.330, with effect from the same date. Some persons in the category of Operator-cum-Mechanic, possessing the qualification of diploma in engineering, claimed entitlement to the nomenclature of Sub-Assistant Engineer, as also, the scale of pay prescribed for the post of Sub-Assistant Engineer. The Government of West Bengal, during the course of hearing of the matter before this Court, adopted the position, that diploma holder engineers working as Operator-cum-Mechanics in the Irrigation Department, were not entitled to be designated as Sub-Assistant Engineers. The said plea was negatived by this Court in State of West Bengal v. Debdas Kumar, 1991 Supp. (1) SCC 138.

[11] (2004) 1 SCC 347

(ii) Another group of Operator-cum-Mechanics, who did not possess diploma in engineering, and were graduates in science, or were holding school final examination certificate, claimed parity with Operator-cum-Mechanics, possessing the qualification of diploma in engineering. This Court, while rejecting their claim, observed as under:-

> "30. The respondents are merely graduates in Science. They do not have the requisite technical qualification. Only because they are graduates, they cannot, in our opinion, claim equality with the holders of diploma in Engineering. If any relief is granted by this Court to the respondents on the aforementioned ground, the same will be in contravention of the statutory rules. It is trite that this Court even in exercise of its jurisdiction under Article 142 of the Constitution of India would not ordinarily grant such a relief which would be in violation of a statutory provision."

18. ***S.C. Chandra v. State of Jharkhand*** [12]***, decided by a two-Judge bench:*** In the above matter, a number of civil appeals were disposed of, through a common order. The appellants had approached the High Court with the prayer, that directions be issued to the respondents, to fix their pay-scale at par with the payscale of government secondary school teachers, or at par with Grade I and II Clerks of the respondent company (Bharat Coking Coal Ltd. – BCCL). The appellants also prayed, that facilities such as provident fund, gratuity, pension and other retiral benefits, should also be made available to them. In addition to the above prayers, the appellants also sought a direction, that the management of the school, be taken over by the State Government. Dissatisfied with the orders passed by the High Court, the employees of the school approached this Court. This Court disposed of the matter by recording the following conclusion:-

> "21. Learned counsel for the appellants have relied on Article 39(d) of the Constitution. Article 39(d) does not mean that all the teachers working in the school should be equated with the clerks in BCCL or the Government of Jharkhand for application of the principle of equal pay for equal work. There should be total identity between both groups i.e. the teachers of the school on the one hand and the clerks in BCCL, and as such the teachers cannot be equated with the clerks of the State Government or of BCCL. The question of application of Article 39(d) of the Constitution has recently been interpreted by this Court in State of Haryana v. Charanjit Singh, (2006) 9 SCC 321,

[12] (2007) 8 SCC 279

> wherein Their Lordships have put the entire controversy to rest and held that the principle, "equal pay for equal work" must satisfy the test that the incumbents are performing equal and identical work as discharged by employees against whom the equal pay is claimed. Their Lordships have reviewed all the cases bearing on the subject and after a detailed discussion have finally put the controversy to rest that the persons who claimed the parity should satisfy the court that the conditions are identical and equal and same duties are being discharged by them. Though a number of cases were cited for our consideration but no useful purpose will be served as in State of Haryana v. Charanjit Singh, (2006) 9 SCC 321, all these cases have been reviewed by this Court. More so, when we have already held that the appellants are not the employees of BCCL, there is no question seeking any parity of the pay with that of the clerks of BCCL."

A perusal of the determination rendered by this Court reveals, that for claiming parity under the principle of 'equal pay for equal work', there should be total identity between the post held by the claimants, and the reference post, with whom parity is claimed.

19. ***Official Liquidator v. Dayanand[13], decided by a three-Judge bench:*** Directions were issued by the Calcutta and Delhi High Courts to the appellant, in the above matter, to absorb persons employed by the Official Liquidators (attached to those High Courts) under Rule 308 of the Companies (Court) Rules, 1959, against sanctioned posts, in the Department of Company Affairs. By virtue of the above directions, the respondents who were employed/engaged by Official Liquidators, were paid salaries and allowances from the Company's funds. The question that arose for consideration before this Court was, whether the respondents were entitled to sanctioned Government posts, in the office of the Official Liquidator(s). While disposing of the above issue, this Court held as under:-

> "100. As mentioned earlier, the respondents were employed/engaged by the Official Liquidators pursuant to the sanction accorded by the Court under Rule 308 of the 1959 Rules and they are paid salaries and allowances from the company fund. They were neither appointed against sanctioned posts nor were they paid out from the Consolidated Fund of India. Therefore, the mere fact that they were doing work similar to the regular employees of the Offices of the Official

[13] (2008) 10 SCC 1

Liquidators cannot be treated as sufficient for applying the principle of equal pay for equal work. Any such direction will compel the Government to sanction additional posts in the Offices of the Official Liquidators so as to facilitate payment of salaries and allowances to the company-paid staff in the regular pay scale from the Consolidate Fund of India and in view of our finding that the policy decision taken by the Government of India to reduce the number of posts meant for direct recruitment does not suffer from any legal or constitutional infirmity, it is not possible to entertain the plea of the respondents for payment of salaries and allowances in the regular pay scales and other monetary benefits on a par with regular employees by applying the principle of equal pay for equal work."

20. ***State of West Bengal v. West Bengal Minimum Wages Inspectors Association[14], decided by a two-Judge bench:*** The respondent Association represented the cadre of Inspector (Agricultural Minimum Wages), before the High Court of Calcutta. The claim made before the High Court was, that the said cadre was entitled to parity in pay-scales, with the posts of Inspector (Cooperative Societies), Extension Officer (Panchayats) and Revenue Officer. The aforesaid claim of parity was based on the sole consideration, that the posts of Inspector (Agricultural Minimum Wages) on the one hand, and the posts of Inspector (Cooperative Societies), Extension Officer (Panchayats) and Revenue Officer on the other, were in the same pay-scale, prior to the revision of payscales, i.e., Pay-Scale 9 (– Rs.300-600). After the pay revision in 1981, while the Inspector (Agricultural Minimum Wages) cadre, was retained in Pay-Scale 9 (– Rs.300-600), the other three cadres – Inspector (Cooperative Societies), Extension Officer (Panchayats) and Revenue Officer, were placed in Pay-Scale 11 (– Rs.425-1050). It was based on the above factual assertion, that the respondents claimed placement in Pay-Scale 11 (- Rs.425-1050). The claim of the respondents, was not based on the assertion, that Inspectors (Agricultural Minimum Wages) were discharging duties and responsibilities, which were similar/identical to those of Inspectors (Cooperative Societies), Extension Officers (Panchayats) and Revenue Officers. It is this aspect, which weighed with this Court while determining the claim of the respondents for parity. In the above adjudication, this Court recorded the following observations:-

"20. The burden to prove disparity is on the employees claiming parity – vide State of U.P. v. Ministerial Karamchari Sangh, (1998) 1 SCC 422; Associate Banks Officers' Association v. SBI, (1998) 1

[14] (2010) 5 SCC 225

SCC 428; State of Haryana v. Haryana Civil Secretariat Personal Staff Association, (2002) 6 SCC 72; State of Haryana v. Tilak Raj, (2003) 6 SCC 123; S.C. Chandra v. State of Jharkhand, (2007) 8 SCC 279 and U.P. SEB v. Aziz Ahmad, (2009) 2 SCC 606.

21. What is significant in this case is that parity is claimed by Inspectors, AMW, by seeking extension of the pay scale applicable to Inspector (Cooperative Societies), Extension Officers (Panchayat) and KGO-JLRO (Revenue Officers) not on the basis that the holders of those posts were performing similar duties or functions as Inspectors, AMW. On the other hand, the relief was claimed on the ground that prior to ROPA Rules 1981, the posts in the said three reference categories, and Inspectors, AMW were all in the same pay scale (Pay Scale 9), and that under ROPA Rules 1981, those other three categories have been given a higher Pay Scale of No.11, while they – Inspectors, AMW - were discriminated by continuing them in the Pay Scale 9.

22. The claim in the writ petition was not based on the ground that subject post and reference category posts carried similar or identical duties and responsibilities but on the contention that as the subject post holders and the holders of reference category posts who were enjoying equal pay at an earlier point of time, should be continued to be given equal pay even after pay revision. In other words, the parity claimed was not on the basis of equal pay for equal work, but on the basis of previous equal pay.

23. It is now well-settled that parity cannot be claimed merely on the basis that earlier the subject post and the reference category posts were carrying the same scale of pay. In fact, one of the functions of the Pay Commission is to identify the posts which deserve a higher scale of pay than what was earlier being enjoyed with reference to their duties and responsibilities, and extend such higher scale to those categories of posts.

24. The Pay Commission has two functions; to revise the existing pay scale, by recommending revised pay scales corresponding to the prerevised pay scales and, secondly, make recommendations for upgrading or downgrading posts resulting in higher pay scales or lower pay scales, depending upon the nature of duties and functions attached to those posts. Therefore, the mere fact that a t a n earlier

point of time, two posts were carrying the same pay scale does not mean that after the implementation of revision in pay scales, they should necessarily have the same revised pay scale.

25. As noticed above, one post which is considered as having a lesser pay scale may be assigned a higher pay scale and another post which is considered to have a proper pay scale may merely be assigned the corresponding revised pay scale but not any higher pay scale. Therefore, the benefit of higher pay scale can only be claimed by establishing that holders of the subject post and holders of reference category posts, discharge duties and functions identical with, or similar to, each other and that the continuation of disparity is irrational and unjust."

Based on the above consideration, this Court observed, that Inspectors (Agricultural Minimum Wages), had neither pleaded nor proved, that they were discharging duties and functions similar to the duties and functions of the Inspectors (Cooperative Societies), Extension Officers (Panchayats) and Revenue Officers, and therefore held, that their claim for pay parity, under the principle of 'equal pay for equal work', could not be accepted.

21. ***Union Territory Administration, Chandigarh v. Manju Mathur[15], decided by a two-Judge bench:*** In the above matter, the respondents were working as Senior Dieticians and Dieticians in the Directorate of Health Services of the Chandigarh Administration. They were posted in the General Hospital, Chandigarh, under the Union Territory Administration of Chandigarh. They were placed in the pay-scale of Rs.1500-2540 and Rs.1350-2400, respectively. They moved the Chandigarh Administration, seeking the pay-scale extended to their counterparts, employed in the State of Punjab. The posts against which they were claiming equivalence, were those of Dietician (gazetted) and Dietician (nongazetted) in the Directorate of Research and Medical Education, Punjab. The posts with which they were seeking equivalence, were sanctioned posts in the Rajindera Hospital (Patiala) and the Shri Guru Teg Bahadur Hospital (Amritsar). These posts were in the pay-scale of Rs.2200-4000 and Rs.1500-2640, respectively. After the State Government declined to accept their claim, they approached the High Court of Punjab and Haryana, which accepted their claim. Dissatisfied with the judgment rendered by the High Court, the Union Territory Administration of Chandigarh, approached this Court.

(ii) During the pendency of the proceedings before this Court, a direction

[15] (2011) 2 SCC 452

was issued to the Union Territory Administration of Chandigarh, to appoint a 'High Level Equivalence Committee', to examine the nature of duties and responsibilities of the post of Senior Dietician working under the Union Territory Administration of Chandigarh, vis-a-vis, Dietician (gazetted) working under the State of Punjab. And also to examine the nature of duties and responsibilities of the post of Dietician, working under the Union Territory Administration of Chandigarh, vis-a-vis, Dietician (non-gazetted) working under the State of Punjab, and submit a report. A report was accordingly submitted to this Court (which is extracted in the above judgment).

(iii) In its report, the 'High Level Equivalence Committee' arrived at the conclusion, that the duties and responsibilities of the posts held by the respondents, and the corresponding reference posts with which they were claiming parity, were not comparable or equivalent. As such, this Court recorded the following observations:-

> "9. We have heard the learned Counsel for the parties. We find from the report of the High Level Equivalence Committee extracted above that the Directorate of Research and Medical Education, Punjab, is a teaching institution in which the Dietician has to perform multifarious duties such as teaching the probationary nurses in subjects of nutrition dietaries, control and management of the kitchen, etc., whereas, the main duties of the Dietician and Senior Dietician in the Government Multi-Specialty Hospital in the Union Territory Chandigarh are only to check the quality of food being provided to the patients and to manage the kitchen."

Based on the above determination, the prayer for parity under the principle of 'equal pay for equal work' was declined to the respondents, and accordingly the judgment of the High Court, was set aside.

22. ***Steel Authority of India Limited v. Dibyendu Bhattacharya[16], decided by a three-Judge bench:*** The respondent in the above case, was appointed against the post of Speech Therapist/Audiologist, in the Durgapur Steel Plant, in S-6 grade in Medical and Health Services. After serving for a few years, he addressed a representation to the appellant, claiming parity with one B.V. Prabhakar, employed at the Rourkela Steel Plant (a different unit of the same company).The said B.V. Prabhakar was holding the post of E-1 grade in the executive cadre, though designated as Speech Therapist/Audiologist. In his representation, the respondent did not claim

[16] (2011) 11 SCC 122

parity in pay, but only claimed change of the cadre and upgradation of his post, and accordingly relaxation in eligibility, so as to be entitled to be placed in the pay-scale of posts in E-1 grade.

(ii) The appellant did not accept the claim raised by the respondent. He accordingly approached the High Court of Calcutta. A division bench of the High Court, accepted his claim for pay parity. It is in the aforesaid background, that the appellant approached this Court, to assail the judgment rendered by the High Court. The issue of pay parity was dealt with by this Court, by recording the following observations:-

> "30. In view of the above, the law on the issue can be summarised to the effect that parity of pay can be claimed by invoking the provisions of Articles 14 and 39(d) of the Constitution of India by establishing that the eligibility, mode of selection/recruitment, nature and quality of work and duties and effort, reliability, confidentiality, dexterity, functional need and responsibilities and status of both the posts are identical. The functions may be the same but the skills and responsibilities may be really and substantially different. The other post may not require any higher qualification, seniority or other like factors. Granting parity in pay scales depends upon the comparative evaluation of job and equation of posts. The person claiming parity, must plead necessary averments and prove that all things are equal between the posts concerned. Such a complex issue cannot be adjudicated by evaluating the affidavits filed by the parties.
>
> 31. The onus to establish the discrimination by the employer lies on the person claiming the parity of pay. The Expert Committee has to decide such issues, as the fixation of pay scales etc. falls within the exclusive domain of the executive. So long as the value judgment of those who are responsible for administration i.e. service conditions, etc., is found to be bonafide, reasonable, and on intelligible criteria which has a rational nexus of objective of differentiation, such differentiation will not amount to discrimination. It is not prohibited in law to have two grades of posts in the same cadre. Thus, the nomenclature of a post may not be the sole determinative factor. The courts in exercise of their limited power of judicial review can only examine whether the decision of the State authorities is rational and just or prejudicial to a particular set of employees. The court has to keep in mind that a mere difference in service conditions does not amount to discrimination. Unless there is complete and wholesale/

> wholesome identity between the two posts they should not be treated as equivalent and the Court should avoid applying the principle of equal pay for equal work."

Based on the above consideration, this Court recorded its analysis, on the merits of the controversy, as under:-

> "34. Shri B.V. Prabhakar, had been appointed in E-1 Grade, in the Rourkela unit, considering his past services in the Bokaro Steel Plant, another unit of the Company, for about two decades prior to the recruitment of the respondent. As every unit may make appointments taking into consideration the local needs and requirement, such parity claimed by the respondent cannot be held to be tenable. The reliefs sought by the respondent for upgradation of the post and waiving the eligibility criteria had rightly been refused by the appellants and by the learned Single Judge. In such a fact-situation, there was no justification for the Division Bench to allow the writ petition, granting the benefit from the date of initial appointment of the respondent. The respondent has not produced any tangible material to substantiate his claim, thus, he could not discharge the onus of proof to establish that he had made some justifiable claim. The respondent miserably failed to make out a case for pay parity to the post of E-1 Grade in executive cadre. The appeal, thus, deserves to be allowed."

It is, therefore apparent, that this Court did not accept the prayer of pay parity, in the above cited case, based on the principle of 'equal pay for equal work'.

23. ***Hukum Chand Gupta v. Director General, Indian Council of Agricultural Research[17], decided by a two-Judge bench***: In the above matter, the appellant was originally appointed as a Laboratory Assistant in Group D, in the National Dairy Research Institute. He was promoted as a Lower Division Clerk, after he qualified a limited departmental competitive examination. He was further promoted as a Senior Clerk, again after qualifying a limited departmental competitive examination. At this stage, he was placed in the pay-scale of Rs.1200-2040. He was further promoted to the post of Superintendent in the pay-scale of Rs.1640-2900, yet again, after passing a departmental examination. Eventually, he was promoted as an Assistant Administrative Officer, on the basis of seniority-cum-fitness. The Indian Council of Agricultural Research revised the pay-scales of Assistants,

[17] (2012) 12 SCC 666

from Rs.1400-2600 to Rs.1640-2900, with effect from 1.1.1986. However, the pay-scale of the post of Superintendent was not revised.

(ii) The appellant submitted a representation seeking revision of his pay-scale on the ground, that in the headquarters of the Indian Council of Agricultural Research, the post of Superintendent is a promotional post, from the post of Assistant (which carried the pay-scale of Rs.1640-2900). He also claimed parity in pay-scale with one J.I.P. Madan. The claim of the appellant was not accepted by the authorities, whereupon, he first approached the Administrative Tribunal and eventually the High Court of Punjab and Haryana, which also did not accept his contention. It is, therefore, that he approached this Court.

(iii) While adjudicating upon the above controversy, this Court relied and endorsed the reasons recorded by the Administrative Tribunal in rejecting the claim of the appellant in the following manner:-

> "9. By a detailed order, the Tribunal rejected both the claims. It was observed that the post at headquarters cannot be compared with the post at institutional level as both are governed by different sets of service rules. The second prayer with regard to the higher pay scale given to Shri J.I.P. Madan was rejected on the ground that he had been given the benefit of second upgradation in pay since he had earned only one promotion throughout his professional career. Aggrieved by the aforesaid, the appellant filed a writ petition C.W.P. No. 9595 CAT of 2004 before the High Court. The writ petition has also been dismissed by judgment dated 8-7- 2008. This judgment is impugned in the present appeal."

This Court, recorded the following additional reasons, for not accepting the claim of the appellant, by observing as under:-

> "15. In our opinion, the explanation given by Mrs. Sunita Rao does not leave any room for doubt that the claim made by the appellant is wholly misconceived. There is no comparison between the appellant and Shri J.I.P. Madan. The appellant had duly earned promotion in his cadre from the lowest rank to the higher rank. Having joined in Group D, he retired on the post of AAO. On the other hand, Shri J.I.P. Madan had been working in the same pay scale till his promotion on the post of AAO. Therefore, he was held entitled to the second upgradation after 24 years of service. He had joined as an Assistant by Direct Recruitment and promoted on 24-8-1990 as a Superintendent.

After the merger of the post of Assistant with the Superintendent, the earlier promotion of Shri Madan was nullified, as Assistant was no longer a feeder post for the promotion on the post of Superintendent. Thus, a financial upgradation, in view of ACP Scheme, was granted to him since he had no opportunity for the second promotion."

This Court concluded the issue by holding as under:-

"20. We are also not inclined to accept the submission of the appellant that there can be no distinction in the pay scales between the employees working at headquarters and the employees working at the institutional level. It is a matter of record that the employees working at headquarters are governed by a completely different set of rules. Even the hierarchy of the posts and the channels of promotion are different. Also, merely because any two posts at the headquarters and the institutional level have the same nomenclature, would not necessarily require that the pay scales on the two posts should also be the same. In our opinion, the prescription of two different pay scales would not violate the principle of equal pay for equal work. Such action would not be arbitrary or violate Articles 14, 16 and 39D of the Constitution of India. It is for the employer to categorize the posts and to prescribe the duties of each post. There can not be any straitjacket formula for holding that two posts having the same nomenclature would have to be given the same pay scale. Prescription of pay scales on particular posts is a very complex exercise. It requires assessment of the nature and quality of the duties performed and the responsibilities shouldered by the incumbents on different posts. Even though, the two posts may be referred to by the same name, it would not lead to the necessary inference that the posts are identical in every manner. These are matters to be assessed by expert bodies like the employer or the Pay Commission. Neither the Central Administrative Tribunal nor a Writ Court would normally venture to substitute its own opinion for the opinions rendered by the experts. The Tribunal or the Writ Court would lack the necessary expertise undertake the complex exercise of equation of posts or the pay scales.

21. In expressing the aforesaid opinion, we are fortified by the observations made by this Court in State of Punjab vs. Surjit Singh, (2009) 9 SCC 514. In that case, upon review of a large number of judicial precedents relating to the principle of "equal pay for equal work", this Court observed as follows: (SCC pp. 527-28, para 19)

> "19. … '19. … Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a court of law. But equal pay must be for equal work of equal value. The principle of "equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation….. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even thenature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. Thus, normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interfere. Normally a party claiming equal pay for equal work should be required to raise a dispute in this regard. In any event, the party who claims equal pay for equal work has to make necessary averments and prove that all things are equal. Thus, before any direction can be issued by a court, the court must first see that there are necessary averments and there is a proof.'*" (emphasis supplied) In our opinion, the aforesaid observations would be a complete answer to all the submissions made by the appellant."

For the above reasons, this Court rejected the claim of the appellant, based on the principle of 'equal pay for equal work'.

24. ***National Aluminum Company Limited v. Ananta Kishore Rout*[18], *decided by a two-Judge bench:*** The appellant in the above matter, i.e.,

National Aluminum Company Limited (hereinafter referred to as, NALCO) had established two schools. In the first instance, NALCO itself looked after the management of the said schools. In 1985, it entered into two separate but identical agreements with the Central Chinmoy Mission Trust, Bombay, whereby the management of the schools was entrusted to the above trust. In 1990, a similar agreement was entered into for the management of the above two schools, with the Saraswati Vidya Mandir Society (affiliated to Vidya Bharati Akhila Bharatiya Shiksha Sansthan). Accordingly, with effect from 1990, the said Society commenced to manage the affairs of the employees, of the above two schools. Two writ petitions were filed by the employees of the two schools before the High Court of Orissa at Cuttack, seeking a mandamus, that they be declared as employees of NALCO, and be treated as such, with the consequential prayer, that the employees of the two schools be accorded suitable pay-scales, as were admissible to the employees of NALCO. The High Court accepted the aboveprayers. It is, therefore, that NALCO approached this Court.

(ii) In adjudicating upon the above matter, this Court recorded its consideration as under:-

> "33. Insofar as their service conditions are concerned, as already conceded by even the respondents themselves, their salaries and other perks which they are getting are better than their counter parts in Government schools or aided/ unaided recognised schools in the State of Orissa. In a situation like this even if, for the sake of argument, it is presumed that NALCO is the employer of these employees, they would not be entitled to the pay scales which are given to other employees of NALCO as there cannot be any comparison between the two. The principle of ''equal pay for equal work'' is not attracted at all. Those employees directly employed by NALCO are discharging altogether different kinds of duties. Main activity of NALCO is the manufacture and production of alumina and aluminium for which it has its manufacturing units. The process and method of recruitment of those employees, their eligibility conditions for appointment, nature of job done by those employees etc. is entirely different from the employees of these schools. This aspect is squarely dealt with in the case of SC Chandra vs. State of Jharkhand, (2007) 8 SCC 279, where the plea for parity in employment was rejected thereby refusing to give parity in salary claim by school teachers with class working

[18] (2014) 6 SCC 756

under Government of Jharkhand and BCCL. The discussion which ensued, while rejecting such a claim, is recapitulated hereunder in the majority opinion authored by A.K. Mathur, J.: (SCC p. 289, paras 20-21)

"20. After going through the order of the Division Bench we are of opinion that the view taken by the Division Bench of the High Court is correct. Firstly, the school is not being managed by BCCL as from the facts it is more than clear that BCCL was only extending financial assistance from time to time. By that it cannot be saddled with the liability to pay these teachers of the school as being paid to the clerks working with BCCL or in the Government of Jharkhand. It is essentially a school managed by a body independent of the management of BCCL. Therefore, BCCL cannot be saddled with the responsibilities of granting the teachers the salaries equated to that of the clerks working in BCCL.

21. Learned counsel for the appellants have relied on Article 39(d) of the Constitution. Article 39(d) does not mean that all the teachers working in the school should be equated with the clerks in BCCL or the Government of Jharkhand for application of the principle of equal pay for equal work. There should be total identity between both groups i.e. the teachers of the school on the one hand and the clerks in BCCL, and as such the teachers cannot be educated with the clerks of the State Government or of BCCL. The question of application of Article 39(d) of the Constitution has recently been interpreted by this Court in State of Haryana v. Charanjit Singh, (2006) 9 SCC 321, wherein Their Lordships have put the entire controversy to rest and held that the principle, 'equal pay for equal work' must satisfy the test that the incumbents are performing equal and identical work as discharged by employees against whom the equal pay is claimed. Their Lordships have reviewed all the cases bearing on the subject and after a detailed discussion have finally put the controversy to rest that the persons who claimed the parity should satisfy the court that the conditions are identical and equal and same duties are being discharged by them. Though a number of cases were cited for our consideration but no useful purpose will be served as in Charanjit Singh all these cases have been reviewed by this Court. More so, when we have already held that the appellants are not the employees of BCCL, there is no question seeking any parity of the pay with that of the clerks of BCCL."

Based on the above consideration, this Court recorded its conclusion as follows:-

> "35. We say at the cost of repetition that there is no parity in the nature of work, mode of appointment, experience, educational qualifications between the NALCO employees and the employees of the two schools. In fact, such a comparison can be made with their counter parts in the Government schools and/or aided or unaided schools. On that parameter, there cannot be any grievance of the staff which is getting better emoluments and enjoying far superior service conditions."

It is, therefore apparent, that the principle of 'equal pay for equal work' was held to be not applicable to the employees of the two schools, so as to enable them to claim parity, with the employees of NALCO.

25. We shall now attempt an analysis of the decisions rendered by this Court, wherein temporary employees (differently designated as work-charge, dailywage, casual, ad-hoc, contractual, and the like) raised a claim for being extended wages, equal to those being drawn by regular employees, and the parameters determined by this Court, in furtherance of such a claim. Insofar as the present controversy is concerned, the same falls under the present category.

26. ***Dhirendra Chamoli v. State of U.P.***[19], decided by a two-Judge bench: Two Class-IV employees of the Nehru Yuvak Kendra, Dehradun, engaged as casual workers on daily-wage basis, claimed that they were doing the same work as Class-IV employees appointed on regular basis. The reason for denying them the pay-scale extended to regular employees was, that there was no sanctioned post to accommodate the petitioners, and as such, the assertion on behalf of the respondent-employer was, that they could not be extended the benefits permissible to regular employees. Furthermore, their claim was sought to be repudiated on the ground, that the petitioners had taken up their employment with the Nehru Yuvak Kendra knowing fully well, that they would be paid emolumentsof casual workers engaged on daily-wage basis, and therefore, they could not claim beyond what they had voluntarily accepted.

(ii) This Court held, that it was not open to the Government to exploit citizens, specially when India was a welfare state, committed to a socialist pattern of society. The argument raised by the Government was found to be violative of the mandate of equality, enshrined in Article 14 of the

[19] (1986) 1 SCC 637

Constitution. This Court held that the mandate of Article 14 ensured, that there would be equality before law and equal protection of the law. It was inferred therefrom, that there must be 'equal pay for equal work'. Having found, that employees engaged by different Nehru Yuvak Kendras in the country were performing similar duties as regular Class-IV employees in its employment, it was held, that they must get the same salary and conditions of service as regular Class-IV employees, and that, it made no difference whether they were appointed on sanctioned posts or not. So long as they were performing the same duties, they must receive the same salary.

27. ***Surinder Singh v. Engineer-in-Chief, CPWD[20], decided by a two-Judge bench:*** The petitioners in the instant case were employed by the Central Public Works epartment on daily-wage basis. They demanded the same wage as was being paid to permanent employees, doing identical work. Herein, the respondent-employer again contested the claim, by raising the plea that petitioners could not be employed on regular and permanent basis for want of permanent posts. One of the objections raised to repudiate the claim of the petitioners was, that the doctrine of 'equal pay for equal work' was a mere abstract doctrine and was not capable of being enforced in law.

(ii) The objection raised by the Government was rejected. It was held, that all organs of the State were committed to the directive principles of the State policy. It was pointed out, that Article 39 enshrined the principle of 'equal pay for equal work', and accordingly this Court concluded, that the principle of 'equal pay for equal work' was not an abstract doctrine. It was held to be a vital and vigorous doctrine accepted throughout the world, particularly by all socialist countries. Referring to the decision rendered by this Court in the D.S. Nakara case2, it was held, that the above proposition had been affirmed by a Constitution Bench of this Court. It was held, that the Central Government, the State Governments and likewise, all public sector undertakings, were expected to function like model and enlightened employers and further, the argument that the above principle was merely an abstract doctrine, which could not be enforced through a Court of law, could not be raised either by the State or by State undertakings. The petitions were accordingly allowed, and the Nehru Yuvak Kendras were directed to pay all daily-rated employees, salaries and allowances as were paid to regular employees, from the date of their engagement.

28. ***Bhagwan Dass v. State of Haryana [21], decided by a two-Judge bench:*** The Education Department of the State of Haryana, was pursuing an

[20] (1986) 1 SCC 639 [21] (1987) 4 SCC 634

adult education scheme, sponsored by the Government of India, under the National Adult Education Scheme. The object of the scheme was to provide functional literacy to illiterates, in the age group of 15 to 35, as also, to impart learning through special contract courses, to students in the age group of 6 to 15, comprising of dropouts from schools. The petitioners were appointed as Supervisors. They were paid remuneration at the rate of Rs.5,000/- per month, as fixed salary. Prior to 7.3.1984, they were paid fixed salary and allowance, at the rate of Rs.60/- per month. Thereafter, the fixed salary was enhanced to Rs.150/- per month. The reason for allowing them fixed salary was, that they were required to work, only on part-time basis. The case set up by the State Government was, that the petitioners were not full-time employees; their mode of recruitment was different from Supervisors engaged on regular basis; the nature of functions discharged by them, was not similar to those discharged by Supervisors engaged in the regular cadre; and their appointments were made for a period of six months, because the posts against which they were appointed, were sanctioned for one year at a time.

(ii) Having examined the controversy, this Court rejected all the above submissions advanced on behalf of the State Government. It was held, that the duties discharged by the petitioners even though for a shorter duration, were not any different from Supervisors, engaged in the regular cadre. Even though recruitment of Supervisors in the regular cadre was made by the Subordinate Selection Board by way of an open selection, whereas the petitioners were selected through a process of consideration which was limited to a cluster of a few villages, it was concluded that, that could not justify the denial to the petitioners, wages which were being paid to Supervisors, working in the regular cadre. It was held, that so long as the petitioners were doing work, which was similar to the work of Supervisors engaged in the regular cadre, they could not be denied parity in their wages. Accordingly it was held, that from the standpoint of the doctrine of 'equal pay for equal work', the petitioners could not be discriminated against, in regard to pay-scales. Having concluded that the petitioners possess the essential qualification for appointment to the post of Supervisor, and further the duties discharged by them were similar to those appointed on regular basis, it was held, that the petitioners could not be denied wages payable to regular employees. This Court also declined the plea canvassed on behalf of the Government, that they were engaged in a temporary scheme against posts which were sanctioned on year to year basis. On the instant aspect of the matter, it was held, that the same had no bearing to the principle of 'equal pay

for equal work'. It was held, that the only relevant consideration was, whether the nature of duties and functions discharged and the work done was similar. While concluding, this Court clarified that in the instant case, it was dealing with temporary employees engaged by the same employer, doing work of the same nature, as was being required of those engaged in the regular cadre, on a regular basis. It was held, that the petitioners, who were engaged on temporary basis as Supervisors, were entitled to be paid on the same basis, and in the same pay-scale, at which those employed in the regular cadre discharging similar duties as Supervisors, were being paid.

29. ***Daily Rated Casual Labour Employed under P&T Department through Bhartiya Dak Tar Mazdoor Manch v. Union of India[22], decided by a two-Judge bench***: The persons on whose behalf the Mazdoor Manch had approached this Court under Article 32 of the Constitution of India, were working as daily-rated casual labourers, in the Posts and Telegraphs Department. They included three broad categories of workers, namely, unskilled, semi-skilled and skilled. The unskilled labour consisted of Safai Workers, Helpers, Peons, and the like. The unskilled labour was engaged in digging, carrying loads and other similar types of work. The semi-skilled labour consisted of Carpenters, Wiremen, Draftsmen, A.C. Mechanics etc. They needed to have technical experience, but were not required to possess any degree or diploma qualification. The skilled labour consisted of labourers doing technical work. The skilled labourers were required to possess technical degree/diploma qualification.

(ii) All the three categories of employees, referred to above, were engaged as casual labourers. They were being paid very low wages. Their wages were far less than the salary and allowances paid to regular employees, of the Posts and Telegraphs Department, engaged for the same nature of work. The Director General, Posts and Telegraphs Department, by an order dated 15.5.1980 prescribed the following wages for casual labourers in the Department:-

"(i) Casual labour who has not completed 720 days of service in a period of three years at the rate of 240 days per annum with the Department as on April 1, 1980. No change. They will continue to be paid at the approved local rates.

(ii) Casual labour who having been working with the Department from April 1, 1977 or earlier and have completed 720 days of service as on

[22] (1988) 1 SCC 122

April 1, 1980. Daily wages equal to 75 per cent of 1/30th of the minimum of Group D Time Scale plus admissible DA.

(iii) Casual labour who has been working in the Department from April 1, 1975 or earlier and has completed 1200 days of service as on April 1, 1980.

Daily wages equal to 1/30th of the minimum of the Group D Time Scale plus 1/30th of the admissible DA.

(iv) All the casual labourers will, however, continue to be employed on daily wages only.

(v) These orders for enhanced rates for category (ii) and (iii) above will take effect from May 1, 1980.

(vi) A review will be carried out every year as on the first of April for making officials eligible for wages indicated in paras (ii) and (iii) above.

(vii) The above arrangement of enhanced rates of daily wages will be without prejudice to absorption of casual mazdoors against regular vacancies as and when they occur…."

Four years later, by an order dated 26.7.1984, the rate of wages payable to casual labourers in Posts and Telegraphs Department, was revised as under:-

"(i) Casual semi-skilled/skilled labour who has not completed 720 days of service over a period of three years or more with the department.

No change. They will continue to be paid at the approved local rates.

(ii) Casual semi-skilled/skilled labour who has completed 720 days of service over a period of three years or more.

Daily wage equal to 75 per cent of 1/30th of the minimum of the scale of semi-skilled (Rs.210-270) or skilled (Rs.260-350) as the case may be, plus admissible DA/ADA thereon.

(iii) Casual labour who has completed 1200 days of service over a period of 5 years or more.

Daily wage equal to 1/30th of the minimum of the pay scale of semiskilled (Rs.210-270) skilled (Rs.260-350) as the case may be, plus DA/ADA admissible thereon.

(iv) All the casual semi-skilled/skilled labour will, however continue to be employed on daily wages only.

(v) These orders for enhanced rates for category (ii) and (iii) above will take effect from April 1, 1984.

(vi) A review for making further officials eligible for wages vide (ii) and

(iii) above will take effect as on first of April every year.

(vii) If the rates calculated vide (ii) and (iii) above happen to be less than the approved local rates, payment shall be made as per approved local rates for above categories of labour.

(viii) The above arrangements of enhanced rates of daily wages will be without prejudice to absorption of casual semi-skilled/skilled labour against regular vacancies as and when they occur….."

(iii) Aggrieved by the discrimination made against them, through the aforementioned orders dated 15.5.1980 and 26.7.1984, the Mazdoor Manch submitted a statement of demands, inter alia, claiming the same salary and allowances and other benefits, as were being paid to regular and permanent employees of the Union of India, in the corresponding cadres. The aforesaid demands were departmentally rejected on 13.12.1985. It is, therefore, that the petitioners approached this Court for the redressal of their grievances.

(iv) Before this Court the Union of India contended, that the employees in question belonged to the category of casual labourers, and had not been regularly employed. As such, it was urged that they were not entitled to the same privileges, which were extended to regular employees.

(v) This Court while adjudicating upon the controversy, took into consideration the fact that, the employees in question were rendering the same kind of service which was being rendered by regular employees. The submission advanced before this Court, on behalf of the casual labourers, was under Article 38(2) of the Constitution, which provides that "The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations." It was also urged on behalf of the employees, that the State could not deny (at least) the minimum pay in the pay-scales of regularly employed workmen, even though the Government may not be compelled to extend all the benefits enjoyed by regularly recruited employees.

(vi) While adjudicating upon the controversy, this Court expressed the view, that the denial of wages claimed by the workers in question, amounted

to exploitation of labour. It was held, that the Government cannot take advantage of its dominant position, and compel any worker to work even as a casual labourer on starvation wages. It was pointed out, that a casual labourer who had agreed to work on such low wages, had done so, because he had no other choice. In the opinion of this Court, it was poverty, that had driven the workers to accept such low wages. In the above view of the matter, in the facts and circumstances of the case, this Court held that classification of employees into regularly recruited employees and casual employees for the purpose of paying less than the minimum wage payable to employees in the corresponding regular cadres, particularly in the lowest rung in the department, where the pay-scales were the least, was not tenable. This Court also held that the classification of labourers into three categories (depicted in the orders dated 15.5.1980 and 26.7.1984, extracted above) for the purpose of payment of wages at different rates, was not tenable. It was held, that such a classification was violative of Articles 14 and 16 of the Constitution, besides being opposed to the spirit of Article 7 of the International Covenant on Economic, Social and Cultural Rights, 1966, which exhorts all State parties to ensure fair wages and equal wages for equal work. Accordingly, this Court directed the Union of India, and the other respondents, to pay wages to the workmen, who were engaged as casual labourers, belonging to different categories, at rates equivalent to the minimum pay, in the pay-scales of regularly employed workers, in the corresponding cadres, but without any increments. The workers were also held to be entitled to corresponding dearness allowance and additional dearness allowance, if any, payable thereon. It was also directed, that whatever other benefits were being extended to casual labourers hitherto before, would be continued.

30. ***Harbans Lal v. State of Himachal Pradesh*** [23]***, decided by a two-Judge bench:*** The petitioners in this case were Carpenters (1st and 2nd grade), employed at the Wood Working Centre of the Himachal Pradesh State Handicraft Corporation. They were termed as daily-rated employees. Their claim in their petition was for emoluments in terms of wages paid to their counterparts in regular Government service, under the principle of 'equal pay for equal work'. On the factual matrix, based on the averments made in the pleadings, this Court felt that the Corporation with which the petitioners were employed, had no regularly employed Carpenter. It is, therefore evident, that the claim of the petitioners was only with reference to Carpenters engaged in different Government services. In the instant factual

[23] **(1989) 4 SCC 459**

backdrop, this Court expressed the view, that the claim made by the petitioners could not be accepted, because the discrimination complained of, must be within the same establishment, owned by the same management. It was emphasized, that a comparison under the principle of 'equal pay for equal work' could not be made with counterparts in other establishments, having a different management, or even with establishments in different geographical locations, though owned by the same master. It was held, that unless it was shown, that there was discrimination amongst the same set of employees under the same master, in the same establishment, the principle of 'equal pay for equal work' would not be applicable. It is, therefore, that the claim of the petitioners was rejected.

31. *Grih Kalyan Kendra Workers' Union v. Union of India*[6]*, decided by a two- Judge bench:* The workers' union had approached this Court, for the first time, in 1984, by filing writ petition no. 13924 of 1984. In the above petition, the relief claimed was for payment of wages under the principle of 'equal pay for equal work'. The petitioners sought parity with employees of the New Delhi Municipal Committee, and also, with employees of other departments of the Delhi Administration, and the Union of India. They approached this Court again by filing civil writ petition no. 869 of 1988, which was disposed of by the above cited case.

(ii) The petitioners were employees of Grih Kalyan Kendras. They desired the Union of India, to pay them wages in the regular pay-scales, at par with other employees performing similar work, under the New Delhi Municipal Committee, or the Delhi Administration, or the Union of India. It would be relevant to mention, that the petitioner- Workers' Union, was representing employees working on ad-hoc basis. Some of them were being paid a fixed salary (described as honorarium), while others were working on piece-rate wages at the production centres, without there being any provision for any scale of pay, or other benefits like gratuity, pension, provident fund etc.

(iii) This Court, in the first instance, endeavoured to deal with the question, whether employers of these workers, were denying them wages as were being paid to other similarly placed employees, doing the same or similar work. The question came to be examined on account of the fact, that unless the petitioners could demonstrate, that the employees of the Grih Kalyan Kendras were being discriminated against, on the subject of pay and other emoluments, with other similarly placed employees, the principle of 'equal pay for equal work' would not be applicable. During the course of the

first adjudication, in writ petition no. 13924 of 1984, this Court requested a former Chief Justice of India to make recommendations after taking into consideration, firstly, whether other similarly situated employees (engaged in similar comparable works, putting in comparable hours of work, in a comparable employment) were being paid higher pay, and if so, what should be the entitlement of the agitating employees, in order to comply with the principle of 'equal pay for equal work'; and secondly, if there is no other similar comparable employment, whether the remuneration of the agitating employees deserved to be revised, on the ground that their remuneration was unconscionable or unfair, and if so, to what extent. Pursuant to the above request, the former Chief Justice of India, concluded, that there was no employment comparable to the employment held by those engaged by the Grih Kalyan Kendras, and therefore, they could not seek parity with employees, working either under the New Delhi Municipal Committee, or the Delhi Administration, or the Union of India.

(iv) Based on the aforesaid factual conclusion, this Court held, that the concept of equality implies and requires equal treatment, for those who are situated equally. Comparison between unequals is not possible. Since the workers who had approached this Court had failed to establish, that they were situated similarly as others, they could not be extended benefits which were being given to those, with whom they claimed parity. And therefore, since there were no other employees comparable to the employees working in the Grih Kalyan Kendras, this Court declined to entertain the prayer made by the petitioners.

32. ***Ghaziabad Development Authority v. Vikram Chaudhary[24], decided by a two-Judge bench:*** The respondents in this case were engaged by the Ghaziabad Development Authority, on daily-wage basis. The instant judgment has been referred to only because it was cited by the learned counsel for the appellants. In the cited case, the claim raised by the respondents was not based on the principle of 'equal pay for equal work', yet it would be relevant to mention, that while disposing of the appeal preferred by the Ghaziabad Development Authority, this Court held that the respondents, who were engaged as temporary daily wage employees, would not be entitled to pay at par with regular employees, but would be entitled to pay in the minimum wages prescribed under the statute, if any, or the prevailing wages as available in the locality. It would, therefore, be improper for us to treat this judgment as laying down any principle emerging from the concept of 'equal pay for equal work'.

[24] (1995) 5 SCC 210

33. ***State of Haryana v. Jasmer Singh***[25], decided by a two-Judge bench: The respondents were employed as Mali-cum-Chowkidars/Pump Operators on dailywage basis, under the employment of the Government of Haryana. They had approached the High Court claiming the same salary as was being paid to the regularly employed persons, holding similar posts in the State of Haryana. The instant prayer was made by the respondents, under the principle of 'equal pay for equal work'. The above prayer made by the respondents, was granted by the High Court. The High Court issued a direction to the State Government, to pay the respondents, the same salary and allowances as were being paid to regular employees holding similar posts, with effect from the dates on which the respondents were engaged by the State Government.

(ii) This Court held, that the respondents who were employed on daily-wage basis, could not be treated at par with persons employed on regular basis, against similar posts. It was concluded, that daily-rated workers were not required to possess the qualifications required for regular workers, nor did they have to fulfill the postulated requirement of age, at the time of recruitment. Dailyrated workers, it was felt, were not selected in the same manner as regular employees, inasmuch as, their selection was not as rigorous as that of employees selected on regular basis. This Court expressed the view, that there were also other provisions relating to regular service, such as the liability of a member of the service to be transferred, and his being subjected to disciplinary jurisdiction. It was pointed out, that daily-rated employees were not subjected to either of the aforesaid contingencies/consequences. In view of the aforesaid consideration, this Court held that the respondents, who were employed on dailywage basis, could not be equated with regular employees for purposes of their wages, nor were they entitled to obtain the minimum of the regular pay-scale extended to regular employees. This Court, however held, that if a minimum wage was prescribed for such workers, the respondents would be entitled to it, if it was higher than the emoluments which were being paid to them.

(iii) It would be relevant to mention that in the above decision this Court took notice of the fact, that the State of Haryana had taken policy decisions from time to time to regularize the services of the employees, similarly placed as the respondents, wherein daily-wage employees on completion of 3/5 years' service, were entitled to regularization. On their being regularized, they were entitled to wages payable to regular employees.

[25] (1996) 11 SCC 77

34. ***State of Punjab v. Devinder Singh*[26], *decided by a two-Judge bench:*** The respondents were daily-wage Ledger-Keepers/Ledger Clerks engaged by the State of Punjab. They approached the Punjab & Haryana High Court, claiming salary and allowances, as were being paid to regular employees holding similar posts. The High Court held in their favour, and directed the State Government to pay to the respondents, salary and allowances, as were being paid to regular employees holding similar posts. The aforesaid decision was rendered because the High Court accepted their contention, that they were doing the same work as was taken from regular Ledger-Keepers/Ledger Clerks. Their prayer was accordingly accepted, under the principle of 'equal pay for equal work'. (ii) This Court was of the view that the principle of 'equal pay for equal work' could enure to the benefit of the respondents to the limited extent, that they could have been paid the minimum of the pay-scale of Ledger-Keepers/Ledger Clerks, appointed on regular basis. This conclusion was drawn by applying the principle of 'equal pay for equal work'. This Court, therefore, allowed the prayer made by the State Government to the aforesaid limited extent. The right claimed by the respondents, to be paid in the same time scale, as regularly employed Ledger-Keepers/Ledger Clerks were being paid, was declined.

35. ***State of Haryana v. Tilak Raj*[27]**, decided by a two-Judge bench: Thirty five respondents were appointed at different points of time, as Helpers on dailywages by the Haryana Roadways. They filed a writ petition before the Punjab and Haryana High Court, claiming regularization because they had rendered long years of service. They also claimed salary, as was payable to regular employees, engaged for the same nature of work, as was being performed by them. Even though, the High Court did not accept the prayer made by the respondents, either for regularization or for payment of wages at par with regular employees, it directed the State of Haryana to pay to the respondents, the minimum pay in the scale of pay applicable to regular employees. The State of Haryana being aggrieved by the order passed by the High Court, approached this Court.

(ii) While disposing of the appeal preferred by the State of Haryana, this Court accepted the contention advanced on its behalf, that a scale of pay is attached to a definite post. This Court also accepted, that a daily-wager holds no post. In view of the above factual/legal position, this Court arrived at the conclusion, that the prayer made by the respondents before the High Court, that they be granted emoluments in the pay-scale of the regular employees,

[26] (1998) 9 SCC 595 [27] (2003) 6 SCC 123

could not be acceded to. Since no material was placed before the High Court, comparing the nature of duties of either category, it was held, that it was not possible to hold that the principle of 'equal pay for equal work' could be invoked by the respondents, to claim wages in the regular pay-scale.

(iii) Despite having found that the respondents were not eligible to claim wages in the regular scale of pay, on account of the fact that they were engaged on daily-wage basis, this Court directed the State of Haryana to pay to the respondents, the minimum wages as prescribed for such workers.

36. ***Secretary, State of Karnataka v. Umadevi[28], decided by a five-Judge Constitution Bench:*** Needless to mention, that the main proposition canvassed in the instant judgment, pertained to regularization of government servants, based on the employees having rendered long years of service, as temporary, contractual, casual, daily-wage or on ad-hoc basis. It is, however relevant to mention, that the Constitution Bench did examine the question of wages, which such employees were entitled to draw. In paragraph 8 of the judgment, a reference was made to civil appeal nos. 3595-612 of 1999, wherein, the respondent-employees were temporarily engaged on daily-wages in the Commercial Taxes Department. As they had rendered service for more than 10 years, they claimed permanent employment in the department. They also claimed benefits as were extended to regular employees of their cadre, including wages (equal to their salary and allowances) with effect from the dates from which they were appointed. Even though the administrative tribunal had rejected their claim, by returning a finding, that they had not made out a case for payment of wages, equal to those engaged on regular basis, the High Court held that they were entitled to wages, equal to the salary of regular employees of their cadre, with effect from the date from which they were appointed. The direction issued by the High Court resulted in payment of higher wages retrospectively, for a period of 10 and more years. It would also be relevant to mention, that in passing the above direction, the High Court had relied on the decision rendered by a three-Judge bench of this Court in Dharwad District PWD Literate Daily-***Wage Employees Association v. State of Karnataka[29]***. The Constitution Bench, having noticed the contentions of the rival parties, on the subject of wages payable to daily-wagers, recorded its conclusions as under:-

> "55. In cases relating to service in the commercial taxes department, the High Court has directed that those engaged on daily wages, be

[28] (2006) 4 SCC 1 , [29] (1990) 2 SCC 396

paid wages equal to the salary and allowances that are being paid to the regular employees of their cadre in government service, with effect from the dates from which they were respectively appointed. The objection taken was to the direction for payment from the dates of engagement. We find that the High Court had clearly gone wrong in directing that these employees be paid salary equal to the salary and allowances that are being paid to the regular employees of their cadre in government service, with effect from the dates from which they were respectively engaged or appointed. It was not open to the High Court to impose such an obligation on the State when the very question before the High Court in the case was whether these employees were entitled to have equal pay for equal work so called and were entitled to any other benefit. They had also been engaged in the teeth of directions not to do so. We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that is being paid to regular employees be paid to these daily-wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily-wage earners, there would be no question of other allowances being paid to them. In view of our conclusion, that Courts are not expected to issue directions for making such persons permanent in service, we set aside that part of the direction of the High Court directing the Government to consider their cases for regularization. We also notice that the High Court has not adverted to the aspect as to whether it was regularization or it was giving permanency that was being directed by the High Court. In such a situation, the direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent. If sanctioned posts are vacant (they are said to be vacant) the State will take immediate steps for filling those posts by a regular process of selection. But when regular recruitment is undertaken, the respondents in C.A. Nos. 3595-3612 and those in the Commercial Taxes Department similarly situated, will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for their having been engaged for work in the

> Department for a significant period of time. That would be the extent of the exercise of power by this Court under Article 142 of the Constitution to do justice to them." We have extracted the aforesaid paragraph, so as not to make any inference on our own, but to project the determination rendered by the Constitution Bench, as was expressed by the Bench.

We have no hesitation in concluding, that the Constitution Bench consciously distinguished the issue of pay parity, from the issue of absorption/regularization in service. It was held, that on the issue of pay parity, the High Court ought to have directed, that the daily-wage workers be paid wages equal to the salary at the lowest grade of their cadre. The Constitution Bench expressed the view, that the concept of equality would not be applicable to the issue of absorption/regularization in service. And conversely, on the subject of pay parity, it was unambiguously held, that daily-wage earners should be paid wages equal to the salary at the lowest grade (without any allowances).

37. ***State of Haryana v. Charanjit Singh[30], decided by a three-Judge bench:*** A large number of civil appeals were collectively disposed of by a common order. In all these appeals, the respondents were daily-wagers, who were appointed as Ledger Clerks, Ledger Keepers, Pump Operators, Mali-cum-Chowkidar, Fitters, Petrol Men, Surveyors, etc. All of them claimed the minimum wages payable under the pay-scale extended to regular Class-IV employees. The above relief was claimed with effect from the date of their initial appointment. It would be relevant to mention, that while the appeals disposed of by the common order were pending before this Court, all the respondents were regularized. From the date of their regularization, they were in any case, being paid salary in the scales applicable to regular Class-IV employees. The limited question which came up for adjudication before this Court in the matters was, whether the directions issued by the High Court to pay the minimum wage in the scale payable to Class- IV employees to the respondents, from the date of their filing the respective petition before the High Court, was required to be interfered with. While adjudicating upon the aforesaid issue, this Court made the following observations:-

> "19. Having considered the authorities and the submissions we are of the view that the authorities in the cases of State of Haryana v. Jasmer Singh, (1996) 11 SCC 77, State of Haryana v. Tilak Raj, (2003) 6

[30] (2006) 9 SCC 321

SCC 123, Orissa University of Agriculture & Technology v. Manoj K. Mohanty, (2003) 5 SCC 188, Govt. of W.B. v. Tarun K. Roy, (2004) 1 SCC 347, lay down the correct law. Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a Court of law. But equal pay must be for equal work of equal value. The principle of "equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a difference. If the educational qualifications are different, then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by the competent authority cannot be challenged. A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. Thus normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interfere. Normally a party claiming equal pay for equal work should

be required to raise a dispute in this regards. In any event the party who claims equal pay for equal work has to make necessary averments and prove that all things are equal. Thus, before any direction can be issued by a Court, the Court must first see that there are necessary averments and there is a proof. If the High Court, is on basis of material placed before it, convinced that there was equal work of equal quality and all other relevant factors are fulfilled it may direct payment of equal pay from the date of the filing of the respective Writ Petition. In all these cases, we find that the High Court has blindly proceeded on the basis that the doctrine of equal pay for equal work applies without examining any relevant factors."

Having made the above observations, the judgments rendered by the High Court were set aside, and the matters were remanded back to the High Court, to examine each case in order to determine whether the respondents were discharging the same duties and responsibilities, as the employees with whom they claimed parity. In sum and substance therefore, this Court acceded to the proposition that daily-wagers who were rendering the same duties and responsibilities as regular employees, would be entitled to the minimum wage in the pay-scale payable to regular employees. It is only because the said factual determination had not been rendered by the High Court, the matter was remanded back, for a fresh adjudication on the above limited issue.

38. ***State of U.P. v. Putti Lal[31], decided by a three-Judge bench***: The question which arose for adjudication was, whether the respondents who were daily-rated wage earners in the Forest Department, were entitled to regularization, and should be paid the minimum of the pay-scale as was payable to a regular worker, holding a corresponding post in the Government. On the above issue, this Court in the above judgment, recorded the following conclusion:-

> *"5. In several cases this Court applying the principle of equal pay for equal work has held that a daily-wager, if he is discharging the similar duties as those in the regular employment of the Government, should at least be entitled to receive the minimum of the pay scale though he might not be entitled to any increment or any other allowance that is permissible to his counterpart in the Government.* In our opinion that would be the correct position and we, therefore, direct that these daily-wagers would be entitled to draw at the minimum of the pay scale being received by their counterparts in the

[31] (2006) 9 SCC 337

> Government and would not be entitled to any other allowances orincrement so long as they continue as daily-wagers. The question of their regular absorption will obviously be dealt with in accordance with the statutory rules already referred to."

It is therefore apparent, that in the instant judgment, the three-Judge bench extended the benefit of the principle of 'equal pay for equal work' to persons engaged on daily-wage basis.

39. ***State of Punjab v. Surjit Singh[32], decided by a two-Judge bench:*** The respondents in the above mentioned matter, were appointed in different posts in the Public Health Department of the State of Punjab. All of them were admittedly appointed on daily-wage basis. Inter alia, because the respondent-employees had put in a number of years of service, they were held by the High Court to be entitled to the benefit of the principle of 'equal pay for equal work'. In the challenge raised before this Court, it was concluded as under:-

> "36. With utmost respect, the principle, as indicated hereinbefore, has undergone a sea change. We are bound by the decisions of larger Benches. This Court had been insisting on strict pleadings and proof of various factors as indicated heretobefore. Furthermore, the burden of proof even in that case had wrongly been placed on the State which in fact lay on the writ petitioners claiming similar benefits. The factual matrix obtaining in the said case particularly similar qualification, interchangeability of the positions within the regular employees and the casual employees and other relevant factors which have been noticed by us also had some role to play."

Rather than determining whether or not the respondents were entitled to any benefit under the principle of 'equal pay for equal work', on account of their satisfying the conditions stipulated by this Court in different judgments including the one in State of Haryana v. Charanjit Singh30, this Court while disposing of the above matter, required the State to examine the cases of the respondents by appointing an expert committee, which would determine whether or not the parameters laid down in the judgments rendered by this Court, would entitle the respondent-employees to any benefit under the principle of 'equal pay for equal work'. Herein again, the principle in question, was considered as applicable to temporary employees.

[32] (2009) 9 SCC 514

40. ***Uttar Pradesh Land Development Corporation v. Mohd. Khursheed Anwar***[33], decided by a two-Judge bench: In the instant case, the respondents were employed on contract basis, on a consolidated monthly salary of Rs.2000/-. Prior to their appointment, they were interviewed by a selection committee alongwith other eligible candidates, and were found to be suitable for the job. Their contractual appointment was continued from time to time. Though they were employed on contract basis, the fact that two posts of Assistant Engineer and one post of Junior Engineer were vacant at the time of their engagement, was not disputed. The respondents were not given any specific designation. The Allahabad High Court, while accepting the claim filed by the respondents, held that they were entitled to wages in the regular pay-scale of Rs.2200-4000, prescribed for the post of Assistant Engineer.

(ii) This Court, while adjudicating upon the controversy arrived at the conclusion, that the High Court had granted relief to the respondents on the assumption that two vacant posts of Assistant Engineer were utilized for appointing the respondents. The above impression was found to be ex-facie fallacious, by this Court. This Court was of the view, that the orders of appointment issued to the respondents, did not lead to the inference, that they were appointed against the two vacant posts of Assistant Engineer. Despite the above, this Court held, that the decision of the appellant Corporation to effect economy by depriving the respondents even, the minimum of pay-scale, was totally arbitrary and unjustified. This Court expressed the view, that the very fact that the respondents were engaged on a consolidated salary of Rs.2000 per month, while the prescribed pay-scale of the post of Assistant Engineer in the other branches was Rs.2200-4000, and that of Junior Engineer was Rs.1600- 2660, was sufficient to infer, that both the respondents were engaged to work against the posts of Assistant Engineer. The appellants were directed to pay emoluments to the respondents, at the minimum of the pay-scale, prescribed for the post of Assistant Engineer (as revised from time to time), from the date of their appointment, till they continued in the employment of the Corporation.

41. ***Surendra Nath Pandey v. Uttar Pradesh Cooperative Bank Ltd.***[34]***, decided by a two-Judge bench***: The appellants in the above mentioned case, were appointed during 1978 to 1981 on daily-wage basis, by the U.P. Cooperative Bank Ltd. Upto 30.6.1981, they were paid daily-wages. From 1.7.1981, they were paid consolidated salary of Rs.368 per month, which was

[33] (2010) 7 SCC 739 , [34] (2010) 12 SCC 400

increased to Rs.575 per month with effect from 1.4.1982. From 1.7.1983, they were extended the benefit of minimum in the pay-scale applicable to regular employees, with allowances, but without yearly increments. Based on regulations framed for regularization of ad-hoc appointees in 1985, the appellants were regularized from different dates in 1985-86, whereafter, they were paid wages in the regular payscale, with all allowances. In 1990, they approached the Allahabad High Court, seeking benefit of regular pay-scale, allowances and other benefits, which were extended to regular employees, with effect from the date of their original appointment. Their claim was rejected by the High Court. While adjudicating upon the appeal preferred by the appellants, this Court held as under:-

> "9. We are of the view that the real issue is whether persons employed on stopgap or ad hoc basis were entitled to the benefit of pay scales with increments during the period of service on daily or stopgap or ad hoc basis. Unless the appellants are able to establish that either under the contract, or applicable rules, or settled principles of service jurisprudence, they are entitled to the benefit of pay scale with increments during the period of their stopgap/ad hoc service, it cannot be said that the appellants have the right to claim the benefit of pay scales with increments."

The Consideration

42. All the judgments noticed in paragraphs 7 to 24 hereinabove, pertain to employees engaged on regular basis, who were claiming higher wages, under the principle of 'equal pay for equal work'. The claim raised by such employees was premised on the ground, that the duties and responsibilities rendered by them, were against the same post for which a higher pay-scale was being allowed, in other Government departments. Or alternatively, their duties and responsibilities were the same, as of other posts with different designations, but they were placed in a lower scale. Having been painstakingly taken through the parameters laid down by this Court, wherein the principle of 'equal pay for equal work' was invoked and considered, it would be just and appropriate, to delineate the parameters laid down by this Court. In recording the said parameters, we have also adverted to some other judgments pertaining to temporary employees (also dealt with, in the instant judgment), wherein also, this Court had the occasion to express the legal position with reference to the principle of 'equal pay for equal work'. Our consideration, has led us to the following deductions:-

(i) The 'onus of proof', of parity in the duties and responsibilities of the subject post with the reference post, under the principle of 'equal pay for equal work', lies on the person who claims it. He who approaches the Court has to establish, that the subject post occupied by him, requires him to discharge equal work of equal value, as the reference post (see – the Orissa University of Agriculture & Technology case10, Union Territory Administration, Chandigarh v. Manju Mathur15, the Steel Authority of India Limited case16, and the National Aluminum Company Limited case[18]).

(ii) The mere fact that the subject post occupied by the claimant, is in a "different department" vis-a-vis the reference post, does not have any bearing on the determination of a claim, under the principle of 'equal pay for equal work'. Persons discharging identical duties, cannot be treated differently, in the matter of their pay, merely because they belong to different departments of Government (see – the Randhir Singh case1, and the D.S. Nakara case[2]).

(iii) The principle of 'equal pay for equal work', applies to cases of unequal scales of pay, based on no classification or irrational classification (see – the Randhir Singh case1). For equal pay, the concerned employees with whom equation is sought, should be performing work, which besides being functionally equal, should be of the same quality and sensitivity (see – the Federation of All India Customs and Central Excise Stenographers (Recognized) case3, the Mewa Ram Kanojia case5, the Grih Kalyan Kendra Workers' Union case6 and the S.C. Chandra case[12]).

(iv) Persons holding the same rank/designation (in different departments), but having dissimilar powers, duties and responsibilities, can be placed in different scales of pay, and cannot claim the benefit of the principle of 'equal pay for equal work' (see – the Randhir Singh case1, State of Haryana v. Haryana Civil Secretariat Personal Staff Association[9], and the Hukum Chand Gupta case[17]). Therefore, the principle would not be automatically invoked, merely because the subject and reference posts have the same nomenclature.

(v) In determining equality of functions and responsibilities, under the principle of 'equal pay for equal work', it is necessary to keep in mind, that the duties of the two posts should be of equal sensitivity, and also, qualitatively similar. Differentiation of pay-scales for posts with difference in degree of responsibility, reliability and confidentiality, would fall within the realm of valid classification, and therefore, pay differentiation would be legitimate and permissible (see – the Federation of All India Customs and Central Excise Stenographers (Recognized) case[3] and the State Bank of India

case[8]). The nature of work of the subject post should be the same and not less onerous than the reference post. Even the volume of work should be the same. And so also, the level of responsibility. If these parameters are not met, parity cannot be claimed under the principle of 'equal pay for equal work' (see - State of U.P. v. J.P. Chaurasia4, and the Grih Kalyan Kendra Workers' Union case [6]).

(vi) For placement in a regular pay-scale, the claimant has to be a regular appointee. The claimant should have been selected, on the basis of a regular process of recruitment. An employee appointed on a temporary basis, cannot claim to be placed in the regular pay-scale (see – the Orissa University of Agriculture & Technology case[10]).

(vii) Persons performing the same or similar functions, duties and responsibilities, can also be placed in different pay-scales. Such as - 'selection grade', in the same post. But this difference must emerge out of a legitimate foundation, such as – merit, or seniority, or some other relevant criteria (see - State of U.P. v. J.P. Chaurasia [4]).

(viii) If the qualifications for recruitment to the subject post vis-a-vis the reference post are different, it may be difficult to conclude, that the duties and responsibilities of the posts are qualitatively similar or comparable (see – the Mewa Ram Kanojia case[5], and Government of W.B. v. Tarun K. Roy11). In such a cause, the principle of 'equal pay for equal work', cannot be invoked.

(ix) The reference post, with which parity is claimed, under the principle of 'equal pay for equal work', has to be at the same hierarchy in the service, as the subject post. Pay-scales of posts may be different, if the hierarchy of the posts in question, and their channels of promotion, are different. Even if the duties and responsibilities are same, parity would not be permissible, as against a superior post, such as a promotional post (see - Union of India v. Pradip Kumar Dey[7], and the Hukum Chand Gupta case[17]).

(x) A comparison between the subject post and the reference post, under the principle of 'equal pay for equal work', cannot be made, where the subject post and the reference post are in different establishments, having a different management. Or even, where the establishments are in different geographical locations, though owned by the same master (see – the Harbans Lal case[23]). Persons engaged differently, and being paid out of different funds, would not be entitled to pay parity (see - Official Liquidator v. Dayanand[13]).

(xi) Different pay-scales, in certain eventualities, would be permissible even for posts clubbed together at the same hierarchy in the cadre. As for instance, if the duties and responsibilities of one of the posts are more onerous, or are exposed to higher nature of operational work/risk, the principle of 'equal pay for equal work' would not be applicable. And also when, the reference post includes the responsibility to take crucial decisions, and that is not so for the subject post (see – the State Bank of India case [8]).

(xii) The priority given to different types of posts, under the prevailing policies of the Government, can also be a relevant factor for placing different posts under different pay-scales. Herein also, the principle of 'equal pay for equal work' would not be applicable (see - State of Haryana v. Haryana Civil Secretariat Personal Staff Association[9]). (xiii) The parity in pay, under the principle of 'equal pay for equal work', cannot be claimed, merely on the ground, that at an earlier point of time, the subject post and the reference post, were placed in the same pay-scale. The principle of 'equal pay for equal work' is applicable only when it is shown, that the incumbents of the subject post and the reference post, discharge similar duties and responsibilities (see - State of West Bengal v. West Bengal Minimum Wages Inspectors Association[14]).

(xiv) For parity in pay-scales, under the principle of 'equal pay for equal work', equation in the nature of duties, is of paramount importance. If the principal nature of duties of one post is teaching, whereas that of the other is nonteaching, the principle would not be applicable. If the dominant nature of duties of one post is of control and management, whereas the subject post has no such duties, the principle would not be applicable. Likewise, if the central nature of duties of one post is of quality control, whereas the subject post has minimal duties of quality control, the principle would not be applicable (see – Union Territory Administration, Chandigarh v. Manju Mathur[15]).

(xv) There can be a valid classification in the matter of pay-scales, between employees even holding posts with the same nomenclature i.e., between those discharging duties at the headquarters, and others working at the institutional/sub-office level (see – the Hukum Chand Gupta case[17]), when the duties are qualitatively dissimilar.

(xvi) The principle of 'equal pay for equal work' would not be applicable, where a differential higher pay-scale is extended to persons discharging the same duties and holding the same designation, with the objective of ameliorating stagnation, or on account of lack of promotional avenues (see – the Hukum Chand Gupta case[17]).

(xvii) Where there is no comparison between one set of employees of one organization, and another set of employees of a different organization, there can be no question of equation of pay-scales, under the principle of 'equal pay for equal work', even if two organizations have a common employer. Likewise, if the management and control of two organizations, is with different entities, which are independent of one another, the principle of 'equal pay for equal work' would not apply (see – the S.C. Chandra case[12], and the National Aluminum Company Limited case[18]).

43. We shall now venture to summarize the conclusions recorded by this Court, with reference to a claim of pay parity, raised by temporary employees (differently designated as work-charge, daily-wage, casual, ad-hoc, contractual, and the like), in the following two paragraphs.

44. We shall first outline the conclusions drawn in cases where a claim for pay parity, raised at the hands of the concerned temporary employees, was accepted by this Court, by applying the principle of 'equal pay for equal work', with reference to regular employees:-

(i) In the Dhirendra Chamoli case[19] this Court examined a claim for pay parity raised by temporary employees, for wages equal to those being disbursed to regular employees. The prayer was accepted. The action of not paying the same wage, despite the work being the same, was considered as violative of Article 14 of the Constitution. It was held, that the action amounted to exploitation – in a welfare state committed to a socialist pattern of society.

(ii) In the Surinder Singh case[20] this Court held, that the right of equal wages claimed by temporary employees emerged, inter alia, from Article 39 of the Constitution. The principle of 'equal pay for equal work' was again applied, where the subject employee had been appointed on temporary basis, and the reference employee was borne on the permanent establishment. The temporary employee was held entitled to wages drawn by an employee on the regular establishment. In this judgment, this Court also took note of the fact, that the above proposition was affirmed by a Constitution Bench of this Court, in the D.S. Nakara case[2].

(iii) In the Bhagwan Dass case[21] this Court recorded, that in a claim for equal wages, the duration for which an employee would remain (- or had remained) engaged, would not make any difference. So also, the manner of selection and appointment would make no difference. And therefore, whether the selection was made on the basis of open competition or was limited to a cluster of villages, was considered inconsequential, insofar as the

applicability of the principle is concerned. And likewise, whether the appointment was for a fixed limited duration (six months, or one year), or for an unlimited duration, was also considered inconsequential, insofar as the applicability of the principle of 'equal pay for equal work' is concerned. It was held, that the claim for equal wages would be sustainable, where an employee is required to discharge similar duties and responsibilities as regular employees, and the concerned employee possesses the qualifications prescribed for the post. In the above case, this Court rejected the contention advanced on behalf of the Government, that the plea of equal wages by the employees in question, was not sustainable because the concerned employees were engaged in a temporary scheme, and against posts which were sanctioned on a year to year basis.

(iv) In the Daily Rated Casual Labour Employed under P&T Department through Bhartiya Dak Tar Mazdoor Manch case[22] this Court held, that under principle flowing from Article 38(2) of the Constitution, Government could not deny a temporary employee, at least the minimum wage being paid to an employee in the corresponding regular cadre, alongwith dearness allowance and additional dearness allowance, as well as, all the other benefits which were being extended to casual workers. It was also held, that the classification of workers (as unskilled, semi-skilled and skilled), doing the same work, into different categories, for payment of wages at different rates, was not tenable. It was also held, that such an act of an employer, would amount to exploitation. And further that, the same would be arbitrary and discriminatory, and therefore, violative of Articles 14 and 16 of the Constitution.

(v) In State of Punjab v. Devinder Singh[26] this Court held, that daily-wagers were entitled to be placed in the minimum of the pay-scale of regular employees, working against the same post. The above direction was issued after accepting, that the concerned employees, were doing the same work as regular incumbents holding the same post, by applying the principle of 'equal pay for equal work'.

(vi) In the Secretary, State of Karnataka case[28], a Constitution Bench of this Court, set aside the judgment of the High Court, and directed that daily-wagers be paid salary equal to the lowest grade of salary and allowances being paid to regular employees. Importantly, in this case, this Court made a very important distinction between pay parity and regularization. It was held that the concept of equality would not be applicable to issues of absorption/regularization. But, the concept was held as applicable, and was

indeed applied, to the issue of pay parity – if the work component was the same. The judgment rendered by the High Court, was modified by this Court, and the concerned daily-wage employees were directed to be paid wages, equal to the salary at the lowest grade of the concerned cadre.

(vii) In State of Haryana v. Charanjit Singh[30], a three-Judge bench of this Court held, that the decisions rendered by this Court in State of Haryana v. Jasmer Singh[25], State of Haryana v. Tilak Raj[27], the Orissa University of Agriculture & Technology case[10], and Government of W.B. v. Tarun K. Roy11, laid down the correct law. Thereupon, this Court declared, that if the concerned daily-wage employees could establish, that they were performing equal work of equal quality, and all other relevant factors were fulfilled, a direction by a Court to pay such employees equal wages (from the date of filing the writ petition), would be justified.

(viii) In State of U.P. v. Putti Lal[31], based on decisions in several cases (wherein the principle of 'equal pay for equal work' had been invoked), it was held, that a daily-wager discharging similar duties, as those engaged on regular basis, would be entitled to draw his wages at the minimum of the pay-scale (drawn by his counterpart, appointed on regular basis), but would not be entitled to any other allowances or increments.

(ix) In the Uttar Pradesh Land Development Corporation case[33] this Court noticed, that the respondents were employed on contract basis, on a consolidated salary. But, because they were actually appointed to perform the work of the post of Assistant Engineer, this Court directed the employer to pay the respondents wages, in the minimum of the pay-scales ascribed for the post of Assistant Engineer.

45. We shall now attempt an analysis of the judgments, wherein this Court declined to grant the benefit of 'equal pay for equal work' to temporary employees, in a claim for pay parity with regular employees:-

(i) In the Harbans Lal case[23], daily-rate employees were denied the claimed benefit, under the principle of 'equal pay for equal work', because they could not establish, that the duties and responsibilities of the post(s) held by them, were similar/equivalent to those of the reference posts, under the State Government.

(ii) In the Grih Kalyan Kendra Workers' Union case[6], ad-hoc employees engaged in the Kendras, were denied pay parity with regular employees working under the New Delhi Municipal Committee, or the Delhi Administration, or the Union of India, because of the finding returned in the

report submitted by a former Chief Justice of India, that duties and responsibilities discharged by employees holding the reference posts, were not comparable with the posts held by members of the petitioner union.

(iii) In State of Haryana v. Tilak Raj[27], this Court took a slightly different course, while determining a claim for pay parity, raised by daily-wagers (-the respondents). It was concluded, that daily-wagers held no post, and as such, could not be equated with regular employees who held regular posts. But herein also, no material was placed on record, to establish that the nature of duties performed by the daily-wagers, was comparable with those discharged by regular employees. Be that as it may, it was directed, that the State should prescribe minimum wages for such workers, and they should be paid accordingly.

(iv) In State of Punjab v. Surjit Singh[32], this Court held, that for the applicability of the principle of 'equal pay for equal work', the respondents who were dailywagers, had to establish through strict pleadings and proof, that they were discharging similar duties and responsibilities, as were assigned to regular employees. Since they had not done so, the matter was remanded back to the High Court, for a re-determination on the above position. It is therefore obvious, that this Court had accepted, that where duties, responsibilities and functions were shown to be similar, the principle of 'equal pay for equal work' would be applicable, even to temporary employees (otherwise the order of remand, would be meaningless, and an exercise in futility).

(vi) It is, therefore apparent, that in all matters where this Court did not extend the benefit of 'equal pay for equal work' to temporary employees, it was because the employees could not establish, that they were rendering similar duties and responsibilities, as were being discharged by regular employees, holding corresponding posts.

46. We have consciously not referred to the judgment rendered by this Court in State of Haryana v. Jasmer Singh[25] (by a two-Judge division bench), in the preceding two paragraphs. We are of the considered view, that the above judgment, needs to be examined and explained independently. Learned counsel representing the State government, had placed emphatic reliance on this judgment. Our analysis is recorded hereinafter:-

(i) In the above case, the respondents who were daily-wagers were claiming the same salary as was being paid to regular employees. A series of reasons were recorded, to deny them pay parity under the principle of 'equal

pay for equal work'. This Court expressed the view, that daily-wagers could not be treated at par with persons employed on regular basis, because they were not required to possess qualifications prescribed for appointment on regular basis. Dailywagers, it was felt, were not selected in the same manner as regular employees, inasmuch as, a regular appointee had to compete in a process of open selection, and would be appointed, only if he fell within the zone of merit. It was also felt, that daily-wagers were not required to fulfill the prescribed requirement of age, at the time of their recruitment. And also because, regular employees were subject to disciplinary proceedings, whereas, daily-wagers were not. Daily-wagers, it was held, could also not be equated with regular employees, because regular employees were liable to be transferred anywhere within their cadre. This Court therefore held, that those employed on daily-wages, could not be equated with regular employees, and as such, were not entitled to pay parity, under the principle of 'equal pay for equal work'.

(ii) First and foremost, it is necessary to emphasise, that in the course of its consideration in State of Haryana v. Jasmer Singh[25], this Court's attention had not been invited to the judgment in the Bhagwan Dass case[21], wherein on some of the factors noticed above, a contrary view was expressed. In the said case, this Court had held, that in a claim for equal wages, the manner of selection for appointment would not make any difference. It will be relevant to notice, that for the posts under reference in the Bhagwan Dass case[21], the selection of those appointed on regular basis, had to be made through the Subordinate Selection Board, by way of open selection. Whereas, the selection of the petitioners as daily-wagers, was limited to candidates belonging to a cluster of villages, and was not through any specialized selection body/agency. Despite thereof, it was held, that the benefit under the principle of 'equal pay for equal work', could not be denied to the petitioners. The aforesaid conclusion was drawn on the ground, that as long as the petitioners were performing similar duties, as those engaged on regular basis (on corresponding posts) from the standpoint of the doctrine of 'equal pay for equal work', there could be no distinction on the subject of payment of wages.

(iii) Having noticed the conclusion drawn in State of Haryana v. Jasmer Singh[25], it would be relevant to emphasise, that in the cited judgments (noticed in paragraph 26 onwards, upto paragraph 41), the employees concerned, could not have been granted the benefit of the principle of 'equal pay for equal work' (in such of the cases, where it was so granted), because temporary employees (daily-wage employees, in the said case) are never ever

selected through a process of open selection, by a specialized selection body/agency. We would therefore be obliged to follow the large number of cases where pay parity was granted, rather than, the instant singular judgment recording a divergent view.

(iv) Temporary employees (irrespective of their nomenclature) are also never governed by any rules of disciplinary action. As a matter of fact, a daily-wager is engaged only for a day, and his services can be dispensed with at the end of the day for which he is engaged. Rules of disciplinary action, are therefore to the advantage of regular employees, and the absence of their applicability, is to the disadvantage of temporary employees, even though the judgment in State of Haryana v. Jasmer Singh[25], seems to project otherwise.

(v) Even the issue of transferability of regular employees referred to in State of Haryana v. Jasmer Singh[25], in our view, has not been examined closely. Inasmuch as, temporary employees can be directed to work anywhere, within or outside their cadre, and they have no choice but to accept. This is again, a further disadvantage suffered by temporary employees, yet the judgment projects as if it is to their advantage.

(vi) It is also necessary to appreciate, that in all temporary appointments (-work-charge, daily-wage, casual, ad-hoc, contractual, and the like), the distinguishing features referred to in State of Haryana v. Jasmer Singh[25], are inevitable, yet in all the judgments referred to above (rendered before and after, the judgment in the State of Haryana v. Jasmer Singh[25]), the proposition recorded in the instant judgment, was never endorsed.

(vii) It is not the case of the appellants, that the respondent-employees do not possess the minimum qualifications required to be possessed for regular appointment. And therefore, this proposition would not be applicable to the facts of the cases in hand.

(viii) Another reason for us in passing by, the judgment in State of Haryana v. Jasmer Singh[25] is, that the bench deciding the matter had in mind, that dailywagers in the State of Haryana, were entitled to regularization on completion of 3/5 years of service, and therefore, all the concerned employees, would in any case be entitled to wages in the regular pay-scale, after a little while. This factual position was noticed in the judgment itself.

(ix) It is not necessary for us to refer the matter for adjudication to a larger bench, because the judgment in State of Haryana v. Jasmer Singh[25], is irreconcilable and inconsistent with a large number of judgments, some of which are by larger benches, where the benefit of the principle in question was extended to temporary employees (including daily-wagers).

(x) For all the above reasons, we are of the view that the claim of the appellants cannot be considered, on the basis of the judgment in State of Haryana v. Jasmer Singh[25].

47. We shall now endeavour to examine the impugned judgments.

48. First and foremost, it is essential for us to deal with the judgment dated 11.11.2011 rendered by the full bench of the High Court (in Avtar Singh v. State of Punjab & Ors., CWP no. 14796 of 2003). A perusal of the above judgment reveals, that the High Court conspicuously focused its attention to the decision of the Constitution Bench in the Secretary, State of Karnataka case[28]. While dealing with the above judgment, the full bench expressed the view, that though at the first impression, the judgment appeared to expound that payment of minimum wages drawn by regular employees, had also to be extended to persons employed on temporary basis, but a careful reading of the same would show that, that was not so. Learned counsel, representing the State of Punjab, reiterated the above position. In order to understand the tenor of the aforesaid assertion, reference was made to paragraphs 44 and 48, of the judgment of the Constitution Bench, which are extracted hereunder:-

> "44. The concept of "equal pay for equal work'' is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of public employment….
>
> …..It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution permitting those persons engaged, to be absorbed or to be made permanent, based on

their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality.

xxx xxx xxx

48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled."

We have given our thoughtful consideration to the observations recorded by this Court, as were relied upon by the full bench (- as also, by the learned counsel representing the State of Punjab). It is not possible for us to concur with the inference drawn by the full bench, for the reasons recorded hereunder:-

(i) We are of the considered view, that in paragraph 44 extracted above, the Constitution Bench clearly distinguished the issues of pay parity, and

regularization in service. It was held, that on the issue of pay parity, the concept of 'equality' would be applicable (as had indeed been applied by the Court, in various decisions), but the principle of 'equality' could not be invoked for absorbing temporary employees in Government service, or for making temporary employees regular/permanent. All the observations made in the above extracted paragraphs, relate to the subject of regularization/permanence, and not, to the principle of 'equal pay for equal work'. As we have already noticed above, the Constitution Bench unambiguously held, that on the issue of pay parity, the High Court ought to have directed, that the daily-wage workers be paid wages equal to the salary, at the lowest grade of their cadre. This deficiency was made good, by making such a direction.

(ii) Insofar as paragraph 48 extracted above is concerned, all that needs to be stated is, that they were merely submissions of learned counsel, and not conclusions drawn by this Court. Therefore, nothing further needs to be stated, with reference to paragraph 48.

(iii) We are therefore of the view, that the High Court seriously erred in interpreting the judgment rendered by this Court in the Secretary, State of Karnataka case28, by placing reliance on paragraphs 44 and 48 extracted above, for drawing its inferences with reference to the subject of pay parity. On the above subject/issue, this Court's conclusions were recorded in paragraph 55 (extracted in paragraph 36, hereinabove), which have already been dealt with by us in an earlier part of this judgment.

49. It would also be relevant to mention, that to substantiate its inference drawn from the judgment rendered by this Court in the Secretary, State of Karnataka case28, the full bench of the High Court, placed reliance on State of Punjab v. Surjit Singh[32], and while doing so, reference was made to the following observations recorded in paragraphs 27 to 30 (of the said judgment). Learned counsel for the State of Punjab has reiterated the above position. Paragraphs 27 to 30 aforementioned are being extracted hereunder:-

> "27. While laying down the law that regularization under the constitutional scheme is wholly impermissible, the Court in State of Karnataka v. Umadevi (3), (2006) 4 SCC 1, had issued certain directions relating to the employees in the services of the Commercial Taxes Department, as noticed hereinbefore. The employees of the Commercial Taxes Department were in service for more than ten years. They were appointed in 1985-1986. They were sought to be regularized in terms of a scheme. Recommendations were made by

the Director, Commercial Taxes for their absorption. It was only when such recommendations were not acceded to, the Administrative Tribunal was approached. It rejected their claim. The High Court, however, allowed their prayer which was in question before this Court.

28. This Court stated: (Secretary, State of Karnataka v. Umadevi, (2006) 4 SCC 1, pp. 19-20, para 8)

> "8. … It is seen that the High Court without really coming to grips with the question falling for decision in the light of the findings of the Administrative Tribunal and the decisions of this Court, proceeded to order that they are entitled to wages equal to the salary and allowances that are being paid to the regular employees of their cadre in government service with effect from the dates from which they were respectively appointed. It may be noted that this gave retrospective effect to the judgment of the High Court by more than 12 years. The High Court also issued a command to the State to consider their cases for regularisation within a period of four months from the date of receipt of that order. The High Court seems to have proceeded on the basis that, whether they were appointed before 1-7-1984, a situation covered by the decision of this Court in Dharwad District PWD Literate Daily Wage Employees Assn. v. State of Karnataka, (1990) 2 SCC 396, and the scheme framed pursuant to the direction thereunder, or subsequently, since they have worked for a period of 10 years, they were entitled to equal pay for equal work from the very inception of their engagement on daily wages and were also entitled to be considered for regularisation in their posts."

29. It is in the aforementioned factual backdrop, this Court in exercise of its jurisdiction under Article 142 of the Constitution of India, directed: (Secretary, State of Karnataka v. Umadevi, (2006) 4 SCC 1, p. 43, para 55)

> "55. … Hence, that part of the direction of the Division Bench is modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily-wage earners, there would be no question of other allowances being paid to them. In view of our conclusion, that the courts are not expected to issue directions for making such persons permanent in service, we set aside that part of

> the direction of the High Court directing the Government to consider their cases for regularisation. We also notice that the High Court has not adverted to the aspect as to whether it was regularisation or it was giving permanency that was being directed by the High Court. In such a situation, the direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent. If sanctioned posts are vacant (they are said to be vacant) the State will take immediate steps for filling those posts by a regular process of selection. But when regular recruitment is undertaken, the respondents in CAs Nos. 3595-612 and those in the Commercial Taxes Department similarly situated, will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for their having been engaged for work in the Department for a significant period of time. That would be the extent of the exercise of power by this Court under Article 142 of the Constitution to do justice to them."
>
> 30. We, therefore, do not see that any law has been laid down in para 55 of the judgment in Umadevi case. Directions were issued in view of the limited controversy. As indicated, the State's grievances were limited."

Yet again, we are of the view, that the full bench erred in referring to the above observations, to draw its conclusions. Our reasons are summarized herein below:-

(i) It is apparent, that this Court in State of Punjab v. Surjit Singh[32], did hold, that the determination rendered in paragraph 55 of the judgment in the Secretary, State of Karnataka case[28], was in exercise of the power vested in this Court, under Article 142 of the Constitution of India. But the above observation does not lead, to the conclusion or the inference, that the principle of 'equal pay for equal work' is not applicable to temporary employees. In fact, there is a positive take-away for the temporary employees. The Constitution Bench would, in the above situation, be deemed to have concluded, that to do complete justice to the cause of temporary employees, they should be paid the minimum wage of a regular employee, discharging the same duties. It needs to be noticed, that on the subject of pay parity, the findings recorded by this Court in the Secretary, State of Karnataka case[28], were limited to the conclusions recorded in paragraph 55 thereof (which we have dealt with above, while dealing with the case law, on the principle of 'equal pay for equal work').

(ii) Even in the case under reference - State of Punjab v. Surjit Singh[32], this Court accepted the principle of 'equal pay for equal work', as applicable to temporary employees, by requiring the State to examine the claim of the respondents for pay parity, by appointing an expert committee. The expert committee was required to determine, whether the respondents satisfied the conditions stipulated in different judgments of this Court including State of Punjab v. Charanjit Singh[30], wherein this Court had acceded to the proposition, that daily-wagers who were rendering the same duties and responsibilities as regular employees, would be entitled to the minimum wage payable to regular employees. And had therefore, remanded the matter back to the High Court for a fresh adjudication. Paragraph 38 of the judgment in State of Punjab v. Surjit Singh[32], wherein the remand was directed, is being extracted below:-

> "38. We, therefore, are of the opinion that the interest of justice would be subserved if the State is directed to examine the cases of the respondents herein by appointing an expert committee as to whether the principles of law laid down herein viz. as to whether the respondents satisfy the factors for invocation of the decision in State of Haryana v. Charajnit Singh, (2006) 9 SCC 321 in its entirety including the question of appointment in terms of the recruitment rules have been followed."

(iii) For all the above reasons, we are of the view, that the claim of the temporary employees, for minimum wages, at par with regularly engaged Government employees, cannot be declined, on the basis of the judgment in *State of Punjab v. Surjit Singh* [32].

50. The impugned judgment rendered by the full bench, also relied upon the judgment in ***Satya Prakash v. State of Bihar*[35]**, which also attempted to interpret the judgment in the Secretary, State of Karnataka case28. Learned counsel for the State of Punjab also referred to the same, to canvass the case of the State government. Relevant observations relied upon, are reproduced below:-

> "7. We are of the view that the appellants are not entitled to get the benefit of regularization of their services since they were never appointed in any sanctioned posts. The appellants were only engaged on daily wages in the Bihar Intermediate Education Council.
>
> 8.In State of Karnataka v. Umadevi (3), (2006) 4 SCC 1, this Court

(2010) 4 SCC 179 [35]

held that the Courts are not expected to issue any direction for absorption/regularization or permanent continuance of temporary, contractual, casual, daily-wage or ad hoc employees. This Court held that such directions issued could not be said to be inconsistent with the constitutional scheme of public employment. This Court held that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. In view of the law laid down by this Court, the directions sought for by the appellants cannot be granted.

9. Paragraph 53 of Umadevi (3) judgment, deals with irregular appointments (not illegal appointments). The Constitution Bench specifically referred to the judgments in State of Mysore vs. S.V. Narayanappa, AIR 1967 SC 1071, and R.N. Nanjundappa vs. T. Thimmiah, (1972) 1 SCC 409, in para 15 of Umadevi (3) judgment as well. Let us refer to paras 15 and 16 of Umadevi (3) judgment in this context.

xxx xxx xxx

15. In our view, the appellants herein would fall under the category of persons mentioned in paras 8 and 55 of the judgment and not in para 53 of judgment of Umadevi (3)."

Yet again, all that needs to be stated is, that the observations relied upon by the full bench of the High Court, dealt with the issue of regularization, and not with the concept of 'equal pay for equal work'. Paragraph 7 extracted above, leaves no room for any doubt, that the issue being considered in the Satya Prakash case35, pertained to regularization of the appellants in service. Our view, that the issue being dealt with pertained to regularization gains further ground from the fact (recorded in paragraph 1 of the above judgment), that the appellants in the Satya Prakash case35 had approached this Court, to claim the benefit of paragraph 53 of the judgment in the Secretary, State of Karnataka case28. Paragraph 53 aforementioned, is reproduced below:-

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in State of Maysore v. S.V. Narayanappa, AIR 1967 SC 1071, R.N. Nanjundappa v. T. Thimmiah, (1972) 1 SCC 409, and B.N. Nagarajan

> v. State of Karnataka, (1979) 4 SCC 507, and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

A perusal of paragraph 53 extracted above, leaves no room for any doubt, that the issue canvassed was of regularization, and not pay parity. We are therefore of the view, that reliance on paragraph 53, for determining the question of pay parity (claimed by the concerned employees), resulted in the High Court drawing an incorrect inference.

51. The full bench of the High Court, while adjudicating upon the above controversy had concluded, that temporary employees were not entitled to the minimum of the regular pay-scale, merely for the reason, that the activities carried on by daily-wagers and regular employees were similar. The full bench however, made two exceptions. Temporary employees, who fell in either of the two exceptions, were held entitled to wages at the minimum of the pay-scale drawn by regular employees. The exceptions recorded by the full bench of the High Court in the impugned judgment are extracted hereunder:-

> "(1) A daily wager, ad hoc or contractual appointee against the regular sanctioned posts, if appointed after undergoing a selection process based upon fairness and equality of opportunity to all other

eligible candidates, shall be entitled to minimum of the regular pay scale from the date of engagement.

(2) But if daily wagers, ad hoc or contractual appointees are not appointed against regular sanctioned posts and their services are availed continuously, with notional breaks, by the State Government or its instrumentalities for a sufficient long period i.e. for 10 years, such daily wagers, ad hoc or contractual appointees shall be entitled to minimum of the regular pay scale without any allowances on the assumption that work of perennial nature is available and having worked for such long period of time, an equitable right is created in such category of persons. Their claim for regularization, if any, may have to be considered separately in terms of legally permissible scheme.

(3) In the event, a claim is made for minimum pay scale after more than three years and two months of completion of 10 years of continuous working, a daily wager, ad hoc or contractual employee shall be entitled to arrears for a period of three years and two months."

A perusal of the above conclusion drawn in the impugned judgment (passed by the full bench), reveals that the full bench carved an exception for employees who were not appointed against regular sanctioned posts, if their services had remained continuous (with notional breaks, as well), for a period of 10 years. This category of temporary employees, was extended the benefit of wages at the minimum of the regular pay-scale. In the Secretary, State of Karnataka case28, similarly, employees who had rendered 10 years service, were granted an exception (refer to paragraph 53 of the judgment, extracted in the preceding paragraph). The above position adopted by the High Court reveals, that the High Court intermingled the legal position determined by this Court on the subject of regularization of employees, while adjudicating upon the proposition of pay parity, emerging under the principle of 'equal pay for equal work'. In our view, it is this mix-up, which has resulted in the High Court recording its afore-extracted conclusions.

(ii) The High Court extended different wages to temporary employees, by categorizing them on the basis of their length of service. This is clearly in the teeth of judgment in the Daily Rated Casual Labour Employed under P&T Department through Bhartiya Dak Tar Mazdoor Manch case22. In the above judgment, this Court held, that classification of employees based on their

length of service (- those who had not completed 720 days of service, in a period of 3 years; those who had completed more than 720 days of service - with effect from 1.4.1977; and those who had completed 1200 days of service), for payment of different levels of wages (even though they were admittedly discharging the same duties), was not tenable. The classification was held to be violative of Articles 14 and 16 of the Constitution.

(iii) Based on the consideration recorded hereinabove, the determination in the impugned judgment rendered by the full bench of the High Court, whereby it classified temporary employees for differential treatment on the subject of wages, is clearly unsustainable, and is liable to be set aside.

52. In view of all our above conclusions, the decision rendered by the full bench of the High Court in Avtar Singh v. State of Punjab & Ors. (CWP no. 14796 of 2003), dated 11.11.2011, is liable to be set aside, and the same is hereby set aside. The decision rendered by the division bench of the High Court in State of Punjab & Ors. v. Rajinder Singh & Ors. (LPA no. 337 of 2003, decided on 7.1.2009) is also liable to be set aside, and the same is also hereby set aside. We affirm the decision rendered in State of Punjab & Ors. v. Rajinder Kumar (LPA no. 1024 of 2009, decided on 30.8.2010), with the modification, that the concerned employees would be entitled to the minimum of the pay-scale, of the category to which they belong, but would not be entitled to allowances attachedto the posts held by them.

53. We shall now deal with the claim of temporary employees before this Court.

54. There is no room for any doubt, that the principle of 'equal pay for equal work' has emerged from an interpretation of different provisions of the Constitution. The principle has been expounded through a large number of judgments rendered by this Court, and constitutes law declared by this Court. The same is binding on all the courts in India, under Article 141 of the Constitution of India. The parameters of the principle, have been summarized by us in paragraph 42 hereinabove. The principle of 'equal pay for equal work' has also been extended to temporary employees (differently described as workcharge, daily-wage, casual, ad-hoc, contractual, and the like). The legal position, relating to temporary employees, has been summarized by us, in paragraph 44 hereinabove. The above legal position which has been repeatedly declared, is being reiterated by us, yet again.

55. In our considered view, it is fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work, cannot be paid less than another, who performs the same duties and

responsibilities. Certainly not, in a welfare state. Such an action besides being demeaning, strikes at the very foundation of human dignity. Any one, who is compelled to work at a lesser wage, does not do so voluntarily. He does so, to provide food and shelter to his family, at the cost of his self respect and dignity, at the cost of his self worth, and at the cost of his integrity. For he knows, that his dependents would suffer immensely, if he does not accept the lesser wage. Any act, of paying less wages, as compared to others similarly situate, constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation.

56. We would also like to extract herein Article 7, of the International Covenant on Economic, Social and Cultural Rights, 1966. The same is reproduced below:-

> "Article 7
>
> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
>
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
>
> (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
>
> (b) Safe and healthy working conditions;
>
> (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
>
> (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

India is a signatory to the above covenant, having ratified the same on 10.4.1979. There is no escape from the above obligation, in view of different provisions of the Constitution referred to above, and in view of the law declared by this Court under Article 141 of the Constitution of India, the principle of 'equal pay for equal work' constitutes a clear and unambiguous right and is vested in every employee – whether engaged on regular or temporary basis.

57. Having traversed the legal parameters with reference to the application of the principle of 'equal pay for equal work', in relation to temporary employees (daily-wage employees, ad-hoc appointees, employees appointed on casual basis, contractual employees and the like), the sole factor that requires our determination is, whether the concerned employees (before this Court), were rendering similar duties and responsibilities, as were being discharged by regular employees, holding the same/corresponding posts. This exercise would require the application of the parameters of the principle of 'equal pay for equal work' summarized by us in paragraph 42 above. However, insofar as the instant aspect of the matter is concerned, it is not difficult for us to record the factual position. We say so, because it was fairly acknowledged by the learned counsel representing the State of Punjab, that all the temporary employees in the present bunch of appeals, were appointed against posts which were also available in the regular cadre/establishment. It was also accepted, that during the course of their employment, the concerned temporary employees were being randomly deputed to discharge duties and responsibilities, which at some point in time, were assigned to regular employees. Likewise, regular employees holding substantive posts, were also posted to discharge the same work, which was assigned to temporary employees, from time to time. There is, therefore, no room for any doubt, that the duties and responsibilities discharged by the temporary employees in the present set of appeals, were the same as were being discharged by regular employees. It is not the case of the appellants, that the respondent-employees did not possess the qualifications prescribed for appointment on regular basis. Furthermore, it is not the case of the State, that any of the temporary employees would not be entitled to pay parity, on any of the principles summarized by us in paragraph 42 hereinabove. There can be no doubt, that the principle of 'equal pay for equal work' would be applicable to all the concerned temporary employees, so as to vest in them the right to claim wages, at par with the minimum of the pay-scale of regularly engaged Government employees, holding the same post.

58. In view of the position expressed by us in the foregoing paragraph, we have no hesitation in holding, that all the concerned temporary employees, in the present bunch of cases, would be entitled to draw wages at the minimum of the pay-scale (- at the lowest grade, in the regular pay-scale), extended to regular employees, holding the same post.

59. Disposed of in the above terms.

60. It would be unfair for us, if we do not express our gratitude for the assistance rendered to us by Mr. Rakesh Khanna, Additional Advocate General, Punjab. He researched for us, on our asking, all the judgments on the issue of pay parity. He presented them to us, irrespective of whether the conclusions recorded therein, would or would not favour the cause supported by him. He also assisted us, on different parameters and outlines, suggested by us, during the course of hearing.

Appeals disposed of.

2016 (II) ILR - CUT- 1203

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

W.P.(C) NO. 19261 OF 2015

MOHANTY TRADING & CO. & ORS. .....Petitioners

.Vrs.

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

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

Petitioners are empanelled registered dealers under the State Agricultural policy 2013 – They are authorised to distribute water pump sets under the subsidy scheme – However in the review meeting held on 13.07.2015 O.P.No2 passed order for supply of all the 40,000 pump sets during 2015-2016 by a sole supplier i.e Odisha Agro Industries Corporation Ltd. (O.P.No.3) – Hence the writ petition – Impugned orders passed by O.P.No2 who was discharging his duty in dual capacity, as commissioner-cum-Director of Agriculture and Food Production Odisha and chairman-cum-Managing Director Agro Industries Corporation Ltd. – O.P.No2 was all out to favour O.P.No.3 in total disregard to the Agricultural policy, 2013 and guidelines issued there under – Order suffers from bias and prejudice by O.P.No2 – Held, the impugned order is quashed – In case, all the supplies have yet not been made, the farmers shall be at liberty to purchase the water pump sets under the subsidy scheme of the Government from the petitioners.

(Paras 16,17)

(B) **CIVIL PROCEDURE CODE, 1908 – Ss. 11,141**
R/w Article 226 of the constitution of India,1950

Resjudicata – Writ petition – Opp. Parties alleged that since earlier writ petition filed by the farmers was dismissed, the present writ petition at the instance of the approved dealers, for the same cause of action is not maintainable being hit by the principle of constructive resjudicata – Explanation to section 141 C.P.C. states that the expression "proceeding" includes proceeding under order 9 C.P.C. but does not include any "proceeding" under Article 226 of the Constitution of India – Though the procedure envisaged under C.P.C. is not applicable to the proceeding under Article 226 of the Constitution of India it is held that the under lying principles therein are applicable while deciding the matter in accordance with law.

In this case, the farmers in the earlier writ petition were not the persons aggrieved to maintain the PIL which was dismissed but the present writ petition has been filed by the approved registered dealers, where the authority excluding their rights allowed only one registered dealer namely Odisha Agro Industries Corporation Ltd. (O.P.No3) for supply of the pump sets, which itself affects the rights of the petitioners to trade which is a fundamental right under Article 19 (1) (g) of the Constitution of India – So the petitioners being the persons aggrieved have every right to maintain the writ application – Held, the present writ petition is not hit by the principles of Constructive resjudicata, as parties are different, claims are different so also the subject matter of dispute is different. (Para 14)

For petitioners : M/s. Ashok Mohanty, A.A. Das & S.K.Dalai.

For opp. parties : Mr. B. Bhuyan, Addl. Govt. Advocate.
M/s. B. Baug, R.R. Jethi, P.C. Das,
Mr. Karunakar Jena

Date of judgment :16.11.2016

JUDGMENT

VINEET SARAN, C.J.

The petitioners, who are the empanelled dealers under the State Agriculture Policy 2013 and are authorized to distribute pump sets under "the guidelines for sanction and disbursement of subsidy on pump set", have filed this writ application impugning the communication dated 22.07.2015 in annexure-3 purportedly issued on the basis of the minutes of the review meeting dated 13.07.2015 held under the Chairmanship of the Chief Secretary, Odisha wherein a decision has been taken that supply of 40,000 pump sets during 2015-16 shall be made by a sole supplier, i.e., the Odisha Agro Industries Corporation Ltd. (OAIC). By such decision, the petitioners

having been deprived of their rights to supply pump sets to the farmers of Jagatsinghpur district under the Scheme of the Government, have sought for quashing of the same being violative of Article 19(1)(g) of the Constitution of India.

2. The brief facts of the case are that the Government of Odisha has been issuing its State Agricultural Policy from time to time. The initial policy was issued in the year 1996, which was modified in the year 2008, and the policy which is in existence, and in consideration for the purpose of this case, is one issued in the year 2013. The guidelines for sanction and distribution of subsidy on pump sets under the Agricultural Policy, 2013 have been issued, which are filed as Annexure-2 to the writ petition. The admitted fact is that all the petitioners herein are registered dealers for supply of 1.5 HP single phase electric pump sets for the district of Jagatsinghpur. The list of registered dealers, which includes the names of all the 58 petitioners, has been filed as Annexure-1 to the writ petition. Along with such registered dealers, opposite party no.3-Odisha Agro Industries Corporation (OAIC) is one such dealer. Each dealer has been registered for distribution of pumps of particular manufacturers, and also the particular models of pumps of such manufacturers. The opposite party no.3-OAIC is also a registered dealer for five manufacturers. Different petitioners herein are dealers of different manufacturers of pump sets, which may be one, two, three or more manufacturers. Admittedly, opposite party no.3-OAIC is not the registered dealer of all the manufacturers. Some of the petitioners are registered dealers of manufacturers, other than the five, for which OAIC is the dealer.

3. It is not disputed that as per the guidelines issued by the State Government, it is mandatory that for supply of pump sets on subsidy, the supplier should be a registered dealer. As per the policy, 40,000 pump sets are to be supplied to the farmers with 50% subsidy, limited to Rs.15,000/- only for each pump set. In pursuance of the said policy, a review meeting on crop and weather situation was held on 13.07.2015 under the chairmanship of the Chief Secretary, Odisha, of which the opposite party no.2-Commissioner-cum-Director of Agriculture & Food Production, Odisha was also a member. In the said meeting, certain decisions were taken, which were recorded in para-7 of the minutes of the said meeting. Sub-para (vi) of para-7, being relevant for the purpose of this case, is reproduced below:-

> *"40,000 pump sets will be distributed to the farmers, with priority to the rain deficit areas, at usual subsidy by end of August, 2015."*

4. By an order dated 22.07.2015, which is impugned in this writ petition, opposite party no.2 Commissioner-cum-Director of Agriculture & Food Production, Odisha wrote to opposite party no.3-Managing Director, OAIC stating therein that as per the decision taken in the review meeting held on 13.07.2015, it was decided to supply 40,000 pump sets during 2015-16 under subsidy and that OAIC would be the sole supplier of all such pump sets. For ready reference, the said communication dated 22.07.2015 is being reproduced below:

"***DIRECTORATE OF AGRICULTURE & FOOD PRODUCTION : ODISHA : BHUBANESWAR***

No. 2M(12) 91/15 24370 / Agril, Date : 22.07.2015

To

The Managing Director,
Odisha Agro Industries Corporation,
Odisha, Bhubaneswar.

Sub. : Modalities for supply of pump sets during 2015-16.

Sir,

Please find enclosed herewith the minutes of the review meeting on crop and weather situation held on 13.07.2015 under the Chairmanship of the Chief Secretary, Odisha (Annexure-1). In the said meeting, it has been decided to supply 40000 pump sets during 2015-16 under subsidy. OAIC will be the sole supplier of all such pump sets. In this regard, in order to finalise the modality and to fine tune the pump set tracking system software, a meeting was held under the Chairmanship of the Commissioner-cum-Director, Agriculture on 17.07.15 at 10.30 AM in the conference hall of the Directorate. The proceedings of the said meeting are enclosed herewith at Annexure-2, where in the modalities and action points to be followed have been outlined.

You are requested to take immediate steps for effecting supply of the pump sets in view of the urgency. The district wise targets will be intimated to you separately.

Encl. : AS ABOVE (Annexure 1 & 2)

Yours faithfully,
Commissioner-cum-Director of
Agriculture & Food Production, Odisha
Memo No. 24371 / Date 22.07.2015"

Interestingly, it is admitted between the parties that the opposite party no.2-Commissioner-cum-Director of Agriculture & Food Production, Odisha is himself the Managing Director of OAIC-opposite party no.3.

5. The submission of learned counsel for the petitioners is that OAIC could not have been chosen as the sole supplier of 40,000 water pump sets, to the exclusion of the other registered dealers, such as the petitioners. The contention is that OAIC was one of the registered dealers and could have only been treated at par with other registered dealers, and the order passed by opposite party no.2 Commissioner-cum-Director of Agriculture & Food Production, Odisha for supply of 40,000 water pump sets only by the OAIC, is discriminatory and is liable to be quashed. It is further contended that the signatory of the order dated 22.07.2015, who was the Commissioner-cum-Director of Agriculture & Food Production, Odisha, was himself the Managing Director of OAIC to whom the letter was addressed, and the same amounts to one hand giving benefit to the other hand to the exclusion of other eligible parties, who are entitled to the benefit of the policy. Learned counsel for the petitioners thus submitted that the order is biased and mala fide and passed only for benefiting OAIC, which could at best be treated at par with other registered dealers. It is also submitted that it is for the farmers to purchase the water pump sets from any one of the registered dealers, and for this the farmers would have a choice of the model and the manufacturers of the water pump sets. It is thus contended that since the OAIC is the dealer of only five manufacturers and that too of some of their models and not all models, the choice of the farmers has thus been limited, as other dealers are registered for selling pumps of other manufacturers also, which the farmers will not be able to purchase under the scheme. According to the petitioners, all this has been done only in order to benefit the OAIC through the signatory of the impugned order, who was himself the Managing Director, OAIC. Learned counsel for the petitioners submitted that OAIC is the dealer of the manufacturers, namely, Greaves Cotton, Kirloskar Brothers, Mahendra Pumps, Southern Agro Engine (P) Ltd. and USHA International Limited, whereas the petitioners are dealers of the aforesaid manufacturers, as well as other manufacturers like Sabar Industries Pvt. Ltd., V-Guard Industries Ltd, Mascot Pump Ltd., Angel Pumps (P) Limited, Tecmo Industries, Best Pumps (Ind.) Pvt. Ltd., Lagajjar Machineries Pvt. Ltd and CRI etc., of which opposite party no.3-OAIC is not a dealer. It is thus contended that by the impugned order dated 22.07.2015 the choice of the farmers to purchase the pumps which they find to be efficient, has been limited. It is further contended that in the minutes of the review meeting on crop and weather

situation held on 13.07.2015 under the Chairmanship of the Chief Secretary, Odisha, a decision was taken to supply 40,000 pump sets during 2015-16 under subsidy by the sole supplier-Odisha Agro Industries Corporation. The minutes of the meeting held on 13.07.2015 has been annexed in Annexure-B to the counter affidavit filed by opposite parties no.1 and 2. Nowhere such decision has been taken to supply 40,000 pump sets during 2015-16 under subsidy scheme only by the Odisha Agro Industries Corporation Ltd. Thus, the authority which issued impugned letter dated 22.07.2015, who is the Commissioner-cum-Director of Agriculture & Food Production, Odisha was functioning as the Chairman-cum-Managing Director of Odisha Agro Industries Corporation, has issued such letter unilaterally. Consequentially such letter suffers from bias and prejudice. Therefore, the same deserves to be quashed.

6. Per contra, Mr. B. Bhuyan, learned Addl. Govt. Advocate has submitted that the petitioners would not have any vested right to supply the water pump sets under the policy, as no dealer would have a right to sell its good when a Government authority takes a decision to allow only one dealer to supply the product. It has been submitted that though the petitioners may be registered dealers, since opposite party no.3 is a government organization and was also registered as a dealer, the State Government has rightly chosen that supply of all the pumps be made only through opposite party no.3. He has, however, not denied the fact that the signatory of the impugned order dated 22.07.2015, who is opposite party no.2, was himself the Managing Director of the OAIC in whose favour the order has been passed. It has also not been denied that opposite party no.3-OAIC is not a dealer of all the manufacturers of water pump sets, of which the petitioners are registered dealers. In support of his submission, he has relied on a decision of the apex Court in the case of ***Krishnan Kakkanth v. Government of Kerala and others***, (1997) 9 SCC 495.

7. Sri B. Baug, learned counsel for opposite party no.3-OAIC has submitted that though it may be true that opposite party no.2 is the Managing Director of opposite party no.3, however, since opposite party no.3 is a government company, the order dated 22.07.2015 is perfectly justified as the government has a right to supply the products through its own corporation. He has, however, not denied the fact that all the petitioners are registered dealers and also that opposite party no.3 is the registered dealer of only five manufacturers, whereas the petitioners are registered dealers of other manufacturers also. He has, however, submitted that the supply of water

pump sets has been completed and that the scheme has come to an end on 10.11.2016. He also submitted that W.P.(C) (PIL) No.17812 of 2015, which was filed by some of the farmers of the locality for the same cause of action, having been dismissed on 01.10.2015, the present writ petition is not maintainable being hit by the principle of constructive res judicata and, as such, the same is liable to be dismissed.

8. We have heard Sri Ashok Mohanty, learned Senior Counsel along with Sri A.A. Das and Sri S.K. Dalai for the petitioners; as well as Mr. B. Bhuyan, learned Addl. Govt. Advocate appearing for the State-opposite parties no.1 and 2; Sri B. Baug, learned counsel for opposite party no.3-OAIC and Sri Karunakar Jena, learned counsel for opposite party no.4. Pleadings between the parties have been exchanged and with consent of learned counsel for the parties, this writ petition is disposed of finally at the stage of admission.

9. In view of the aforementioned pleaded facts, the primary question that falls for consideration in this writ petition is as to whether a dealer for supply of water pump sets, registered under the scheme of the Government, could have any vested right to claim for supply of pump sets under the scheme. The other question involved in this case would be that, whether the Government would have a right to assign only one of such registered dealers to supply the pump sets to the farmers, ignoring the rights of the other registered dealers.

10. The basis of issuance of Annexure-3, the letter dated 22.07.2015, by the Commissioner-cum-Director of Agriculture & Food Production, Odisha is the minutes of review meeting on crop & weather situation held on 13.07.2015 under the Chairmanship of the Chief Secretary, Odisha. In the said meeting it has been decided to supply 40,000 pump sets during 2015-16 under subsidy and Odisha Agro Industries Corporation will be the sole supplier of such pump sets. The minutes of meeting held on 13.07.2015 are available on record which has been filed by opposite parties no.1 and 2 in their counter affidavit filed on 03.11.2015 as Annexure-B at page 70. In paragraph-7 thereof the following decisions emerge to be taken:

> *"7. After a detailed discussion, the following decisions were taken:-*
>
> *(i) The Agro Advisory prepared in consultation with the OUAT along with the information on availability of different kinds of certified seeds (variety-wise and location-wise) shall be made available through Doordarshan/Print Media/Website for information of farmers.*

(ii) Balanced use of fertilizers shall be promoted among the farmers through mass campaign and awareness programme a well as wide publicity through print & electronic media.

(iii) Video conferencing shall be conducted jointly by the Agriculture & Cooperation Department involving DDAs & DRCS at the District level to sort out the problems relating to smooth supply and lifting of fertilizers by the PACS.

(iv) The obstructions in movement of fertilizer by the Truck Owner's Association must be resolved at the district level with t he intervention of Collectors. The matter shall be brought to the notice of the Chief Secretary, Odisha in case the problem remained unresolved in any district.

(v) For distribution of pulse, oilseed and vegetable minikits in the eventuality of an exigent situation, the Commissioner-cum-Director of Agriculture & Food Production, Odisha shall empanel the seed suppliers after checking the availability of certified seed stocks with them. The seed stocks shall be kept in readiness for procurement at the time of exigency and Government approval to the effect shall be taken in advance.

(vi) 40,000 pumpsets will be distributed to the farmers, with priority to the rain deficit areas, at usual subsidy by end of August, 2015.

(vii) The availability of pump sets in different Agro Service Centre (ASC) shall also be ascertained and publicised so that those can be hired by the farmers in exigency.

(viii) The M.D., OLIC and Special Secretary, Energy Department shall jointly work out a plan to ensure energisation of 13,000 Deep Bore Wells by 15th August, 2015 for which farmers' share has been received and work order issued by OLIC.

(ix) Efforts will be made for sanction of DRI loans to 20,000 beneficiaries, who have not yet deposited their share towards the Bore Wells. ACS, Finance will request the Commercial Banks and SLBC Convenor to expeditiously advance such DRI loans.

(x) The Contingent Action Plan shall be prepared by the Panchayati Raj Department for establishment of water harvesting structures, diversion weirs etc. in consultation with the Agriculture Department.

(xi) The irrigation programme made for the current Kharif season shall be reviewed jointly by the Water Resources Department & Agriculture Department and the information shall be transmitted to the farmers.

(xii) Crop Demonstrations are to be conducted on zero tillage and use of drum seeders with the sprouted paddy seeds and these techniques be made popular among the farmers quickly by the Directorate of Agriculture & Food Production to mitigate and kind of moisture stress situation.

The meeting ended with vote of thanks to the Chair & participants.
This issues with the approval of Chief Secretary, Odisha."

A glimpse of the aforementioned decisions would show that nowhere any decision has been taken that the Odisha Agro Industries Corporation would be the sole supplier of all such 40,000 pump sets during 2015-16 under subsidy. Thereby, the order impugned dated 22.07.2015 in Annexure-3 stated to be issued basing on such minutes of review meeting dated 13.07.2015 is contrary to the materials available on the record. More so, the very same person, who was functioning as Commissioner-cum-Director of Agriculture & Food Production, Odisha and discharging the duty of Chairman-cum-Managing Director of Agro Industries Corporation, having issued the impugned order in his dual capacity, the order would suffer from bias and prejudice by the authority concerned.

In ***Secy. To Govt., Transport. Deptt. V. Munuswamy Mudaliar***, 1988 Supp SCC 651 : AIR 1988 SC 2232, the apex Court explained the term "bias" as follows:

"A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. The test for bias is whether a reasonable intelligent man, fully apprised of the circumstances would feel a serious apprehension of bias."

In ***Rattan Lal Sharma V. Managing Committee, Dr Hari Ram (Co-Education) Higher Secondary School***, AIR 1993 SC 2155 : (1993) 4 SCC 10, the apex Court interpreted the word "bias" as follows:

"A predisposition to decide for or against one party without proper regard to the true merits of the dispute is bias. Personal bias is one of the three major limbs of bias namely pecuniary bias, personal bias and official bias."

In ***State of W.B. v. Shivananda Pathak***, AIR 1998 SC 2050 : (1998) 5 SCC 513, the apex Court defined "bias" as follows:

> *"Bias may be defined as a preconceived opinion or a predisposition or predetermination to decide a case or an issue in a particular manner, so much so that such predisposition does not leave the mind open to conviction. It is, in fact, a condition of mind, which sways judgments and renders the Judge unable to exercise impartiality in a particular case.*
>
> *Bias has many forms. It may be pecuniary bias, personal bias, bias as to subject-matter in dispute or policy bias etc."*

11. Apart from the above, the petitioners in the writ petition have specifically pleaded in paragraph-16 of the writ petition to the following effect:

> *"16. That, after being verified the facts of the game it was learnt one Dr. P.K.Meherda who is now holding post of Commissioner-cum-Director, Agriculture Department so also Managing Director, Agro Industry Corporation and he is the sole authority to take all the decisions with an malafide intention to misappropriate public money and the policy which has been adopted by him is contrary to the Agriculture Policy, 2013 and loss of Rs. 12 crores is a great concerned of the State."*

Opposite parties no.1 and 2 have not given any specific reply to paragraph-16 of the writ petition, rather in paragraph-8 of their counter affidavit it has been stated as follows:

> "*8. That in reply to the averments made in Paragraph-15 to 19 of the writ petition, the deponent humbly submits that the farmers are free to choose the make and model of the pump sets. During 2015-16, as per revised guidelines approved by Govt., the lowest of the offered/approved/indicative prices have been fixed for the purpose of subsidy and in view of OAIC, being the exclusive supplier, model wise rates have been fixed for sale after negotiation with the Manufacturers, as the Corporation will first procure and supply the models as per farmers' choice.*
>
> *It is also humbly submitted that the Managing Director, Odisha Agro Industries Corporation Ltd. Has issued the expression of Interest (EOI) for empanelment of Manufactures of oil/electric pump sets with an objective to facilitate the farmers to select specified quality pump sets at reasonable price across the State. The Managing Director,*

OAIC on behalf of the farmers has called for the best offer price from the Manufacturers of pump sets in the said EOI. The best negotiated price has been fixed with 18 Manufacturers, as per the EOI and OAIC was supplying the models at the best negotiated price. The need for empanelment through EOI has been clearly mentioned in the EOI document. Farmers' community need not have to pay more as mentioned in the writ petition."

Similarly, in paragraph-12 of the counter affidavit filed by opposite party no.3 in reply to paragraph-16 of the writ petition it has been stated as follows:

12. That as regards the averments and assertions made in paragraph-15 to 19 of the writ petition, it is humbly stated that the farmers are free to choose the make and model of pump sets and in this regard, the petitioners should not be worried and prejudiced since they are no way concerned with the choice of the farmers. The lowest price has been fixed for the purpose of subsidy and the OAIC Limited being the exclusive supplier, model wise rates have also been fixed for sale of the pump sets of different makes and it has been directed that the OAIC Limited will procure and supply models of pump sets as per the choice of the farmers.

12. On the basis of the pleadings available on record, there is no specific denial made by the opposite parties to the fact pleaded in paragraph-16 of the writ petition as mentioned (supra). Furthermore, in the order dated 01.10.2015 passed in W.P.(C) (PIL) No.17812/2015, which was filed by some of the farmers of the locality, though it has been noted in paragraph-3 thereof that-

"*It is alleged by the petitioner that one Dr. P.K. Meharda is holding the post of commissioner-cum-Director agriculture & Food Production as also the post of Managing director, Odisha Agro Industries corporation Ltd. and he is the sole authority who has taken all the decisions with mala fide intention to misappropriate public money in contravention of the State Agriculture Policy, 2013. It is alleged that more than Rupees One Hundred twenty crores in supply of 40,000 pump sets through opposite paty No.3 (OAIC) with average difference of Rs.3000/- apiece not only amounts to misappropriation of public money but it will directly go to the pockets of some officials. It is submitted that the quotations from other dealers are quoting the*

same amount for the same brand and capacity of the pump, but their prices are inclusive of some accessories.

Although it is repeatedly alleged that the decision of the opponents is contrary to the State agriculture Policy, 2013, it is not clearly pointed out how the distribution of pumps through OAIC is violating the policy."

in regard to the same, no finding has been given in the said order.

Therefore, applying the principle discussed above to the present context, the order impugned in annexure-3 suffers from the *person bias* of the authority concerned, as it has been passed by the very same person while discharging his duty in dual capacity. In view of such, we are of the considered view that the order impugned in annexure-3 dated 22.07.2015 cannot sustain in the eye of law.

13. Reliance has been placed by learned Additional Government Advocate on ***Krishnan Kakkanth*** (supra) wherein the apex Court has held that a citizen has no fundamental right to insist on Government or any other individual to do business with him. In that case, the Government circular directing that farmers or agriculturists of certain districts opting to receive financial assistance under a Government scheme for purchase of pump sets would be obliged to purchase the pump sets from approved dealers of the Government, was the subject matter of challenge. But in the case at hand, the fact that opposite party no.3 is one of the registered dealers is not disputed. It is also not disputed that the farmers have a right to purchase the water pump sets of their choice from the registered dealers and that the policy did not contemplate restricting the supplies to be made by any one particular registered dealer. Once a dealer fulfils all the conditions and has been registered with the government for supply of water pump sets under the scheme of the Government, he acquires a vested right to do business in that regard as a registered dealer. The position of a registered dealer is distinct from that of a private dealer. The apex Court was dealing with the case of the farmers in ***Krishnan Kakkanth*** (supra), wherein it has been held that the private dealers would not have a right under the scheme of the Government. It was not a case where registered dealers having been discriminated vis-à-vis one registered dealer. There is no dispute that a private dealer would not have the same right as that of a registered dealer. But once a dealer is registered for some business purpose, he does acquire a right to do business and denial of the same to such registered dealers by permitting only one registered dealer

to do all the business, to the exclusion of other registered dealers, cannot be justified in law.

14. A contention was raised that in view of the decision already taken by a Division Bench of this Court on 01.10.2015 dismissing W.P.(C) (PIL) No.17812/2015 filed by the farmers, the present writ petition at the instance of the approved notified dealers, for the same cause of action, is not maintainable and hit by the principle of constructive res judicata.

Section 11 of the Code of Civil Procedure, 1908 deals with res judicata. Section 141 of the same Code deals with miscellaneous proceedings. Explanation thereto clearly states that in this section, the expression "proceeding" includes proceeding under order IX, but does not include any "proceeding" under Article 226 of the Constitution. Therefore, though the procedure envisaged under the Code of Civil Procedure is not applicable to the proceeding under Article 226 of the Constitution of India, it is held that the underlying principles therein are applicable while deciding the matter in accordance with law.

On perusal of the said judgment dated 01.10.2015 passed in W.P.(C) (PIL) No.17812/2015, it appears that this Court was not inclined to interfere with the scheme, guidelines or modalities devised for their execution, on the basis of unsubstantiated allegations and baseless adverse inferences. As such, the farmers are not the persons aggrieved so as to maintain the PIL which has been dismissed by this Court vide order dated 01.10.2015. But, the present writ petition, which has been filed by the respective approved registered dealers is not a PIL, but by those who have been empanelled and registered to supply the pump sets to the farmers, and excluding their rights, if authority decides to allow supply of pump sets to only one individual registered dealer, namely, Odisha Agro Industries Corporation, that itself affects the rights of the petitioners to trade, which is a fundamental right as enshrined under Article 19(1)(g) of the Constitution of India. Thereby, the petitioners, being the persons aggrieved, have every right to maintain the writ petition before this Court and at their instances, if the writ petition is entertained, it cannot be said that the present writ petition is hit by the principle of constructive res judicata.

In ***Alka Gupta v. Narender Kumar Gupta***, (2010) 10 SCC 141, while considering Section 11 of the Code of Civil Procedure, the apex Court held as follows:

> "*Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more*

particularly where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive res judicata, nor had the appellant-plaintiff an opportunity to meet the case based on such plea. (para 20)

Res judicata means " a thing adjudicated", that is, an issue that is finally settled by judicial decision. The Code deals with res judicata in Section 11, relevant portion of which is extracted below (excluding Explanations I to VIII) :

"11. Res Judicata – No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court." (Para21)

Section 11 of the Code, on an analysis requires the following essential requirements to be fulfilled, to apply the bar of res judicata to any suit or issue:

(i) The matter must be directly and substantially in issue in the former suit and in the later suit.

(ii) The prior suit should be between the same parties or persons claiming under them.

(iii) Parties should have litigated under the same title in the earlier suit.

(iv) The matter in issue in the subsequent suit must have been heard and finally decided in the first suit.

(v) The court trying the former suit must have been competent to try the particular issue in question. (para 22)

To define and clarify the principle contained in Section 11 of the Code, eight Explanations have been provided. Explanation I states that the expression "former suit" refers to a suit which had been decided prior to the suit in question whether or not it was instituted prior thereto. Explanation II states that the competence of a court shall be determined irrespective of whether any provisions as to a right of appeal from the decision of such court. Explanation III states

that the matter directly and substantially in issue in the former suit, must have been alleged by one party or either denied or admitted expressly or impliedly by the other party. Explanation IV provides that :

"Explanation IV – Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

The principle of constructive res judicata emerges from Explanation IV when read with Explanation III both of which explain the concept of "matter directly and substantially in issue". (Para 23.

Explanation III clarifies that a matter is directly and substantially in issue, when it is alleged by one party and denied or admitted (expressly or impliedly) by the other. Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if it was not actually set up as a ground of attack or defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata. Constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2 Rule 2 of the Code relates to reliefs which ought to have been claimed on the same cause of action but not claimed."

Applying the principles discussed above to the present case, this Court is of the considered view that the writ petition is not hit by the principles of constructive res judicata, as the parties are different, claims are different, and also subject matter of the dispute is different from that of W.P.(C)(PIL) No.17812/2015 dismissed on 01.10.2015.

15. On facts what we find is that in the counter affidavit the averments made by opposite party no.2 and the opposite party no.3 are at variance, although both the counter affidavits have been sworn on the same date, i.e., 03.11.2015. In paragraph-9 of the counter affidavit of opposite party no.2, it has been stated that-

"by 19.08.2015, target (Quota) had already been released for 36557 pump sets out of 40000 earmarked for 2015-16. Permits had also been issued in respect of a total of 9000 pump sets as on 29.10.2015".

Whereas counter affidavit filed by opposite party no.3, in paragraph-14 it has been averred that-

"in view of the urgency of the matter of supply of pump sets within the specified period, the present Opposite Party No. 3 may be allowed to continue the supply of the balance 31000 numbers of pump sets to the farmers".

On the same date, one averment is made by opposite party no.2 that 36557 pump sets have been released out of 40000 earmarked for 2015-16, whereas opposite party no.3 states that the OAIC be allowed to supply balance 31000 out of 40000 pump sets. Interestingly, both the opposite parties are headed by the same person, although the counter affidavit has been filed by different officials.

16. From the above, it is made clear that opposite party no.2 was all out to favour opposite party no.3 in total disregard to the Agricultural Policy, 2013 and guidelines issued thereunder, which cannot be sustained in the eye of law.

17. In view of the discussion made hereinabove, we answer the two questions involved in this case in favour of the petitioners and are of the view that the writ petition deserves to be allowed, and is accordingly allowed. The order dated 22.07.2015 passed by opposite party no.2-Commissioner-cum-Director of Agriculture & Food Production, Odisha is quashed. In case all the supplies have yet not been made, the farmers shall be at liberty to purchase the water pump sets under the subsidy scheme of the government from the petitioners, who are all registered dealers for the district of Jagatsinghpur. No order to cost.

Writ petition allowed.

2016 (II) ILR - CUT-1219

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

W.A. NO. 415 OF 2016

RABINDRA SAHOO & ORS. ……..Appellants

.Vrs.

STATE OF ODISHA & ORS. ..……Respondents

ODISHA GRAMA PANCHAYAT ACT, 1964 – S. 149

Re-organization of Grama Panchayats – Notification of the Government Dt 01.07. 2015 – Dispute is, whether villages, Jamalpur and Changhani be included in R.R. Pur G.P. or the newly created Kotasahi G.P. – Learned single Judge directed BDO, Jaleswar to conduct an opinion poll in both the villages through secret ballot and enable the Block Level committee to make recommendation – Hence the appeal – Holding opinion poll is not contemplated either in the Act, Rules, Regulations or the policy framed by the Government Dt 01.07.2015 – Since the learned single Judge has adopted this methodology for greater public interest this Court is not inclined to interfere with such direction, however this should not be taken as a precedent for other cases – Direction issued to declare the result of the opinion poll forthwith so that the Block Level Committee/District Level committee make recommendations for the State Government to pass necessary orders in compliance to the notification Dt 01.07.2015.

(Paras 17,18,19)

For Appellants : Mr. R.K. Rath, Sr. Adv. M/s. S.S. Patra, S.K. Patra,B.N.Tripathy, S.K. Mishra, B.K.Sahoo & K.L. Sharm.

For Respondents: Mr. B. Bhuyan, Addl. Govt. Advocate
Mr. B.M. Patnaik, Sr. Adv. M/s. P.R. Patnaik, R. Sharma, R.K. Ray, S.N. Barik & B. Binaya,

---

Date of judgment : 22.11.2016

JUDGMENT

VINEET SARAN,C.J.

This intra Court appeal has been preferred by the appellants (petitioners in W.P.(C) No.3565 of 2016 who also sought for intervention in W.P.(C) No. 12410 of 2016), assailing the order dated 30.08.2016 passed in W.P.(C) No.12410 of 2016, whereby the learned Single Judge disposed of the writ petition with the direction to the Block Development Officer (B.D.O.),

Jaleswar to conduct an opinion poll in both the villages, namely, Jamalpur and Chaughani with the participation of all the adult male and female members of both the villages through secret ballot within one month from the date of receipt of certified copy of the order, to enable the Block Level Committee to make its recommendation in terms of notification dated 01.07.2015.

2. The factual matrix of the case, in brief, is that the Government of Odisha in Panchayati Raj Department by Notification No.10729 dated 01.07.2015 notified under Section 149 of Odisha Grama Panchayat Act, 1964 for reorganization and delimitation of the Gramas within the State by laying down the norms, procedure and time table. In conformity with the said notification, the Block Level Team of Jaleswar Block prepared a Grama Panchyat Chart with proposed new Grama Panchayats on 30.07.2015 and submitted the proposal to District Level Committee, Balasore bifurcating Rayan Ramchandrapur (R.R. Pur) Grama Panchayat and creating Kotasahi Grama Panchayat tagging Jamalpur and Chaughani villages in Kotasahi Grama Panchayat. Then, the Collector, Balasore published a notification on 06.08.2015 inviting objection/ suggestion by 17.08.2015. One Pradosh Chandra Parida and others of Jamalpur and Chaughani villages filed petition for inclusion of those two villages in newly created Kotasahi Grama Panchayat. Whereas, one Nirmal Chandra Das, Madhusudan Senapati and others of the same Jamalpur and Chaughani villages filed objection not to include the said villages in proposed Kotasahi Grama Panchayat. Simultaneously, the M.L.A. of Jaleswar submitted objection to the Collector, Balasore for inclusion of Jamalpur and Chaughani villages in proposed Kotasahi Grama Panchayat on 22.08.2015.

3. After hearing the objection and suggestion, on 25.08.2015, the Collector, Balsore and the District Level Committee decided to recommend for inclusion of villages Jamalpur and Chaughani in proposed Kotasahi Grama Panchayat. On 06.11.2015, the District Level Committee was convened for finalization of New Grama Panchayats wherein the Jamalpur and Chaughani villages were included in proposed Kotasahi Grama Panchayat. Accordingly, the District Level Committee submitted proposal on 17.11.2015 to the Government for formation of new Grama Panchayats tagging Jamalpur and Chaughani villages in proposed Kotasahi Grama Panchayat. The Government returned the proposal on 07.12.2015 with the observation for reconsideration and resubmission of the same to the Government after due scrutiny in the Block Level.

4. On 18.01.2016, the Collector, Balasore instructed to all the B.D.Os. to resubmit the proposal after scrutiny at Block level. Consequentially, the B.D.O., Jaleswar submitted the revised proposal on 21.01.2016 to the Collector, Balasore wherein Jamalpur and Chaughani villages were proposed to be tagged with R.R. Pur Grama Panchayat instead of newly created/proposed Kotasahi Grama Panchayat. On 03.02.2016 and 16.02.2016, representations were made by Ex-Sarapanch of R.R. Pur Grama Panchayat challenging the inclusion of Jamalpur and Chaughani villages in R.R. Pur Grama Panchayat. Pursuant thereto, an inquiry was conducted regarding the revised proposal for inclusion of Jamalpur and Chaughani villages in R.R. Pur Grama Panchayat, and a report was submitted on 30.03.2016 by justifying the inclusion of both the villages in R.R. Pur Grama Panchayat. The District Level Committee submitted proposal of all Blocks to the Government including the proposal of tagging Jamalpur and Chaughani villages in R.R. Pur Grama Panchayat.

5. The appellants, in addition to the representations filed on 03.02.2016 and 16.02.2016, challenged inclusion of Jamalpur and Chaughani villages in R.R. Pur Grama Panchayat before this Court in W.P.(C) No. 3565 of 2016 on 25.02.2016. One Tanuja Parida and others of villages Jamalpur and Chaughani submitted a petition before the Chief Minister, Odisha for inclusion of Jamalpur and Chaughani villages in Kotasahi Grama Panchayat. The writ petition filed by the present appellants (W.P.(C) No. 3565 of 2016) was disposed of by order dated 03.03.2016 directing that the appellants would file fresh representation highlighting all the grievances before the State Government within a period of two weeks and such representation, if filed, would be disposed of by the opposite party-State Government in accordance with law by passing a reasoned order within a period of eight weeks from the date of its filing. In compliance of the same, the appellants filed a comprehensive representation along with a certified copy of the order passed in W.P.(C) No.3565 of 2016 before opposite party no.1 for consideration of their grievances made therein.

6. While the matter stood thus, the representation filed by Tanuja Parida and others of Jamalpur and Chaughani villages, which was submitted before the Chief Minister, was forwarded by Government to the Collector on 15.03.2016 to cause an inquiry and submit report. Consequentially, vide letter dated 26.03.2016, the B.D.O., Jaleswar was instructed to conduct an inquiry into the petition so filed. The B.D.O., Jaleswar submitted his inquiry report on 30.03.2016 mentioning the distance factor of those two villages to R.R. Pur

7. Grama Panchayat and Kotasahi Grama Panchayat with suggestion to tag those villages in R.R. Pur Grama Panchayat. The said inquiry report of the B.D.O., Jaleswar was forwarded by the Collector, Balasore to the Government on 05.05.2016. The State Government, without looking into the report and recommendation of the Block Level Committee, District Level Committee and also inquiry report of the Block Development Officer dated 30.03.2016, passed an order on 04.07.2016 directing inclusion of both the villages Jamalpur and Chaughani in newly created Kotasahi Grama Panchayat as the villages are contiguous one and adjacent to village Kotasahi. The said order is not a speaking or reasoned one, rather, it only gives a comment that the villages are contiguous one and adjacent to village Kotasahi. Accordingly, the Government issued notification dated 05.07.2016 under Section 3 read with sub-section (3) of Section 4 and Section 149 of Odisha Grama Panchayat Act reorganizing the Grama Panchayats wherein Jamalpur and Chaughani villages have been included in newly created Kotasahi Grama Panchayat.

8. Challenging such notification, respondents no.5 to 9 filed W.P.(C) No.12410 of 2016 without impleading the present appellants as parties to the said writ petition. The appellants filed Misc. Case No.12568 of 2016 for impletion/intervention in the said writ petition. The Government of Odisha in Panchayati Raj Department also filed their counter affidavit on 04.08.2016. Without considering the Misc. Case No.12568 of 2016 filed by the present appellants for impletion/intervention, W.P.(C) No.12410 of 2016 was disposed of by the learned Single Judge with direction for opinion poll within thirty days. Hence, the appellants preferred the present appeal to set aside the order dated 30.08.2016 passed in W.P.(C) No.12410 of 2016 by the learned Single Judge. Needles to mention here, in Misc. Case No.667 of 2016 arising out of the present appeal, this Court passed an interim order on 16.09.2016 that the opinion poll would be held on scheduled date, but the result of the same would not be declared till next date. In compliance of the said order, though the opinion poll has been conducted on 23.09.2016, but the result of the same has not been declared and has been kept in a sealed ballot box in strong room of Sub-Treasury, Jaleswar. On the basis of the above factual backdrop, the appeal has been considered keeping in view the materials available on record.

9. Mr. R.K. Rath, learned Senior Counsel appearing along with Mr. S.S. Patra, learned counsel for the appellants strenuously contended before this Court that the learned Single Judge has passed the impugned order without impleading the present appellants (who were the petitioners in W.P.(C)

No.3565 of 2016) as parties. The order dated 04.07.2016 passed by the Secretary, Panchayati Raj Department having emanated from the order passed in W.P.(C) No.3565 of 2016, the appellants are necessary parties. As such, when the respondents no.5 to 9 preferred W.P.(C) No.12410 of 2016, they should have impleaded the appellants, as necessary and proper parties, and the learned Single Judge should have given them opportunity of hearing, while disposing of the W.P.(C) No.12410 of 2016. He further contended that the order dated 04.07.2016 passed by the Commissioner-cum-Secretary, Panchayati Raj Department including Jamalpur and Chaughani villages in Kotsahi Grama Panchayat instead of R.R.Pur Grama Panchayat is justified. Since in a re-organization process some Grama Panchayats are to lose some of the villages, consequentially no illegality has been caused by the State Government in passing such order. It is further contended that R.R.Pur Grama Panchayat having all facilities, it should part with the existing Jamalpur and Chaughani villages in favour of newly created Kotasahi Grama Panchayat. The earlier decision taken for inclusion of Jamalpur and Chaughani villages in proposed Kotasahi Grama Panchayat is justified one and subsequent decision having been taken to include those two villages in R.R. Pur Grama Panchayat, as before, cannot sustain in the eye of law. It is further contended that the procedure adopted or the direction issued by the learned Single Judge for carrying out opinion poll of the villagers cannot pass the test of law, as the same is not contemplated in the notification dated 01.07.2015

10. Mr. B.Bhuyan, learned Addl. Government Advocate appearing for respondents no.1 to 4 tried to justify the order by stating that the same has been done in consonance with the guidelines dated 01.07.2015 and, as such, to reach a reasonable conclusion if the learned Single Judge has directed for conduct of opinion poll, the order impugned cannot be said to be illegal or arbitrary or unreasonable so as to warrant interference of this Court in the present appeal.

11. Mr. B.M.Patnaik, learned Senior Counsel appearing along with Mr. P.R. Patnaik, learned counsel for respondents no.5 to 9 also tried to justify the order passed by the learned Single Judge and stated that no irregularity or illegality has been committed by the order impugned and the action has been taken keeping greater public interest in consideration. Therefore, the same should not be interfered with.

12. We have heard Sri R.K. Rath, learned Senior Counsel along with Sri S.S. Patra for the appellants, as well as Sri B. Bhuyan, learned Addl. Govt. Advocate appearing for the State-respondents no. 1 to 4 and Sri B.M.

13. Pattnaik, learned Senior Counsel along with Sri P.R. Pattnaik for respondents no. 5 to 9 and have perused the records.

14. The dispute in the present writ petition is with regard to the two villages, i.e, Jamalpur and Choughani. The question is as to whether the said two villages be included in the R.R.Pur Grama Panchayat or in the newly created Kotasahi Grama Panchayat.

15. This case has a chequered history, as narrated above. In view of that the learned Single Judge has examined the correctness of order of the State Government dated 04.07.2016 and the consequential notification dated 05.07.2016 whereby the aforesaid two villages have been included in the Kotasahi Grama Panchayat whereas the writ petitioners (respondents herein) claim that as per the report of the Block Level Committee and the response of the Block Development Officer given on 30.03.2016 all the parameters were for inclusion of the said two villages in R.R. Pur Grama Panchayat.

16. Perusal of the notification dated 01.07.2015 would go to show that the Block Level Committee, after making necessary inquiry, has to make its recommendation to the District Level Committee, headed by the Collector, for inclusion of the villages of the block in the Grama Panchayats concerned. Thereafter, the same shall be notified by the Collector and after inviting objections the District Level Committee is to make its final recommendation to the State Government after hearing objections and considering the report of the Block Level Committee. It is the State Government, which is to ultimately issue the notification for inclusion of various villages in different Grama Panchayats, after considering the report of the District Level Committee and the Block Level Committee.

17. It is noteworthy, that the reason given in the impugned order of the State Government dated 04.07.2016 is that since the said two villages are adjacent to village Kotasahi, where the new Grama Panchayat has been created, hence it should be included in the said Grama Panchayat. The same is factually not correct and this also accepted by Mr. R.K. Rath, learned Senior Counsel for the appellants, as the site plan clearly shows that the said two villages are not adjacent to the village Kotasahi and further, the report of the B.D.O. dated 30.03.2016 clearly states that village Jamalpur is 100 meters from R.R.Pur and 2.0 kilometer from village Kotasahi; and further, the other village Choughani is 200 meters from village R.R.Pur and 2.2 kilometers from village Kotasahi. As such, there is no dispute with regard to the direction of the learned Single Judge quashing the order dated 04.07.2016 as well as notification dated 05.07.2016 with regard to villages in

question and remanding the matter for fresh decision. The issue in question is with regard to the direction to the Block Development Officer for holding an opinion poll and then submit a fresh report in terms of the notification dated 01.07.2015.

18. The further contention raised that the appellants have not been given opportunity before the writ Court, even though they have filed an application for intervention, is not correct to the extent that the appellants, who had filed application for intervention/impletion, have been heard by the learned Single Judge, as it is apparent from the impugned order dated 30.08.2016 where in first paragraph the name of the counsel appearing for the intervenors has been indicated. The question raised that the appellants having filed application for intervention/impletion of parties, the same should have been allowed and opportunity should have been given to them to file counter, is not always necessary. If the learned counsel for the intervenors, appellants herein, has been heard in the matter, in that case, it cannot be said that no opportunity had been given to the appellants by the writ Court. Therefore, the contention to that extent cannot sustain in the eye of law.

19. As we have already mentioned above, the only question remains for consideration is with regard to the direction issued by the learned Single Judge for holding opinion poll of the villagers. Though strictly speaking the said procedure of holding an opinion poll is not contemplated either in the Act, Rules, Regulations or the policy framed on 01.07.2015, but in the peculiar facts of the case, where villagers are fighting for inclusion of their respective villages in Kotasahi Grama Panchayat and R.R. Pur Grama Panchayat and for that purpose both the sides have approached this Court on several occasions, to resolve the dispute for all time to come, if this methodology has been adopted by the learned Single Judge for greater public interest, we would not be inclined to interfere with the direction given by the learned Single Judge.

20. It is not disputed by the parties that the Block Level Committee is to give its opinion after considering the views of the villagers. Taking the views of the villagers by way of an opinion poll would be nothing but requiring the villagers to fairly give their opinion in the form of their respective votes so that the Block Level Committee may consider the same, as well as other parameters, before giving its final recommendation to the District Level Committee. We make it clear that this should not be taken to be that the Block Level Committee, in normal course, is to take such opinion poll and this direction has been issued by the learned Single Judge in the peculiar facts of

the case where parties are fighting and approaching this Court time and again. We are, thus, not interfering with the said direction issued by the learned Single Judge. We make it clear that this should not be taken as a precedent for other cases.

21. It is thus directed that the result of the opinion poll which has been carried out by the Block Development Officer on 23.09.2016, shall be declared forthwith. The Block Level Committee shall then give its recommendation in accordance with law and the observation made herein above to the District Level Committee which shall follow the procedure provided in the notification dated 01.07.2015 and make its recommendation to the State Government, which in turn shall thereafter pass necessary orders in compliance of the guidelines issued by the notification dated 01.07.2015.

22. With the aforesaid observations and directions, the writ appeal stands dismissed.

Writ appeal dismissed.

2016 (II) ILR - CUT- 1226

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

W.P.(C) NO. 10236 OF 2015

SURYAKANTA HABODA .....Petitioner

.Vrs.

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

ODISHA MINOR MINERALS CONCESSION RULES, 2004 – RULE 26(1)
(As amended in 2014)

Application for quarry lease – Rule 26(1) prescribes that application is to be submitted alongwith the documents mentioned therein – No power vested with O.P.No.4-Tahasildar to allow time to the highest bidder to submit wanting documents and as such he has acted in excess of his jurisdiction – Moreover, when the 1st highest bidder withdrew from the race O.P.No.4 should not have accepted the offer made by the 3rd highest bidder, without affording an opportunity to the 2nd highest bidder (present petitioner), which is in gross violation of the principles of natural justice – No reason assigned by O.P.4 for allowing the long term quarry in favour of the 3rd highest bidder causing loss of revenue to the State – Held, settlement of quarry lease in favour of

O.P.No.5 (3rd highest bidder) is quashed – Direction issued to O.P.No.4 to conduct fresh auction for the quarry in question.

(Paras 12,13,14)

Case Laws Referred to :-

1. AIR 1955 SC 376 : Jugalkishore Saraf v. M/s. Raw Cotton Co. Ltd.
2. AIR 1961 SC 674 : Shri Ram Daya Ram v. State of Maharashtra.
3. AIR, 1968 SC 247 : Electrical Manufacturing Co. Ltd. v. D.D. Bhargava.
4. AIR 1997 SC 1165: Mohammad Ali Khan v.Commissioner of Wealth Tax.
5. AIR 2003 SC 317 : Colgate Palmolive (India) Ltd. v. M.R.T.P. Commission
6. AIR 2007 SC 2018 : State of Rajasthan v. Babu Ram.
7. AIR 2007 SC 2245 : State of Haryana v. Suresh.
8. AIR 1964 SC 358 : State of Uttar Pradesh v. Singhara Singh.
9. AIR 2001 SC 1512 : Dhananjay Reddy v. State of Karnataka.
10. AIR 1999 SC 3558 : Chandra Kishore Jha v. Mahabir Prasad.
11. AIR 2008 SC 1921 : Gujrat Urja Vikas Nigam Ltd. v. Essar Power Ltd.
12. (2009) 6 SCC 735 : Ram Deen Maurya v. State of U.P.

For Petitioner : M/s. Kalyan Pattnaik, P.B.Sinha.
For Opp. Parties : Mr. B.Bhuyan, Addl.Govt.Adv.
M/s. S.K.Mishra, J.Pradhan, Ms.P.P.Mohanty, S.Rout.

Date of Judgment:18.08.2016

JUDGMENT

DR. B.R. SARANGI, J.

The Tahasildar, Shamakhunta in the district of Mayurbhanj, opposite party no.4 issued a notice for long term quarry lease bearing no.652 dated 13.04.2015 inviting applications in Form-J in triplicate along with required documents from the interested bidders in sealed covers under the provisions of Odisha Minor Minerals Concession AFR 2 (Amendment) Rules, 2014. Pursuant to such notice, applications duly filled in sealed covers in respect of TMC No.16/2015-16 of Suniapal Sand Bed Sairat Sources of Khata No.74, Plot No.319-322 of area in hector 5.65 were submitted by different bidders, which were received on 27.04.2015, and the sealed covers were opened on 28.04.2015. In respect of said sand quarry, five persons had participated in the proceedings, of whom one Tarakanta Mohanty had offered highest bid price at the rate of Rs.258/- per c.m., the bid of the petitioner was the second highest at the rate of Rs.185/- per c.m. and opposite party no.5 was the third highest bidder, who had offered Rs.169/- per c.m. Though Tarakanta Mohanty was the highest bidder, due to want of certain documents, namely,

affidavit, treasury challan and solvency certificate, a notice was issued on 29.04.2015 directing him to submit such documents on or before 08.05.2015 along with EMD. Since the bid was being undertaken in respect of Suniapal Sand Bed along with other sairat sources, the highest bidders of respective sources were required to furnish the wanting documents, which had been indicated in the aforesaid notice. Tarakanta Mohanty having not furnished the documents, as required, on or before 08.05.2015 along with EMD, on 3 08.05.2015 itself vide Annexure-5 the bid was settled in favour of the 3rd highest bidder, opposite party no.5 at the rate of Rs.169/- per c.m. and he was directed to submit EMD, prepare mining plan and get environmental clearance within three months. The petitioner, who was the second highest bidder, having offered the price of Rs.185/- per c.m., being aggrieved by such notice dated 08.05.2015 in Annexure-5 settling Suniapal Sand Bed in favour opposite party no.5, has filed this writ petition.

2. Mr. K. Pattnaik, learned counsel for the petitioner has urged that without issuing any notice to the petitioner, who was the second highest bidder, the sand quarry in question has been settled in favour of opposite party no.5, who was the third highest bidder and had offered lesser price than the petitioner. In that view of the matter, opposite party no.4 has acted arbitrarily and unreasonably, which hits Article 14 of the Constitution of India.

3. Mr. B. Bhuyan, learned Addl. Govt. Advocate for the State has stated that pursuant to the notice dated 29.04.2015, the bidders were required to submit the wanting documents on or before 08.05.2015 along with the EMD, and the same having not been complied with by the petitioner, the 4 authority has not committed any illegality or irregularity in settling the sources in favour of opposite party no.5, the third highest bidder.

4. Mr. S.K. Mishra, learned counsel for opposite party no.5, the third highest bidder, has stated that the application submitted by opposite party no.5 in prescribed Form-J being in consonance with law, even if he had offered lower price, opposite party no.4 has settled the sources in his favour. Consequentially, no illegality has been committed by the authority. Further more, it is urged that opportunity had been given to the highest bidders to submit the wanting documents on or before 08.05.2015. Since the highest bidders did not submit the documents, as required, within the time frame, there was no other option available to opposite party no.4 than to settle the Suniapal Sand Bed in favour of opposite party no.5. Therefore, no illegality has been committed so as to warrant interference by this Court.

5. We haveheard learned counsel for the parties and gone through the records. Pleadings between the parties have been exchanged and with their consent the matter is being disposed of finally at this stage.

6. The admitted facts are that opposite party no.4 had issued a notice on 13.04.2015 for grant of long term quarry lease for a period of five years of different sources under its jurisdiction, including Sunialpal Sand Bed, in respect of which the petitioner and opposite party no.5 had submitted their application along with three others. On opening of the price bids on 28.04.2015, it was found that one Tarakanta Mohanty had quoted highest rate of royalty, i.e., at the rate of Rs.258/- per c.m., the petitioner had quoted second highest rate of Rs.185/- per c.m., whereas opposite party no.5 had quoted third highest rate of Rs.169/- per c.m. On 29.04.2015, opposite party no.4 issued notice Annexure-4 directing the respective highest bidders in respect of different sairat sources to submit wanting documents on or before 8.5.2015 along with EMD. So far as Suniapal Sand Bed (TMC No. 16/2015-16) is concerned, the name of Tarakanta Mohanty was shown as the highest bidder, who had quoted highest royalty at the rate of Rs.258/- per c.m. Tarakanta Mohanty, being the highest bidder in respect of the sairat source in question, having not furnished the wanting documents on or before 08.05.2015 pursuant to notice dated 29.04.2015, his bid was cancelled and in his place, opposite party no.5, who had furnished 6 necessary documents, was selected and called upon to submit EMD, prepare mining plan and get environmental clearance within three months. Opposite party no.5 was the third highest bidder and, by selecting him, the second highest bidder, namely, the petitioner has been ignored by the authority. In other words, no opportunity was given to the second highest bidder, the petitioner herein, to furnish the necessary wanting documents, if any, for selecting him for grant of long term lease quarry in his favour.

7. In Exercise of powers conferred by sub-section (1) of Section 15 of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957), the State Government has framed Rules for regulating the grant of mineral concessions in respect of minerals and for purposes connected therewith, called "The Orissa Minor Minerals Concession Rules, 2004 (hereinafter referred to as "the 2004 Rules"). The said Rules have undergone an amendment called "The Odisha Minor Minerals Concession (Amendment) Rule 2014" published in Odisha Gazette vide Notification No. 443/2014 dated 16.09.2013. Chapter-IV deals with grant of quarry leases. Rule 26 (1) of 2004 Rules reads as follows:-

26. Application for quarry lease and its renewal- (1) An application for quarry lease or its renewal shall be made to the 7 competent authority in FORM –J in triplicate and shall be accompanied with the following documents and particulars :

(i) Treasury Challan showing deposit of one thousand rupees (non-refundable) towards the application fee:

(ii) Plan, boundary description and land schedule, which would facilitate easy identification of the area applied for;

(iii) An affidavit stating the details of area held by the applicant or with any other person(s) having joint interest by way of quarry lease within the State;

(iv) Attested copies of up-to-date Income-tax and Sales tax clearance certificates or non-assessment certificates, as the case may be;

Note - In case of non-availability of an up-to-date Income Tax clearance certificate, an affidavit that up-to-date Income Tax returns as prescribed under the Income Tax Act, 1961 and that tax due including the tax on account of self assessment has been paid, may be furnished.

(v) An affidavit stating that no mining due payable under the Act and the Rules made thereunder is outstanding against the applicant;

(vi) Where the land applied for belongs to Government (Revenue Department) a no objection certificate from the Tahasildar for grant of quarry lease;

(vii) Where the land applied for belongs to private persons, consent of all such persons for grant of quarry lease;

(viii) Where the land applied for is of forest kissam, a clearance from Forest Department for grant of quarry lease;

(ix) A solvency certificate and a list of immovable properties from the Revenue Authority;

(x) In case of claims of preference because of industry, attested copies of documents to establish that he has already set up or has definite plan for setting up an industry based on minor mineral in the state;

(xi) Any other information which the applicant intends to furnish, such as, technical knowledge, experience, mach machinery under possession, financial position and the like."

On perusal of the aforesaid Rules, it appears that an application for quarry lease shall be made to the competent authority in FORM-J in triplicate

and shall be accompanied with the documents as mentioned in clauses-(i) to (xi). If the documents, as enumerated in clauses-(i) to (xi) of Rule-26(1), are not appended to in the prescribed FORM-J, then it can be construed that application so submitted for grant of quarry lease is defective/incomplete. The same could not have been accepted/considered by the authority.

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

9. Therefore, the provisions contained in Rule-26 of 2004 Rules have to be complied with in their letter and spirit. But by deviating from Rule 26(1), opposite party no.4 has issued a notice on 29.04.2015 allowing the highest bidder, 9 namely, Tarakanta Mohanty to submit the wanting documents, on or before 08.05.2015 along with EMD. Therefore, the action of opposite party no.4 is contrary to Rule 26(1) of 2004 Rules.

10. As it appears, opportunity was given to the highest bidder to furnish the wanting documents pursuant to the notice dated 29.04.2015. If that be so, similar benefits should have been given to the petitioner by calling upon him to furnish the wanting documents, if any, and ultimately, if the petitioner would have complied the same, the quarry lease in question, should have been awarded in his favour. But bypassing the petitioner, the authority has allotted the quarry lease in favour of opposite party no.5, who was the third highest bidder. Admittedly, for awarding the quarry lease in favour of opposite party no.5, it has been urged that he had complied Rule-26(1) of the 2004 Rules. But nothing has been produced before this Court by the State-opposite parties or opposite party no.5 to substantiate the same. In absence of any material before this Court, no presumption can be drawn that settlement in favour of opposite party no.5 has been done in accordance with law.

11. In **Nazir Ahmed v. King Emperor, AIR 1936 PC 253**, law is well settled "where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden." The said principles have been followed subsequently in State **of Uttar Pradesh v. Singhara Singh,** AIR 1964 SC 358, **Dhananjay Reddy v. State of Karnataka**, AIR 2001 SC 1512, **Chandra Kishore Jha** v. **Mahabir Prasad**, AIR 1999 SC 3558, **Gujrat Urja Vikas Nigam Ltd. v. Essar Power Ltd.,** AIR 2008 SC 1921, **Ram Deen Maurya v. State of U.P**., (2009) 6 SCC 735.

12. From the above, it can be safely concluded that, if Rule-26(1) of 2004 Rules prescribes that application has to be submitted by furnishing the documents mentioned therein and, any application submitted bereft of such documents, the same should not have been entertained as the application itself would be a defective one. Further, no power has been vested with opposite party no.4 to allow time to submit the wanting documents by the highest bidder. Thereby, the authority has acted in excess of its jurisdiction, which is not conferred under the Rules prescribed. In addition to the same, acceptance of offer made by the third highest bidder, without 11 affording opportunity to the second highest bidder, is in gross violation of the principles of natural justice. Further, if the highest bidder had given offer of Rs.258/- per c.m., acceptance of offer made by third highest bidder of Rs.169/- per c.m. amounts to arbitrary and unreasonable exercise of powers. By this, the State is losing its revenue at near about Rs.89/- per c.m. and no reasons have been assigned for allowing the third highest bidder to go for grant of long term quarry lease causing loss of revenue of the State. Therefore, while entertaining this application, vide order dated 01.07.2015 in Misc. Case No. 10014 of 2015 this Court granted interim order to maintain status quo in respect of the said quarry. In course of hearing, it has been brought to the notice of the Court that pursuant to the said status quo order, opposite party no.5 has not been granted long term quarry lease and the sairat source in question has not been operated till date.

13. Considering the facts from all angels, this Court arrives at a conclusion that the settlement of quarry in question made in favour of opposite party no.5, the third highest bidder, cannot sustain in the eye of law. Thereby, the notice no.887 dated 08.05.2015 so far it relates to settlement of Suniapal Sand Bed (TMC No.16/2015-16) in favour of 12 opposite party no.5 is hereby quashed. The writ petition is accordingly allowed to the extent indicated above.

14. Before parting with the case, this Court directs the opposite party no.4 to conduct fresh auction for grant of long term quarry lease in respect of Suniapal Sand Bed (TMC No.16/2015-16) by affording adequate opportunity to all the parties in accordance with law, as expeditiously as possible, and in consonance with provisions contained in 2004 Rules.

Writ petition allowed.

2016 (II) ILR - CUT- 1233

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

O.J.C. NO. 14351 OF 1998

MAMTAZ BEGUM .....Petitioner

.Vrs.

CHAIRMAN (MAYOR), CUTTACK MUNICIPAL CORPORATION & ORS. .....Opp. Parties

CONSTITUTUION OF INDIA, 1950 – ART. 226

Attack by stray bull within Cuttack Municipal Area – Death of petitioner's husband – Writ petition for compensation – Opposite party-Corporation failed to discharge its statutory duty to remove stray bulls, cows and dogs from the public street, despite directions made by this Court in the cases reported in 78(1994) CLT 332 and 1995 (II) OLR 574 – Husband of the petitioner became the victim due to non compliance of the above directions – Opposite parties filed counter affidavit disputing the cause of death of the husband of the petitioner – Held, since the writ petition involves disputed questions of fact the same can not be adjudicated under Article 226 of the Constitution of India – However petitioner may move other appropriate forum to establish her case for compensation.

Case Laws Referred to :-

1. 78 (1994) C.L.T. 332 : Madhabananda Pal v. The Executive Officer & Ors.
2. 1995 (II) OLR 574 : Govinda Ch. Patra v. Chairman (Mayor), Cuttack Municipal Corporation & Ors.
3. 2010 (4) Supreme 449 : Rajasthan Pradesh V.S. Sardarshahar & Anr. V. Union of India & Ors,
4. 2013 (Supp.-I) OLR 405 : Pramila Khata & Ors. v. CESU of Orissa.
5. 2013(Supp.-I) OLR 427 : Biswanath Senapati v. Chief Executive Officer, Central Electricity Supply Utility, Bhubaneswar.

6. 2014 (Supp.-I) OLR 51: Udaya Gagarai v. Executive Engineer, Electrical Division & anr.
7. 2015 (I) OLR 637 : T. Bimala v. Cuttack Municipal Corporation, Cuttack & Ors.
8. 2015 (Supp.-I) OLR 1032 : Haramani Das & another v. C.E.S.U. of Orissa.

For Petitioner : M/s. A.K.Choudhury, H.K.Panigrahi, J.Dash.

For Opp. Parties : M/s. S.K.Nayak, D.Nayak, A.K.Baral, Sumanta Ku. Nayak, M. Bhanja
Mr. B.P.Pradhan, Addl. Govt. Adv.

Date of hearing : 09.08.2016
Date of judgment: 18.08.2016

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner has filed this application seeking for following reliefs:

"i) *to direct the opp.parties to implement the directions given by this Hon'ble Court in the decisions reported in 74(1994) C.L.T. 332 and 1995(2) O.L.R. 574 by fixing individual responsibility on opp.parties 1 and 2.*

ii) to direct the opp.parties to take sincere attempts inasmuch as to implement the directions in letter and spirit to remove the stray cattle/dogs from the public interest in Cuttack city.

iii) to direct the opp.parties to pay damages of Rs. 2,00,000/- to the petitioner for the unfortunate death of her husband due to the attack of the stray cattle.

iv) to direct the opp.parties to take immediate steps for making the roads within the Municipal limits free from stray cows, bulls and dogs as the life of the inhabitants have been in endanger and public safety has been jeopardize.

v) and to pass such other order/orders as this Hon'ble Court deems just and proper in the peculiar facts and circumstances of this case.

vi) if the opp.parties fail to show cause or show insufficient cause, to make the said rule absolute."

2. The factual matrix of the case, in hand, is that late Abdul Lyakuddin, husband of the petitioner, became a victim of attack of a stray bull on 30.01.1998 at about 7.55 a.m. at Mangalabg Chhak, while he was going to purchase some sweets from a nearby shop. He was immediately shifted to

S.C.B. Medical College and Hospital, Cuttack, where he, ultimately, succumbed to the injuries on 04.02.1998 and, consequently, an U.D. Case was registered bearing No.85 of 1998 at Mangalabag Police Station. According to the petitioner, the above incident was nothing but an outcome of negligence on the part of the opposite party Corporation and its authorities in removing the stray bulls and cows from the public street. By that, they have not only failed to discharge their statutory duties but also neglected to comply with the directions given in the decisions of this Court in **Madhabananda Pal v. The Executive Officer and others,** 78 (1994) C.L.T. 332 and **Govinda Ch. Patra v. Chairman (Mayor), Cuttack Municipal Corporation and others,** 1995 (II) OLR 574. Therefore, by means of this writ petition, besides claiming compensation, the petitioner seeks for directions to the opposite parties to take immediate steps in compliance of the directions contained in the aforementioned judgments of this Court.

3. Mr. A.K. Choudury, learned counsel appearing for the petitioner strenuously urged before this Court that every citizen has a right to life within the meaning of Article 21 of the Constitution of India, which includes right to life with human dignity and, as such, the opposite parties-Municipal Corporation owe a responsibility to ensure public health and safety of its citizens. Furthermore, even though Section 287 of the Orissa Municipal Act, in order to prevent nuisance or danger, requires the opposite parties-Municipal Corporation to impose restrictions against keeping animal within the municipal area, Section 253 of the Act requires the opposite parties-Municipal Corporation to maintain road safety, and Section 88 of the Act confers emergency powers upon the Executive Officer of the opposite parties-Municipal Corporation for immediate execution or doing/taking action, which is, in his opinion, necessary for the service of safety of the public and, more particularly, when there is specific direction from this Court in **Madhabananda Pal** (supra) and **Govinda Ch. Patra** (supra) to ensure public health and safety, the same having not been complied with, consequence thereof the petitioner's husband has lost his life on the attack of a stray bull. Therefore, the petitioner should be awarded compensation for such negligence on the part of the opposite parties-Municipal Corporation. In support of his contention, learned counsel for the petitioner placed reliance, apart from the aforementioned judgments, upon **Rajasthan Pradesh V.S. Sardarshahar & Anr. V. Union of India and Ors,** 2010 (4) Supreme 449, **Pramila Khata and others v. CESU of Orissa,** 2013 (Supp.-I) OLR 405, **Biswanath Senapati v. Chief Executive Officer, Central Electricity Supply Utility, Bhubaneswar,** 2013(Supp.-I) OLR 427, **Udaya Gagarai v.**

Executive Engineer, Electrical Division and another, 2014 (Supp.-I) OLR 51, **T. Bimala v. Cuttack Municipal Corporation, Cuttack and others,** 2015 (I) OLR 637 and **Haramani Das & another v. C.E.S.U. of Orissa,** 2015 (Supp.-I) OLR 1032.

4. Mr. D. Nayak on behalf of Mr. S.K. Nayak, learned counsel appearing for opposite parties no. 1 and 2- Cuttack Municipal Corporation vehemently urged before this Court that due to disputed questions of facts involved in this case, the petitioner is not entitled to get any compensation, as claimed in this writ application. So far as compliance of the judgments passed by this Court in **Madhabananda Pal** (Supra) and **Govinda Ch. Patra** (supra) is concerned, the opposite parties-Municipal Corporation have taken necessary steps for removal of stray cattle and dogs from the road and to that extent a counter affidavit has been filed by the opposite parties-Municipal Corporation in a connected writ application (OJC No. 5911 of 2000). His further submission was that once the authorities have taken steps for compliance of the judgments of this Court, the allegation that the order has not been complied with, is absolutely misconceived one and, more so, the opposite parties do not admit that the death of the petitioner's husband was due to attack by bull or cow. Therefore, the petitioner is not entitled to get any relief, as prayed for, in this writ application and the same is liable to be dismissed, as disputed questions of facts are involved. In order to substantiate his case, he has relied upon the judgment in **Chairman, GRID Corporation of Orissa Ltd. (GRIDCO) and others v. Sukamani Das (Smt.) and another,** (1999) 7 SCC 298.

5. The admitted facts are that the Cuttack Municipal Corporation owes a duty to keep the road clean and free from stray cows, bulls etc. As per the provisions contained in Section 409(2) of the Orissa Municipal Corporation Act, it has to remove the animal from public road and also prohibit tether any animal on any public road. Section 414 lays down to take precaution for public safety in any street. Similarly, Section 513(1) empowers the Corporation to control the cattle and other animal in the Corporation area. Section 343 prohibits to keep animal and Section 544 also puts a restriction to the extent that no portion of building would be used for keeping animal, i.e., cow, cattle, bullock, buffalo, goat etc. Sections 287, 253 and 88 of the Orissa Municipal Act empower the Municipality/Municipal Authority to keep such roads clean and free from stray cows, bulls & dogs.

6. At this stage, it is worthwhile to mention, that before coming into force of Municipal Corporation Act, the Cuttack city was a Municipality and

was regulated under the provisions of Orissa Municipal Act. Section 287 thereof deals with imposition of prohibition by the Municipality against keeping animal so as to prevent nuisance or danger. Section 253 of the Orissa Municipal Act postulates with regard to maintenance of road safety by the Municipality and Section 88 of the Orissa Municipal Act confers emergency powers upon the Executive Officer of the Municipality for immediate execution or doing/taking action, which is, in his opinion, necessary for the service of safety of the public. A similar question had come up for consideration by this Court in **Madhabananda Pal** (supra), where this Court had issued the following guidelines.

" (i) *A Committee be formed with the Revenue divisional Commissioner, Cuttack as its Chairman and in the said Committee apart from the Chairman, Cuttack Municipality and its Executive officer, the Collector of the district and the Superintendent of Police should also be its members;*

(ii) The revenue Divisional Commissioner can cope up the public spirited people who would be willing to render their valuable assistance in formulating a scheme to tackle the menace of stray cows, bulls and dogs;

(iii) The Vice Chairman, Cuttack Development Authority should also be a member of the said committee so that, if necessary some land could be ear-marked and allotted for the purpose of establishing Kine House;

(iv) The committee would be empowered to suggest any amendment to the Municipal Laws if they find that the existing law is not sufficient to tackle the problem and on such suggestion, if made, the appropriate authority should take steps in that regard;

(v) As an immediate interim measure, the Executive Officer of the Cuttack Municipality can publicise and announce that if any person allows their cows, bulls of dogs to roam on the road, the Municipal authorities would be entitled to take them for the purpose of impounding in the Kine House;

(vi) The so-called Dog Squad which is stated to be in vogue should be energised to destroy the stray dogs moving on the roads which will be a step in solving the menace in accordance with the ultimate scheme to be framed;

(vii) The committee in question be constituted by the Government in the Urban Development Department bearing in mind our observations made in this case within two months from the date of the receipt of our order and the said committee should frame the scheme within three months from the date of its formulation;

(viii) The Secretary to the Revenue Divisional Commissioner should be appointed as the convenor and he should take steps for convening the meeting of the committee;

(ix) It would be open for the petitioner to approach for any further direction in this regard if he finds that the aforesaid committee is not functioning to the satisfaction of all concerned"

This Court disposed of the said writ petition with the aforesaid observation and direction. In spite of the up quoted directions, the Municipal authorities did not rise from the slumber and comply with the same in letter and spirit. As a result, one Gobinda Ch. Patra got injured by a cow within the premises of Cuttack Collectorate and was hospitalized. He filed OJC No.5999 of 1994 claiming compensation and this Court by the judgment reported in **Gobinda Ch. Patra** (supra) directed payment of Rs. 20,000/- and further issued direction to implement the directions contained in the judgment in previous writ petition reported in **Madhabananda Pal** (supra).

7. In the case in hand, it is stated that the husband of the petitioner, while going to purchase some sweets at Mangalabag Chhak, one stray bull attacked him from behind by its horns. As a result, he sustained injuries on his head and ultimately expired at S.C.B. Medical College and Hospital, Cuttack. Accordingly, U.D. Case No. 85 of 1998 has been registered in Mangalabag Police Station. It is further stated that due to inaction of the authorities and non-compliance of the directions given by this Court in earlier writ applications, and also due to their negligence, the petitioner lost her husband on account of attack by the stray cow/bull. It is also stated that the deceased husband of the petitioner was discharging duties of Asst. Post Master and was getting an amount of Rs.8750/- per month and after his death nobody is there to look after his family. Therefore, necessary compensation should be paid by the opposite parties to make good the loss caused to the petitioner.

8. The opposite parties 1 and 2 in their counter affidavit in paragraph 3, 4 and 7 have specifically stated to the following effect:

3. That the writ petition is not entertainable since the facts stated by the petitioner for compensation are not correct. It may kindly be noted that the petitioner did not suffer or die due to attack by a stray cow or Bull. The petitioner has not clearly stated as to who attacked her husband. In paragraph-2 the petitioner alleges that the stray cow was the cause of the death of her husband, but in paragraph-4 of the writ petition the petitioner alleged that the bull attacked her husband.

4. That the opposite party has definite information that nobody was attacked by a stray Bull or cow on the date and time mentioned in paragraph 13 of the writ petition. On being asked by the staff of the Municipal Corporation none of the people of the local area at Mangalabag Chhak, supported the allegation of the petitioner. On other hand they refused to have seen such incident in the morning hour on that particular date. The document as per Annexure-1 does not show in clear terms the cause of death. Therefore, the allegations of the petitioner in this regard are false and fabricated and have been made for illegal gain. Therefore, the writ petition is liable to be dismissed by the Hon'ble Court.

7. That as regards the reported case as referred to by the petitioner in paragraph-2 of the writ petition, these opp.parties humbly submit that steps were taken for removal of stray cattle and dogs which has been categorically stated in the counter affidavit filed in the another case bearing OJC No. 11362/99, which is pending before the Hon'ble Court.

9. On perusal of the pleadings available on records, it appears that in paragraph-2 of the writ application a contention has been raised that due to attack of stray cow, death has been caused to the husband of the petitioner, whereas in paragraph-4 it is stated that due attack of the stray bull, the husband of the petitioner succumbed to the injuries. This apart, the FIR Annexure-1, on which reliance has been placed, nowhere indicates that the death has been caused due to attack of the stray cow/bull, rather, under the heading "cause of death as reported with date and hour of death" it is mentioned "expired on 4.2.98 at 6.55 due to head injury". When the opposite parties filed their counter affidavit disputing the cause of death of the husband of the petitioner, a rejoinder affidavit was filed, in which an attempt has been by the petitioner to controvert the same, by referring to certain documents annexed therewith. But, however, as would be apparent from the

post mortem report, the medical officer, Department of F.M. & T, S.C.B. Medical College and Hospital, Cuttack has opined as follows;

> *"All the injuries are antemortem in nature and could have resulted from blunt force impact over head and death is due to crania-cerebral injuries and complications thereof. Therefore, death is about within 18-24 hrs. in the time of p.mensem."*

Similarly, in the letter addressed to the C.M.O., S.C.B. Medical College and Hospital, Cuttack dated 04.02.1998, it has been indicated as follows:

> *" A case of head injury died in this ward on 4.2.98 at 6.35 p.m. & this is for your information & necessary action"*

In the aforesaid documents, nowhere it is indicated that the death of the husband of the petitioner has been caused due to the injury caused by cow/bull. Therefore, in our considered opinion, it involves disputed questions of facts.

10. So far as compliance of the directions given by this Court in the judgments reported in **Madhabananda Pal** (supra) **and Govinda Ch. Patra** (supra) is concerned, in the affidavit filed by the Chief Executive Officer of the Cuttack Municipal Corporation in the present case it has been categorically indicated that steps have been taken for compliance of the same. We hope and trust that the authorities must have looked into the matter and left no stone unturned in compliance of the directions of this Court, particularly when the opposite parties Municipal Corporation owe a statutory duty to discharge towards safety of road as well as public in conformity with the provisions of law and, any violation thereof, may amount non-compliance of directions given by this Court in the judgments referred to above.

11. Much reliance has been placed in the judgments passed by the apex Court in **Rajasthan Pradesh V.S. Sardarshahar** (supra), and by this Court in **Pramila Khata, Biswanath Senapati, Udaya Gagarai, T. Bimala** and **Haramani Das** (supra), where the death had been occurred due to electrocution and on the basis of the factual matrix of the respective cases, this Court awarded ad-interim/full compensation. But, those cases have no application to the present case, because on the basis of the fact involved in this case, there is no admission on the part of the opposite parties that the death has been occurred to the husband of the petitioner due to attack of the stray cow/bull.

12. The reliance placed in **Rajasthan Pradesh V.S. Sardarshahar** (supra), it appears that the apex Court held that in the writ petition or in the counter affidavit, not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it, unless the pleadings are complete, Court is under no obligation to entertain the pleas. Applying the said principle to the present context, it appears that the petitioner has relied upon the FIR, post-mortem report and letter of the doctor, which have been annexed to the writ application and subsequently in the rejoinder affidavit nowhere it has been stated that the death of the husband of the petitioner has been occurred due to the attack of the cow/bull, rather, the materials available on record indicate that the death has been occurred due to cerebral injuries. The opposite parties have disputed the cause of death of the husband of the petitioner, which this Court cannot adjudicate in exercise of power under article 226 of the Constitution of India.

In **Chairman, GRID Corporation of Orissa Ltd.** (supra), the apex Court has categorically laid down the principles that where disputed questions of fact involved, the matter ought not to be entertained under Article 226 of the Constitution of India. The apex Court, while saying so, came to observe that the High Court has committed an error in entertaining the writ petitions, even though they were not fit cases for exercising power under Article 226 of the Constitution. The High Court went wrong in proceeding on the basis that the deaths had taken place because of electrocution as a result of the deceased coming into contact with snapped live wires of the electric transmission lines of the appellant Grid Corporation. The mere fact that the wire of the electric transmission line belonging to the Grid Corporation had snapped and the deceased had come in contact with the same and had died was not by itself sufficient for awarding compensation. It also required to be examined whether the wire had snapped as a result of any negligence of the Grid Corporation and under which circumstances the deceased had come in contact with the wire. In view of the specific defences raised by the Grid Corporation in each of these cases it deserved an opportunity to prove that proper care and precautions were taken in maintaining the transmission lines and yet the wires had snapped because of circumstances beyond its control or unauthorized intervention of third parties or that the deceased had not died in the manner stated by the petitioners. These questions could not have been decided properly on the basis of affidavits only. It is the settled legal position that where disputed questions of facts are involved a petition under Article 226 of the Constitution is not a proper remedy.

13. Applying the aforesaid analogy to the present context, it appears that nothing has been placed before this Court for consideration how the direction of this Court has not been complied with and what is the negligence caused by the authorities so as to grant compensation to the petitioner and standard of proof requires that the death has been occurred due to negligence on the part of the authorities. In absence of the same, where disputed questions of facts are involved, a petition under Article 226 of the Constitution of India is not proper remedy. In that view of the matter, this Court is not inclined to entertain this writ application, which is hereby dismissed.

14. While parting with the case, this Court makes it clear that dismissal of the writ application will not stand on the way of the petitioner to move appropriate forum to establish the cause of death of her husband by adducing proper evidence in accordance with law so as to claim compensation.

Writ petetion dismissed.

2016 (II) ILR - CUT- 1242

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

W.P.(C) NO. 14122 OF 2016

SATISH MOHAN PADHY ……..Petitioner

.Vrs.

NISER & ORS. ……..Opp. Parties

EDUCATION – Admission to five years M.Sc. programme in NISER – Petitioner was called upon to take admission on 02.08.2016 on spot selection – Due to illness he could not be able to take admission on the date fixed – After recovery, he approached the authority on 07.08.2016 but he was denied admission – Hence the writ petition – Candidates securing less percentage of marks than the petitioner got admission – Four seats are still lying vacant – Held, considering the law of equity, direction issued to the authority to admit the petitioner in NISER for the session 2016-17 – However,the case of the similarly situated candidates, those who have not approached this court in time, can not be considered. (Paras 11,12,13)

Case Laws Referred to :-

1. (2012) 7 SCC 389 : Asha v. PT. B.D. Sharma University Of Health Sciences And Ors.
2. 73 (1992) C.L.T. 791: Prasanna Kumar Nayak & ors.v. National Insurance Company & Ors.
3. (2014) 10 SCC 521: Chandigarh Administration and another v. Jasmine Kaur & Ors.
4. (1986) 4 SCC 268 : Miss Neelima Shangla, Ph.D Candidate v. State of
5. (2010) 10 SCC 677: Haryana and others, Ritesh Tewari and another v. State of Uttar Pradesh and others.

For Petitioner : M/s. V. Narasingh, S.Das & S.Devi
For Opp. Parties : M/s. Sarbeswar Barik & P.C.Behera

Decided on : 30.08.2016

JUDGMENT

DR. B.R. SARANGI, J.

Opposite Party No.1, the National Institute of Science Education & Research, Bhubaneswar (in short 'NISER') has been imparting Five Years M.Sc. Programme offering learning in the core and immerging branches of basic science to students after their 10+2 *AFR* Higher Secondary Schooling. This is an autonomous institute under the department of Atomic Energy, Government of India, which invited applications for selection of candidates for prosecuting their studies for the academic session 2016-17 by conducting National Entrance Screening Test, 2016(NEST, 2016). The petitioner having requisite qualification applied for the said test. He was assigned with NEST Application no. 16139854. In the said entrance test, the petitioner's All India Rank was 950. Though his name was not figured in the 1st select list, subsequently, his name was indicated in the extended waiting list. Accordingly, he was called upon on 31.07.2016 to appear on 2nd August, 2016 for spot admission. Pursuant to intimation issued on 31.07.2016, due to his illness, he was not able to appear on the date fixed i.e. on 2nd August, 2016. Consequently, persons securing less mark got admitted on spot selection on 2nd August, 2016. When the petitioner approached the authority after 2nd August, 2016, he was denied admission on the ground that the last date of admission, i.e., on 2nd August, 2016 has already been closed. Hence, he has approached this Court by filing the present writ application on 12.06.2016 seeking for direction to the opposite parties to admit him into integrated five years M.Sc. programme in the opposite party no.1 institution

during the current academic session 2016-17, as seats belonging to unreserved (UR) category are still lying vacant.

2. Mr. V. Narasingh, learned counsel for the petitioner states hat the petitioner having been selected and called upon to appear for pot admission on 2nd August, 2016, since he could not appear due to he reasons beyond his control, he should not have been denied the dmission to the course for 5 years integrated M.Sc. in the opposite party no.1 institution on the plea that the last date of admission was lready over w.e.f. 2nd August, 2016. It is further urged that the persons securing less percentage of marks have been given admission in the spot selection on the date fixed. If the seats are lying vacant, the petitioner, having secured higher percentage of marks, should have been given equal opportunity and, as such, should not have been denied to prosecute his higher studies. It is further urged that even if there may be similarly situated persons available for admission, since because they have not approached this Court ventilating their grievance and slept over the matter, their cases need not be taken into consideration. To substantiate his contention, he has relied upon the judgments in Asha v. PT. B.D. Sharma University Of Health Sciences And Others, (2012) 7 SCC 389, Prasanna Kumar Nayak and others v. National Insurance Company and others, 73 (1992) C.L.T. 791, Chandigarh Administration and another v. Jasmine Kaur and others, (2014) 10 SCC 521, Miss Neelima Shangla, Ph.D Candidate v. State of Haryana and others, (1986) 4 SCC 268, Ritesh Tewari and another v. State of Uttar Pradesh and others, (2010) 10 SCC 677.

3. Considering the facts that the petitioner has a prima facie case, this Court issued notice both in the main case as well as in misc. case on 16.08.2016 fixing 23.08.2016 as date of appearance. In response to the same, Sri Sarbeswar Barik, learned counsel has entered appearance and filed counter affidavit on behalf of opposite party no.3, Registrar of the Institute, NISER.

4. Mr. S. Barik, learned counsel appearing for opposite party no.3 has specifically stated that since the petitioner could not appear in the counseling at 10.30 a.m. on 2nd August, 2016, the date fixed, he cannot be granted benefit of admission into the course, and more particularly, the request for admission of the petitioner after 7th August, 2016 ought not to have been entertained as per the notification. Since the cut off date had already been declared in the website as 2nd August, 2016, the NISER authority did not interfere with the same and, as such, no further admission was taken place after 2nd August, 2016. The petitioner having failed to appear at the spot

interview on 2nd August, 2016, the date fixed, he cannot be given the benefit of admission into the course.

5. In course of hearing, it has been brought to notice of the Court that at present four seats are lying vacant.

6. We have heard learned counsel for the parties and perused the records. The facts of the case are not disputed to the extent that the petitioner had offered his candidature to participate in the selection for Five Years Integrated M.Sc. Course under the NISER and his rank being 950 and that he had been called upon to appear at the spot interview to be conducted on 02.08.2016. But, unfortunately, on the date fixed, as he was ill, he could not appear before the authority concerned, nor any communication could be sent by him requesting for extension of time. However, the candidates securing less percentage of marks than the petitioner having been given admission, it is stated by learned counsel for the petitioner that the petitioner should be given admission, since the seats are still lying vacant, as admitted by learned counsel appearing for the opposite party no.3.

7. The only question to be considered is as to whether the petitioner can be given admission after the cut off date fixed by the authority concerned, and in the event such admission is given whether any other similarly situated person will get any right for such admission or not.

8. So far as fixation of cut off date as 02.08.2016 is concerned, this Court observes that the authorities have got every right to fix such cut off date, but fact remains that the petitioner was called upon to appear in the interview on the date fixed i.e., 02.08.2016, but he could not appear due to his illness, which was beyond his control, and, as such, he could not be able to inform the authority due to such illness. In that view of the matter, immediately after recovery, when he approached the authority, it was informed that since the cut off date has already been over, even if seats are lying vacant, that cannot be filled up as the academic session has already started with effect from 08.08.2016. Therefore, the cut off date is operating as a bar to admission to the petitioner.

9. Similar question had come up for consideration before the apex Court in Asha v. PT. B.D. Sharma University of Health Sciences And Others (supra) and in paragraph-31 thereof, the apex Court came to hold as follows:-

> *"31. Having recorded that the appellant is not at fault and she pursued her rights and remedies as expeditiously as possible, we are of the considered view that the cut-off date cannot be used as a*

technical instrument or tool to deny admission to meritorious students. The rule of merit stands completely defeated in the facts of the present case. The appellant was a candidate placed higher in the merit list. It cannot be disputed that candidates having merit much lower to her have already been given admission in the MBBS course.The appellant had attained 832 marks while the students who had attained 821, 792, 752, 740 and 731 marks have already been given admission in the ESM category in the MBBS course. It is not only unfortunate but apparently unfair that the appellant be denied admission."

It is well recognized principle of law that strict adherence to the time schedule has to be followed, but the Court may have to mould relief and make an exception to the cut off date in exceptional circumstances in order to ensure that no fault can be attributed to the candidate that candidate persuade his rights and legal remedies expeditiously without any delay.

10. In the judgment rendered in *Chandigarh Administration and another* (supra), the apex Court in paragraphs-33.2 and 33.4 whereof held as follows:

33.2. Under exceptional circumstances, if the court finds that there is no fault ttributable to the candidate i.e. the candidate has pursued his or her legal right expeditiously ithout any delay and that there is fault only on the part of the authorities or there is an apparent breach of rules and regulations as well as related principles in the process of grant of admission which would violate the right to equality and equal treatment to the competing candidates and the relief of admission can be directed within the time schedule prescribed, it would be completely just and fair to provide exceptional reliefs to the candidate under such circumstances alone.

xxx xxx xxx

33.4. When a candidate does not exercise or pursue his/her rights or legal remedies against his/her non-selection expeditiously and promptly, then the courts cannot grant any relief to the candidate in the form of securing an admission.

11. Applying the aforesaid positions of law, as laid down by the apex Court, to the present context, it appears that the petitioner has approached the authority immediately after recovery from his illness, and, when his grievance was not taken into consideration, he approached this Court forthwith on 12.08.2016. As such, the petitioner has not caused any delay

attributable to him. The academic session was started w.e.f. 08.08.2018 and, in the meantime, only twenty days have elapsed and, therefore, in the event the petitioner is given admission in a five years course at this point of time, it will not cause any prejudice to anybody, as the seats are still lying vacant, particularly when the candidates having secured less marks than that of the petitioner have already been admitted into the course by the authority on the date fixed, i.e., 02.08.2016. Therefore, considering the law of equity, which tilts in favour of the petitioner, this Court is of the considered view that the petitioner should be given admission as expeditiously as possible, as he has ventilated his grievance before this Court. Therefore, it would be completely just and proper and also fair to provide exceptional reliefs to the petitioner under such circumstances alone.

12. Apart from the above, so far as the claim of similarly situated persons are concerned, this Court is of the considered opinion that since they have slept over the matter and have not approached this Court in time, their cases cannot be considered. Similar question had come up for consideration before this Court in *Prasanna Kumar Nayak and others* (supra) and in paragraph-7 thereof a Division Bench of this Court observed as follows:-

> *"7. However, to take care of the submission of Shri Nanda that if the opposite parties would be directed to absorb the four petitioners in the posts of Assistant (Typist), it would be not permissible for them to deny appointment to other persons whose names found place in the aforesaid select list, because of which the opposite parties shall have to give appointment to all the persons who had been selected and whose names are in the list. In this connection, we would like to say that there would be no such compulsion on the part of the opposite parties and the present decision of our would not clothe other persons with any right whose names are in the select list but who had slept over the matter for long. Law permits Courts to grant and confine relief to those who come before them and to observe that the same would not be available proprio vigore to those similarly situated but who had chosen to sleep over their rights. Vigilance is said to be the price of liberty. We, therefore, make it clear that this decision of ours would not ipso facto clothe other persons whose names found place in the aforesaid list to claim appointment on the basis of this decision."*

In view of such position, this Court is of the considered view that the decision of ours allowing the petitioner to get admitted into the course would not *ipso*

facto clothe other persons whose names found place in the rank list in question to claim for admission at par with the petitioner. Apart from the same, if other candidates, who do not exercise or pursue their rights or legal remedies against their non-selection expeditiously and promptly, then no relief can be granted by this Court to such candidates in the form of securing an admission.

13. In the above view of the matter, this Court directs the opposite parties to admit the petitioner into the Five Years Integrated M.Sc. Course in NISER for the session 2016-17 within a period of seven days from the date of production/receipt of certified copy of the judgment, by following due procedure of law.

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

Writ petition allowed.

2016 (II) ILR - CUT- 1248

INDRAJIT MAHANTY, J. & BISWAJIT MOHANTY, J.

W.P.(C) NO. 16567 OF 2013

STATE BANK OF INDIA & ANR. ……..Petitioners

.Vrs.

I.T.O-CUM-TAX RECOVERY OFFICER, I.T. DEPT., WARD NO.3, AAYAKARA BHAWAN, ROURKELA & ORS. ……..Opp. Parties

SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS & ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – S. 35

Whether Crown debt / Government dues can override the claim of secured creditor in the absence of a statutory backing ? Law is well settled that Government debts have precedence only over unsecured creditors, so a debt which is secured becomes the first charge over the property and have to prevail over the Crown debt/Government dues.

In this case O.P. No2-company availed several credit facilities from a consortium of banks including the State Bank of India and created equitable mortgage of its immovable properties in favour of the banks – When O.P.No.2 failed to operate the loan accounts the same were classified as NPA and since there was no response for payment

notice U/s 13 (2) of the Act 2002 issued demanding payment within 60 days – In the meantime O.P.No1- Income Tax Department attached the immovable properties of O.P.No.2 which stood mortgaged with the banks in order to realise its income tax dues and put it for auction – Hence the writ petition – It is not disputed that Income Tax Act does not provide for any paramountcy of dues by way of Income Tax – Held, Government dues/Crown debt with regard to recovery of Income Tax can not have priority over the demands of secured creditor like banks and presently petitioner No.2 – O.P. No.1 is wrong in attaching the immovable properties which are already mortgaged with the banks earlier – Petitioner No.2 is at liberty to proceed with the matter in accordance with the provisions of SARFAESI Act, if there is no other impediment. (Paras 8 to 11)

Case Laws Referred to :-

1. (2009) 2 SCC 121 : Union of India and others v. Sicom Limited & Anr.
2. (2013) SCC 746 : Rana Girders Limited v. Union of India & Ors.
3. (2015) 2 SCC 1 : Bombay Stock Exchange v.V.S. Kandalgaonkar & Ors.

For Petitioners : Mr. R.P. Kar.
For Opp. Parties : Mr. Sanjay Acharya, (S.S.C) Income Tax Department.

Date of Judgment: 21.10.2016

JUDGMENT

BISWAJIT MOHANTY, J.

The controversy in this case revolves around the primacy of secured debt vis-à-vis Crown Debt/ State Dues.

2. Opposite party no.2, a public limited company was incorporated as such in the year 1995 under the Companies Act, 1956. Opposite party no.3 is its Chairman and opposite party no.4 is its Managing Director and opposite party nos.5 to 7 are its Directors. Opposite party no.2 availed several credit facilities with effect from the year 1998 from State Bank of India as well as from other borrowers. It also took credit facilities from a consortium of Banks consisting of State Bank of India, UCO Bank, State Bank of Bikaner and Jaipur, Oriental Bank of Commerce, Andhra Bank, Induslnd Bank and Allahabad Bank for carrying on its business. The total credit facilities availed by opposite party no.2 from the consortium of lending banks at the time of filing of writ application stood at Rs.602 Crores out of which State Bank of India, for short, "SBI" alone had contributed Rs.181.01 Crores. In order to secure the above noted credit facilities, opposite party no.2 from time to time

duly created equitable mortgage of its immovable properties in favour of Banks, the first of which was created on 10.7.1999 when title deeds in respect of Ac.19.48 decimals of land belonging to opposite party no.2 was deposited with "SBI" to secure Rs.3.05 crores besides interest, costs and other charges. Such equitable mortgaged was further created/extended on 20.11.2003, 25.10.2008 & 8.12.2008 by deposit/constructive deposit of title deeds with "SBI" and on 8.4.2009 & 13.8.2010 by deposit/constructive deposit of title deeds with "SBI" as the leader of the consortium to secure credit facilities availed by opposite party no.2 from time to time from "SBI" as well as other Banks forming the consortium. The last of such deposit of title deeds for creating equitable mortgage was made on 28.3.2011 with "SBI" as the leader of consortium. According to petitioner no.2, the above noted equitable mortgage covered a total area of Ac. 159.965 decimals of land. Memorandum of deposit of title deeds evidencing creation of equitable mortgage has been filed as part of Annexure-1 Series to the writ application. However, opposite party nos.2 to 7 failed to operate the loan accounts in terms of their contract with the lending banks, as a result of which, the said loan accounts were classified as NPA with effect from 22.10.2012. When there was no response to repeated requests and demand made by the consortium to regularise the loan accounts or to repay all the dues, majority of the consortium lenders including "SBI" recalled the advances by notice dated 5.2.2013 and called upon opposite party no.2 to repay all their dues to the consortium by 16.2.2013 under Annexure-2 Series. When again there was no response from the side of opposite party nos.2 to 7, "SBI" representing the consortium served demand notice dated 25.2.2013 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, for short, "SARFAESI Act" demanding payment of the entire dues with interest plus further interests and costs till payment within 60 days of receipt thereof. This notice dated 25.2.2013 has been filed as part of Annexure-2 Series to the writ application. Sometime thereafter, i.e., on 18.3.2013 vide Annexure-3, opposite party no.1 served a notice on the Branch Manager of "SBI", Panposh Branch calling upon him to appear in person at 4.30 P.M. on 18.3.2013 and produce bank account details as well as details of land, building, factory building and other assets owned by opposite party nos.2 to 5 & 7 which might have been pledged with the Bank in order to get loans. In response to Annexure-3, "SBI" immediately submitted the details of loan accounts, land and building standing in the name of the company (opposite party no.2) and its Directors as mortgaged to it vide Annexure-4 dated 18.3.2013. After getting the information under Annexure-

4, opposite party no.1 attached the immovable properties of opposite party no.2 which stood mortgaged to the banks in order to secure the credit facilities availed from them and published the same in the daily Odia Newspaper "Dharitri" dated 30.3.2013 vide Annexure-5. A perusal of Annexure-5 would show that such attachment was done by the Income Tax Department since the assessee company (opposite party no.2) failed to pay its Income Tax dues to the extent of Rs.12,13,59,877/- plus interest. Such attachment order was passed prohibiting/restraining opposite party no.2 from transferring or charging the above mentioned properties in any way and it was made clear that no one can get any benefit under such transfer or charge. On coming to know about the attachment order under Annexure-5, "SBI" vide its letter dated 3.4.2013 under Annexure-6 informed opposite party no.1 that the properties which have been attached by him on 30.3.2013 vide Annexure-5, have been mortgaged to "SBI" and other banks forming the consortium of which "SBI" is the leader in order to secure the credit facilities availed from them. Thus, consortium lenders have first charge over the said properties and such charge would continue to remain until all the dues are paid to the consortium banks. It was also made clear therein that the demand notice issued under Section 13(2) of "SARFAESI Act" has already been served on 25.2.2013 and thus recovery process under "SARFAESI Act" has already been initiated. Since the banks forming the consortium have first charge over the mortgaged properties at least from 20.11.2003, the attachment of opposite party no.1 under Annexure-5 should be subservient to the charge created in favour of the consortium of banks. According to petitioner no.2, such information under Annexure-6 was submitted to opposite party no.1 with a hope that the said authority would act in accordance with law, would realise the legal position and vacate the said illegal order of attachment suo motu. When opposite party no.1 instead of withdrawing/vacating its illegal order of attachment dated 30.3.2013 under Annexure-5 tried to proceed further to realise the alleged Income Tax dues of opposite party no.2 by putting the above noted immovable properties mortgaged to the Banks to auction, petitioner no.1 filed the present writ application with the prayers to quash the attachment order under Annexure-5 and to direct opposite party no.1 not to proceed against the secure assets of "SBI" and other consortium banks for recovery of Income Tax dues of opposite party nos.2 to 7 in any manner whatsoever.

3. Opposite party no.1 has only filed a counter affidavit stating therein that the assessee company (opposite party no.2) had a total outstanding tax liabilities for two assessment years, i.e., 2009-2010 & 2010-2011 to the tune

of Rs.12,1359,877/-, which includes the interest. As opposite party no.2 did not pay the taxes, recovery proceeding against it was initiated in accordance with the provisions of the Income Tax Act, 1961. Since "SBI" was not a party to the recovery proceedings as the department was taking action against opposite party no.2 for its default, there was no reason for giving "SBI" a prior hearing before taking coercive action against the defaulting taxing payer, namely, opposite party no.2. The counter further makes it clear that the Income Tax Department has the power to take coercive action against the defaulters under Second Schedule of the Income Tax Act, 1961 and accordingly, action as permissible in law was taken under Annexure-5 in order to effect recovery of tax. With regard to the letter of bank raising objection to attachment notice, on 3.4.2013 vide Annexure-6, the stand of opposite party no.1 is that since the Income Tax Department was already pursuing recovery of huge demand of tax outstanding against opposite party no.2 and since despite repeated requests, opposite party no.2 failed to discharge its obligation, the Department was compelled to take coercive action under Annexure-5. Thus, opposite party no.1 contended that the proceeding initiated by the Income Tax Department under Annexure-5 is in accordance with law and there is nothing inappropriate about the same as has been alleged by the Bank. Further, opposite party no.1 in its counter made it clear that Government dues have a place of priority over secured debts of the banks. Thus, there is nothing wrong in issuing the impugned order under Annexure-5. Further stand of opposite party no.1 is that they are protected under Second Schedule of the Income Tax Act, 1961 and so also under Section 293 of the Income Tax Act, 1961. Further according to opposite party no.1, in the facts and circumstances of the case, Rule-11 of Part-I of the Second Schedule has no application to the present case. So, petitioner no.2 is not entitled to get a relief under the same.

4. It appears that during the pending of the proceeding, the financial asset pertaining to the account of opposite party no.2 along with underlying interest/security arising out of financial assistance granted by "SBI" along with all other banks was acquired by petitioner no.2 a registered Securitisation and Assets Reconstruction Company. Accordingly, petitioner no.2 filed Misc. Case No.1193 of 2015 with a prayer to permit it to prosecute the writ application by substituting petitioner no.1. This misc. case was disposed of on 17.7.2015 by allowing the substitution and accordingly, name of petitioner no.2 came to be reflected in the cause title. Therefore, it appears that for all purposes, now petitioner no.2 is the real petitioner in accordance with Section 5 of "SARFAESI Act".

5. Mr. R.P. Kar, learned counsel for petitioner no.2 submitted that the properties in question having been equitably mortgaged to the Bank, to secure the credit facilities and the same having been taken over by petitioner no.2, thus, petitioner no.2 has first charge over the same for recovery of its dues from opposite party nos.2 to 7 and since recovery proceeding was initiated by issuing notice under Section 13(2) of "SARFAESI Act" on 25.2.2013, opposite party no.1 has no legal authority to attach the said secured assets. In this context, Mr. Kar relied on Section 35 of "SARFAESI Act" and contended that the provisions of "SARFAESI Act" will override the provisions of the Income Tax Act, 1961. Secondly, he also invited attention of this Court to Section 74 of the Estate Duty Act, 1953, Section 30 of Gift Act, 1958, Section 55 of the Orissa Value Added Tax, 2004, Section 13-B of The Orissa Sales Tax Act, Section 26B of Kerala General Sales Tax Act, 1963, Section 38C of Bombay Sales Tax Act, 1959, Section 142A of the Customs Act, 1962 and lastly to Section 88 of the Service Tax (Chapter V of Finance Act, 1994 to contend that unlike the above noted Acts with provision for first charge, the Income Tax Act, 1961 does not provide for any paramountcy of dues by way of Income Tax. In other words, Mr. Kar submitted that there is no substantive provision in the Income Tax Act, 1961 for superseding or overriding the claims or rights of a secured creditor. In such background, the State cannot claim its preferential right over the mortgaged properties debarring the secured creditors of their rights in any manner whatsoever. Therefore, according to him, the order of attachment issued by opposite party no.1 was illegal and vitiated. In this context, Mr. Kar relied on the decisions of the Hon'ble Supreme Court in the cases of **Union of India and others** v. **Sicom Limited and another** reported in **(2009) 2 SCC 121**, **Rana Girders Limited** v. **Union of India and others** reported in **(2013) SCC 746** and **Bombay Stock Exchange** v. **V.S. Kandalgaonkar and others** reported in **(2015) 2 SCC 1**. Thirdly, Mr. Kar submitted that Second Schedule to the Income Tax Act, 1961 only prescribes the procedure for recovery but it does not prescribe any substantive right to take away a right, which has already been accrued in favour of/vested with the secured creditors. On this account, he contended that the order of attachment under Annexure-5 was also illegal. Lastly, Mr. Kar pointed out that at least after receipt of the letter under Annexure-6 dated 3.4.2013, opposite party no.1 ought to have been conducted an enquiry in terms of Rule-11 of Part-I of the Second Schedule of the Income Tax Act, 1961. By not doing this, opposite party no.1 has acted arbitrarily and unreasonably.

6. Mr. Acharya, learned Senior Standing Counsel for the Income Tax Department strenuously argued that Government dues/Crown Debt in the form of Income Tax dues have a place of priority over other debts including the secured debts of petitioner no.2. He further submitted that the decisions cited by Mr. Kar have no application to the facts and circumstances of the present case and thus, no wrong has been committed by opposite party no.1 in issuing the order of attachment under Annexure-5. **Secondly**, Mr. Acharya submitted that since the order of attachment under Annexure-5 has been issued in tune with Second Schedule of the Income Tax Act, 1961 for recovery of Income Tax, the same cannot be legally faulted. **Thirdly**, he submitted that no enquiry under Rule-11 was necessary since the Government dues in the form of Income Tax were to be collected from the assessee. Thus, the secured creditor does not have any claim of relief under Rule-11 of Part-I of Second Schedule to the Income Tax Act, 1961. Lastly, he submitted that even otherwise the action of opposite party no.1 by issuing the attachment order under Annexure-5 is protected under first part Section 293 of the Income Tax Act, 1961 as according to him no proceeding is maintainable to set aside, modify any order made under the Income Tax Act, 1961 and in such background, he urged that the writ application is without any merit and the same should be dismissed.

None has appeared on behalf of opposite party nos. 2 to 7.

7. Heard Mr. R.P. Kar, learned counsel for petitioner no.2 and Mr. Acharya, learned Senior Standing Counsel for the Income Tax Department.

8. Before taking up the rival contentions made at the Bar, let us refer to and analyse some relevant provisions of "SARFAESI Act" and the decisions of the Hon'ble Supreme Court as referred earlier.

Section 2(1)(zd) defines "secured creditor" as below:

"secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes —

(i) debenture trustee appointed by any bank or financial institution; or

(ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or

(iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance;"

Section 2(1)(ze) defines “secured debt” as below:

"secured debt" means a debt which is secured by any curity interest;

Section 2(1)(zf) defines “security interest” as below:

"security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31.”

A perusal of the above definitions shows that a secured creditor is one in whose favour security interest has been created for due repayment by any borrower of any financial assistance. Such security interest includes mortgages and when a debt is secured by “security interest”, it is known as “secured debt”.

Sub-section (13) of Section 13 of “SARFAESI Act” makes it clear that no borrower shall after receipt of notice referred to in sub-section (2) of Section 13 of “SARFAESI Act”, transfer, by way of sale, lease or otherwise then in the ordinary course of his business any of his secured assets referred to in the notice without prior consent of the secured creditor. So, in a sense with issuance of notice under sub-section (2) of Section 13 of “SARFAESI Act”, the mortgaged properties get attached atleast vis-à-vis the borrowers. Section 35 of “SARFAESI Act” makes it clear that the provisions of this Act would override other laws. According to it, the provisions of “SARFAESI Act” shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Thus, “SARFAESI Act” can override other inconsistent laws/instruments.

Now to the decisions of the Hon’ble Supreme Court. In the case of Union of India and others v. Sicom Limited and another (*supra*), the issue involved was whether realisation of duty under the Central Excise Act will have priority over the secured debts in terms of the State Financial Corporation Act, 1951. In that case, the Hon’ble Supreme Court held that a debt which is secured or which by reason of the provisions of a statute becomes first charge over the property must be held to prevail over the Crown Debts which is an unsecured one. Further, by referring to the non-obstante clause in Section 46-B of State Financial Corporation Act, 1951, it dismissed the appeal against the judgment of the High Court, where the High Court has held that the dues claimed by the State Financial Corporation will

have priority over the dues customs. In coming to such a conclusion, the Hon'ble Supreme Court highlighted the following things;

> **"9.** Generally, the rights of the Crown to recover the debt would prevail over the right of a subject. Crown debt means the "debts due to the State or the King; debts which a prerogative entitles the Crown to claim priority for before all other creditors". [See *Advanced Law Lexicon* by P. Ramanatha Aiyar (3rd Edn.), p. 1147.] Such creditors, however, must be held to mean unsecured creditors. Principle of Crown debt as such pertains to the common law principle. A common law which is a law within the meaning of Article 13 of the Constitution is saved in terms of Article 372 thereof. Those principles of common law, thus, which were existing at the time of coming into force of the Constitution of India are saved by reason of the aforementioned provision. A debt which is secured or which by reason of the provisions of a statute becomes the first charge over the property having regard to the plain meaning of Article 372 of the Constitution of India must be held to prevail over the Crown debt which is an unsecured one.
>
> **10.** It is trite that when Parliament or a State Legislature makes an enactment, the same would prevail over the common law. Thus, the common law principle which was existing on the date of coming into force of the Constitution of India must yield to a statutory provision. To achieve the same purpose, Parliament as also the State Legislatures inserted provisions in various statutes, some of which have been referred to hereinbefore providing that the statutory dues shall be the first charge over the properties of the taxpayer. This aspect of the matter has been considered by this Court in a series of judgment.
>
> xxx xxx xxx
>
> **13.** These aspects of the matter, however, have been considered at some length by a three-Judge Bench of this Court in *Dena Bank* v. *Bhikhabhai Prabhudas Parekh & Co.*[6] Dealing extensively with the doctrine of priority to Crown debts, it was held: (*Dena Bank case*[6], SCC p. 701, para 7)
>
> "*7.* What is the common law doctrine of priority or precedence of Crown debts? Halsbury, dealing with general rights of the Crown in relation to property, states that where the Crown's right and that of a

subject meet at one and the same time, that of the Crown is in general preferred, the rule being '*detur digniori*' (*Laws of England*, 4th Edn., Vol. 8, Para 1076 at p. 666). Herbert Broom states:

'*Quando jus domini regis et subditi concurrunt jus regis praeferri debet*.—Where the title of the king and the title of a subject concur, the king's title must be preferred. In this case *detur digniori* is the rule. … where the titles of the king and of a subject concur, the king takes the whole. … where the king's title and that of a subject concur, or are in conflict, the king's title is to be preferred.' (*Legal Maxims*, 10th Edn., pp. 35-36)

This common law doctrine of priority of State's debts has been recognised by the High Courts of India as applicable in British India before 1950 and hence, the doctrine has been treated as 'law in force' within the meaning of Article 372(1) of the Constitution."

It was, furthermore, observed: (*Dena Bank case*[6], SCC p. 703, para 10)

"*10*. However, the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It

is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In *Giles* v. *Grover*[7] it has been held that the Crown has no precedence over a pledgee of goods. In *Bank of Bihar* v. *State of Bihar*[4] the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in *Law of Mortgage* (*Tagore Law Lectures*, 7th Edn., p. 386) — 'It seems a

government debt in India is not entitled to precedence over a prior secured debt.' "

The principles enunciated therein have been reiterated by the Andhra Pradesh High Court in *Sitani Textiles & Fabrics (P) Ltd.* v. *CCE & Customs*[8] where the applicability of the provisions of the 1951 Act vis-à-vis the Central excise dues were in question holding: (ELT pp. 301-02, para 22)

"*22*. From the above it follows: That in the case of a pledge, pawnee has special property and lien which is not of an ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawnor has any right to take away goods or its price. The right of a pawnee could not be extinguished by the subsequent attachment/seizure of the goods under any other law. It gives the pawnee a primary right to sell the goods in satisfaction of the liability of the pawnor. An unsecured creditor could not have any higher rights than the pawnor and was entitled only to the surplus money after satisfaction of the secured creditor's dues."

xxx xxx xxx

23. Furthermore, the right of a State Financial Corporation is a statutory one. The Act contains a non obstante clause in Section 46-B of the Act which reads as under:

"46-B. *Effect of Act on other laws*.—The provisions of this Act and of any rule or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern."

The non obstante clause shall not only prevail over the contract but also other laws. (See *Periyar & Pareekanni Rubbers Ltd.* v. *State of Kerala*[15].)"

Thus, the above decision makes it clear that a debt which is secured becomes the first charge over the property and has to prevail over the Crown debt/Government dues as such dues are unsecured.

In the case of Rana Girders Limited v. Union of India and others (*supra*) the Hon'ble Supreme Court reiterated that being a secured creditor, the State Financial Corporation debts will have priority over debts of Central Excise in absence of specific provisions creating charge over the properties under the Central Excise Act, 1944 at the relevant point of time. In other words, it held that the State Financial Corporation would have priority over mortgaged properties being a secured creditor and the Central Excise Department can have no charge over the said property. Here, the Hon'ble Supreme Court reiterated the principles laid down in Union of India v. Sicom Limited (*supra*) at Paragraphs-18 & 19 of the judgment. Accordingly, the Hon'ble Supreme Court quashed the Excise Department calling upon the appellant to pay the dues.

In Bombay Stock Exchange v. V.S. Kandalganonkar and others (supra), one of the point in controversy was whether the Income Tax Department can claim priority over the debts vis-à-vis Bombay Stock Exchange, which was a secured creditor. The Hon'ble Supreme Court came to hold that the Income Tax Act does not provide for any paramountcy of dues by way of Income Tax. In such background, it held that Stock Exchange being a secured creditor, will have precedence over the claim of dues made by way of Income Tax by the Income Tax Department. Thus, in other words, it held that the Bombay Stock Exchange being a secured creditor, would have priority over Government dues. In this context, the relevant Paragraphs of the judgment are quoted hereunder;

> **"26.** It is settled law that Government debts have precedence only over unsecured creditors. This was held in *Dena Bank* v. *Bhikhabhai Prabhudas Parekh and Co.*[6] as follows: (SCC p. 703, para 10)
>
> "*10*. However, the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already.

In *Giles* v. *Grover*[7] it has been held that the Crown has no precedence over a pledgee of goods. In *Bank of Bihar* v. *State of Bihar*[8] the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in *Law of Mortgage* (TLL, 7th Edn., p. 386) — 'It seems a government debt in India is not entitled to precedence over a prior secured debt'.

xxx xxx xxx

39. The first thing to be noticed is that the Income Tax Act does not provide for any paramountcy of dues by way of income tax. This is why the Court in *Dena Bank case*[6] held that Government dues only have priority over unsecured debts and in so holding the Court referred to a judgment in *Giles* v. *Grover*[7] in which it has been held that the Crown has no precedence over a pledgee of goods. In the present case, the common law of England qua Crown debts became applicable by virtue of Article 372 of the Constitution which states that all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed by a competent legislature or other competent authority. In fact, *Collector* v. *Central Bank of India*[17] after referring to various authorities held that the claim of the Government to priority for arrears of income tax dues stems from the English common law doctrine of priority of Crown debts and has been given judicial recognition in British India prior to 1950 and was therefore "law in force" in the territory of India before the Constitution and was continued by Article 372 of the Constitution (AIR pp. 1835-36, para 7 : SCR at pp. 861-62).

40. In the present case, as has been noted above, the lien possessed by the Stock Exchange makes it a secured creditor. That being the case, it is clear that whether the lien under Rule 43 is a statutory lien or is a lien arising out of agreement does not make much of a difference as the Stock Exchange, being a secured creditor, would have priority over Government dues."

A survey of all the above decisions make it clear that Crown Debt/State Dues cannot override the claim of secured creditor unless there is a statutory backing to same.

9. In such background, we have to address ourselves to various rival contentions raised at the Bar. As indicated earlier, it is not disputed that there exists equitable mortgage/mortgages with regard to immovable properties of opposite party no.2 covering the plots included in Annexure-5 earlier in favour of the Banks and now in favour of petitioner no.2 in view of the provisions of Section-5 of "SARFAESI Act". Taking into account the definition of "secured creditor", "secured debt" & "security interest" as discussed earlier, it can safely be said that petitioner no.2 is a secured creditor with security interest by way of mortgage on immovable properties of debtor like opposite party no.2. In other words the debt in the present case is a secured debt. On account of default committed by the borrowers, it is not disputed that on 25.2.2013, a notice under sub-section (2) of Section-13 of "SARFAESI Act" was issued against the borrowers. Such notice clearly covers all the plots indicated under Annexure-5 issued by opposite party no.1 of which opposite party no.2 is the owner. Section-35 of "SARFAESI Act" as referred earlier makes it clear that the provisions of this Act would override other laws and would have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. This non-obstante clause shall not only prevail over any inconsistent instrument but also over other laws. Coupled with this, it is not disputed that Income Tax Act does not provide for any paramountcy of dues by way of Income Tax as has been provided under other Acts like the Estate Duty Act, 1953, Gift Tax Act, 1958, Orissa Value Added Tax, 2004, Kerala General Sales Tax Act, 1963, Bombay Sales Tax, 1959 and Customs Act. 1962.

10. In such background, keeping in mind the ratio of decisions of the Hon'ble Supreme Court as referred earlier, we have no doubt in our mind that the Government dues/Crown dues with regard to recovery of Income Tax, cannot have priority over the demands of secured creditors like banks and presently, petitioner no.2. Thus, opposite party no.1 has gone wrong in issuing notice under Annexure-5 attaching the immovable properties of borrower, which are already mortgaged with the banks earlier and with petitioner no.2 now, particularly, after the recovery proceeding has been initiated after issuance of notice under Section 13(2) under "SARFAESI Act". Since earlier the bankers and now petitioner no.2 are "secured creditors" under "SARFAESI Act", the opposite party no. 1 ought to have

withdrawn the notice issued under Annexure-5, after receipt of letter of the Bank under Annexure-6 dated 3.4.2013, since dues under the Income Tax Act, 1961 do not provide for any paramountcy of dues over that of a "secured creditor". After receiving the letter dated 3.4.2013 under Annexure-6, opposite party no.1 should have conducted an enquiry keeping in mind the ratio decided by the Hon'ble Supreme Court in very many cases in favour of the "secured creditors". We are sure had he adopted the said course, he would have recalled the notice under Annexure-5 thereby releasing the mortgaged properties from attachment. Since we have held that Crown Debt/State Dues by way of Income Tax dues cannot override the claim of "secured creditor" like the petitioner no.2, it is crystal clear that opposite party no.1 could not have proceeded under provisions of the Income Tax Act, 1961 vis-à-vis the "secured assets" covered by Annexure-2 Series. In such background, the attempt of Mr. Acharya, learned Senior Standing Counsel for the Income Tax Department to defend the action of opposite party no.1 on the basis of Second Schedule of the Income Tax Act does not merit our acceptance. Once, opposite party no.1 has no legal authority to claim preferential right over the mortgaged properties, automatically it means that he has no legal authority to attach such secured assets. Second Schedule to the Income Tax Act, 1961, as rightly contended by Mr. Kar only prescribes the procedure for recovery and does not prescribe for any substantive right nor takes away a right, which has already accrued in favour of the "secured creditors". With regard to the submission of Mr. Acharya that the action of opposite party no.1 is protected under Section 293 of the Income Tax Act, we hold that the same has no application to the present case, inasmuch as, the said Section deals with bar with regard to filing of suits in civil courts for setting aside or modifying any proceeding taken or any order made under this Act. The said Section does not and cannot control the powers of a Constitutional court like High Court exercising its jurisdiction under Articles 226 and 227 of the Constitution of India.

11. For all these reasons, the writ application is allowed by quashing the notice under Annexure-5 and making it clear that petitioner no.2 is at liberty to proceed with the matter in accordance with the provisions of "SARFAESI Act", if there is no other impediment. No costs.

Writ petition allowed.

2016 (II) ILR - CUT-1263

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

O.J.C. NO. 6305 OF 1994

SUDEB SUNA .....Petitioner

.Vrs.

THE PRESIDING OFFICER, LABOUR COURT, SAMBALPUR & ANR. .....Opp. Parties

SERVICE LAW – Petitioner-workman was appointed as regular sweeper – In the application for appointment he suppressed his involvement in a criminal case – He was removed from service by the Management – Order confirmed by the Labour Court – Hence the writ petition on the ground that he was removed from service without any enquiry – Clause-13 of the terms of appointment shows that appointment will be terminated if there is suppression of material information in the application for employment – So petitioner having accepted the offer, it is not required to issue any show cause notice while terminating his service – Moreover suppression of material facts amounts to fraud which has no leg to stand and which avoids all judicial acts – Held, there is no illegality in the findings given by the learned Labour Court calling for interference by this Court.

(Paras 9 to18)

Case Laws Referred to :-

1. *AIR 1992 SC 1593* :State of Punjab and others vrs. Surinder Kumar & ors.
2. (1994) 1 SCC 1 : S.P. Chengalavaraya Naidu vrs. Jagannath
3. (2013) 9 SCC 363 : Devendra Kumar vrs. State of Uttaranchal & ors.
4. (1992) 1 SCC 543 : Smt. Shrisht Dhawan vrs. M/s. Shaw Brothers.
5. (2000) 3 SCC 581 : United India Insurance Co. Ltd. Vrs. Rajendra Singh & ors.
6. (2003) 8 SCC 319 : Rama Chandra Singh Vrs. Savitri Devi
7. AIR 1964 SC 477 : Syed Yakoob Vrs. K. S. Radhakrishnan and Ors.
8. (2015) 4 SCC 270 : M/s.Pepsico India Holding Pvt. Ltd. Vrs. Krishna Kant Pandey,
9. (1986) 4 SCC 447 : Chandavarkar Sita Ratna Rao Vrs. Ashalata S.Guram

For Petitioner : M/s. N.K.Mishra, B.Dasmohapatra.
For Opp. Parties : Addl. Govt. Advocate.
M/s. J.Pattnaik, B.Mohanty, T.K.Pattnaik, A.Pattnaik.

Date of hearing : 06.09.2016
Date of judgment: 06.09.2016

JUDGMENT

S. N. PRASAD, J.

Award dated 4.11.1993 passed in I.D. Case No.60 of 1992 passed by the Labour Court, Sambalpur is under challenge whereby and where under following reference i.e.*,"Whether the action of the management of Rourkela Steel Plant, Rourkela in terminating the employment of Sri Sudeb Suna, Sweeper w.e.f. 14.07.1981 is legal and/or justified ? If not, to what relief Sri Suna is entitled to ?",* has been answered against the petitioner-workman, hence this writ petition.

2. Brief facts of the case of the petitioner-workman is that he was selected after due process of selection as Learner Sweeper on 20.12.1979 and on completion of successful training, he was appointed as a regular Sweeper on 23.06.1980. The petitioner was working to the best satisfaction of the authorities without any complaint from any quarter till 10.02.1981, when he received a letter from the management by which he was called upon to show cause for giving false information regarding involvement in court case and for suppression of facts in attestation form. In reply to the said letter, the petitioner gave his response stating therein that he had not intentionally suppressed the fact of his alleged involvement in the Court case and requested the management to keep the said matter in abeyance till disposal of criminal case pending before the competent court of criminal jurisdiction. After receiving the reply from the petitioner-workman, without any charge-sheet or enquiry, the management has issued a letter being Letter No.514 dated 14.07.1981 removed the petitioner from service.

3. Case of the petitioner is that before inflicting major punishment of removal from service, an enquiry was required but without holding any enquiry since he has been removed from service which is in violation of principle of natural justice and contrary to the provision prescribed in the certified Standing Orders of the management, when the order of removal has not been recalled, the petitioner-workman having no option has raised a dispute and the appropriate government has made reference and referred the matter before the Labour Court, Sambalpur for its adjudication and accordingly it has been answered against opposite party-workman, the petitioner herein.

4. Being aggrieved with the order passed by the Labour Court, this writ petition has been filed on the ground that order of removal is absolutely arbitrary, illegal and unreasonable, since the same has been passed without

following the principle of natural justice, without holding of enquiry and without following the provision contained in the certified Standing Orders.

Other ground has been taken that the petitioner-workman has raised a ground before the Labour Court that whatever act has been done, that is not intentional but he being an illiterate person has only put his signature in the attestation form which has been filled up by other person, as such he was not known about the contents of attestation form, hence terminating from service will not be proper.

5. Opposite party-management has appeared and filed detail counter affidavit and while placing his case by defending the award, it has been submitted that the Labour Court after taking into consideration all aspect of the matter has passed the order and as such there is no infirmity or perversity in the finding. It has further been submitted that admittedly on the date when the petitioner has filled up attestation form, he was implicated in a criminal case for the offence under Section 457, 380 of the I.P.C. and the petitioner has filled up the attestation form but not given declaration regarding pendency of criminal case upon him but when it was sent for police verification through the D.I.G., Central Industrial Security Force, Rourkela. The CISF personnel has got a report from the Addl. Dist. Magistrate, Sundargarh that there is adverse entry against him and he is facing trial in criminal case pending against him and thereafter show cause notice has been issued upon him as to why his service will not be terminated for giving false declaration and for suppressing the fact as per the conditions of his employment. The petitioner has submitted reply to the show cause notice but the management after being not satisfied with the reply has terminated from service on the ground of giving false declaration in the attestation form and this aspect of the matter has been taken into consideration by the Labour Court and thereafter the award has been passed answering the reference against the petitioner-workman.

6. The Labour Court after taking into consideration that when there is specific condition mentioned in Clause-12(i) of the attestation form regarding pendency of a criminal case against a candidate who is desirous for getting a job under Rourkela Steel Plant, hence it was the duty of the petitioner to give correct declaration by filling up the attestation form, but the petitioner intentionally has not given such declaration which lead to active concealment of the material fact and thereafter show cause notice has been issued for alleged violation of the terms of the appointment wherein a condition has been contained in Clause-13 that after joining, if it would found to have made

any misstatements or suppressed any information in application form for employment, the offer of appointment will be liable to be summarily terminated without any notice and in compliance of the said condition, the management-opposite party has terminated the petitioner from service.

7. We have heard learned counsel for the parties and on perusal of the documents on record, it is evident that the petitioner has got employment as learner Sweeper under the management-Rourkela Steel Plant on 22.12.1979 on a stipend of Rs. 375/- per month for a period of one year with a condition that on successful completion of training he will be appointed as Sweeper in the scale of Rs.400/-8-488/- and that a separate offer of appointment with detailed terms and conditions will be issued at that time and in pursuant to the said offer of appointment, the petitioner joined the service as learner Sweeper on 7.1.1980 and before joining service, the petitioner-workman filled up attestation form wherein he declared particulars detail like name, address, family members etc. in the attestation form. He was required to fill up against item No.12(i), if he was ever arrested, prosecuted, kept under detention, bound down, fined by a law court, convicted by law court etc. to which the petitioner has been specifically answered to have not been arrested, prosecuted etc. duly filled up and submitted on 31.12.1979, which was sent for police verification through D.I.G., Central Industrial Security Force, Rourkela. The C.I.S.F. after getting attestation form verified, got a report from the Addl. Dist. Magistrate, Sundergarh stating that there is adverse entry against him to the effect the he was facing trial in the criminal case pending against him and accordingly communicated the said fact to the management-opposite party.

Thereafter the management-opposite party has issued show cause notice on 10.02.1981 as to why service of the petitioner-workman shall not be terminated for giving false declaration and for suppressing the fact as per the conditions of the employment. Pursuant to the said show cause notice, the petitioner-workman admitted the fact of his arrest and released on bail and about the pendency of the criminal case under Section 457, 380 of the I.P.C.

8. The appointing authority thereafter terminated the petitioner-workman from service on the ground of suppression of the fact and giving false declaration in the attestation form and as per the terms and conditions of offer of appointment issued in his favour.

9. In the backdrop of the factual aspect of the matter, the Labour Court has formulated two issues for his termination i.e., as follows:-

(i) "Whether the action of the management of Rourkela Steel Plant, Rourkela in terminating the employment of Sri Sudeb Suna, Sweeper w.e.f. 14.07.1981 is legal and/or justified ?, and

(ii) If not, to what relief Sri Suna is entitled to ?"

The Labour Court after framing these two issues has proceeded to answer the same. The Labour Court after taking into consideration the fact that it is the admitted case of the petitioner that there was a criminal case pending much before his filling up attestation form under Clause 12(i) and as such it has been held by Labour Court that it is a clear case of violation of condition of offer of appointment issued on 27.06.1980 which contains a condition in Clause-13, which is being reproduced herein below:-

> "*this offer of appointment is subject to your producing your original certificate, Degree or Diploma and submitting the attested copies of such documents at the time of joining in support of the statements made in our application for employment. After joining the post in terms of this offer, your appointment will be liable to be summarily terminated without any notice in case you are found to have made any misstatements or suppressed any information in your application for employment or if you are found to hold any degree, diploma or certificate which is not recognized by the Govt. of India."*

Thus, the petitioner has accepted the offer of appointment that in case of suppression or misstatements of information in application form, the service would be terminated without issuing any show cause notice.

10. It is admitted case of the petitioner that he was implicated in a criminal case in terms of an F.I.R. arising out of G.R. Case No.327 of 1976 dated 17.06.1976 in which he was taken into judicial custody, however released on bail on 31.09.1979. The petitioner while seeking the engagement ought to have disclosed all the facts as per the requirement made in the attestation form but he suppressed these things, however show cause notice was issued and he admitted about the fact of pending of criminal case.

11. The management-opposite party after following the conditions mentioned in the offer of appointment as contained in Clause-13 (Ext.3) has issued show cause notice, however no show cause notice is required but in order to provide opportunity of being heard to the petitioner, the said provision has been followed which has been responded to by the petitioner and the guilt has been admitted regarding suppression of the material fact and thereafter he has been terminated from service on the ground of suppression and misrepresentation of material fact.

The Labour Court after taking into consideration this aspect of the matter, has answered the reference against opposite party-workman.

12. Learned counsel for the petitioner while assailing the award has submitted that a full fledged enquiry ought to have conducted by following the provision of Article 311(2) of the Constitution of India, but this argument is of no substance for the reason that the question of applicability of Article 311(2) of the Constitution of India is only for such employee who is holding the "civil post" but admittedly the petitioner who has been engaged as Sweeper for a period of one year subject to regularization in service on successful completion of training but before that it has come to the notice of the authorities that in course of police verification of the past character of the petitioner, it was found that the petitioner was involved in a criminal case, as such provision as contained in Article 311(2) will not be held to be applicable further for the reason that the provision of service code will be applicable to an employee unless a person holds the post permanently, his service would be governed by the terms and conditions incorporated in the appointment letter. Reference needs to be referred in the case of **State of Punjab and others vrs. Surinder Kumar and others** reported in *AIR 1992 SC 1593*.

Thus, there is no denial about the settled proposition that so long the service of an employee is confirmed, he cannot take advantage of the service rule rather he will be governed by the terms and conditions of offer of appointment.

13. There is also no dispute about the settled proposition that under the provision of Article 311 (2), initiation of regular departmental proceeding is required to be followed if the employee is under the regular establishment but here in this case, the petitioner-workman was not under the regular establishment rather he had been engaged subject to successful completion of training and in the meanwhile, it has come to the notice of the authorities of the management that he has suppressed material fact violating terms and conditions of the offer of appointment, show cause notice has issued, thereafter he has been terminated from service. Hence, on this backdrop, there is no force of the arguments advanced on behalf of the learned counsel for the petitioner in this regard.

14. It is also settled that while entering into a service, the candidate is required to come with clean hand i.e., without suppressing the material information. Implication in a criminal case is undisputedly material fact to be disclosed by the candidate before entering the service under the management, but the same has not been done by the petitioner-workman, even though there

is specific mention in Clause-12(i) contained in the attestation form. Thus, the petitioner has suppressed this material fact and suppression of material fact amounts to fraud as per the definition of 'fraud' stipulated in Section 17 of the Indian Contract Act. If such candidate will get employment suppressing the fact regarding involvement of criminal case, he is not deserved to be shown any sympathy for the reason that "fraud avoids all judicial acts, ecclesiastical or temporal" Reference needs to be made to the judgment rendered by the Hon'ble Supreme Court in the case of **S.P. Chengalavaraya Naidu vrs. Jagannath** reported in *(1994) 1 SCC 1*, wherein it has been held that;

> *"A judgment or decree obtained by playing fraud on the court is nullity and non est in the eye of law".*

15. The Hon'ble Apex Court in the case of **Devendra Kumar vrs. State of Uttaranchal & ors.** reported in (*2013) 9 SCC 363* wherein after taking into consideration the judgments rendered in the cases of **Smt. Shrisht Dhawan vrs. M/s. Shaw Brothers** reported in (*1992) 1 SCC 543*, **United India Insurance Co. Ltd. Vrs. Rajendra Singh & ors.** reported in (*2000) 3 SCC 581*, **Rama Chandra Singh Vrs. Savitri Devi** reported in *(2003) 8 SCC 319*, it has been held at para-18 and 25, which is being quoted herein below:-

> "**18**. The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit those persons who have frauded or misrepresented themselves. In such circumstances the court should not perpetuate the fraud by entertaining petitions on their behalf. In Union of India vrs. M. Bhaskaran reported in 1995 Suppl. (4) SCC 100 this Court, after placing reliance upon and approving its earlier judgment in Vizianagaram Social Welfare Residential School Society Vrs. M. Tripura Sundari Devi reported in (1990) 3 SCC 655, observed as if by committing fraud any employment is obtained, the same cannot be permitted to be countenanced by a court of law as the employment secured by fraud renders it voidable at the option of the employer.
>
> **25**. More so, if the initial action is not in consonance with law, the subsequent conduct of a party cannot sanctify the same. *Sublato fundamento cadit opus* – a foundation being removed, the superstructure falls. A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent court. In such a case the legal maxim *nullus commodum capere potest de injuria sua propria* applies. The

> persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. Nor can a person claim any right arising out of his own wrongdoing."

Thus, the Hon'ble Apex Court has taken the view that if appointment/engagement has been obtained by commission of fraud, it has no leg to stand, taking into consideration this settled proposition of law, the Labour Court has answered the reference against the petitioner-workman. After going through the award impugned in this writ petition and on the basis of the proposition laid down by the Hon'ble Apex Court, we are of conscious view that there is no infirmity in the award and as such there is no requirement to make any interference with the same.

16. Even otherwise also the power of judicial review of the High Court sitting under Article 226 is very limited to the extent that if the order is without jurisdiction or the finding is perverse or there is any error apparent on the face of record, but according to us, there is no perversity or error apparent on the face of record. Reference in this regard may be made to the judgment rendered by Hon'ble Supreme Court by its Full Bench in the case of **Syed Yakoob Vrs. K. S. Radhakrishnan and others** reported in *AIR 1964 SC 477* wherein at paragraph-7 their Lordships have been pleased to hold as follows:-

> "**7.**The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdictions. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ

proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of tact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the. Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was' insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Art. 226 to issue a writ of certiorari can be legitimately exercised." the proposition laid down in the case of Syed Yakoob is still holds good.

After going through the settled proposition of law which still hold good as has been considered by the Hon'ble Apex Court in the case of **M/s.Pepsico India Holding Pvt. Ltd. Vrs. Krishna Kant Pandey, (2015) 4 SCC 270** wherein their Lordships while discussing the scope of Article 226 and 227 of the Constitution of India in the matter of showing interference with the finding of the Tribunal has been pleased to hold after placing reliance upon the judgment rendered in the case of **Chandavarkar Sita Ratna Rao Vrs. Ashalata S. Guram, (1986) 4 SCC 447** as follows:

"***17****. In case of finding of facts, the court should not interfere in exercise of its jurisdiction under Article 227 of the Constitution. Reference may be made to the observations of his Court in Bathutmal Raichand Oswal v. Laxmibai R. Tarta where this Court observed that the High Court could not in the guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the legislature has not conferred a right of appeal. The High Court was not competent to correct errors of facts by examining the evidence and reappreciating. Speaking for the Court, Bhagwati, J. as the*

learned Chief Justice then was, observed at p. 1301 of the report as follows: (SCC p. 864, para 7)

"The special civil application preferred by the appellant was admittedly an application under Article 227 and it is, therefore, material only to consider the scope and ambit of the jurisdiction of the High Court under that article. Did the High Court have jurisdiction in an application under Article 227 to disturb the findings of fact reached by the District Court? It is well settled by the decision of this Court in Waryam Singh v. Amarnath that the power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in Dalmia Jain Airways v. Sukumar Mukherjee to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. This statement of law was quoted with approval in the subsequent decision of this Court in Nagendra Nath Bose v. Commr. of Hills Division and it was pointed out by Sinha, J., as he then was, speaking on behalf of the court in that case:

It is thus, clear that the powers of judicial interference under Article 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the power under Article 226 of the Constitution. Under Article 226 the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article 227 of the Constitution, the power of interference is limited to seeing that the tribunal functions within the limits of its authority."

18. Thus, it is evident that the High Court sitting under Article 226 of the Constitution of India can interfere with the fact finding on issuing writ of certiorari, if the order is without jurisdiction or the finding is perverse or there is any error apparent on the face of record. After going through the award, we are of the considered view that no such exception is available to make interference with the finding given by the Labour Court. Accordingly, we decline to interfere with the same. In view thereof, the writ petition is dismissed having no merit.

Writ petition dismissed.

2016 (II) ILR - CUT-1273

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

O.J.C. NO. 7314 OF 1997

AKHILESWAR GIRI .....Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226

Whether the writ petition filed by the petitioner for implementation of the award passed by the Labour Court is maintainable ? Held, No

Since Industrial Disputes Act, 1947, provides provision for implementation of the award passed by the Labour Court, High Court can not exercise its power under Article 226 of the Constitution of India as an executing Court. (Para 4)

For Petitioner : M/s. Kishore Swain & B.K.Raj

For Opp. Parties : Mr. S.Mishra, A.G.A. for State
M/s. G.S.Mamtour, D.P.Dhalsamanta & G.C.Das

Date of hearing : 9.9.2016
Date of judgment: 9.9.2016

JUDGMENT

S.N.PRASAD,J.

This writ petition has been filed for implementation of the award as contained in Annexure-1.

2. The award has been passed in terms of the reference, i.e.

> "Whether the action of the management of M/s Largesized Multi-purpose Cooperative Society Ltd., Champua in terminating the services of Sri Akhileswar Giri (Jr. Salesman) w.e.f. 9.8.83 is legal and /or justified? If not, to what relief Sri Giri is entitled ?"

3. Labour Court has answered the reference holding that termination of the work to be illegal and unjustified and accordingly directed to reinstate the workman to service with full back wages.

4. Direction to implement the award cannot be passed by the High Court in exercise of power under Article 226 of the Constitution of India since High Court cannot be said to be an executive Court. Moreover, the Industrial Disputes Act, 1947 contain a provision for implementation of the award, hence the writ petition is disposed of with the liberty to the petitioner

to take recourse of the provisions of the Industrial Disputes Act,1947 for enforcement of the award. With this observation, the writ petition is disposed of.

Writ petition disposed of.

2016 (II) ILR - CUT-1274

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

W.P.(C) NOS. 18299 OF 2010 &1644 OF 2011

JAGANNATH DAS ……..Petitioner

.Vrs.

PRADYUMNA KU. DAS & ORS. ……..Opp. Parties

ODISHA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 – S.30(1)

Filling up permanent vacancy in the office of the hereditary trustee – Scope – Section 30(1) of the OHRE Act has no scope to declare or recognize someone as the hereditary managing trustee – It only recognizes the successors next in line to the office of hereditary trustee of a religious institution – Held, this court finds no infirmity in the impugned order passed by the Commissioner of Endowments, refusing to recognize the petitioner as hereditary managing trustee of the institution in question. (Paras 16,17,18)

Case Laws Referred to :-

1. 2008 (I) CLR 555 : T.Kalyani Subudhi & Ors. -V- Commissioner of Endowments, Orissa, BBSR & Ors.
2. 2000 (6) SCC 540 : Braja Kishore Jagdev -V- Lingaraj Samantaray & Ors.
3. 51 (1981) CLT 12 : Shri Hari Charan Das Babaji -V- Adhikari Baishnab Charan Das & Ors.
4. AIR 2011 SC 3063 : M/s Divya Exports -V- M/s Shalimar Video Company & Ors.
5. 64 (1987) CLT 367 : Patarla Basava Raju Desibehera -V- V.Durga Prasad Rao & Ors.
6. AIR 1968 SC 281 : State of Bihar and others -V- Subodh Gopal Bose & Anr.
7. AIR 1971 SC 891 : Kakinada Annadana Samajam etc. -V- Commissioner of Hindu Religious & Charitable Endowments,Hyderabad & Ors.

For Petitioner : Mr.S.S.Rao, & U.K.Mohanty
Mr.R.K.Mohanty, (Sr. Advocate)

M/s S.Mohanty, S.N.Biswal & S.Mohant

For Opp. Parties : Mr.Bijan Ray, (Sr. Advocate)
M/s. Biswajit Moharana, B.Mohanty,
D.Chhotray, S.Mohanty ,M/s Amiya Kumar Mishra,
A.K.Sharma, M.K.Dash, P.K.Dash & S.Mishra
M/s S.J.Pradhan & D.Das,Mr.B.Routray,
M/s Suresh Ku. Choudhury & S.R.Kanungo
Mr.R.K.Mohanty, (Sr. Advocate)
M/s D.Mohanty, S.Mohanty, D.Varadwaj,
S.Mohanty, P.Jena & S.N.Biswal
Mr.S.P.Das & A.K.Nath

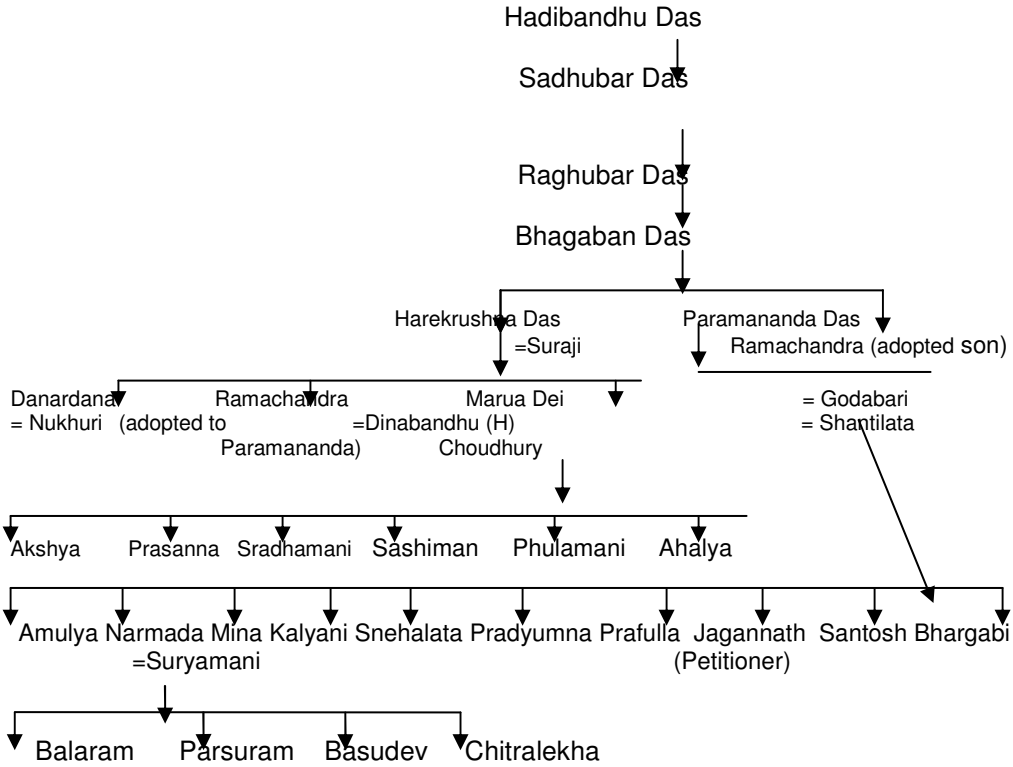
Date of Judgment: 01 .09.2016

JUDGMENT

K.R. MOHAPATRA, J.

Order dated 30.09.2010 passed by learned Commissioner of Endowments, Orissa, Bhubaneswar in O.A. No.74 of 2004 filed under Section 30(1) of the Orissa Hindu Religious Endowments Act, 1951 (for short, 'OHRE Act') is under challenge in these writ petitions.

2. The factual backdrop of this case is not much disputed. The genealogy of the family of Hadibandhu is as follows:-



One Hadibandhu Das was a great saint and the founder of Chhitiabata. He was given Samadhi within the premises of Chhatiabata, which is known as 'Samadhi Gosain'. On his death, his son, namely, Sadhubara and after him Raghubara was managing the institution. Raghubara had no male issue. He adopted Bhagaban Das who was blessed with two sons, namely, Harekrushna and Paramananda. Paramananda had no son. So, he adopted Rama Chandra, who is one of the sons of Harekrushna. Like Hadibandhu, Sadhubara and Raghubara were also given Samadhi in the said premises. Harekrushna had a large number of disciples who used to offer Pranami. With that Pranami of the disciples, pucca construction over the Samadhi of Hadibandhu, Sadhubara and Raghubara was made. When some disputes arose with regard to the nature of the religious institution, an application under Section 41(a) of the OHRE Act in OA No.54 of 1966 was filed by said Harekrushna Das and Rama Chandra Das before the Additional Assistant Commissioner of Endowments for declaration that the institution, Samadhi Gossain Chhatiabata was their private institution. Learned Additional Assistant Commissioner of Endowments by his order dated 27.05.1971 allowed the application and declared the Samadhi Gossain Chhatiabata (for short 'the case institution') as private religious institution. The said order was confirmed by learned Commissioner of Endowments in F.A. No.20 of 1971 by his judgment dated 21.12.1976. During pendency of the appeal, Harekrushna Das died on 26.08.1973 leaving behind Suraji (his widow), Nukhuri (widow of his son, namely, Danardana) and Marua Dei (daughter). They were substituted and brought on record at the instance of the appellants therein. The said judgment of the Commissioner of Endowments was challenged before this Court in MA No.64 of 1977. This Court by judgment dated 28.11.1979 allowed the said appeal and reversed the order passed by the authorities under the OHRE Act holding the institution to be a temple (Public Religious Institution) with the family members of founder as hereditary trustees. In the concluding paragraph of the said judgment, this Court held as follows:-

> "26. It was admitted by both the parties before the Commissioner of Endowments that the institution first came into existence during the life time of Hadibandhu Das. It was also admitted by them that the members of the petitioner's family have been managing the affairs of the institution since the time of the founder. The materials on record lend ample support to the view that he and management of the institution have all along been with the petitioner's family since the time of the founder. <u>There is no evidence to show that the members of public took part in the management of the institution at</u>

> any time. I would, therefore, hold that the institution of the Chhita Bata is a temple as defined in the Act with respondents 1 to 4 the hereditary trustees thereof." [See 50(1980) CLT 151]
>
> (*emphasis supplied*)

Marua Dei, the daughter of Harekrushna challenging the decision of this Court filed S.L.P. before the Hon'ble Supreme Court, which was subsequently numbered as Civil Appeal No.1990 of 1980. Be it stated here that before filing of the Civil Appeal, Suraji Devi (widow of Harekrushna) died on 28.11.1979. Hence, her name was deleted as all of her legal heirs were on record. Likewise, during pendency of the Civil Appeal, Rama Chandra died on 09.12.1988 and Nukhuri Dei (widow of Danardana) died on 30.05.1998. As Nukhri died issueless, her name was deleted. However, the legal heirs of Rama Chandra were substituted. Pradyumna, one of the sons of Rama Chandra, continued to pursue the litigation before the Hon'ble Supreme Court taking the power of attorney from other legal heirs of late Rama Chandra Das. Subsequently, the Civil Appeal No.1990 of 1980 was disposed of on 30.11.1998 and the judgment of this Court in MA No.64 of 1977 was confirmed. Marua Dei died on 01.03.2001. Thus, the Deputy Commissioner of Endowments, Odisha, Bhubaneswar allowed Pradyumna to function as person-in-management of Chhatia Bata until clear proof of succession.

3. At this juncture, Pradyumna filed O.A. No.74 of 2004 on 30.06.2004 under Section 30(1) of the OHRE Act before the Commissioner of Endowments with the following prayer:-

> "P R A Y E R
>
> The petitioner, therefore, prays that this Hon'ble Court may be graciously pleased to recognize and declare the petitioner and opposite party nos.2 to 22 as hereditary trustees with the petitioner as hereditary managing trustee in the next line of succession to the office of the hereditary trustee in order to manage, protect and safeguard the institution first above written.
>
> And for this act of kindness, the petitioner shall, as in duty bound, ever pray."

Learned Commissioner of Endowments by his order dated 30.09.2010 allowed the said application in part holding that the petitioner, namely, Pradyumna and opposite party Nos. 2 to 22 therein being the next in the line of succession to the office of the last declared hereditary Trustee of

the case institution, Sri Samadhi Gossain Chhatiabata, Chhatia, as hereditary Trustees of the said institution. However, he refused the prayer of Pradyumna to recognize him as hereditary managing Trustee of the case institution. Assailing the same, two writ petitions have been filed, i.e., W.P.(C) No.18299 of 2010 by Sri Jagannath Das declaring and recognizing the present petitioner and opposite parties 1 to 20 as hereditary Trustees of the case institution and W.P.(C) No.1644 of 2011 by Sri Pradyumna Das assailing the order refusing to recognize him as Hereditary Managing Trustee of the case institution. For convenience, both the writ petitions are taken up for disposal one after another.

W.P.(C) No. 18299 of 2010

4. Mr.S.S.Rao, learned counsel for the petitioner-Sri Jagannath Das reiterating the contentions made in the case submitted that initially the brothers of Pradyumna supported the case and admitted the claim made by Pradyumna in the application made under Section 30(1) of the OHRE Act. Even the Hindu public, who was opposite party No.23 therein, admitted the claim of Pradyumna. Subsequently, after the closure of evidence, they could detect foul play of Pradyumna and filed an application to reopen the trial and sought for an opportunity to contest the case. The prayer was allowed. Accordingly, all of them were permitted to contest the case by filing their respective written statements and leading evidence. A petition under Order 7 Rule 11, CPC was also filed alleging that there was no cause of action to file such a petition under Section 30(1) of the OHRE Act as there was no permanent vacancy in the office of the hereditary Trustee. Said application was rejected by the Commissioner of Endowments vide order dated 16.12.2006. Assailing the same, Jagannath [petitioner in W.P.(C) No.18299 of 2010] filed W.P.(C) No.809 of 2007. This Court disposed of the said writ petition by order dated 18.05.2007 holding as under:-

> "Regard being had to the aforesaid facts and submission, we dispose of this writ petition with a direction to the Commissioner of Endowments to hear and dispose of O.A. No.74 of 2004 as expeditiously as possible and, preferably within a period of six months from the date of receipt of a copy of this order. He may do well to provide opportunity of hearing on all issues raised and while doing so, he will not be influenced by the impugned order or anything stated in this order
>
> The writ petition is accordingly disposed of."

Thus, this Court permitted the parties to raise all issues, both legal and factual, before the Commissioner in the O.A. It is the contention of Mr.Rao that as per the custom, only male members of the family were in management of the case institution. The Commissioner failed to exercise the jurisdiction vested in him by not taking into consideration the pleading and evidence available on record with regard to the custom to exclude the female members to succeed as hereditary Trustees. The Commissioner failed to appreciate that public have no *locus standi* to have their say in the matter of inheritance or succession to the office of hereditary trustee. However, he supported the finding of learned Commissioner to the effect that in an application under section 30(1) of the OHRE Act, the Commissioner had no jurisdiction to entertain the prayer for declaration of hereditary managing trustee. Hence, he prayed that the application under Section 30(1) of the OHRE Act needs fresh consideration and the impugned order is liable to be set aside.

5. Mr.R.K.Mohanty, learned Senior Advocate appearing for the opposite party No.1-Pradyumna [petitioner in W.P.(C) No.1644 of 2011] submitted that admittedly this Court in M.A. No.16 of 1977 (operative portion of which quoted hereinabove) held and declared the case institution as a temple under the provisions of the OHRE Act being managed by the family members of the founder, namely, Suraji, Nukhri, Marua and Rama Chandra as hereditary trustees. After their death, there occurred a permanent vacancy in the office of the hereditary trustee. Thus, learned Deputy Commissioner of Endowments vide order dated 20.10.2001 directed Pradyumna to continue as person-in-management of the case institution till clear proof of succession and declaration as per Section 30 of the OHRE Act. Thus, the application under Section 30(1) of the OHRE Act is maintainable. He also challenged the *locus standi* of Jagannath to assail the impugned order on the ground that Jagannath being one of the successors in interest of deceased Rama Chandra is estopped from assailing the issue of permanent vacancy. The submission of petitioner to the effect that female heirs are excluded by the custom to succeed to the office of hereditary trustee is not only fallacious but also not available to be considered by this Court. Thus, he contended that this Court in exercise of jurisdiction under Article 227 of the Constitution should not delve into the question with regard to declaration and recognization of petitioner and opposite parties 1 to 20 as hereditary trustees by the Commissioner of Endowments, as they are next in the line of succession. He further submitted that the Assistant Commissioner of Endowments in a proceeding under

Section 41 of the OHRE Act (OA No.54 of 1966) held the case institution to be private and the said order was confirmed by learned Commissioner in F.A. No.20 of 1971, which was challenged before this Court in M.A. No.16 of 1977. This Court allowed the appeal holding the case institution to be a temple within the meaning of the OHRE Act having the family members of the founder, namely, Suraji, Nukhuri, Marua and Rama Chandra as hereditary trustees. The judgment of this Court was challenged before the Hon'ble Supreme Court and the order of this Court was confirmed. Thus, Jagannath who is the successor of Rama Chandra is bound by the acts of said hereditary trustee, namely, late Rama Chandra, who had never challenged recognition of Suraji, Nukhuri and Marua including himself as hereditary trustees of this case institution. Jagannath, therefore, estopped to challenge the right of female heirs of the founder to continue as hereditary trustees. Further, Section 29 of the OHRE Act postulates the disqualification for appointment of a hereditary trustee. In absence of any provision for exclusion of female heir from being appointed as hereditary trustee, such a plea is not available to be considered. The ingredients of custom propounded by Jagannath are not established in this case. The custom as propounded by law has to be from time immemorial. In the case at hand, Suraji, Nukhuri, Marua and Rama Chandra continued as hereditary trustees till 2001. Thus, no custom could have conferred a right on Jagannath, and at the same time imposed a disqualification on female members of the family, to be the hereditary trustees. He also relied upon a decision of this Court in the case of ***T.Kalyani Subudhi and others Vs. Commissioner of Endowments, Orissa, BBSR and others***, reported in 2008 (I) CLR 555 and certain case laws in support of his case. He further submitted that the impugned order is neither perverse nor suffers from any material irregularity. Hence, the same needs no interference by this Court.

6. Mr. B. Routray, learned Senior Advocate appearing for opposite parties 19 and 21 submitted that power under Section 30(1) of the OHRE Act can only be invoked when permanent vacancy occurs in the office of hereditary trustee of a religious institution and next in the line of succession is entitled to succeed to the said office. In the case at hand, there occurs no permanent vacancy in the office of hereditary trustee of the case institution. Further, the dispute with regard to hereditary trustee of a religious institution can only be adjudicated by the Assistant Commissioner of Endowments in exercise of powers under Section 41(c) of the OHRE Act. As such, the petition under Section 30(1) of the OHRE Act is not maintainable. The mode of succession to the office of hereditary trustee has been described under Section

3(vi) of the OHRE Act. It provides three modes of succession to the office of the hereditary trustee and custom is one of those modes. Relying upon the decision in the case of ***Braja Kishore Jagdev Vs. Lingaraj Samantaray and others***, reported in 2000 (6) SCC 540, it is submitted that in order to lay a claim to the office of hereditary trustee it has to be established that the members of the family have been in-charge of the management of affairs of the deity as trustee and succession of the office devolves upon them by hereditary right since time of the founder. In the case at hand, there is evidence on record to show that female members of the family were not in management of the case institution. As such, they are not entitled to succeed to the office of hereditary trustee of the case institution. Though the female members have been substituted as legal heirs after death of the hereditary trustee, they cannot lay their independent claim to the office of the hereditary trustee. They have a limited right only to represent the estate or claim of the deceased. Relying upon the decision of this Court in the case of ***Shri Hari Charan Das Babaji Vs. Adhikari Baishnab Charan Das and others***, reported in 51 (1981) CLT 12, Mr.Rourtary further submitted that the dispute at hand does not come within the scope and ambit of Section 30(1) of the OHRE Act, which contemplates only recognization of admitted heirs as hereditary trustees. When there is dispute with regard to the nature of incumbency to office of the trustee of a given religious institution (whether hereditary or not), it would certainly come within the scope of Section 41(c), but a dispute between the rival claimants to succeed to the office of hereditary trustee is beyond the scope of Section 41(c) of the OHRE Act. Neither the Commissioner nor the Assistant Commissioner has jurisdiction to decide as to whether a particular person is entitled to succeed to the hereditary trusteeship. It is only the Civil Court which can make a declaration to that effect. Mr.Routray replying to the observations made by this Court in MA No.16 of 1977 submitted that the proceeding before the Assistant Commissioner was regarding the nature of the institution, i.e., public or private. This Court reversing the orders passed by the Assistant Commissioner as well as the Commissioner of Endowments, held that the case institution is a temple having the family members of Hadibandhu as hereditary trustees. There was neither any issue framed nor any adjudication made with regard to the trusteeship of the case institution. Thus, the observation made in paragraph-26 of M.A. No.16 of 1977 quoted hereinabove, is *obiter dicta*. He also relied upon the decision of the Hon'ble Supreme Court in the case of ***M/s Divya Exports Vs. M/s Shalimar Video Company & Ords.,*** reported in AIR 2011 SC 3063 in support of his case. Thus, he submitted that the impugned order is not sustainable and the same is liable to be set aside.

7. Mr.Choudhury and Mr.Roy, learned Senior Advocate supplemented the submissions of Mr.Routray and Mr.S.S.Rao, learned counsel appearing for opposite parties 4 to 7 by making submissions with regard to mismanagement of the case institution and conduct of Pradyumna-opposite party No.1. They submitted that the institution was running smoothly and it is Pradyumna who created disturbances in the smooth management of the case institution and filed a petition under Section 30(1) of the OHRE Act, which invited several disputes and litigations in subsequent days. Learned counsel therefore submitted that the impugned order is not sustainable both in law and facts and prayed for setting aside of the same.

8. In order to test the sustainability of the impugned order under Annexure-1, it requires close scrutiny of Section 30 of the OHRE Act at the threshold, which reads as follows:-

"**Section 30 - Filling up of vacancies in the office of hereditary trustee—**

(1) When a permanent vacancy occurs in the office of the hereditary trustee of such religious institution the next in the line of succession shall be entitled to succeed to the office.

(2) When a temporary vacancy occurs in such an office by reason of the suspension of the hereditary trustee under Sub-section (1) of Section 28 or by reason of his ceasing to hold office under the provisions of Section 29, the next in the line of succession shall be appointed to discharge the functions of the trustee until his disability ceases.

(3) When a permanent or temporary vacancy occurs in such an office and there is a dispute respecting the right of succession to the office, or when such vacancy cannot be filled up immediately or when a hereditary trustee is minor and has no legally constituted guardian fit and willing to act as such or there is a dispute respecting the person who is entitled to act as such guardian, the appoint a fit person to discharge the functions of the trustee of the institution until the disability of the hereditary trustee ceases or another hereditary trustee succeeds to the office or for such shorter term as the Commissioner may direct. The Commissioner shall have power to remove such interim trustee for the reasons specified in Section 28.

> Explanation-In making any appointment under this sub-section the Commissioner, shall have due regard to the claims of members of the family, if any, entitled to the succession.
>
> (4) Nothing in this section shall affect the right of any person aggrieved by an order of the Commissioner under Sub-section (3) to establish the right to hold office of the hereditary trustee in a Court of law:
>
> Provided that such Court shall have no power to stay the operation of the Commissioner, pending the disposal of the suit or other proceedings arising in relation thereto."

The provisions of sub-sections (2), (3) and (4) of Section 30 of the OHRE Act have little relevance to the case at hand. However, Section 30(1) of the said Act is the relevant provision for determination of real controversy between the parties. No doubt, the case institution is being managed by the hereditary trustees. Thus, it has to be seen as to whether there occurred any permanent vacancy in the office of hereditary trustee so as to invoke the provision of Section 30(1) of the OHRE Act. The next question crops up for consideration is, whether the female members of the family are entitled to succeed to the office of hereditary trustee.

9. It is the admitted case of the parties that Hadibandhu is the founder of the case institution, after him Sudhakar and thereafter Raghubara and Bhagaban succeeded to the office of hereditary trustee in hierarchy. Bhagaban had two sons, namely, Harekrushna and Paramananda. Paramananda had no son for which he adopted 2nd son of Harekrushna, namely, Rama Chandra. Since some dispute arose regarding the nature of the case institution, O.A. No.54/1966 was filed under Section 41(c) of the OHRE Act to declare the case institution as a private one. Learned Additional Assistant Commissioner of Endowments, Cuttack on consideration of the case declared the case institution as private. The said order was confirmed by Commissioner of Endowments by F.A.20 of 1971 by his judgment dated 21.12.1976. During pendency of the appeal before the Commissioner of Endowments, Harekrushna died on 26.08.1973 leaving behind Suraji, his widow, Nukhuri, the widow of Danardana (who pre-deceased Harekrushna) and Marua Dei, his daughter. The order of the Commissioner of Endowments was challenged before this Hon'ble Court in M.A. No.64 of 1977. This Court by judgment dated 28.11.1979 reversed the orders passed by the Assistant Commissioner as well as the Commissioner

and held that the case institution is a temple as defined in OHRE Act having Suraji, Nukhuri, Marua Dei and Rama Chandra as hereditary trustees (respondents 1 to 4 in the said appeal). Thereafter, the matter was carried to Hon'ble Supreme Court in Civil Appeal No.1990/1980 by Marua Dei, the daughter of Harekrushna. Before filing of the appeal before the Hon'ble Supreme Court, Suraji died on 28.11.1979 leaving behind legal heirs, who were already on record. Nukhuri died on 30.05.1998 issueless. Hence, the name of Suraji and Nukhuri were deleted from the cause title. Rama Chandra died on 09.12.1988 leaving behind his legal heirs and they were substituted. Again after disposal of the Civil Appeal before the Hon'ble Supreme Court, Marua Dei died on 01.03.2001. Thus, there arose a permanent vacancy in the office of hereditary trustee after the death of the last declared hereditary trustee. In the interregnum, Deputy Commissioner of Endowments, Odisha allowed Pradyumna (one of the sons of Rama Chandra) to continue as person-in-management of the case institution until clear proof of succession by his order communicated vide Memo No.1395/249-C (M) dated 20.10.2001. He also issued direction to Pradyumna to get a declaration to that effect under Section 30 of the OHRE Act. Thus, from the said order of Deputy Commissioner of Endowments, Odisha, Bhubaneswar, it is clear that there was permanent vacancy in the office of the hereditary trustee of the case institution and thus the petition under Section 30(1) of the OHRE Act is maintainable.

10. The next question crops up for consideration is with regard to succession of female members of the family to the office of the hereditary trustee. Section 29 of the OHRE Act deals with disqualification for appointment as trustee which reads as follows:-

"**Section 29 –**

(1) A person shall be disqualified for appointment as a trustee, if he-

(a) is a minor;

(b) has been convicted by a Criminal Court of any offence involving moral turpitude;

(c) is of unsound mind and is so declared by a competent Court;

(d) is an undischarged insolvent;

(e) has directly or indirectly any interest in a lease or any other transaction relating to the property of the institution;

(f) is a paid employee of the institution or has any share or interest in a contract for the supply of goods to, or the execution of any works or the performance of any service undertaken by the institution;

(g) has been found to be guilty of misconduct; or

(h) does not profess the religion or does not belong to the religious persuasion or denomination to which the institution belongs.

(2) A trustee shall be disqualified to continue and shall cease to hold office as such if he incurs any of the disqualifications specified in Clauses (b) to (h) of Sub-section (1)."

Apparently, Section 29 does not attach any disqualification to the female members of the family to succeed to the office of hereditary trustee. Thus, it has to be seen as to whether the female members of the family can otherwise be prevented from succeeding to the office of the hereditary trustee. For that, the definition of hereditary trustee as provided under Section 3(vi) of the OHRE Act is relevant; the same reads as follows:-

"**3 – Definitions-** In this Act unless there is anything repugnant in the subject or context-

xx xx xx

(vi) "**hereditary trustee**" means the trustee of a religious institution succession to whose office devolves by hereditary right since the time of the founder or is regulated by custom or is specifically provided for by the founder, so long as such scheme of succession is in force;"

The definition of hereditary trustee provides that succession to the office of hereditary trustee of a religious institution can be made either.—

(a) by hereditary right since the time of the founder;

(b) regulated by custom;

(c) specifically provided for by the founder so long such Scheme of succession is in force.

Admittedly, there is no Scheme provided for by the founder for succession to the office of hereditary trustee. It is the admitted case of the parties that the succession to the office is by hereditary right since the time of the founder. Thus, it has to be seen as to whether there is any custom preventing the female members of the family to be hereditary trustee of the institution. Drawing attention of the Court to paragraph-17 of the petition under Section 30(1) (in OA No.74 of 2004) (Annexure-2), the petitioner

(Jagannath) categorically submitted that the male heirs of the family, namely, the sons of Rama Chandra Das are managing the case institution. Further, Smt. Amulya Kumari Ojha (opposite party No.8 herein), who is the daughter of late Rama Chandra Das, at paragraph-5 of her evidence stated that the female members have neither participated in the management nor even interfered in the management of the case institution. Shantilata Das (opposite party No.18 herein), the widow of late Rama Chandra Das in her evidence at paragraph-4, stated that as per the tradition of the family, the male members of the founder's family are to manage the case institution. She further stated that their family history disclosed that whenever a male heir is not blessed with a male child he used to adopt. Thus, female heirs from the time of the founder are not in management of the case institution. Such is the custom and tradition of the case institution. Thus, the female heirs cannot succeed to the office of the hereditary trustee.

11. In order to establish the customary right and to prove the custom to be valid and enforceable in law, the following essential conditions must be satisfied as held in the decision of this Court in the case of ***Patarla Basava Raju Desibehera Vs. V.Durga Prasad Rao and others***, reported in 64 (1987) CLT 367.

(i) It must be immemorial in origin;
(ii) It must be certain;
(iii) It must be reasonable and not opposed to public policy; and
(iv) It must have been followed continuously, and uniformly by those
(v) who are governed by it.

Mr.Mohanty, learned Senior Advocate, relying upon the case law (supra), submitted that the plea of custom has not been proved by the petitioner. According to him, a custom to be valid and enforceable in law must satisfy all the essential ingredients spelt out in *Patarla Basava Raju Desibehera (supra*]. It is his submission that this Court in M.A. No.16 of 1977 at paragraph 26 (quoted above), came to a categoric conclusion that the materials on record lend ample support to the view that the management of the case institution have all along with the petitioner's family since the time of the founder. There is no evidence to show that the members of the public took part in the management of the institution at any time. Thus, it was held therein that the case institution is a temple as defined under the Act, wherein respondent Nos.1 to 4 in the said Misc. Appeal, namely, Suraji Devi @ Danu Bou, Nukhuri, Marua Dei and Rama Chandra were the hereditary trustees.

He therefore, submitted that the deposition of Shantilata and Amulaya is of no consequence as it has been categorically held that the family of the founder has been in management of the case institution. The judgment of this Court passed in M.A. No.16 of 1977 was assailed before the Hon'ble Supreme Court in Civil Appeal No.1990 of 1980 by Marua. During pendency of the Civil Appeal, Suraji, Rama Chandra and Nukhuri died and were substituted by their legal heirs. The substitution of the legal heirs was not objected to at any point of time. Rama Chandra never challenged the judgment passed by this Court in M.A.No.16 of 1977. Neither he nor his legal heirs had ever challenged the *locus standi* of Morua in assailing the said judgment in M.A. No.16 of 1977 before the Hon'ble Supreme Court. Further, Section 29 of the OHRE Act does not enjoin any disqualification to the female members of the family members of the hereditary trustee to succeed to the said office. Drawing attention to the prayer made under Section 30(1) of the OHRE Act, Mr.Mohanty submitted that the prayer made therein was to declare the opposite party Nos. 2 to 22 (petitioner and opposite party Nos. 1 to 20 herein), which include the female members of the family to be hereditary trustee of the case institution. Thus, it was rightly allowed by the Commissioner of Endowments.

The scope of Section 30(1) is limited to the extent of filling up of permanent vacancy in the office of hereditary trustee of a religious institution and to pass necessary orders in respect thereof. He therefore supported the finding of learned Commissioner declaring opposite party Nos.2 to 22 (petitioner and opposite party Nos. 1 to 20 herein) as the hereditary trustee. On perusal of the materials on record and on scrutiny of the evidence laid by the parties, it is clear that the family of the petitioner is in management of the case institution. There was no difficulty in such management of the case institution till the death of Rama Chandra. After his death, there was a vacancy in the office of the hereditary trustee. However, Deputy Commissioner of Endowments appointed Pradyumna as the person-in-management by his order, which was communicated on 20.10.2001 (supra), till clear proof of succession and directed to get a declaration under Section 30 of the OHRE Act. In the interregnum, dispute cropped up. It is claimed by the petitioner that as per the custom of the family only the male members are in management of the case institution. The deposition of widow of Rama Chandra, namely, Shantilata and Amulya, the daughter of Rama Chandra also goes to show that only the male members of the family were in management of the case institution. It is a trite law as held in the case of

State of Bihar and others –v- Subodh Gopal Bose and another, reported in AIR 1968 SC 281, wherein at paragraph 12, the Hon'ble Supreme Court held as under:-

> "…a custom is wisdom by virtue of which the class of persons belonging to a defined section in a locality are entitled to exercise specific right against certain other persons or property in the same locality to be a valid custom, the same must be ancient, certain and reasonable and being in derogation of the general rules of law."

Thus, the custom overrides the general law. Further, as relied upon by Mr.Mohanty, this Court in the decision of *Patarla Basava Raju Desibehera* (supra) laid down principles to prove the custom. It has been established beyond any doubt that the management of the case institution is with the family of the founder since its inception. However, materials available on record are not sufficient to prove that the management of the case institution is only with the male members of the family. On the other hand, the finding of this Court in MA No.16 of 1977 to the effect that management of the institution have all along with the petitioner's family since time of the founder is not disturbed by the Hon'ble Supreme Court in Civil Appeal No.1990 of 1980. The deposition of Shantilata and Amulya is not sacrosanct to come to a conclusion that only the male members of the family of the founder were in management of the case institution. Further, the Court has to be very careful while dealing with the issue of custom, as it precludes certain class of persons, who are otherwise legally entitled to exercise specific right. Apart from being ancient, the custom must be certain, reasonable and being in derogation of the general rule of law. The evidence and materials available on record are not sufficient to hold that only the male members of the family, by custom, have been managing the case institution. Thus, the plea of the petitioner to the effect that the case institution is only managed by the male members of the family to the exclusion of the female heirs cannot be accepted. It also does not appear to be reasonable. Further, the finding in MA No.16 of 1977 breaks the continuity and uniformity to the so-called custom, if any, existing. In that view of the matter, it is not safe to accept the plea of custom advanced by the petitioner. The right of hereditary trustee is a bare right of administration as held by the Hon'ble Supreme Court in the case of ***Kakinada Annadana Samajam etc. Vs. Commissioner of Hindu Religious & Charitable Endowments, Hyderabad & others***, reported in AIR 1971 SC 891.

12. Mr.B.Routrary, learned Senior Advocate submitted that the observation made by this Court in MA No.16 of 1977 to the effect that respondents 1 to 4 are the hereditary trustees of the case institution is an obiter. Controversy was with regard to the nature of the case institution as to whether the same is a private or public religious. Holding the case institution to be a temple within the meaning of OHRE Act, this Court proceeded further to declare the respondents 1 to 4 therein as hereditary trustees of the case institution, which was neither the issue nor the case of parties thereto.

13. Mr.Amiya Kumar Mishra, learned counsel appearing for opposite party No.2 submitted that the Assistant Commissioner of Endowments while adjudicating the matter under Section 41 of the OHRE Act with regard to nature of the institution has to delve into the question of management of such institution in order to establish that he assumes such jurisdiction under section 41(c) of the Act. Unless the issue with regard to the management of the religious institutions is adjudicated the nature of the institution cannot be ascertained. Thus, determination of the question with regard to management of the institution is incidental to the issue of nature of the institution. As such, it cannot be held that finding to the effect that respondent No.1 to 4 (in MA No.16 of 1977) as hereditary trustee of the case institution to be *obiter dicta*. Moreover, the said finding has already been confirmed by Hon'ble Supreme Court.

The issue before the Assistant Commissioner of Endowments in O.A. No.54 of 1966 (under Section 41 of the OHRE Act) was with regard to the nature of the institution, but neither the Assistant Commissioner nor the Commissioner of Endowments (in FA No.20 of 1971) came to a definite conclusion with regard to management and rituals of the institution, which are essential to be looked into while delving into the question of nature of such institution. It appears from the judgment in MA No.16 of 1977 that the appellants therein had pleaded with regard to management of the institution and led evidence to that effect. This Court discussing the materials on record, came to a conclusion that public were offering Puja and attending functions of the case institution. At the same time, this Court held that the management of the institution have all along been petitioner's family since the time of its founder. On the basis of such finding this Court held the case institution to be public in nature. The findings on the incidental issues (questions) required to be decided to answer the principal issue involved in the lis, cannot be said to be an *obitor dicta* Thus, the finding arrived at by this Court with regard to hereditary trustee therein cannot be held to be an *obiter dicta*.

W.P.(C) No.1644 of 2011

14. Mr.Mohanty, learned Senior Advocate for the petitioner namely, Pradyumna, contended that the Deputy Commissioner of Endowments in the administrative side while considering the question of management of the case institution passed an order vide Memo No.1395/249-C (M) dated 20.10.2001 allowing Pradyumna, the petitioner to continue in the management of the case institution till clear proof of succession. Since then, Pradyumna has been in the management of the case institution. The said administrative order merged in the final order passed by the Commissioner of Endowments under Section 30(1) of the OHRE Act. Thus, Pradyumna is the hereditary managing trustee of the case institution. Learned Commissioner of Endowments, while considering the prayer for recognizing Pradyumna as hereditary managing trustee of the case institution, miserably failed to take into consideration this material fact. Thus, the impugned order to that effect is liable to be quashed and the petitioner (Pradyumna) is entitled to be declared as hereditary managing trustee of the case institution.

15. The said contention of Mr.Mohanty, learned Senior Advocate was vehemently objected and refuted by learned counsel for the opposite parties. They contended that Section 30(1) of the OHRE Act provides for filling up permanent vacancy in the office of hereditary trustee of the temple. Recognization/declaration of hereditary managing trustee of the case institution is beyond the scope of Section 30(1) of the OHRE Act. Thus, the learned Commissioner of Endowments rightly refused to grant such prayer to the petitioner.

16. On a plain reading of the provision of Section 30(1) of the OHRE Act, it appears that the provision only provides for filling up of the permanent vacancy in the office of hereditary trustee of a temple. Normally, the person(s) amongst the hereditary trustees who are in management of the temple are recognized as managing trustees. Such order is being passed by the authority under the OHRE Act in the administrative side taking into consideration the facts and circumstances of each case. The scope of Section 30(1) of the OHRE Act does not provide a scope to adjudicate upon the same. Thus, we find no infirmity in the order of the Commissioner of Endowments refusing to recognize the petitioner as hereditary managing trustee of the case institution and the same needs no interference.

17. As discussed, Section 30(1) of the OHRE Act has no scope to declare or recognize someone as the hereditary managing trustee. It only recognizes

the successors next in line to the office of hereditary trustee of a religious institution.

18 In that view of the mater, we do not find any infirmity in the impugned order, which warrants interference. Accordingly, the writ petitions are dismissed being devoid of any merit. But in the circumstances, there shall be no order as to costs.

Writ petitions dismissed.

2016 (II) ILR - CUT- 1291

S.C. PARIJA, J.

CRLMC NO. 3332 OF 2016

RAHAS BEHARI SANTY ……..Petitioner.

.Vrs.

STATE OF ORISSA ……..Opp.party.

CRIMINAL PROCEDURE CODE, 1973 – S. 311

Recall and re-examination of witness – Duty of Court – No straitjacket formula – Every Court must endeavour to discover truth and to see that the fairness of trial, not only from the point of view of the accused but also from the point of view of the victim and the society – However power should not be exercised neither to help the prosecution nor the defence – Such power must not be arbitrary and must be guided only by the object of arriving at a just decision of the case – Held, the discretionary power must be exercised to meet the ends of justice for strong and valid reasons with care, caution and circumspection.

In this case P.W 1 is the victim girl – P.W 5 is her mother and P.W 6 is her maternal uncle – All of them were examined on 20.01.2004 and 3.3.2016 and were subjected to extensive cross-examination – Learned trial Court considered in detail the questions sought to be asked to the above witnesses and came to hold that the same were not relevant and necessary for a just decision of the case – Held, there is no infirmity in the impugned order calling for interference by this Court.

Case Laws Referred to :-

1. (2016) 2 SCC 402) : State (NCT of Delhi) v. Shiv Kumar Yadav & Anr.
2. (2016) 8 SCC 762 : State of Haryana v. Ram Meher and Ors.

3. (2013) 14 SCC 461 : Rajaram Prasad Yadav v. State of Bihar.
4. 10 (2004) 4 SCC 158 : Zahira Habibulla H. Sheikh v. State of Gujarat.

For Petitioner : M/S .Bijaya Ku.Ragada

Date of order: 02.12.2016

ORDER

S.C. PARIJA, J.

Heard learned counsel for the petitioner.

The accused-petitioner, who is facing trial in Special Case No.103 of 2013, arising out of Talcher P.S. Case No.133 of 2013, under Section 376(2)(h) IPC and Section 4 of the POCSO Act, has filed this application under Section 482 Cr.P.C. challenging the order dated 15.7.2016, passed by the learned Judge, Special Court, Angul, rejecting his application under Section 311 Cr.P.C., to recall P.Ws.1, 5 and 6 for their further cross-examination.

Learned counsel for the accused-petitioner submits that as the counsel for the accused had inadvertently left out some relevant questions while cross-examining P.Ws.1, 5 and 6, an application was filed for recalling the said P.Ws.1, 5 and 6 for their further cross-examination, which was necessary for a just decision of the case. It is submitted that the learned trial Court has proceeded to reject the application of the accused-petitioner on the ground that the questions sought to be put to P.Ws.1, 5 and 6 are not relevant and necessary for a just decision of the case, which is not proper and justified.

Learned counsel for the accused-petitioner submits that as certain questions could not be asked to P.Ws.1, 5 and 6 at the time of their cross-examination, it is necessary to recall them for their further cross-examination as otherwise, the accused would be seriously prejudiced. In this regard, reliance has been placed on a decision of the apex Court in ***Natasha Singh v. CBI (State)***, (2013) 5 SCC 741.

On a perusal of the impugned order, it is seen that the learned trial Court has elaborately dealt with the application of the accused-petitioner filed under Section 311 Cr.P.C., for recalling P.Ws.1, 5 and 6 for their further cross-examination. Each of the questions, which the accused proposed to ask the said P.Ws.1, 5 and 6 in their further cross-examination has been elaborately dealt with and considering all aspects of the matter, learned trial Court has come to hold that none of the questions, which is sought to be asked to the P.Ws.1, 5 and 6 in their further cross-examination are necessary for a just decision of the case.

It is well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. (See- ***State (NCT of Delhi) v. Shiv Kumar Yadav and another*** (2016) 2 SCC 402).

In ***State of Haryana v. Ram Meher and others*** (2016) 8 SCC 762, the apex Court while dwelling upon the concept of "fair trial" has observed as under :-

> "24.The decisions of this Court when analysed appositely clearly convey that the concept of the fair trial is not in the realm of abstraction. It is not a vague idea. It is a concrete phenomenon. It is not rigid and there cannot be any straitjacket formula for applying the same. On occasions it has the necessary flexibility.Therefore, it cannot be attributed or clothed with any kind of rigidity or flexibility in its application. It is because fair trial in its ambit requires fairness to the accused, the victim and the collective at large. Neither the accused nor the prosecution nor the victim which is a part of the society can claim absolute predominance over the other. Once absolute predominance is recognised, it will have the effect potentiality to bring in an anarchical disorder in the conducting of trial defying established legal norm. There should be passion for doing justice but it must be commanded by reasons and not propelled by any kind of vague instigation. It would be dependent on the fact situation; established norms and recognized principles and eventual appreciation of the factual scenario in entirety. There may be cases which may command compartmentalization but it cannot be stated to be an inflexible rule. Each and every irregularity cannot be imported to the arena of fair trial. There may be situations where injustice to

> the victim may play a pivotal role. The centripodal purpose is to see that injustice is avoided when the trial is conducted. Simultaneously the concept of fair trial cannot be allowed to such an extent so that the systemic order of conducting a trial in accordance with CrPC or other enactments get mortgaged to the whims and fancies of the defence or the prosecution. The command of the Code cannot be thrown to winds. In such situation, as has been laid down in many an authority, the courts have significantly an eminent role. A plea of fairness cannot be utilized to build castles in Spain or permitted to perceive a bright moon in a sunny afternoon. It cannot be acquiesced to create an organic disorder in the system. It cannot be acceded to manure a fertile mind to usher in the nemesis of the concept of trial as such.
>
> 25. From the aforesaid it may not be understood that it has been impliedly stated that the fair trial should not be kept on its own pedestal. It ought to remain in its desired height but as far as its applicability is concerned, the party invoking it has to establish with the support of established principles. Be it stated when the process of the court is abused in the name of fair trial at the drop of a hat, there is miscarriage of justice. And, justice, the queen of all virtues, sheds tears. That is not unthinkable and we have no hesitation in saying so."

The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the section uses the word "shall". It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words "essential to the just decision of the case" are the keywords. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be guided only by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It

should not permit the prosecution to fill up the lacuna. Whether recall of a witness is for filling up of a lacuna or it is for just decision of a case depends on the facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.

The object of Section 311 Cr.P.C. is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 Cr.P.C. but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth. (See-***Zahira Habibulla H. Sheikh v. State of Gujarat*** 10 (2004) 4 SCC 158.

In ***Rajaram Prasad Yadav v. State of Bihar*** (2013) 14 SCC 461, the apex Court referred to the earlier decisions and culled out certain principles which are to be kept in mind while exercising power under Section 311 Cr.P.C., which are as under:-

> "17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?
>
> 17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.
>
> 17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.
>
> 17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.
>
> 17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would

result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care,

caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

In the instant case, P.W.1 is the victim girl, P.W.5 is her mother and P.W.6 is her maternal uncle. All of them were examined on 20.01.2014 and 03.03.2016 and were subjected to extensive cross-examination. Learned trial Court has discussed in detail the questions sought to be asked to P.Ws.1, 5 and 6 and has come to hold that the same are not relevant and necessary for a just decision of the case.

Applying the principles of law, as discussed above to the facts of the present case, I do not find any infirmity in the impugned order of the learned trial Court so as to warrant any interference.CRLMC being devoid of any merit, the same is accordingly dismissed.

CRLMC dismissed.

2016 (II) ILR - CUT- 1297

B.K. NAYAK, J.

CRLMC NO.303 OF 2013

PADMALOCHAN NATH .....Petitioner.

.Vrs.

PRANATI PANDA .....Opp.party.

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

Divorced wife claming maintenance – Whether section 125 (4) Cr.PC. is a bar for the wife to claim maintenance as marriage between the parties dissolved on the ground of the wife living in adultery ? – Held, No

Claim for maintenance under the first part of section 125 Cr.P.C. is based on the subsistence of marriage while claim for maintenance by a divorced wife is based on the foundation provided by explanation (b) to sub-section 1 of section 125 Cr.P.C., if the divorced wife has not remarried and unable to maintain herself – Held, since the present opposite Party has not remarried she is entitled to claim maintenance from the petitioner. (Paras 7,8,9)

Case Law Relied on :-
1. AIR 2000 SC 952 Rohtash Singh v. Ramendri & Ors

Case Laws Referred to :-
1. 1986 (2) OLR 379 : (Snehalata Biswal v. Sarjo Kumar Biswal)
2. 2004 (1) OLR 305 : (Narendra Mohapatra v. Manorama Mohapatra)

For petitioner : Mr. Sahasransu Sourav.
For opp. party : Mr.B.B.Routray.

Date of hearing : 25.08.2016
Date of judgment: 15.09.2016

JUDGMENT

B.K.NAYAK, J.

The short question that falls for consideration in this application under Section 482, Cr.P.C. is whether a wife, whose marriage has been dissolved on the ground of her living in adultery, would not be entitled to maintenance in view of the bar contained in sub-section (4) of Section 125 of the Code of Criminal Procedure,1973 ?

2. The said question arises in the following factual background:-

The petitioner and the opposite party were admittedly husband and wife. The opposite party filed Criminal Misc. Case No.193 of 2006 before the learned S.D.J.M., Sambalpur claiming monthly maintenance @ Rs.3,000/- and Rs.1,500/- respectively for herself and for her minor son under Section 125, Cr.P.C. alleging torture and desertion by the petitioner and non-providing of maintenance by him. The petitioner (husband) filed his show cause in the proceeding making counter allegations that the opposite party deserted him without any sufficient cause and that she was seen moving regularly with one Sibasankar Padhee of Burla. Both the parties led evidence in the proceeding before the learned J.M.F.C., Sambalpur, who, on consideration of the evidence on record, by his judgment dated 30.10.2011 allowed the application of the opposite party and granted a monthly maintenance of Rs.2,000/- in her favour and Rs.1,000/- for her minor son from the date of the passing of the order. Challenging the order of the learned J.M.F.C., the petitioner filed Criminal Revision No.47 of 2011 before the learned Sessions Judge, Sambalpur. At the same time, the present opposite party also filed Criminal Revision No.46 of 2011 praying for payment of maintenance as per order of the learned J.M.F.C. from the date of

filing application under Section 125, Cr.P.C. By the common judgment dated 10.01.2013, the learned Sessions Judge dismissed Criminal Revision No.47 of 2011 and allowed Criminal Revision No.46 of 2011, directing for payment of maintenance as per order of the learned J.M.F.C. from the date of filing of the claim application, i.e., 09.11.2006.

3. It transpires that during the pendency of the maintenance proceeding before the learned J.M.F.C., Sambalpur, the present petitioner filed MAT Case No.38 of 2007 before the learned Civil Judge (Senior Division), Sambalpur for dissolution of marriage between the parties, on the ground that the opposite party was living in adultery. The said MAT case was decided on 09.03.2009 ex-parte and decree of dissolution of marriage was passed. During hearing of the maintenance proceeding before the learned J.M.F.C. and also the Criminal Revision before the learned Sessions Judge, Sambalpur, the petitioner raised the contention that decree of dissolution of marriage between the parties having been passed by the competent civil court on the ground that the opposite party was living in adultery, she was not entitled to maintenance in view of the provision of sub-section (4) of Section 125, Cr.P.C. It appears that the trial court has rejected the said contention of the petitioner relying on the decision of the Hon'ble apex Court in the case of ***Rohtash Singh v. Ramendri and others : AIR 2000 SC 952*** to the effect that the provision of sub-section (4) of Section 125, Cr.P.C. would be applicable only where the marriage between the parties subsists and not where it has come to an end. The contention raised before the revisional court has also been negatived.

4. Learned counsel for the petitioner in assailing the concurrent judgments of the courts below raises the very same contention that the competent civil court having found the opposite party to be living in adultery and on that ground having passed the decree of dissolution of marriage, sub-section (4) of Section 125, Cr.P.C. is a bar against the claim of opposite party for maintenance. Learned counsel for the petitioner relying on the decision of the High Court of Madras (Madurai Bench) in the case of ***M. Chinna Karuppasamy v. Kanimozhi*** decided on 16.07.2015 states that the facts of the case in hand are totally identical to the facts of that case, where the Madras High Court noticed the judgment of the Hon'ble Supreme Court in ***Rohtash Singh*** (supra) and distinguished the same on the ground that it was a case of divorce on the ground of desertion and not on the ground of the wife living in adultery.

5. Learned counsel for the opposite party, on the other hand, contended that the decision of the Hon'ble apex Court in the case of ***Rohtash Singh*** (supra) is quite clear on the point and, therefore, there is no scope for interference with the concurrent judgment passed by both the courts below.

6. The contention of the learned counsel for the petitioner is not acceptable and the decision of the Madras High Court cited by him is not applicable in view of the fact that the question has already been settled by this Court at least in two decisions of this Court reported in ***1986 (2) OLR 379 (Snehalata Biswal v. Sarjo Kumar Biswal)*** and ***2004 (1) OLR 305 (Narendra Mohapatra v. Manorama Mohapatra)*** where it has been held that a wife divorced on mutual consent is entitled to maintenance from the husband, if she is not re-married. Further, in a recent decision of this Court delivered on 26.08.2016 in W.P.(CRL) No.1595 of 2013 in the case of ***Srikant Panda v. Anita Panda,*** while accepting the principle laid down by the Hon'ble apex Court in the case of ***Rohtash Singh*** (supra), it has been held that none of the grounds disentitling a wife from claiming maintenance under sub-section (4) of Section 125, Cr.P.C. is applicable to a divorced wife.

7. In the case of ***Rohtash Singh*** (supra) with regard to applicability of sub-section (4) of Section 125, Cr.P.C., the 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."

The legal position settled by the Hon'ble apex Court is that the circumstances contemplated by sub-section (4) of Section 125, Cr.P.C.

presuppose the existence of matrimonial relation, that is to say, where the marriage between the parties subsists and not where it has come to an end.

8. Therefore, the distinction made by the Madras High Court on the ground that even after dissolution of marriage the divorced wife should also remain faithful to the husband for claiming maintenance is fallacious, inasmuch as, the wife who does not owe any marital obligation to the husband after dissolution of the marriage should be expected to remain faithful to the ex-husband.

9. In the aforesaid analysis, it is held that sub-section (4) of Section 125, Cr.P.C. is no bar for the divorced wife to claim maintenance where marriage between the parties is dissolved on ground of the wife living in adultery. Hence, the present opposite party is entitled to claim maintenance from the petitioner as long as she is not re-married. The CRLMC is devoid of merit and therefore dismissed.

CRLMC dismissed.

2016 (II) ILR - CUT- 1301

B. K. NAYAK, J.

CRLMC NO. 3965 OF 2015

GAYADHAR JENA .....Petitioner

.Vrs.

STATE OF ODISHA .....Opp.Party

ODISHA PROTECTION OF INTEREST OF DEPOSITORS (IN FINANCIAL ESTABLISHMENTS) ACT, 2011 – S. 6

Cognizance taken against the petitioner U/s. 6 of the Act, 2011 – Order challenged on the ground that since the agreement between the petitioner and the informant executed in the year 2010-11 and the Act came into force on 19.08.2013, the order taking cognizance U/s. 6 of the Act is illegal being violative of Article 20 (1) of the constitution of India – Where the Act constituting an offence is of continuous nature, it can be punished under a law passed during the continuance of the Act, although at the commencement of the Act, it was not punishable and was not an offence – In this case failure of the petitioner to execute the sale deed infavour of the informant as per agreement having continued at every moment till the Act, 2011 came into force i.e Dt. 19. 08.2013, the bar under Article 20 (1) of the Constitution of India does not apply – Held, the impugned order cannot be said to be bad in law.

(Paras 11,13)

Case Laws Referred to :-

1. AIR 1991 SC 2173 : Soni Devrajbhai Babubhai v. State of Gujarat & Ors.
2. AIR 1977 SC 2091 : State of Maharashtra v. Kaliar Koil Subramaniam Ramaswamy
3. (2015) 6 SCC 222 : Mohan Lal v. State of Rajasthan

For Petitioner : M/r. Gokulananda Mohapatra
For Opp.Party : Mr. Anil Kumar Nayak (A.S.C)

Date of hearing : 09.08.2016
Date of judgment: 07.09.2016

JUDGMENT

B.K.NAYAK, J.

In this application under Section 482, Cr.P.C., the petitioner challenges the order dated 13.07.2015 passed by the learned Designated Court under OPID Act-cum-1st. Additional District & Sessions Judge, Cuttack in C.T. Case No.10 of 2015 (arising out of EOW Bhubaneswar P.S. Case No.9 dated 15.03.2015) taking cognizance of offences under Sections 467/468/471/406/420 of the I.P.C. read with Section 6 of the Orissa Protection of Interest of Depositors (in Financial Establishments) Act,2011 against the petitioners.

2. During hearing the learned counsel for the petitioner to confined his argument only with respect to cognizance under Section 6 of the Orissa Protection of Interest of Depositors (in Financial Establishments) Act,2011 (in short, 'the OPID Act'.)

3. The case arose on the basis of F.I.R. lodged by the Senior Professor and Dean, Indian Institute of Technology (IIT) Bhubaneswar alleging that the petitioner runs a Firm in the name and style M/s. Sarala Realcon Pvt. Ltd. and during the year 2010-11, he took an advance of Rs.4.00 lakh from the informant and entered into an agreement to provide a plot of land measuring 2000 sq. ft. having sub plot no.757 in his so-called project, namely, Sarala Nagar Phase-IX, Satyabhamapur, Bhubaneswar, in the name of the wife of the informant. Similarly, the petitioner also entered into an agreement with the brother-in-law of the informant to provide land measuring 1500 sq.ft to him in the same project area and received advance consideration of Rs.3.00 lakh, but even after the expiry of the agreement period, he neither executed any sale deed nor returned the consideration money received from the informant and his brother-in-law, even though they visited the office of the

petitioner time and again over a period of four years. It appears that the petitioner did not have any land to be sold to the informant and his brother-in-law within the so-called project area.

4. Upon investigation, the police submitted charge-sheet against the petitioner, keeping the investigation open under Section 173 (8), Cr.P.C. On consideration of charge-sheet, the learned Designated Court under OPID Act (1st. Additional District & Sessions Judge), Cuttack has passed the impugned order of cognizance.

5. In assailing the order of cognizance of offence under Section 6 of the OPID Act, the learned counsel for the petitioner submitted that the OPID Act, 2011 came into force on 19.08.2013 and that the alleged offence under Section 6 of the Act, i.e., the failure of the petitioner to render the service (to sell the land) as per the agreement executed in favour of the informant within the period stipulated having taken place prior to coming into force of the OPID Act, the said provision cannot have retrospective effect and also it would be violative of the provision of Article-20 of the Constitution of India. It is, therefore, his submission that since the petitioner cannot be held to be penally liable for an act when the OPID Act was not in force, the order taking cognizance of the offence under Section 6 of the Act is illegal and unsustainable. In support of his contention, the learned counsel for the petitioner has relied on some decisions of the apex Court.

Learned State Counsel, on the other hand, submits that the OPID Act has no retrospective application. But the offence alleged being in the nature of omission and it being continuing one, Article-20(1) of the Constitution does not apply.

6. Section 6 of the OPID Act provides as under :

> "***6. Default in Repayment of deposits and interests honouring the commitment-***Notwithstanding anything contained in section 3, where any Financial Establishment defaults the return of the deposit or defaults the payment of interest on the deposit or fails to return in any kind or fails to render service for which the deposit have been made, every person responsible for the management of the affairs of the Financial Establishment shall be punished with imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees and such Financial Establishment is also liable for a fine which may extend to two lakh rupees."

7. Article 20 of the Constitution of India runs as under:

"**20. Protection in respect of conviction for offences.**- (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

8. Clause (1) of Article 20 of the Constitution in its broad import has been enacted to prohibit conviction and sentence under '*ex post facto law'*.

9. In the case ***Soni Devrajbhai Babubhai v. State of Gujarat and others : AIR 1991 SC 2173***, the Hon'ble apex Court held as follows:

"9. … … … Section 304-B is a substantive provision creating a new offence and not merely a provision effecting a change in procedure for trial of a pre-existing substantive offence. Acceptance of the appellant's contention would amount to holding that the respondents can be tried and punished for the offence of dowry death provided in Section 304-B of the Indian Penal Code with the minimum sentence of seven years' imprisonment for an act done by them prior to creation of the new offence of dowry death. In our opinion, this would clearly deny to them the protection afforded by Cl. (1) of Art.20 of the Constitution … …)"

10. In the case of ***State of Maharashtra v. Kaliar Koil Subramaniam Ramaswamy : AIR 1977 SC 2091***, the accused was found in possession of disproportionate assets by the search, which was made on 17.5.1964, when possession of disproportionate was not an offence. While the matter was still under investigation, the Prevention of Corruption Act, 1947 was amended by Act 40 of 1964 and clause (e) was added to sub-section (1) of Section 5 of the Act. The respondent in that case was convicted on trial for having committed offence, inter alia under clause (e) of sub-section (1) of Section 5 of the P.C. Act., but in appeal he was acquitted of the said charge by the High Court. In an appeal by the State, the Hon'ble Supreme Court held as follows :

"**6.** … … …

So when there was no law in force at the time when the accused was found in possession of disproportionate assets by the search which was made on May 17, 1964, under which his possession could be said

> to constitute an offence, he was entitled to the protection of Cl.(1) of Article 20 and it was not permissible for the trial Court to convict him of an offence under Cl (e) of sub-section (1) of Section 5 as no such clause was in existence at the relevant time. The accused could not therefore be said to have committed an offence under clause (e) of sub-section (1) of Section 5 read with sub-section (2) of that section."

11. However where the act constituting an offence is of a continuous nature, it can be punished under a law passed during the continuance of the act, although at the commencement of the act, it was not punishable and was not an offence. This is more so where the offence consists of not doing a positive act, but of omission to do something which the offender is enjoined under law or otherwise legally bound to do.

12. In the case of ***Mohan Lal v. State of Rajasthan : (2015) 6 SCC 222***, it has been held by the Hon'ble Supreme Court that even if offence of possession of contraband opium was committed prior to commencement of NDPS Act when Section 9 of Opium Act was in operation, if opium remained in possession of accused on date of coming into force of NDPS Act, without anything to show that he was divested of it in meanwhile, possession being in continuum, Section 18 of the NDPS Act, instead of Section 9 of Opium Act would be applicable. In such situation, no question of retrospective imposition of higher punishment under Section 18 of the NDPS Act, instead of lower punishment under Section 9 of Opium Act, in violation of Article 20(1) of the Constitution arises.

It was also further held that Article 20 (1) of the Constitution of India prohibits conviction or sentence under an 'ex post facto' law and not the trial of offence thereof.

13. In the case in hand the service (execution of sale deed) in favour of the informant by the petitioner was agreed to be effected by a particular date. But by such date, the execution of sale deed was not done. Therefore, though on the expiry of the date for omission/failure in rendering the service by the petitioner, no offence was committed, but the omission having continued at every moment till the date the OPID Act came into force, the bar under Article 20 (1) of the Constitution of India does not apply. Therefore, taking cognizance under Section 6 of the OPID Act by the impugned order for petitioner's failure to execute the sale deed even on the date of coming into force of the penal provision of Section 6 of the Act cannot be said to be bad in law. Thus, I find no merit in this case, which is accordingly dismissed.

CRLMC dismissed.

2016 (II) ILR - CUT-1306

A.K. RATH, J.

SA NO. 244 OF 2000

TULA BEWA (SINCE DEAD) AND AFTER HER, HER LEGAL REPRESENTATIVES ……..Appellants

.Vrs.

DHRUBA CHARAN DEHURY & ORS. ……Respondents

CIVIL PROCEDURE CODE,1908 – S.100

Appeal preferred before the first appellate Court was barred by limitation – Appeal disposed of on merit without considering the limitation application – Said question raised in second appeal – Learned first appellate court fell in to patent error of law in deciding the appeal on merit without condoning the delay – Impugned judgment and decree passed by the lower appellate court is set aside – Matter is remitted back to the said court to hear the appeal as per law.

(Paras 12,13,14)

For Appellants : Mr.S.R. Pattnaik
For Respondents : Mr. P.K. Singh

Date of hearing : 28.10.2016
Date of judgment: 09.11.2016

JUDGMENT

DR. A.K.RATH, J

This is an appeal against the judgment and decree dated 3.5.2000 and 12.5.2000 respectively passed by the learned Addl. District Judge, Angul in T.A No.7 of 1991 setting aside the judgment and decree dated 20.10.1990 and 26.10.1990 respectively passed by the learned Subordinate Judge in T.S No.14 of 1974.

2. Since the dispute lies in a narrow compass, it is not necessary to recount in detail the cases of the parties. Suffice it to say that the respondents 1 and 3 along with proforma defendants 4 to 6 as plaintiffs instituted the suit for declaration of right, title and interest over Schedule-A and B properties, confirmation of possession over Schedule-C properties, and recovery of possession of Schedule-C property. Pursuant to issuance of summons, defendants 1 and 2 entered appearance and filed a written statement. Defendants 4 and 5 filed a written statement denying the assertions made in the plaint. The suit was dismissed. Thereafter, the plaintiffs filed FA No.138

of 1976 before this Court. The case was remanded to the learned trial court for adjudication. After remand, learned trial court dismissed the suit. Thereafter, the plaintiffs filed First Appeal No.21 of 1991 before this Court. The same was returned to be presented before the learned District Judge. Thereafter, they filed Title Appeal No.7 of 1991 before the learned District Judge, Dhenkanal. Since there was a delay in filing the appeal, an application was filed to condone the delay. The appeal was adjourned from time to time. By order dated 28.7.1994, learned District Judge admitted the appeal subject to hearing on the point of limitation at the time of hearing the appeal on merit. Thereafter, the appeal was transferred to the court of learned Addl. District Judge. Instead of considering the application for condonation of delay, learned lower appellate court heard the appeal on merit and set aside the judgment and decree of the trial court.

3. The appeal was admitted on the substantial questions of law enumerated in Ground Nos.9(A) and (C), which are as follows:

> "(A) Whether the 1st appellate court was justified by allowing the appeal, though in the present case the appeal before the 1st appellate court was admittedly barred by limitation and there is no order of the lower appellate court condoning the delay and keeping in view of the principle as envisaged in Section 3 of the Limitation Act casting a duty on the court to consider the question of limitation whether raised by the opponent or not, the decree of the lower appellate court cannot be sustained as has to be set aside ?
>
> (C) Whether the learned District Judge has the jurisdiction and was justified to dispose of T.A No.7 of 1991 on merit without considering the question of limitation ?"

4. Mr. Pattnaik, learned counsel for the appellants, argued with vehemence that when an appeal is presented after expiry of the period of limitation, it shall be accompanied by an application supported by an affidavit setting forth the facts on which the appellants rely on to satisfy the court that they had sufficient cause in not preferring the appeal within such period. He submitted that before proceeding to hear the appeal on merit, a duty is cast upon the learned lower appellate court to consider the application for condonation of delay. He further submitted that the appeal filed after the prescribed period of limitation shall be dismissed even though the limitation has not been set up as a defence. He relied on the decision of this Court in the case of Bahadul Gountia alias Biswal v. Khuriram Meher and others, 2000 (I) OLR 411.

5. Per contra, Mr. Singh, learned counsel for the contesting respondents, submitted that since there was a delay in filing the appeal, an application for condonation of delay was filed. No fault can be attributed to the respondents. The appellants, who were the respondents in the court below, had not brought to the notice of the learned lower appellate court that there was delay in filing the appeal. Rather they argued the matter on merit. In view of the same, it is not open to them to assail the judgment and decree of the learned lower appellate court on the technical plea. He further submitted that the limitation is a mixed question of law and fact. It was open to the present appellants to raise this question after their appearance. Since the appeal had been disposed of on merit, it must be taken that delay in filing the appeal had been impliedly complied with. He relied upon the decisions in the case of V. Ramachandra Ayyar and another v. Ramalingam Chettiar and another, AIR 1963 SC 302, Gauri Shankar v. M/s. Hindustan Trust (Pvt.) Ltd. and others, AIR 1972 SC 2091, Dijabar and another v. Sulabha and others, AIR 1986 Orissa 38 and Lokanath Biswal v. Union of India, AIR 2008 Orissa 33.

6. Admittedly the appeal was filed beyond the prescribed period of limitation along with an application for condonation of delay on 27.3.1991. The appeal was adjourned from time to time. On 28.7.1994 learned lower appellate court directed that the application for condonation of delay shall be considered at the time of hearing of the appeal. But then, the appeal was heard on merit and the decision of the learned trial court was reversed.

7. An identical question came up for consideration before this Court in Bahadul Gountia alias Biswal (supra). This Court held:

> "4. Law is well settled that when an appeal is barred by limitation, ordinarily, until delay is condoned, the appeal should not be taken up for disposal on merit. In the decision reported in AIR 1917 Privy Council, 179 (Krishnasami Panikondar v. Ramasami Chettiar and others), the practice of admitting a time-barred appeal without notice to the respondent with the stipulation that the question of condonation of delay is to be considered after service of notice on the respondent was strongly deprecated on the ground that adoption of such a course may lead to needless expenditure of money and un profitable waste of time. It was observed:
>
> ".....Their Lordships therefore desire to impress on the Courts in India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission, th e final

determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal."

In the present case, from the records it does not appear that while issuing notice to the respondents, it was indicated that the question of limitation is to be considered after appearance of the parties. It is apparent that the plaintiff-respondent at that stage was not possibly aware of the fact that the appeal was barred by limitation. Therefore, merely because the plaintiff-respondent remained silent, it cannot be said that he is estopped from raising the question of limitation in the present Second Appeal. Moreover, the question of implied condonation of delay does not arise. It was the duty of the lower appellate Court to consider the question of condonation of delay after appearance of the respondents. In the decision reported in AIR 1961 Ori. 13 (Municipal Councillors of Puri Municipality v. Madhusudan Das Mohapatra) almost in a similar matter, it was held that the party had the right to challenge the decree of the lower appellate Court on the ground that the appeal before the lower appellate Court was barred by limitation. Since in the present case, the appeal was admittedly barred by limitation and there is no order of the lower appellate Court condoning the delay and keeping in view the principle as envisaged in Section 3 of the Limitation Act casting a duty on the Court to consider the question of limitation, whether raised by the opponent or not, the decree of the lower appellate Court cannot be sustained and has to be set aside."

(Emphasis laid)

8. The ratio in the case of Bahadul Gountia alias Biswal (supra) applies with full force to the facts of the present case.

9. The decisions cited by Mr. Singh, learned counsel for the respondents, are distinguishable on facts. In Gauri Shankar (supra), the apex Court held that a question not agitated before the lower appellate Court or expressly given up there can be allowed to be raised in the second appeal if it is a pure question of law, but in permitting the same to be done the has to consider whether in exercise of proper and judicial discretion such a point should be permitted to be agitated when it has been conceded or abandoned before the Court below. While giving permission to argue that point the Court has to look at all the facts and circumstances, the conduct of the parties seeking to raise that point is of great importance. This being a pure question of law, the appellants can raise the same in the second appeal.

10. The judgment in the case of V. Ramachandra Ayyar (supra) is of no assistance to the respondents. The apex Court held that the High Court was not justified in interfering with the finding of fact recorded by the lower appellate court merely because the judgment of the lower appellate court was not as elaborate as that of trial judge, or because some of the reason given by the trial judge had not been expressly reversed by the lower appellate court. But the same is not the case here. The said decision is distinguishable on facts.

11. In Dijabar (supra), this Court had an occasion to consider the provisions enumerated in Order 41 Rule 3A CPC and held that the same is not mandatory.

12. In Lokanath Biswal v. Union of India, AIR 2008 Orissa 33, this Court held that when a time barred appeal is presented without being accompanied the application for condonation of delay, such presentation is defective for non-compliance with Order 41 Rule 3-A(1) CPC. A reasonable opportunity shall be provided to the appellant to rectify the defect in limine. Both the decisions are distinguishable on facts.

13. In view of the authoritative pronouncement of this Court in the case of Bahadul Gountia alias Biswal (supra), the irresistible conclusion is that the learned lower appellate court fell into patent error of law in deciding the appeal on merit without condoning the delay.

14. Accordingly, the judgment and decree of the learned lower appellate court is set aside. The second appeal is allowed. The matter is remitted back to the learned lower appellate court to consider first the question of limitation. In the event the delay in filing the appeal is condoned, learned lower appellate court shall proceed to hear the appeal on merit.

Appeal allowed.

2016 (II) ILR - CUT- 1311

DR. A.K. RATH, J.

C.M.P. NO. 1390 OF 2016

JAMBESWAR SETHI & ANR. .....Petitioners

.Vrs.

ANANTHA OJHA & ANR. .....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-26, R-9

Report of Survey Knowing Commissioner – Acceptance of the report challenged – Learned trial court assigned cogent reasons in accepting the report – Acceptance of the report means the report is considered to be a part of the record which is to be considered alongwith other evidence at the time of hearing of the suit – Held, there is no perversity or illegality in the impugned order calling for interference by this Court. (Paras 7,8,9)

For Petitioners : Mr. Samarendra Ku. Bal.
For Opp. Parties : Mr. D.P.Mohanty

Date of hearing : 19.10.2016
Date of judgment: 26.10.2016

JUDGMENT

DR. A.K.RATH, J.

By this application under Article 227 of the Constitution, challenge is made to the order dated 19.8.2016 passed by the learned Civil Judge (Junior Division), Puri in C.S No.15 of 2013 whereby the learned trial court accepted the report of the survey knowing commissioner.

2. The petitioners as plaintiffs instituted the suit for declaration of right, title and interest, confirmation of possession, permanent injunction and other consequential reliefs impleading the opposite parties as defendants. In course of hearing of the suit, the plaintiffs filed an application under Order 26 Rule 9 CPC for deputation of a survey knowing commissioner. The same was allowed. Learned trial court deputed a survey knowing commissioner. The survey knowing commissioner measured the suit plots and submitted the report. Thereafter, the survey knowing commissioner was examined as C.W.1. By order dated 19.8.2016, the learned trial court accepted the report of the survey knowing commissioner.

3. Heard Mr. Samarendra Bal, learned counsel for the petitioners and Mr.D.P. Mohanty, learned counsel for the opposite parties.

4. Mr. Bal, learned counsel for the petitioners, submitted that the survey knowing commissioner was appointed to answer the questions; (a) The area and extent of the suit property on spot in Mouza-Chhaitana in Khata No.61, Plot No.1086 and (b) whether the defendants' new construction, i.e., wall and verandah towards eastern side of his Plot No.1087 exists over which plot. But then, he has only measured Plot No.1086. The commissioner has given the topography of the area in a slipshod manner. From the report, it is clear that the encroached area by the defendants to the plot no.1086 is not correct. The commissioner has not measured the verandah and wall constructed by the defendants over the land of the plaintiffs. In view of the same, the learned trial court is not justified in accepting the report of the commissioner. He cited the decision of this Court in the case of Gopal Behera and others v. Lokanath Sahu and others, AIR 1991 Orissa 6.

5. Per contra Mr. Mohanty, learned counsel for the opposite parties, supported the impugned order of the court below. He submitted that merely because the report of the commissioner has been accepted by the court below, the same is not binding on the court. The same can be considered along with other evidence on record. He cited the decision of this Court in the case of Sankar Kumar and another v. Mohanlal Sharma, AIR 1998 Orissa 117.

6. The commissioner has been appointed to answer the questionnaires cited supra. He submitted the report. He was examined as C.W.1. Learned trial court accepted the report of the commissioner by assigning cogent reasons and came to hold that the report of the survey knowing commissioner is for the assistance of the court and the same is to be read along with evidence on record.

7. In Gopal Behera (supra), this Court held that in a case where objection is raised to the report of the Commissioner, the Court has to be satisfied that the local investigation was complete and free from error before he accepts the report. In a case where the Commissioner is examined as witness either by the Court or by any party with permission of the Court this point has to be judged in the light of the evidence of the Commissioner in Court. In case there are serious discrepancies between the statement made by the Commissioner in Court and the contents of the report or the evidence during local investigation it will not be safe to conclude that the report is free from error and it is reliable and acceptable. The Commissioner's report is intended to assist the Court in proper understanding and appreciation of the matter in dispute in the case. Therefore if a defective report is accepted

brushing aside the serious discrepancies in the evidence of the Commissioner and his report and materials recorded during local investigation such a report instead of assisting the Court is likely to mislead him.

8. In Sankar Kumar (supra), it has been held that merely because a report of the Commissioner is accepted during the trial, such report is not binding on the trial court at the time of final decision of the suit. Acceptance of a Commissioner's report at that stage only means that the report is considered to be a part of the record and is to be considered along with the other evidence on record at the time of final hearing.

9. There is no quarrel over the proposition of law as laid down by this Court in Gopal Behera (supra). As stated above, learned trial court has assigned cogent reasons in accepting the report of the survey knowing commissioner. The same becomes a part of the record and has to be considered along with other evidence on record at the time of hearing of the suit.

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

Petition dismissed.

2016 (II) ILR - CUT- 1313

D. DASH, J.

R.F.A. NOS. 119 & 139 OF 2005

THE ORISSA STATE FINANCIAL CORPORATION & ORS. .....Appellants

.Vrs.

BIJAY KUMAR PRADHAN & ORS. .....Respondents

CIVIL PROCEDURE CODE, 1908 – S.9

Consumer forum finally decided the dispute on merit – Claim negated – Whether Civil Court has jurisdiction to entertain the self same dispute ? – Held, No

In this case respondent No1-Plaintiff moved the Consumer Redressal forum for redressal of his dispute – He had never prayed for withdrawal of the case – When his claim was negated he moved the Civil Court for the self same relief – Trial Court allowed the prayer – Hence these appeals – Held, when the dispute has been finally decided

by the consumer forum and no appeal is preferred against that order, it has reached its finality U/s 24 of the consumer protection Act and the civil Court has no jurisdiction to entertain the said dispute – Impugned judgment and decree are setaside and the suit filed by the plaintiff is dismissed. (paras 21,22)

Case Laws Referred to :-

1. AIR 2003 MP 203 : Basant Kumar vs. the United India Insurance Company and Ors.

For Appellants : M/s. P.K.Routray, B.G.Mishra, N.K.Deo, R.K.Rout, A.Routray, M/s. Sabita R.Pattnaik, P.Pattnaik, P.K.Swain, N.K.Senapati, D.Pradhan,N.K.Biswal & R.P.Pattnaik.

For Respondents : M/s. L.Samantray, U.K.Barik,R.Pradhan, M/s.S.R.Patnaik, P.K.Swain,Mrs. P.Patnaik, N.K.Senapati, S.D.Pradha, M/s. M.Kanungo, P.K.Rath, S.K.Kanungo, S.Das, D.Pradhan, K.C.Tripathy, M/s.B.P.Tripathy, P.K.Chand, D.K.Pradhan, C.R.Panda, D.Satpathy, J.Mohanty, M/s.S.P.Mishra, S.Nanda, S.K.Samantaray, A.K.Dash, B.Mohanty,S.K.Jena, Miss S.Das, M/s.P.K.Routray, B.G.Mishra, N.K.Deo, R.K.Rout, A.Routray, M/s. M.Kanungo,S.K.Kanungo, S.Das, J.M.Mohanty, & S.S.Misra,

---

Date of hearing :19. 07. 2016
Date of judgment: 07.10.2016

JUDGMENT

D. DASH, J.

These two appeals arise out of the judgment and decree passed by the learned Civil Judge (Sr.Divn.), Aska in TMS No. 66 of 1997.

The suit filed by the respondent no.1 as the plaintiff has been decreed as under:-

(i) declaring the seizure of the bus by the appellant-defendant no.1 as illegal and the auction thereof as irregular;

(ii) directing respondent-defendant no.5 auction-purchaser from the appellant-defendant no.2 (Orissa State Financial Corporation-OSFC) to restore the possession of the bus;

(iii) directing the appellant-defendant no. 4 (National Insurance Company-Insurer) to pay a sum of Rs.1,33,380/- with interest at the rate of 6% per annum with quarterly rests from 23.10.1997;

(iv) directing appellant-defendant nos. 1 to 3 (OSFC and officials) to pay damage to the tune of Rs.1,50,000/- to the respondent-plaintiff within two months failing which to pay interest at the rate of 6% per annum with quarterly rests till payment;

(v) directing the appellant-defendant nos. 1 to 3 not to charge any interest or cost or monetary demand upon the respondent-plaintiff from the date of seizure till its restoration of possession to the respondent-plaintiff or the matter is regularized between respondent-plaintiff and the appellant (OSFC) as if the situation resumes back to the date of seizure of the bus; and

(vi) directing that in the event of failure of respondent-defendant no. 5 to restore possession of the bus to the respondent-plaintiff, the defendant no. 2 would be adjusting a sum of Rs.3,00,000/- towards principal loan advanced to the plaintiff with further responsibility of dealing with respondent-defendant no.5 at their own risk and cost.

One appeal (A) has been filed by the defendants nos. 1 to 3 i.e. Orissa State Financial Corporation and the other one (B) by the defendant no.4 i.e. National Insurance Company Ltd.

Both these appeals having arisen from the same suit and as are concerned with the same judgment and decree, those have been heard together for their disposal as such.

2. For the sake of convenience, in order to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arraigned in the trial court.

3. The plaintiff's case is that he had taken loan of Rs.3,91,000/- from the defendant no. 1 (OSFC) for purchasing a passenger vehicle. The vehicle being purchased with the said financial assistance stood registered on 1.12.1986. As per the terms and conditions, the loan was to be repaid in monthly instalment as fixed as agreed upon. It is stated that the plaintiff continued to pay the same regularly till October, 1990. In that very month, unfortunately the vehicle met with an accident and thereafter when it had been parked by the side of the bus stand due to the flood situation, it got again submerged under water and because of the same the vehicle got completely damaged. The plaintiff then finding no other way applied for an additional flood loan and was sanctioned with a sum of Rs. 1,00,000/-.

However, out of this amount, first of all a sum of Rs.40,000/- was adjusted towards the arrear instalments and the balance was spent for repair of the vehicle. Be that as it may, finally the vehicle with all efforts was made ready to run on the road in the month of October, 1991. But then again a problem arose with regard to the demand of the motor vehicle tax and non-issuance of permit for non-clearance of the said dues as demanded. So their ensued a legal battle. Ultimately, it ended by the order of the High Court in OJC No. 3812 of 1992 in view of the direction to the Regional Transport Officer to issue road permit.

Being aware of all these, the defendant nos. 1 to 3 all of a sudden on 10.11.92 seized the bus and brought it to Berhampur without prior notice. So the plaintiff approached the High Court by filing a writ application. This Court by an order allowed one chance to the plaintiff to run the vehicle and clear the loan. But the defendants insisted payment of Rs.1,00,000/- for the purpose of release. Being not able to pay the same, the plaintiff again approached this Court by carrying a writ. In that proceeding, this Court restrained the sale of the bus to any 3rd person in case of payment of Rs.15,000/- by the present plaintiff. It is stated that the plaintiff when approached the defendants for receiving Rs.15,000/-, they demand of Rs.50,000/-. So the matter again came before this Court in OJC No. 9660 of 1992. This Court then directed for payment of Rs.30,000/- and asked the defendant nos. 1 to 3 (OSFC) to fix monthly instalment by rephasing the outstanding loan amount. It is next stated that the plaintiff could not come to deposit the amount as directed by the High Court due to serious illness of his father and on his return, the payment date as fixed had already expired. The defendant nos. 1 to 3 (OSFC) did not listen to the prayer thereafter. However, the matter came before the Disposal-Cum-Advisory Committee and the plaintiff was asked to be present before said Committee for taking a view in the matter. It is stated that on that date fixed, the plaintiff's father died. So postponement of said date had been prayed for. However, on 14.1.94, the vehicle was sold by the public auction.

The plaintiff again carried the matter to the High Court in OJC No. 750 of 1994. This Court directed the plaintiff to file a petition before the Managing Director, OSFC for its consideration in the matter of handing over the vehicle. The petition was filed but the vehicle was not delivered for the reason that the process was by then over as per law. Lastly, when the plaintiff approached against said delivery of vehicle by filing OJC No. 1157 of 1994 before this Court, the application was dismissed finding involvement of

questions of fact needing adjudication and in view of availability of alternative remedy.

4. It is stated that the vehicle being registered was also duly insured with National Insurance Company, the defendant no. 4. After the damage in the accident and then because of the flood, there was intimation to the insurer. The plaintiff though demanded a sum of Rs.3,00.000/- from the insurers the same was not paid any heed to.

It is next stated that being wrongly advised, the plaintiff after all these developments on 5.5.95 filed Consumer Dispute Case No. 270 of 1995 before the District Consumer Disputes Redressal Forum, Ganjam at Berhampur. The said application was dismissed. Being aggrieved, the plaintiff then carried on appeal to the State Consumer Disputes Redressal Commission, at Cuttack wherein the financier (OSFC), the insurer (National Insurance Company) and others had been arraigned as respondents. The State Commission also dismissed the appeal. After loosing in those Forums, the present suit came to be filed claiming the following reliefs:-

"i. for recovery of Rs.2,00,000/- by way of damages for illegal seizure, sale and disposal of his vehicle OSG-9060 and against defendant no.3.

ii. for recovery of Rs.3,00,000/- as per terms and conditions of the Insurance and against defendant no.4.

iii. for directing the said defendant no. 5 for restoration of the vehicle OSG-9060 to the plaintiff by holding that by the illegalities committed by the defendants 1 to 3, he has acquired no valid title to the said property;

iv. for any other relief or reliefs as the Hon'ble Court deems proper; and

v. for costs."

5. The defendant nos. 1 to 3 (OSFC) contested the suit by filing written statement and they asserted that all action right from the seizure of the bus till auction have been held in accordance with law and the plaintiff is not entitled to any of the reliefs prayed for. Over and above, they had taken the stand that the suit is barred by limitation and lastly in view of the order passed by the State Consumer Disputes Redressal Commission in C.D. Appeal No. 368 of 1996, it had been contended the present suit to be barred under law and the issues thus cannot again be reagitated in the suit for decision.

6. The defendant no.4 (National Insurance Company) also contested the suit by filing the written statement asserting that it has no liability in the facts

and circumstances of the case to pay any further amount to the plaintiff under the insurance policy.

7. On such rival pleadings, the trial court framed the following issues:-

"1. Is the suit maintainable ?

2. Is there any cause of action to file the suit?

3. Is the suit barred by limitation?

4. Whether the judgment in C.D. case No. 207/95 of the DCDRF, Berhampur and C.D. Appeal No. 368/96 of S.C.D.R.C. Orissa will operate as res judicata for this suit?

5. Whether the judgment in C.D. Case No. 207/95 of the District Consumer Redressal Forum, Berhampur and C.D. Appeal No. 368/96 of State Consumer Disputes Redressal Commission, Orissa will operate as resjudicata for this suit (for short as DCDRF & SCDRC respectively)?

6. Has this court jurisdiction try this suit?

7. Whether the suit is bad for mis-joinder of parties as well as misjoinder of the cause of action?

8. Whether the seizure of the bus dated 10.11.92 by the O.S.F.C. is legal and whether the sale thereof in public auction is in accordance with the provisions of law.

9. Whether there is violation of principle of natural justice and deviation in following the procedure enshrined under the Act to seize the bus and to put the same into public auction.

10. Did the plaintiff suffer loss to the extent of rupees two lakhs due to the auction (illegal) of OSFC which will entitle him to damages to the extent of rupees two lakhs?

11. Whether the plaintiff is entitled to get back the vehicle bearing No.OSG 9060 from the possession of D-5, the auction purchaser?

12. Whether the Insurance Policy of the bus bearing No. OSG 9060 of the plaintiff with D-4 was valid at the time of accident during the last week of October, 1990 and on 4.11.90 when the devastating flood flew through Aska?

13. Whether there was loss and damage of the bus by accident or by flood and if the damage to the bus was caused due to the flood then whether the plaintiff is entitled to recover Rs.3,00,000/- from D-4 as per the terms and conditions of the Insurance Policy?

14. To what relief the plaintiff is entitled to?"

8. Learned counsel for the parties at the outset contend for a decision of issue nos. 4 and 5 which have been first taken up by the trial court and answered in favour of the plaintiff saying that the jurisdiction of the Civil Court is not ousted in the facts and circumstances of the case and that the orders passed by the State Consumer Disputes Redressal Commission does not stand in the way of such adjudication of the matter as raised and contested in the suit. And thereby to judge the sustainability of the said findings.

9. I have heard learned counsel for the parties at length in the matter of above two issues whose outcome wholly depend upon the appreciation of settled legal position and say as to how far the present suit as laid gets impacted thereby in further progressing for decision on the merit of the claim.

10. It's well settled in law that every forum has its jurisdiction to address itself at the threshold to arrive at a conclusion with regard to its jurisdiction and to deal with such facts which are necessary to assume jurisdiction. The findings of the District Forum or the State Commission with regard to the status of any complainant as consumer and the grounds for the relief sought for are final under section 24 of the Consumer Protection Act, 1986. Those are not available to be re-adjudicated in a Civil Court.

11. In this connection let me refer to the decision reported in (1995) 3 SCC 383 (AIR 1995 SC 1428) (Laxmi Engineering Works vs. P.S.G. Industrial Institute) wherein at para-15 it has been held:

> "By virtue of S.18 the procedure prescribed in S.13 applies to State Commission as well. From the above provisions, *it is clear that the orders of the District Forum, State Commission and National Commission are final as declared in S.24 and cannot be questioned in a Civil Court*. The issues decided by the said authorities under the Act cannot be reagitated in a Civil Court. The said provisions make it equally clear that the Forums created by the Act fall in the second category of Tribunals mentioned in R.V. Commissioner for Special Purposes of the Income-Tax (1888) 21 QBD 313, 319-which decision has been repeatedly affirmed and applied by this Court-which means that the Forums/Commissions under the Act have jurisdiction to determine whether the complainant before *them is a 'consumer'* and *whether he has made out grounds for grant of relief. Even if the Forums/Commission decides the said questions wrongly, their orders*

made following the procedure prescribed in sub-sections (1) and (2) of S.13 cannot be questioned in a Civil Court-except of course, in situations pointed out in Dhulabhai v. State of M.P. (1968) 3 SCR 662: AIR 1969 SC 78. They can and must be questioned only in the manner provided by the Act." (Emphasis supplied)

From the above, it is very clear that the determination of any party as a consumer and as regards the justification or otherwise for the grant of relief are not available to be questioned again before a Civil Court.

12. In case of **Basant Kumar vs. the United India Insurance Company and others**: AIR 2003 Madhya Pradesh 203, the claimant had availed the remedy available under the Act and after having obtained an order in his favour granting compensation, he opted to have recourse for proceeding in arbitration as provided in the clause in the agreement as he was not satisfied with the sum awarded towards damage by the District Consumer Forum.

13. Referring to the provision of section 24 of the Act, it has been held:-

"9. Section 24 of the Consumer Protection Act, 1986 attaches finality to the orders of District Forum, State Commission or the National Commission if no appeal has been preferred against such an order under the provisions of this Act. It is not a case where lack of jurisdiction is alleged; petitioner has been benefited by the award made by the Consumer Forum; by enacting Section 23 any person if aggrieved by an order made by National Commission in exercise of its power conferred by sub-clause (i) of clause (a) of Section 21, may prefer an appeal against such order to the Supreme Court within a period of thirty days from the date of the order. The intention of the Act is to make the order final as provided in Section 24 of the Act. Section 24 of the Act read as under:-

"24. Finality of orders: Every order of a District Forum, State Commission or the National Commission shall, if no appeal has been preferred against such order under the provisions of this Act, be final."

10. An arbitrator cannot be allowed to sit over the order of the District Forum and State Commission *particularly when the matter has been adjudicated on merits*. In my opinion, considering the scheme of the Consumer Protection Act, petitioner cannot now avail the benefit of arbitration proceedings *though initially it was open for him to choose the remedy before the arbitrator. Once the matter has*

been entertained and decided by the District Forum; award has been passed, it is not open for the petitioner to claim further amount by having recourse to the arbitration clause in the agreement. The order passed under Consumer Protection Act is final" (emphasis supplied)

14. In case of "Ms. Fair Air Engineers Pvt. Ltd. v. N.K. Modi; AIR 1997 SC 533", the Apex Court held that the Consumer Protection Act provides an additional forum though the remedy of Arbitration Act is initially available. In order to relieve the consumers of the cumbersome arbitration proceedings or civil action, the Act has been enacted and the consumer Forum has jurisdiction to adjudicate on merit of claim in spite of availability of arbitration proceedings. The Apex Court held that matter need not be referred to the Arbitration and the State Commission should decide it on merits.

15. Adverting to the facts of the instant case, the plaintiff after having failed in all the attempts to get the bus released having approached several times to this Court carrying writ applications including the last one vide OJC No. 1157/1994 which was not entertained on the ground of involvement of question of facts needing adjudication and because of availability of alternative remedy, next had approached District Consumer Disputes Redressal Forum, Ganjam in C.D. No. 207 of 1995. The said application being dismissed, the plaintiff challenged it by filing C.D. Appeal No.368 of 1996 before the State Consumer Disputes Redressal Commission, Orissa at Cuttack. The appeal stood dismissed. The order has been admitted in evidence and marked as Ext.38=Ext. E.

In that appeal both the National Insurance Company (defendant no.4 and the OSFC (defendant no.1) were parties and they contested the same denying their liability in the matter.

The present in that Consumer dispute had prayed the following reliefs:-

i). direct the opposite parties to pay a sum of Rs.1,00,000/- as compensation for damages jointly and severally;

ii). direct the O.P. No. 1 & 2 (National Insurance Co.) to pay the insurance claim amount with interest from the date of occurrence;

iii). direct the O.P. No. 3 & 4 (OSFC) to return the vehicle intact to the complainant;

iv). direct the opposite parties to pay the cost of the case; and

v). grant any such other relief or relieves as the Hon'ble District Forum deems fit and proper under the circumstances of the case in the ends of justice.

16. The State Commission in para 4 of the order while dealing with the claim of this plaintiff vis-à-vis the delay have held:

"xxx xxx xxx
xxx xxx xxx

But in the present case far from showing any circumstances justifying the delay, we do not find any grain of truth in the allegation of the complainant that any damage was caused to this vehicle on account of any accident on 04.11.90.

17. Next in para-5 of the order, coming to the liability of the OSFC, the defendant no.1 in the suit it has been held as under:-

> "5. The common case of the O.P. Nos. 3 & 4, on the other hand is that the complainant borrowed loan from the Corporation agreeing to repay the same in instalments with interest and that on the demand of O.P. No.4, he failed to clear up the outstanding loan amount. So the O.P. Nos. 3 and 4 took action U/S 29 of the State Financial Corporations Act, 1951 as per the terms and condition of the agreement and hypothecation deed executed by him. The seizure of the Bus was made in accordance with the provisions of the said Act, and the Agreements executed between the parties. It is contended by these O.Ps. that the complainant cannot be considered to be a 'consumer' within the meaning of the Consumer Protection Act and the complaint is no maintainable against them and that the complaint is barred by limitation. So they prayed for dismissal of the complaint."

18. With the above findings, the claim of this plaintiff was found to be without any merit and accordingly the plaintiff's appeal was dismissed.

It is pertinent to state here that the State Commission thus dismissed the claim of this plaintiff as laid on merit firstly finding that there remains no liability in the matter in so far as the defendant no.4 (National Insurance Co.) is concerned and secondly that the actions of defendant nos. 1 to 3 (OSFC) in the matter of seizure and auction have not been found in any way as legally objectionable and that those have not been established. Thus the defendant nos. 1 to 3 (OSFC) has also been exonerated from having any liability in the matter.

19. From the above, it is clearly seen that the State Commission has not dismissed the claim of the plaintiff as not entertainable either on the ground that the plaintiff is not a consumer or on the ground of limitation. But its

decision is on the merit of the claim holding it to be not payable by the opposite parties therein i.e. either by the defendant nos.1 to 3 (OSFC) and the defendant no.4 (National Insurance Co.).

20. The trial court dealing with the above issue nos. 4 and 5 has taken the view as per discussion as reproduced hereunder:-

> "With the hope of disposal of his dispute in the consumer court the plaintiff knocked the door of consumer forum but to his ill-luck he could not get any relief there. It is because of the fact that the relief sought for is not cognizable under the Consumer Protection Act and the dispute is not coming under the jurisdiction of the Consumer Forum. If the plaintiff cannot got redress in the Consumer Forum then the question arises where he has to agitate his grievance and where such problem would be adjudicated. Secondly, should he be debarred to approach the Civil Court simply because the consumer forum did not listen to him holding that the dispute is not coming within the four corners of the Consumer Act to give relief to the plaintiff. Plaintiff is get relief. It is immaterial as to which Court or authority has the jurisdiction to entertain the complaint of the plaintiff. Since alternative remedy exists and is available to the plaintiff and since he failed in one forum i.e. under Consumer Protection Act he will not be debarred to settle his dispute in the Civil Court. Plaintiff will not go without any remedy. Whatever the plaintiff did, he as per the advice of his Advocate. Hence he cannot be penalized for choosing a wrong forum due to the mistaken advice of his legal adviser. It is immaterial if the plaintiff has got merit in his claim or not. But the doors of the Civil Court is not closed for him. As such rightly he approached the Civil Court. The forum without framing issues considers regarding the deficiency of service without inviting oral evidence. The forum gives a finding relying upon the pleadings and documents while Sec. 9 of the C.P.C. gives a broad and wide jurisdiction to Civil Court not only to club oral evidence but also to test the veracity of such oral evidence and the Civil Court analyses the evidence on record issue wise and gives findings on each issue. Hence the findings of the Consumer Forum will not operate as resjudicata so as to keep the plaintiff armless and helpless to put forth his claim in the forum in which he ought to have filed the case. In a decision reported in State of Karnatak vs. Biswabharati House Building Cooperative Society

and others 2—3 Vol.I CJD Supreme Court at page so it has been held as follows;-

"By reason of the provisions of section 3 of the Act, it is evident that remedies provided thereunder are not in derogation of those provided under other laws. The said Act supplements and not supplants the jurisdiction of the Civil Courts or other statutory authorities.

The said Act provides for a further safeguard to the effect that in the event a complaint involves complicated issues requiring recording of evidence of experts, the complainant would be at liberty to approach the Civil Court for appropriate relief. The right of the consumer to approach the Civil Court for necessary relief has, therefore, been provided under the Act itself."

In another decision reported in Synco Industries vs. State Bank of Bikanore & Jeypore and others; AIR 2002 SC (FB) page 568 it has been held that where the claim required detail evidence, the same cannot be entertained by commission but civil court is the proper remedy. Here in the instant case not only the plaintiff but also the defendants have led lengthy evidence consuming time months together in support of their respective cases which shows that the same could not have been possible under the consumer forum. Probably for that reason Hon'ble Court in its short order observed that the dispute involves several questions of fact which needs adjudication. That means adjudication of such disputed facts in the Civil Court but not under the consumer Forum. Simply because the plaintiff chosed (*sic*) a wrong forum due to the mistaken advice of his Advocate he will not go without any remedy and the order of the consumer forum should not an obstacle for him to come to the Civil Court. Hence keeping in view to the principles decided in the above decisions and upon its application to the present case, I am of the opinion that the judgment of the Consumer Forums are not resjudicata to this case. In view of my above discussions this Court has jurisdiction to try this suit. These issues are decided in favour of the plaintiff."

21. In the factual backdrop as regards the disposal of the Consumer Dispute appeal by the State Commission as stated in para-16 and in view of the reliefs claimed in the said dispute as stated in para-15 as asserted in the appeal, now let us advert to carefully find out the principles set at rest in

those above decisions relied upon by the trial court in arriving at the above conclusion, based upon the same so as to say that how far those provide support to the above said view taken by the trial court and if those can sustain in the eye of law.

In the case of Synco Industries (supra), the claimant had moved the Commission alleging deficiency in service against the Bank since it had frozen the sanctioned working facilities of the claimant without prior intimation. The claimant also sought for a direction for preparing the funding package so as to restart the claimant's oil division with further prayer for waiver of interest, damage and other expenses. The National Commission disposed of the said claim holding it not fit for being tried under the Consumer Protection Act. The National Commission at that stage gave liberty to the claimant to approach the civil court or any other forum if so advised.

The claimant however insisting upon continuing the adjudication of the claims on merit and grant of the reliefs claimed therein founded upon the facts and circumstances by the National Commission moved the Apex Court. In that connection, the Apex Court has said that in view of the rival case as projected since it require detail evidence to be led to prove the claim, damages etc, it cannot be heard and disposed of under the Act. So, the Apex Court confirmed the order of the National Commission holding it to have rightly passed so in granting the liberty to the claimant to move the civil court.

The facts and circumstances of the cited case are completely distinguishable from the case in hand. In our case, finally the State Commission being moved by the plaintiff for adjudication of his claim and for grant of reliefs as noted above, has decided the appeal holding the plaintiff to be having failed to establish his claim. The plaintiff had moved the State Commission being unsuccessful before the District Forum and thus it prayed for disposal of the claim on merit. At no point of time he had prayed for withdrawal of the case from the State Commission nor sought for the liberty. Nor the State Commission has granted any such liberty. The plaintiff has thus accepted and submitted to the jurisdiction of the State Commission in deciding the dispute on merit and his claims being negated land the plaintiff being denied to be granted with any relief, has no more knocked the door of the higher forum as available under the Act nor any other proceeding has been levied to get the said order of the State Commission set aside. But the plaintiff now has filed the suit in the civil court for adjudication of the claims on merit afresh founded upon those facts and circumstances for grant of the reliefs as aforesaid. The question thus arises that can the plaintiff now turn around and

again move the civil court saying that the Commission ought not to have so decided the dispute as it involved leading of lengthy evidence, their appreciation and final adjudication. In my considered view, it cannot be so said and the order of the State Commission cannot be so avoided to say that it has no impact in the matter and does not in any way stand as legal hurdle on the path of the Civil Court for the adjudication of that very claim against those very parties on merit founded upon same factual and circumstantial settings and in their back drop. In that event the very purpose and objective of the legislation in creating the adjudicatory Forums under the Act would stand nugatory.

It is true that the Forum and Commission created under the Consumer Protection Act supplement to the jurisdiction of the civil court or other statutory authority. The provision of section 3 of the Act is very clear that the remedies provided there under are not in derogation of those as provided under law. The said Act supplements and not supplants the jurisdiction of the civil courts or other statutory authority. The said Act provides for further safeguard to the effect that in the event a complaint involves complicated issues requiring recording of evidence of experts, the claimant would be at liberty to approach the civil court for appropriate relief. It's clearly an option remaining with the claimant first and then with the Forum or Commission to so hold for not proceeding to decide the claim/dispute on that ground. The right of the consumer to approach the civil court for necessary relief, has therefore, been very much provided under the Act itself. The provisions of the said act are required to be interpreted as broadly as possible. It has the jurisdiction to entertain a complaint despite the fact that other forums/courts would also have the jurisdiction to adjudicate upon the reliefs.

(A) But from all these it cannot be deduced that a claimant having gone unsuccessful in the Forums under the Act holding his claim to be meritless and disentitling him from being granted with the reliefs as claimed, still can approach the civil court by filing the suit for adjudication of his claim on merit afresh on those very facts and circumstances forming foundation for the claim for grant of the same reliefs or reliefs of same nature. Here, the question is not resting on ousting of the jurisdiction but its because of the seal of finality being put upon the order of the Forums under the Act as provided in section 24 of the Act stairing on the face of the civil court or other statutory authorities not to proceed for adjudication of the same matter over and again land afresh.

The intention of the legislature in creating the Forums and Commissions under the Act are undoubtedly as supplements but the same is

certainly not that the jurisdiction of Forums and Commissions being invoked and the claim being disposed of on merit, the jurisdiction of normal or ordinary forums under the common law or other statutory forums are still invokable leading to multiplicity of proceedings which is against public policy and which is frowned upon.

Next authoritative pronouncement in the case of State of Karnataka (supra) has been much banked upon by the trial court. In that case the constitutionality of the Consumer Protection Act was questioned. So the Apex Court looking at the objective behind the legislation has clearly expressed the view that the rights of the parties have adequately been safeguarded by reasons of the provisions of the said Act inasmuch as providing in an alternative system of consumer jurisdiction on summary trial; they are required to arrive at a conclusion based on reasons. Even when quantifying damages, they are required to make an attempt to serve the ends of justice aiming not only at recompensing the individual but also to bring about a qualitative change in the attitude of the service provider. Assignment of reasons excludes or at any rate minimizes the changes of arbitrariness and the higher forums created under the Act can test the correctness thereof. In that very case, the Apex Court has held that the provision relating to the power to approach the appellate court by a party aggrieved by a decision of the Forums/State Commissions as also the power of High Court and the Apex Court under Article 226/227 of the Constitution of India and Article 32 of the Apex Court apart from section 26 of the Act provide for adequate safeguards. Furthermore, primarily the jurisdiction of the Forums/Commissions is to grant damages. In the event a claimant feels that he would have a better and effective remedy in a civil court as he may have to seek for an order of injunction, he indisputably may file a suit in an appropriate civil court or may take recourse to some other remedies as provided for in other statutes.

(A) For the aforesaid discussion and reasons, I am unable to understand as to how the above decisions come to the aid of the plaintiff in avoiding the order of the State Commission as to be having no value in the eye of law in further moving the civil court for redressal of selfsame grievances in claiming said relief by an adjudication afresh and as having no such legal impact, the order being not even the worth of the paper written on. The plaintiff here having very much pursed the litigation before the State Commission when has suffered from the decision in negating his case, has approached the civil court. As it appears, the trial court has failed to appreciate the ratios of the decision in correct prospective far from taking the legislative intent into consideration.

The word 'final' finding place in section 24 of the Act cannot be so read only for the purpose of the dispute before the Forums and Commissions constituted under the Act but as not to be so accepted in the civil suit or other proceeding concerning the same subject matter claiming reliefs founded upon the same factual and circumstantial settings. The contrary being the view of the trial court as is clearly discernable, as also the conclusion of the trial court that the plaintiff has rightly approached the civil court are unsustainable in the eye of law and thus cannot be allowed to stand. In my considered view, the civil court's jurisdiction in the matter of reopening the issues with regard to the claim of the plaintiff against the defendant no.4 (National Insurance Co. and the defendant nos. 1 to 3 (O.S.F.C.) stood foreclosed in view of the provision of section 24 of the Consumer Protection Act as those have already become final and no more questionable before the civil court in a suit for the same reliefs concerning same subject matter and based upon same facts and circumstances. The findings of the trial court on those issues are thus hereby set aside.

In view of the finding that the civil court has no jurisdiction to entertain the lis as laid, which has already been decided by the State Commission holding the plaintiff as not entitled to the claim as laid against the National Insurance Co., the defendant no.4 and O.S.F.C., the defendant nos. 1 to 3, there stands no further necessity to proceed to examine the here sustainability of the findings of the trial court on other issues touching the merit of the claim.

22. Resultantly, both the appeals stand allowed. The judgment and decree passed by the trial court in TMS No. 66 of 1997 are hereby set aside. The plaintiff's suit as laid stands dismissed. However, in the facts and circumstances of the case, no order as to cost is passed.

Appeals allowed.

2016 (II) ILR - CUT-1329

S. PUJAHARI, J.

BLAPL NO.6117 OF 2015

SRIKANTA DEBATA ……..Petitioner

.Vrs.

STATE OF ORISSA ..…… Opp.party

(A) CRIMINAL PROCEDURE CODE, 1973 – S.439
R/w section 37(I)(b) NDPS Act.1985

Bail – Offence U/s 20 (b) (ii) (c) NDPS Act – Seizure of "Ganja" of 86 Kgs. 150 grams – Petitioner took resort to section 37 (I)(b) on the ground that he was impleaded in the case only on the confessional statement of the co-accused without having any criminal antecedent – Limitations U/s 37 (I) (b) of the NDPS Act, for grant of bail – The court must give an opportunity to the public prosecutor to object the prayer for bail and if he objects, should not grant bail without recording its satisfaction that there are reasonable ground for believing that the accused is not guilty of the offence alleged and not likely to commit any offence if allowed to go on bail.

In this case Ganja of commercial quantity was seized and the petitioner and other occupants in the vehicles fled away from the spot and one of them being apprehended, named the petitioner to be one fleeing from the spot – Held, the petitioner has no case for his release on bail in view of the mandate of section 37 (I) (b) of the NDPS Act and his prayer for bail is rejected being devoid of merit.

(Paras 11 to 15)

(B) CRIMINAL PROCEDURE CODE, 1973 –Ss 437,439

Bail – Rule of parity claimed as similarly situated co-accused persons released on bail – Court is not bound to follow earlier bail order not containing reasons – Even if the order contain reasons but if such order was passed in flagrant violation of well settled principles and ignored to take into consideration the relevant factors essential for grant of bail, the court is not bound to grant bail.

In this case, similarly situated co-accused persons have been released on bail by this court in exercise of discretionary jurisdiction but in those orders the mandate of law as provided in sections 37 of the NDPS Act has not been addressed – Held, the petitioner can not claim parity in this case and his application for bail is rejected.

(Paras 16,17)

Case Laws Referred to :-

1. 2015 (Supp.-II) OLR 169 : Abhaya Parichha vrs. State of Orissa,
2. 2016 CRI.L.J. 594 : Intelligence Officer, Narcotic Control Bureau, Sub Zone, Kakkanad, Kochi vrs. Lijo K. Jose,
3. AIR 1980 SC 785 : Niranjan Singh and another vrs. Prabhakar Sajram Kharote & ors.
4. AIR 1990 SC 625 : State of Maharashtra vrs. Anand Chaintaman Digha
5. (2001) 4 SCC 280 : Prahalad Singh Bhati vrs. NCT, Delhi
6. (2004) S.C.C. 619 : Narcotics Control Bureau vrs. Dilip Pralhad Namade.
7. (2014) 58 OCR 747 : Sudam Karan vrs. State of Odisha
8. 1998 CRI.L.J. 2374 : Chander alias Chandra Chandra vrs. State of U.P.,

Petitioner : M/s. Mahitosh Sinha
Opp.party : ASC.

Date of Order: 05.08.2016

ORDER

S. PUJAHARI, J

Heard learned counsel for the petitioner and learned counsel for the State.

2. The petitioner being in custody in Special Case No.116 of 2012, arising out of NALCO P.S. Case No.183 of 2012, pending in the court of the learned Judge, Special Court, Angul, has filed this petition for his release on bail. The offence alleged against the petitioner is punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "N.D.P.S. Act").

3. It appears from the materials available on record that the petitioner along with four others said to be transporting 86 Kgs. 150 grams of 'Ganja' in two motor cars, i.e., one Indigo car and one Indica car to dispose of the same in Cuttack town. On their way, NALCO Chhak Main Gate, seeing the police partrolling party, the present petitioner and others fled away from the spot and the driver of Indigo car and an occupant of the Indica car were apprehended. The police patrolling party recovered 'Ganja' of 86 Kgs. 150 grams from both the vehicles. The petitioner was arrested during course of investigation of the aforesaid case.

4. Learned counsel for the petitioner drawing notice of this Court to the materials available on record, so also Section 37(1)(b) of the N.D.P.S. Act, submits that in this case the only material that is available against the petitioner being confession of co-accused before the Police naming the petitioner to be one of the persons, which is no evidence in the eye of law, the

petitioner deserves to be released on bail. He further submits that even if prima-facie case is there indicating the involvement of the petitioner, the petitioner also deserves to be released on bail, inasmuch as there is nothing on record indicating the fact that he shall commit any offence on his release on bail as he has no criminal antecedents and unless the twins conditions are satisfied, an accused is entitled to be released on bail, is the mandate of Section 37(b) of the NDPS Act. He further submits that the petitioner deserves to be released on bail on the ground of parity inasmuch as this Court had already released two co-accused persons, namely, Rinku Sahu and Ranjan Kumar Pradhan on bail vide orders dated 08.04.2013 and 19.06.2013 respectively passed in BLAPL Nos.743 of 2013 and 602 of 2013. In support of his contentions, the learned counsel for the petitioner places reliance on a decision of this Court in the case of ***Abhaya Parichha vrs. State of Orissa,*** 2015 (Supp.-II) OLR 169 wherein it has been held as follows :-

> "xxxxx xxxxxxx
>
> Bail-Commercial quantity of Ganja found from the exclusive and conscious possession of the co-accused – Petitioner was charge sheeted under Section 20(b)(ii)(c)/25/29 of the N.D.P.S. Act – Impleaded in the case only on the confessional statement of the co-accused – No criminal antecedent – Considering the nature of accusation and absence of prima facie materials against the petitioner's involvement in the commission of offence and taking into account of his period of detention in judicial custody, bail of the petitioner allowed.
>
> xxxxxxxxx xxxxx xxxxxx"
>
> [Quoted from Placitum]

So also, the learned counsel for the petitioner places reliance on a decision of the Kerala High Court in the case of ***Intelligence Officer, Narcotic Control Bureau, Sub Zone, Kakkanad, Kochi vrs. Lijo K. Jose,*** 2016 CRI.L.J. 594, wherein in paragraph-14 it has been held as follows:-

> "14. Even though Section 37(1)(b)(ii) of the NDPS Act says that, the aforesaid two grounds arise for consideration only when the Prosecutor opposes the application, I am of the firm view that in appropriate cases, the said two grounds arise even when the Public Prosecutor does not oppose the application. The same is evident from Section 37(2) of the NDPS Act. As per Section 37(2) of the NDPS Act, the limitations contained in Section 37(1)(b) are in addition to the

limitations under the Code of Criminal Procedure, 1973. Therefore, even when the Prosecutor does not oppose the petition, the Court is not bound to enlarge an accused on bail. Even when the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail, if there are some other grounds, normally available to the Court to deny bail to an accused under the Cr.P.C., the Court is not expected to enlarge the accused on bail."

5. Learned counsel for the State, however, opposes the prayer for bail drawing notice of this Court to the materials on record indicating the fact that the petitioner along with others while transporting 'Ganja' of commercial quantity in two vehicles on being intercepted by the police on their way fled away from the spot and one of the co-accused being apprehended named the petitioner to be one of the culprits.Therefore, there being prima-facie material indicating the fact that the petitioner is involved in an offence under Section 20(b)(ii)(C) of the NDPS Act, this Court should be loath in granting bail to him as it is difficult on the aforesaid fact to record a finding that there are reasonable ground for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail and Section 37 of the NDPS Act prohibits to grant bail in case of this nature without recording the aforesaid findings, submits the learned counsel for the State.

6. Since the petitioner has been implicated in an offence under the N.D.P.S. Act for transporting 'Ganja' of commercial quantity and sought for bail in this case, it would be apposite to have a look to Section 37 of the N.D.P.S. Act as the same deals with the limitations prescribed with regard to grant of bail to a person indicted in an offence under Section 20(b)(ii)(C) of the NDPS Act. The said Section reads as thus;

"**37. Offences to be cognizable and non-bailable.-** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) –

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]"

7. A perusal of the aforesaid section would go to show that Court while addressing the bail application of a person accused of the offences mention in Section 37(1)(b) of the N.D.P.S. Act, the Court must give an opportunity to the Public Prosecutor to object the prayer for bail and if he objects, should not grant bail without recording the satisfaction that there are reasonable ground for believing that the accused is not guilty of the offence alleged and not likely to commit any offence if allowed to go on bail. Any offence has been held by the Apex Court to be an offence of similar nature. The aforesaid limitation and in addition to the limitations provided for grant of bail in the Cr.P.C. as well as in any other law.

8. In the case of ***Niranjan Singh and another vrs. Prabhakar Sajram Kharote and others, AIR 1980 SC 785,*** the Apex Court while dealing with the "law of bails" have held as follows;

"The law of bails, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict the liberty of a man who is alleged to have committed a crime and the presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt. The granting of bail in the case of a non-bailable offence is a concession allowed to an accused person. In the case of a bailable offence, bail can be obtained as of right under Sec. 436(1), Cr.P.C., subject to restrictions under Sec. 436(2). While considering an application for bail, detailed discussion of the evidence and elaborate documentation of the merits is to be avoided. This requirement stems from the desirability that no party should have the impression that his case has been pre-judged. Existence of a prima-facie case is only to be considered. Elaborate analysis or exhaustive exploration of the merits is not required……."

9. So also in the case of ***State of Maharashtra vrs. Anand Chaintaman Digha, AIR 1990 SC 625,*** the Apex Court have held that where the offence is of serious nature the question of grant of bail has to be decided keeping in view the nature and seriousness of the offence, character of the evidence and amongst others the larger interest of the public. In the case of ***Prahalad Singh Bhati vrs. NCT, Delhi, (2001) 4 SCC 280,*** the Apex Court have held as follows;

> "8…… While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviours, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or the State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words 'reasonable ground for believing 'instead of 'the evidence' which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

10. In the case of ***Narcotics Control Bureau vrs. Dilip Pralhad Namade, (2004) S.C.C. 619***, the Apex Court dealing with the provisions of Section 37 of the N.D.P.S. Act at paragraphs-9, 10, 11 and 12 have held as follows;

> "9. As observed by this Court in *Union of India v. Thamisharasi* clause (b) of sub-section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code. The two limitations are: (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> 10. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which

really have relevance so far as the present respondent-accused is concerned, are: (1) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence, and (2) that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence and he is not likely to commit any offence while on bail. This nature of embargo seems to have been envisaged keeping in view the deleterious nature of the offence, necessities of public interest and the normal tendencies of the persons involved in such network to pursue their activities with greater vigour and make hay when at large. In the case at hand the High Court seeks to have completely overlooked the underlying object of Section 37 and transgressed the limitations statutorily imposed in allowing bail. It did not take note of the confessional statement recorded under Section 67 of the Act.

11. A bare reading of the impugned judgment shows that the scope and ambit of Section 37 of the NDPS Act was not kept in view by the High Court. Mere non-compliance with the order passed for supply of copies, if any, cannot as in the instant case entitle an accused to get bail notwithstanding prohibitions contained in Section 37.

12. The circumstances under which the bail can be granted in the background of Section 37 have been indicated above. The case is not one to which the exceptions provided in Section 37 can be applied."

[Underlining by me]

11. On perusal of the materials on record, it would go to show that the police party had seen the petitioner to be fleeing away from the spot. Thereafter, one of the co-accused apprehended at the spot named the present petitioner to be one fleeing from the spot. Therefore, it cannot be said that the implication of the petitioner in this case is solely based on the confession of co-accused made before the police. Hence, prima-facie materials are there indicating the fact that the petitioner to have been involved in the offence alleged.

12. It appears that strong incriminating materials have been collected against the petitioner during course of investigation disclosing that he was involved in the offence alleged. The accusation is serious in nature, and the quantum of punishment provided is minimum imprisonment for ten years, which may extend to twenty years and minimum fine of rupees one lakh which may extend rupees two lakhs, which is stringent.

13. The contention of the learned counsel for the petitioner that in this case since the confession of the co-accused before the police is the only material, therefore, it cannot be said that the same is incriminating, appears to this Court to be fallacious inasmuch as here in this case when the police intercepted both the vehicles from which 'Ganja' of commercial quantity was seized and the petitioner and other occupants fled away from the spot and one of the occupants being apprehended, named the petitioner to be one fleeing from the spot. The counsel for the petitioner has not brought to the notice of this Court any materials are there on the record suggesting the fact that the petitioner was not involved in the offence or there is material to show his false implication in this case or materials collected do not attract the offence alleged. Basing on the available materials on record, being hard to record a satisfaction that there are reasonable grounds for believing that the accused was not guilty of the offence alleged and that the petitioner on his release is not likely to commit such offence inasmuch as he was involved in heinous and serious offence of trafficking 'Ganja' of commercial quantity and fled away from the spot. The learned counsel for the State has objected the prayer for bail. The petitioner, therefore, has no case for his release on bail in view of the mandate of Section 37(1)(b) of the N.D.P.S. Act and the law laid down by the Apex Court in the case of ***Narcotics Control Bureau (supra).***

14. The decision in the case of ***Abhaya Parichha (supra),*** on which much reliance has been placed by the learned counsel for the petitioner, is of no assistance to the petitioner inasmuch as the facts of that case are quite distinguishable to the present facts situation. In that case this Court was not inclined to accept the confessional statement of the co-accused before the police to be an incriminating piece of evidence as the same was not recorded in writing and no corroborative material to lend such confession against the petitioner and the petitioner therein had no criminal antecedent and recording the twin satisfaction as required under Section 37 of the NDPS Act with regard to the petitioner's prima-facie innocency and ruling out his propensity of committing any offence, if released on bail, granted bail to the petitioner indicted in an offence under Section 20(b)(ii)(C) of the N.D.P.S. Act. But, in

the case at hand, as stated earlier, sufficient materials are there indicating the involvement of the petitioner in the aforesaid case, and the manner in which the same was committed, the petitioner committing the offence of similar nature on his release on bail, is not ruled out. Furthermore, the contention of the petitioner that since no material is there indicating the fact that the petitioner has any criminal antecedent, as such, he is likely to commit such offence as held by this Court in the case of ***Abhaya Parichha (supra),*** hence one of twin conditions being fulfilled, the petitioner deserves to be released on bail in view of the mandate of Section 37(1)(b) of the NDPS Act. The aforesaid contention is fallacious as it is the clear mandate of Section 37(1)(b) of the NDPS Act to grant bail on the fulfillment of the twin conditions, which is also the interpretation given to the same by the Apex Court in the case of ***Narcotics Control Bureau (supra),*** so also this Court in the case of ***Abhaya Parichha (supra)*** did not held the aforesaid. Furthermore, recording satisfaction with regard to commission of similar offence on release on bail depends upon the peculiar facts and circumstances of that case and, as such, the contention advanced with regard to placing reliance on ***Abhaya Parichha's case (supra),*** appears to this Court to be untenable.

The decision of the Kerala High Court in the case of ***Intelligence Officer, Narcotic Control Bureau, Sub Zone, Kakkanad, Kochi (supra),*** relevant portion of which is quoted supra, on which much reliance has also been placed by the learned counsel for the petitioner, is of no assistance to the petitioner, rather the same militates against the grant of bail to the petitioner in this case.

15. Thus, considering the nature and gravity of the accusation, character of evidence and the stringent punishment provided and also the limitation to grant bail under Section 37(1) of the N.D.P.S. Act in an offence of this nature without recording the satisfaction that there are reasonable grounds for believing that the petitioner is not guilty of the offence alleged or not likely to commit any offence, which is not possible to record in this case, the petitioner's prayer for bail is devoid of merit.

16. With regard to the contention of the learned counsel for the petitioner to release the petitioner on the ground of parity as this Court had already allowed the similarly situated co-accused persons, namely, Rinku Sahu and Ranjan Kumar Pradhan on bail vide orders dated 08.04.2013 and 19.06.2013 respectively passed in BLAPL Nos.743 of 2013 and 602 of 2013. For better appreciation of the contention advanced by the learned counsel for the

petitioner, the orders passed in the aforesaid two bail applications are extracted hereunder;

"**BLAPL No.743 of 2013**
Order No.7 dated 08.04.2013

Heard learned counsel for the petitioner and learned counsel for the State. Perused the case diary.

Considering the nature of allegations made against the petitioner, I do not think it is a fit case for grant of anticipatory bail. However, it is directed that in the event the petitioner surrenders before the learned Judge, Special Court, Angul, in Special Case No.116 of 2012, arising out of NALCO P.S. Case No.183 of 2012 within four weeks hence and moves for bail, he shall be released on bail on such terms and conditions as the learned Magistrate may deem just and proper.

BLAPL is accordingly disposed of.
Issue urgent certified copy as per rules.

BLAPL No.602 of 2013
Order No.6 dated 19.06.2013

This is an application for bail filed under Section 439 Cr.P.C.
Heard learned counsel for the petitioner and learned counsel for the State. Perused the case diary.

Considering the materials available on record, the prayer for bail is allowed. The petitioner be released on bail by the learned Judge, Special Court, Angul, in Special Case No.116 of 2012, arising out of NALCO P.S. Case No.183 of 2012 on such terms and conditions as the learned Court below may deem just and proper.

BLAPL is accordingly disposed of.
Issue urgent certified copy as per rules."

It appears from the aforesaid orders that a Bench of this Court in exercise of its discretionary jurisdiction to grant pre-arrest bail / bail in the Code of Criminal Procedure taking note of the facts and situation in the case relating to the petitioner therein, has exercised its jurisdiction to grant bail as aforesaid to the petitioners. The petitioners therein are undisputedly co-accused of the present petitioner and similarly situated with the present petitioner. But, I humbly disagree with the contention advanced that the aforesaid orders enure to the benefit of the petitioner on the rule of parity

inasmuch as, if I may be permitted to say so, in the aforesaid orders the mandate of law provided in Section 37 of the NDPS Act has not been addressed, more so in view of the ratio laid down in the case of ***Narcotics Control Bureau (supra),*** so also a decision of this Court in the case of ***Sudam Karan vrs. State of Odisha,*** (2014) 58 OCR 747 wherein this Court has also taking note of the decisions in the cases of ***Narcotics Control Bureau (supra), Chander alias Chandra Chandra vrs. State of U.P., 1998 CRI.L.J. 2374 and Gopi @ Gopal Rout vrs. State of Orissa*** passed in BLAPL No.983 of 2013 with regard to the application of the rule of parity in granting bail to the co-accused persons, refused to extend the benefit of rule of parity to the petitioner therein, in similar facts and situations.

In the case of ***Chander alias Chandra (supra),*** a Bench of the Allahabad High Court has held that if the order granting bail to an accused is not supported by reasons, the same cannot form the basis for granting bail to a co-accused on the ground of parity, so also a Judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains reasons, if the same has been passed in flagrant violation of well settled principle and ignores to take into consideration the relevant factors essential for granting bail. So also, a Bench of this Court taking note of the aforesaid decision of Allahabad High Court, in the case of ***Gopi @ Gopal Rout (supra)*** in paragraph-17, held as follows;

> "Keeping in mind the gravity of offence, materials available on record and the above principles of law, now I have to consider the present petition for grant of bail. Undoubtedly, in the present case, accusations are of serious in nature. In a broad daylight, the petitioner along with other co-accused persons entered into the house of the informant on the pretext of courier agent. On the point of pistol and knives, they took the godrej almirah keys from the informant, committed dacoity and took away cash, gold and silver ornaments. The materials already on record are recovery of stolen property from the possession of the accused-petitioner and identification of the accused-petitioner in T.I. parade. The petitioner has criminal antecedents as he is involved in five other criminal cases. The order granting bail to the co-accused Kunia is not supported by any reasons. Therefore, the same cannot form the basis for granting bail to the petitioner on the ground of parity."

17. For the reasons stated above, the prayer for bail of the petitioner is devoid of merit and stands rejected. Accordingly,the BLAPL stands disposed of being dismissed.

However, since the petitioner is stated to have been languishing in custody near about one year and the expeditious disposal of a case being a fundamental right of an accused guaranteed under Article 21 of the Constitution of India, the trial court shall do well to conclude the trial as expeditiously as possible preferably within a period of four months hence, if there is no other legal impediment.

Application dismissed.

2016 (II) ILR - CUT- 1340

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

JCRLA NO.7 OF 2005

MANGALA OYALE ……..Appellant

.Vrs.

STATE OF ODISHA ……..Respondent

EVIDENCE ACT, 1872 – S.3

Circumstantial evidence – Conviction – The following conditions must be fulfilled to established a case against an accused basing on Circumstantial evidence.

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.The circumstances concerned 'must or should' and not 'may be' established;

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude every possible hypothesis except the one to be proved; and

(5) There must be a chain of evidence to complete as not to leave any reasonable ground for the conclusion consistent with the

innocence of the accused and must show that in all human probability the act must have been done by the accused."

In the present case, on reappraisal of the circumstantial evidence, it does not satisfy the test to record a conviction – Held, the impugned judgment of conviction and order of sentence are setaside.

(Paras 16,17,18)

Case Laws Relied on :-

1. AIR 1952 SC 343 : Hanumant Govind Nargundkar & anr .Vrs. State of Madhya Pradesh.
2. AIR 1984 SC 1622 : Sharad Birdhichand Sarda Vrs. State of Maharashtra.

Case Laws Referred to :-

1. AIR (34) 1947 Privy Council 67 : Pulukuri Kottaya and Ors . Vrs. Emperor.
2. (1976) 1 SCC 828 : Mohmed Inayatullah .Vrs. The State of Maharashtra.
3. (2000) 6 SCC 269 : State of Maharashtra .Vrs.Damu S/o. Gopinath Shinde And Ors.
4. XXXV (1969) CLT 351 : Satrughana alias Satura Majhi .Vrs. State

For Appellant : Mr.Biswajit Nayak
For Respondent : Mr.Jyoti Pattnaik, AGA

Date of Hearing : 04.11. 2016
Date of Judgment :18. 11. 2016

JUDGMENT

S.PUJAHARI, J.

Judgment and order dated 20.11.2004 passed by the learned Sessions Judge, Koraput at Jeypore in Criminal Trial No.275 of 2003, convicting the appellant (hereinafter referred to as "the accused") for committing murder of his wife (hereinafter referred to as "the deceased") under Section 302, I.P.C., and sentencing him to undergo R.I. for life, are assailed in this Jail Criminal Appeal by the accused, presently lodged in the District Jail, Koraput to undergo the sentence.

2. The prosecution placed before the trial court a case that 16.02.2003, a Sunday, was a weekly fair day at village Semiliguda. The accused along with the deceased had been to that weekly fair to market sundry goods. After the marketing, both of them left for their village. But, on their way back to home, at about 7.30 P.M., near Dompanigadha 'Dangar' (a hillock) of village-

Mukhi Bidei, both of them had an altercation which led to a fight between them. The accused overpowered the deceased and pinned down her to the ground and mercilessly assaulted her on her face and head with a lathi and stone and caused severe bleeding injuries for which she lost her sense. Then the accused dragged her to a little distance i.e. to near Dompanigada "Nala" (stream of water) and found her to have succumbed to the injuries. The accused, however, guarded her dead body there throughout the night. On the next day morning, when people found him sitting near her dead body, he confessed before them to have killed the deceased during course of mutual fight between them. The matter was reported to the police at Semiliguda Police Station by the Ward Member, namely, Shyam Sundar Majhi(P.W.1) in writing (Ext.1), pursuant to which Semiluguda P.S. Case No.23 of 2003 was registered. The police investigated the matter and found substance in the allegation inasmuch as the investigation indicated that the accused was the author of the crime and as such the police placed charge-sheet against the accused for commission of offence punishable under Section 302 of the I.P.C. Learned S.D.J.M., Koraput also took cognizance of the same and finding the case to be triable by the Court of Sessions, committed the same. Hence, the accused be proceeded for committing the murder of the deceased.

3. Learned Sessions Judge, Koraput at Jeypore, placing reliance on the aforesaid case of the prosecution which was also supported by the materials collected by the police during investigation, framed charge under Section 302 of the I.P.C. against the accused. But the accused pleaded not guilty of the charge and faced trial. The prosecution examined as many as 10 witnesses besides exhibiting certain documents and also material objects to establish the charge against the accused. The accused who took a plea of denial and false implication, did not adduce any independent evidence in support of such plea. The trial court on conclusion of the trial, appreciating the evidence adduced by the prosecution, returned the judgment of conviction and order of sentence as stated earlier.

4. Learned counsel for the accused though did not dispute that the deceased died a homicidal death, but submitted that there being no credible evidence on record indicating the fact that the accused was the author of the crime, the trial court erred in recording the judgment of conviction and order of sentence as stated earlier.

5. Elaborating the submission, it has been submitted by the learned counsel for the accused that the trial court on a wrong premises relied on the confession of the accused said to have been made while in police custody,

though Sections 25 and 26 of the Evidence Act, 1872 (hereinafter referred to as "the Act") prohibits the use of the same. No doubt Section 27 of the Act allows some confession while in police custody to be led into evidence in spite of prohibition in the preceding Sections 25 and 26 of the Act, but the same must be distinctly relatable to the fact discovered. The confession before the police relied on here in this case being not covered by the aforesaid exception, the trial court should not have placed reliance on the same resorting the mandate of Section 27 of the Act. When the aforesaid confession is effaced off the record being hit by Section 25 of the Act, the other circumstance available against the accused is recovery of the weapons of offence from the place of concealment which by itself is not sufficient to form the foundation for conviction. In such premises, he submits the accused is entitled to a judgment and order of acquittal.

6. Per contra, drawing notice of the Court to the evidence on record, it has been submitted by the learned counsel for the State that there is ample evidence on record indicating the fact that the deceased died a homicidal death while in the company of the accused and the accused had no explanation for the same. The same itself is a strong incriminating circumstance. Coupled with the same, when the accused had given information to have concealed the material objects which were found to be the weapons of offence, there is no manner of doubt that it was the accused who authored the death of the deceased, even if the confession made while in police custody that was taken into consideration by the trial court, is effaced off the record for having no legal sanction.

7. The evidence on record as placed before the trial court indicates that the death of the deceased was homicidal in nature. The doctor (P.W.8) who conducted the post-mortem examination of the deceased, deposed to have found the following injuries on the person of the deceased during post-mortem examination:

"External injuries:-

A lacerated wound of size 1 cm. x 0.5 cm x 0.5 cm. over the lateral side of left eye.

i. Lacerated wound of size 0.5 c.m. x 0.5 cm x bone depth over the root of nose with fracture of nasal bone.

ii. Rapture of the left eye bail with rent over the cornea of size 1 cm. x 0.5 cm x full thickness.

iii. Peri-orbital swelling of both the eye.

iv. Multiple abrasions (25 in numbers) over the face each of sizes 1 cm. x 0.3 cm.

v. Bruise of size 3 cm. and dia metre over the right pinna.

vi. Abrasion below the right ear over the neck of size 2 cm. x 2 cm.

vii. Bruise 2 cm. and dia-metre behind the left ear.

viii. 3 bruises over the right fore-head each of size 1 cm. and dia-metre with underlying fracture of right frontal bone and an epidural haematoma of size 2 cm x 2 cm. x 0.5 cm. Corresponding membrance and the frontal lobe of the right hemisphear were also bruised.

ix. Abrasion of size 5 cm. x 2 cm.over the anterior chest wall (right) in upper half.

x. Abrasion of size 4 cm. x 1 cm. over the right axilla.

xi. Abrasion of size 1 cm. x 1 cm. over the right shoulder.

xii. Abrasion of size 3 cm. x 1.5 cm. over the anterior chest wall in lower 1/3rd.

xiii. Lacerated wound over the anterior superior iliac spine of size 1 cm x 1 cm. x Muscle depth.

xiv. 3 abrasions each of size 0.5 cm. x 0.5 cm. over the posterior surface of right elbow.

xv. Two parallel bruise each of seize 4 cm. x 0.5 cm. with inter-vening bend of normal skin of size 0.5 cm bredth over the lateral aspect of right upper thigh oriented horizontally.

xvi. Two parallel bruises each of size 10 cm. x 0.5 cm. with intervening bend of normal skin of 0.5 cm. bredth over the anterior surface of left thigh.

xvii. Abrasion over the right knee anteriorily of size 4 c.m. x 3 c.m.

xviii. Two abrasions one on each side of L-5. pinous process each of size 1.5 c.m. x 1 c.m.

xix. Haemotama over the occipital area of skull circular in shape of 3 c.m. and dia metre with brusing of underlying membrance and occipital lobes of both hemisphere.",

According to this doctor, all the aforesaid injuries were antemortem in nature and the death of the deceased was attributable to the injuries on the head which was sufficient in ordinary course of nature to cause death. The doctor had also prepared the post-mortem examination report (Ext.9),

contemporaneous to his such examination. The aforesaid post-mortem examination report (Ext.9) as such corroborates the version of the doctor in the court. Nothing has been elicited in the cross-examination of the doctor to indicate that the aforesaid injuries are suicidal or accidental in nature inasmuch as the doctor has flatly denied the suggestion given that the injuries could be possible by fall on hard and rough surface and looking into the situs and gravity of some of the injuries, possibility of the same being self inflicted is ruled out. No material was brought to record contrary to the evidence of the doctor. No material has also been placed before the court that the doctor had not bestowed the required care and caution while conducting post-mortem examination. In such premises, the finding of the court below that the death of the deceased was attributable to the injuries noticed by the doctor which is also not disputed in this appeal by the accused, appears to be based on credible evidence on record, as such needs no interference. The injuries being homicidal in nature as such the deceased died a homicidal death.

8. So far as author of such homicidal death of the deceased is concerned, there is no manner of doubt that the evidence of the informant (P.W.1) indicates that on the day following the incident at about 9.00 A.M., the accused was found near the dead body of the deceased Dalimba Oyal near Damapani Gada Pada and there was bleeding from her nose and mouth. Thereafter, ascertaining the cause of death from the accused PW-1 stated to have lodged report (Ext.1) scribed by another. This witness in his statement has never deposed anything indicating the fact that the death of the deceased occurred in the company of the accused and he made any confession before him. The aforesaid circumstance as such is not at all incriminating to the accused.

9. The investigating officer (P.W.9) in his evidence deposed that after registration of the case on the basis of the information received vide Ext.1, he conducted investigation and during the course of investigation, as it appears from his evidence, he seized a piece of stone (M.O.IV) and a lathi (M.O.V) consequent to the accused showing the place of concealment after making confession before him that he murdered the deceased by assaulting her with the stone (M.O.IV) and lathi (M.O.V) and after such murder he had thrown away the said lathi and stone at a little distance from the assault place in a concealed manner and also he proved the aforesaid statement recorded by him as Ext.5/1.

It appears that the trial court held such confession of the accused while in police custody to be admissible under Section 27 of the Act and

placing reliance on the same, held the accused to be the author of the injuries contributing to the death of the deceased.

10. Section 25 of the Act speaks that no confession made to a police officer shall be proved as against a person accused of any offence, but Section 26 of the Act which is in the nature of an exception to the rule provided in Section 25 allows a confession made in the custody of a police officer to be proved, if the same is made in the immediate presence of a Magistrate. However, Section 27 of the Act which is in the nature of proviso to the aforesaid rule provided in Sections 25 and 26 of the Act with regard to use of confession before police, speaks that when a fact is deposed to as discovered in consequent of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

11. The aforesaid mandate of law would go to show that though use of confession under Section 25 of the Act before the police officer is prohibited, if the same is made in the immediate presence of a Magistrate, Section 26 of the Act allows such confession made before the police to be admissible in evidence. While Section 27 of the Act overrides the aforesaid prohibitions of use of confession made in police custody by a person accused of an offence, to be proved, even if not made in the circumstances as indicated in Section 26 of the Act, if such confession appears to be an information given to the police pursuant to which a fact was discovered and such information albeit relevant information, if distinctly relates to the fact thereby discovered. Section 27 of the Act does not make confession of an accused while in police custody, to be admissible, which does not distinctly relate to the fact discovered pursuant to such information. It allows such information even if the same is a confession which distinctly relates to the fact discovered.

12. In the case of **Pulukuri Kottaya and others –vrs.- Emperor**, reported in AIR (34) 1947 Privy Council 67, in the context of Section 27 of the evidence Act have held as follows:

> "It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is

> discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. **It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant**." (emphasis supplied)

The aforesaid has been relied upon in a line of decisions by the Apex Court as well as different High Courts of India till date. To our knowledge, the Apex Court has not laid down any law contrary to the aforesaid law laid down by the Privy Council in the case of **Pulukuri Kottaya** (supra). The above proposition of law in this regard which has been described as a "locus classicus", set at rest much of the controversy that centered round the interpretation of Section 27 of the Act.

13. The Apex Court in the case of **MOHMED INAYATULLAH –VRS.- THE STATE OF MAHARASHTRA**, reported in (1976) 1 SCC 828, interpreting Section 27 of the Act have held as follows:

> "12. The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section24, also. It will be seen that the *first* condition necessary for bringing this section into operation is the *discovery of a fact*, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The *second* is that the discovery of such fact must be deposed to. The *third* is that at the time of the receipt of the information the accused must be in police custody. The *last* but the most important condition is that only "so much of the information" as relates *distinctly* to the fact *thereby* discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied

by the accused which is the *direct* and *immediate* cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered."

14. So also in the case of **STATE OF MAHARASHTRA –VRS.- DAMU S/O GOPINATH SHINDE AND OTHERS**, reported in (2000) 6 SCC 269, placing reliance in the case of **Pulukuri Kottaya** (supra) at paragraphs 35 and 36, the Apex Court have held as follows:

"35 The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of the Privy Council in *Pulukuri Kottaya v. Emperor* is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.

36. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. xx xx xx xx xx"

15. The evidence of the investigating officer would go to show that the accused said to have given information of concealment of the stone (M.O.IV)

and the lathi (M.O.V) in a place which are found to be weapons of offence inasmuch as the doctor (P.W.8) in his evidence examined the aforesaid and answered the query of the I.O. vide Ext.10 that the aforesaid could have caused the injuries on the deceased and he identified the said M.Os.IV and V, so also human blood was found in the lathi (M.O.V) in the chemical examination, as revealed from chemical examination report (Ext.15). The information of the accused to have caused the death of the deceased causing the injuries contributing to the death of the deceased with the stone (M.O.IV) and the lathi (M.O.V) is a confession, but the same does not distinctly relate to the fact discovered i.e. recovery of concealed stone (M.O.IV) and lathi (M.O.V) in a place within the knowledge of the accused inasmuch as the said discovery of fact does not in any manner relates to user of the aforesaid M.Os. Without information of the fact that he used the same in causing the injuries contributing to the death of the deceased, the facts as aforesaid could have been discovered also. But, learned Sessions Judge held the same to be admissible under Section 27 of the Act in spite of prohibition contained in Sections 25 and 26 of the Act and placing reliance on the same, held the accused to be the author of the crime. Such approach of the learned Sessions Judge is contrary to law laid down in the case of **Pulukuri Kottaya** (supra), reiterated in a number of decisions by the Apex Court including in the cases of **MOHMED INAYATULLAH** (supra) and **DAMU S/O GOPINATH SHINDE AND OTHERS** (supra)

16. Besides the same, no other evidence being there, now it is to be seen whether the aforesaid circumstances, i.e., the deceased died a homicidal death and pursuant to the information given by the accused M.Os.IV and V, the weapons of offence, were recovered from the place of concealment, are sufficient enough to hold the accused to be the author of the crime. The Apex Court in the case of **Hanumant Govind Nargundkar and another –vrs.- State of Madhya Pradesh**, reported in AIR 1952 SC 343, dealing with a case of circumstantial evidence have held as follows:

> "In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof. In cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of conclusive

nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused." (quoted from placitum)

The aforesaid law laid down by the Apex Court has been reiterated in a number of decisions by the Apex Court including in the oft quoted decision with regard to recording of conviction on circumstantial evidence i.e. in case of **Sharad Birdhichand Sarda –vrs. State of Maharashtra**: reported in AIR 1984 SC 1622. The Apex Court in the case of **Sharad Birdhichand Sarda** (supra) have held as follows:

"The following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established;

(6) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;

(7) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(8) The circumstances should be of a conclusive nature and tendency;

(9) They should exclude every possible hypothesis except the one to be proved; and

(10) There must be a chain of evidence to complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused." (quoted from placitum)

17. Learned counsel for the accused has argued that a piece of evidence collected under Section 27 of the Act in no circumstances can form the foundation of the conviction and as such the accused is entitled to an order of acquittal. The aforesaid is a favorite argument advanced at the Bar in most of the cases, where only the incriminating evidence is relevant under Section 27 of the Act. But the aforesaid contention is at times fallacious as seen from the

law laid down in the case of **Pulukuri Kottaya** (supra) of the Privy Council. A Division Bench of this Court dealing with the aforesaid in the case of **Satrughana alias Satura Majhi –vrs.- State**, reported in XXXV (1969) CLT 351, have held at paragraph 8 as follows:

> "8. *Kottaya v. Emperor*, is the leading decision on this point. A clear exposition of the evidentiary value of such a statement is given in para 11 of the judgment. Their Lordships observed thus:-
>
> "Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law."
>
> The effect of this passage has unfortunately been overlooked in most of the subsequent decisions.
>
> The implication of this concept may be explained by an illustration. If the statement made under Section 27 of the Evidence Act leads to discovery of opium, then a conviction can be founded solely on the basis of that statement, as possession of opium without license is by itself an offence under the Opium Act. Similarly discovery of arms without licence on the basis of a statement made under Section 27 of the Evidence Act can constitute the sole basis of conviction. But where the gist of the offence is not possession alone, then the statement leading to discovery in most cases cannot constitute the foundation of the prosecution case. As their Lordships put it, it is only one link in the chain of proof, and the other links must be established beyond reasonable doubt before the guilt is brought home to the accused."

However, in the present case, the aforesaid circumstances does not satisfy the requirement to record the conviction as laid down in the case of **Hanumant Govind Nargundkar and another** (supra) and also in the case of **Sharad Birdhichand Sarda** (supra). This Court also in the case of **Satrughana alias Satura Majhi** (supra) in similar circumstances had held as follows:

> "9. A direct case on the point is to be found in *Dhunda v. Emperor*. In that case, a blood stained chopper and a blood stained chadar were recovered from the house of the accused. Their Lordships held that such a discovery was not by itself enough to justify the conviction. They observed thus:-

"This is circumstantial evidence the value of which is very great when used to corroborate other evidence. It cannot by itself prove the case for the Crown. It is possible to imagine many an occasion where the mere discovery of a blood-stained weapon or blood-stained clothes was due to something other than murder, for instance, concealing a dead body or receiving from the real murderer a blood-stained weapon in order to hide it and so assist the murderer. It is impossible to say that the discovery of a blood-stained article is enough by itself to justify a conviction for murder".

A similar view was taken in *In re Periyaswami Thevan*. There the distinction in the effect of discovery of an article belonging to the deceased and to the accused was forcefully brought out. Their Lordships held that if the prosecution had shown that the blood-stains on the chopper belonged to the same group as the blood of the deceased, the answer would have been clinching. They observed thus:

"Ordinarily in a case of circumstantial evidence where there has been a discovery as a result of confession made under Section 27, Evidence Act, one expects to find the discovery of something which can be associated with the deceased and not with the accused. The question of the weapon with which the offence was committed being discovered as a result of information given by the accused is also probable. But in such a case the mere fact that a weapon, which could have been used for the commission of a crime like this, was discovered with blood-stains on it on information given by the accused, would not, by itself be sufficient to show that he was the murderer".

On the dictum of the Privy Council authority, we are clearly of opinion that the confessional statement leading to discovery, in the facts and circumstances of this case, cannot establish the prosecution case that the accused was the murderer, though it raises grave suspicion."

18. On reappraisal of the evidence on record, therefore, we are of the considered opinion that in this case conviction recorded by the learned Sessions Judge, Koraput against the accused is indefensible inasmuch as the circumstances which has been brought to the record in this case does not satisfy the test to record a conviction as held by the Apex Court in the cases of **Hanumant Govind Nargundkar and another** (supra) and **Sharad**

Birdhichand Sarda (supra). Hence, there being no evidence indicating that the accused to be the author of the homicidal death of the deceased, we have no hesitation to say that judgment of conviction and order of sentence have been passed in this case in erroneous appreciation of evidence on record and as such the same are liable to be set aside and this Jail Criminal Appeal deserves to be allowed.

19. Accordingly, this Jail Criminal Appeal stands allowed. Consequently, the judgment of conviction and order of sentence passed against the accused are set aside and the accused stands acquitted of the charge under Section 302 of the I.P.C. The accused be set at liberty forthwith, if he is not otherwise required to be incarcerated.

Appeal allowed.

2016 (II) ILR - CUT-1353

S. K. SAHOO, J.

TRPCRL NO. 89 OF 2014

ANUSUYA SITHA ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp. Parties

CRIMINAL PROCEDURE CODE, 1973 – S.407

Transfer of criminal trial – Dowry torture case – Dowry demand made at the time of marriage at Dhenkanal in the Parental house of the wife – Physical torture made to her at her in-laws house at Bhubaneswar, where F.I.R. lodged and trial is pending – Now wife resides with her father at Dhenkanal and faced paucity of funds – Actual cause of action arose at Dhenkanal and mental torture is continuing with the wife at Dhenkanal and it being a continuing offence U/s. 178 (c) Cr.P.C. both Bhubaneswar and Dhenkanal courts have jurisdiction to try the offence – Moreover divorce and maintenance proceedings between the parties are pending in the Dhenkanal Court – Held, the transfer application filed by the petitioner is allowed and C.T.Case No. 632 of 2013 pending in the file of learned SDJM, Bhubaneswar is directed to be transferred to the Court of the learned SDJM, Dhenkanal for trial.

Case Laws Referred to :-

1. AIR 1997 SC 2465 : Smt. Sujata Mukherjee -V- Prashanta Ku. Mukherjee

For Petitioner : Mr. Sidhartha Das
P.R.Singh, A.K.Mohanty & N.K.Sahoo
For Opp. Parties : Mr. Jyoti Prakash Patra, Addl.Standing Counsel.
Mr. A.Jena, A.K.Nayak (O.P.Nos. 2 to 6)

Date of Argument:16.09.2016
Date of Order :16.09.2016

ORDER

S. K. SAHOO, J.

None appears on behalf of the petitioner so also on behalf of the opposite parties nos.2 to 6.

Heard Mr. Jyoti Prakash Patra, learned Additional Standing Counsel for the State.

The petitioner Smt. Anusuya Sitha has filed this application under section 407 Cr.P.C. with a prayer to transfer in C.T. Case No.632 of 2013 arising out of Bhubaneswar UPD Mahila P.S. Case No.37 of 2013 pending in the Court of learned S.D.J.M., Bhubaneswar to the Court of learned S.D.J.M., Dhenkanal for hearing, trial and for adjudication of the case.

As it appears on the First Information Report submitted the petitioner before the Bhubaneswar UPD Mahila Police Station on 15.02.2013, Bhubaneswar UPD Mahila P.S. Case No.37 of 2013 was registered under sections 498-A, 323, 406 read with section 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act against the opposite parties nos. 2 to 6 who are the husband, father-in-law, brother-in-law, mother-in-law and sister-in-law of the petitioner respectively.

During course of investigation, the Investigating Officer visited the spot, examined the witnesses, arrested some of the accused persons, seized the relevant documents and also seized the dowry articles from the house of the accused persons, left it in the Zima of the petitioner as per the Zimanama and finding prima facie case under sections 498-A/323/406/34 of Indian Penal Code and section 4 of the Dowry Prohibition Act, submitted charge sheet on 30.12.2013 and accordingly, on receipt of such charge sheet, the learned S.D.J.M., Bhubaneswar being prima facie satisfied that the ingredients of the offences are made out, vide order dated 12.02.2014 has been pleased to take cognizance of such offences.

It appears from the grounds taken in the application under section 482 Cr.P.C. that the petitioner is now residing in her parents' house at Dhenkanal along with her two children and the father of the petitioner is a retired person

and it is stated that due to paucity of income, it is quite an onerous task for the petitioner to attend the case at Bhubaneswar. It is further stated that the maintenance proceeding was instituted by the petitioner against the opposite party no.2 before the learned Judge, Family Court, Dhenkanal in Criminal Misc. Case No.204 of 2013 and an order of maintenance has been passed but the opposite party no.2 has not paid anything to the petitioner and her two children. It is further stated that the opposite party no.2 filed a divorce petition before the Court of learned Additional District Judge, Tis Hazari Court at New Delhi and the Hon'ble Supreme Court in Transfer Petition (C) No. S 406 of 2014 has been pleased to transfer the divorce petition i.e. HMA Petition No.552 of 2013 to the Court of District Judge, Dhenkanal, Odisha with a further direction to assign the same to the Court of competent jurisdiction.

No objection has been filed to the transfer application of the petitioner by the opposite parties no.2 to 6.

Section 178 of the Cr.P.C. states about the place of inquiry or trial if an offence is committed.

Clause (c) of Section 178 of the Code deals with a situation where an offence is a continuing one, and continues to be committed in more local areas than one. A 'continuing offence' means that if an act or omission on the part of the accused constitutes an offence and if that act or omission continues from day to day, then a fresh offence is committed every day on which the act or omission continues. In a case of dowry torture, if materials collected indicate that the demand was made at the father's place of the victim at place "A" and physical torture was given at the in-laws' house at place "B" and after the victim came back to her father's place, the mental torture continued at place "A", the offence which appears to be one under section 498-A of I.P.C. and section 4 of D.P. Act is a continuing one and as such the victim can lodge the F.I.R. either at place "A" or at place "B" in the concerned police station or file complaint in the concerned Court at "A" or at "B" and the Court within whose local jurisdiction the place "A" or "B" situates can also inquire into or try the offence.

In case of **Smt. Sujata Mukherjee -Vrs.- Prashanta Kumar Mukherjee reported in A.I.R. 1997 S.C. 2465,** the allegation of the appellant was that she was maltreated and humiliated not only in the house of her in-laws at Raigarh but as a consequence of such events, the husband of the appellant had also come to the house of her parents at Raipur and had also assaulted her. The High Court held that except the husband, the complaint

against other respondents related to the incident taking place at Raigarh and as such the criminal case on the basis of the complaint made by the appellant was not maintainable against the other respondents at Raipur but such case was maintainable so far as husband of the appellant is concerned. Hon'ble Supreme Court set aside the order of the High Court on the ground that the complaint reveals a 'continuing offence' of maltreatment or humiliation meted out to the appellant in the hands of all the accused-respondents and in such continuing offence, on some occasions, all the respondents had taken part and on other occasion, one of the respondents had taken part and as such clause (c) of Section 178 of the Code is clearly attracted.

On going through the averments made in the First Information Report as well as charge sheet, it appears that cause of action has also arisen within the territorial jurisdiction of S.D.J.M., Dhenkanal where the demand of dowry was made at the time of marriage and the mental torture is also continuing with the petitioner within the jurisdiction of S.D.J.M., Dhenkanal and the petitioner is now staying at her father's place at Dhenkanal and maintenance proceeding as well as divorce proceeding are also subjudiced before the Dhenkanal Court and therefore, for the convenience of the parties, I am of the view that C.T. Case No.632 of 2013 pending in the Court of learned S.D.J.M., Bhubaneswar should be transferred to the Court of learned S.D.J.M., Dhenkanal in the interest of justice.

Accordingly, the transfer application filed by the petitioner is allowed. C.T. Case No.632 of 2013 which arises out of Bhubaneswar UPD Mahila P.S. Case No.37 of 2013 charge sheeted under sections 498-A, 323, 406 read with section 34 of the Indian Penal Code and section 4 of Dowry Prohibition Act pending before the Court of learned S.D.J.M., Bhubaneswar is directed to be transferred to the Court of learned S.D.J.M., Dhenkanal for trial.

A copy of the order be sent immediately to Court of learned S.D.J.M., Bhubaneswar who on receipt of the same shall transfer the case records of C.T. Case No. 632 of 2013 to the Court of learned S.D.J.M., Dhenkanal for trial. A copy of the order be also sent to the learned S.D.J.M., Dhenkanal for intimation and to do the needful. In the result, the TRPCRL application filed by the petitioner is allowed.

TRPCRL allowed.

2016 (II) ILR - CUT- 1357

S. K. SAHOO, J.

CRLREV NO. 587 OF 2016

MANOJ KUMAR ROUT ……..Petitioner

.Vrs.

STATE OF ORISSA ……Opp. Partiy

CRIMINAL PROCEDURE CODE, 1973 – S.457

Release of vehicle – Petitioner's truck seized in an offence U/s 394 I.P.C. – His application U/s 457 was rejected by the Magistrate – Hence this revision – Since petitioner is not an accused in the case no useful purpose would be served in keeping the seized vehicle at the police station for a long period which is kept open inside the P.S under the sun and rain – Impugned order is setaside – Direction issued for release of the vehicle subject to following conditions.

(i) the petitioner shall produce the original registration certificate, insurance papers before the concerned police station which shall be verified properly and true attested copies thereof shall be retained by the investigating officer/I.I.C. of the police station;

(ii) the petitioner shall furnish property security worth of Rs.1,00,000/- (rupees one lakh);

(iii) the petitioner shall keep the vehicle insured at all times till the conclusion of the trial and produce the insurance certificates before the Trial Court as and when required;

(iv) the petitioner shall not change the colour or any part of the engine and chassis numbers of the vehicle;

(v) the petitioner shall furnish two photographs of the vehicle before taking delivery of the same;

(vi) the petitioner shall not transfer the ownership of the vehicle in favour of any other person;

(vii) the petitioner shall produce the vehicle before the Court as and when called upon;

(viii) the petitioner shall not allow the vehicle to be used in the commission of any offence.

Case Laws Referred to :-

1. (2003) 24OCR(SC) 444 :Sunderbhai Ambala Desai -Vrs.- State of Gujarat.

For Petitioner : Mr. Bichitra Narayan Satapathy
For Opp. Party : Mr. Jyoti Prakash Patra (ASC)

Date of Hearing : 06.09.2016
Date of Judgment : 06.09.2016

JUDGMENT

S. K. SAHOO, J.

The petitioner has challenged the impugned order dated 16.07.2016 passed by the learned J.M.F.C.(P), Kujang in Criminal Misc. Case No.85 of 2016 which arises out of Abhayachandpur P.S. Case No.79 of 2016 corresponding to G.R. Case No.509 of 2016 in rejecting the application filed by the petitioner under section 457 Cr.P.C. for release of the vehicle.

As it appears in connection with commission of an offence under section 394 of the Indian Penal Code, one Mahindra Car (MAXICB) TUV 300-T6+ bearing registration No.OD-05-R-2357 was seized by S.I. of Police, Abhayachandpur Police Station on 03.07.2016.

The petitioner filed an application under section 457 Cr.P.C. before the learned J.M.F.C.(P), Kujanga which was registered as Criminal Misc. Case No.85 of 2016 praying for a direction to the IIC, Abhayachandpur Police Station to release the seized vehicle in his favour on the ground that he was the bonafide registered owner and he is no way connected with the alleged crime and the condition of the vehicle was deteriorating day by day lying abandoned outside the police station campus under rain and sun.

The learned Magistrate called for a report from the Investigating Officer and accordingly, one Kailash Chandra Behura, S.I. of Abhayachandpur Police Station submitted a report on 12.07.2016 indicating that the vehicle might not be released on the following grounds:-

(i) The investigation is under progress and one FIR named accused is yet to be arrested;

(ii) Further it is not yet ascertained that who drove the vehicle on the date of occurrence as the owner of the vehicle avoiding police interrogation;

(iii) The involvement of the owner in the crime is yet to be verified.

The learned Magistrate relying upon the aforesaid report rejected the petition filed by the petitioner.

The learned counsel for the petitioner submitted that the petitioner is not an accused in the case and during course of investigation, as per the

report submitted by the S.I. of Abhayachandpur Police Station, materials came against four accused persons namely, (1) Jitu @ Jitendra @ Niranjan Parida, (2) Chandan Behera, (3) Tapan Swain and (4) Rajendra Behera. The vehicle of the petitioner is detained in the police station being exposed to the sun and rain and therefore, in view of the decision of the Hon'ble Supreme Court in the case of **Sunderbhai Ambala Desai –Vrs.- State of Gujarat reported in (2003) 24 OCR (SC) 444**, the vehicle should be released in favour of the petitioner.

Learned counsel for the State opposed the prayer for release of the vehicle.

Considering the submissions made by the respective parties and taking note of the fact that the vehicle was seized in connection with the case since 03.07.2016 and the petitioner is not an accused in the case as per the report of the S.I., Abhayachandpur Police Station, keeping in view the ratio laid down in the case of **Sunderbhai Ambala Desai -Vrs.- State of Gujarat** (supra), I am of the view that no useful purpose would be served in keeping the seized vehicle at the police station for a long period which being kept open is prone to fast natural decay on account of weather conditions.

Accordingly, the impugned order passed by the learned J.M.F.C.(P), Kujanga in Criminal Misc. Case No.85 of 2016 dated 16.07.2016 is not sustainable in the eye of law and the same is hereby set aside.

It is directed that the aforesaid vehicle shall be released in favour of the petitioner subject to following conditions:-

(i) the petitioner shall produce the original registration certificate, insurance papers before the concerned police station which shall be verified properly and true attested copies thereof shall be retained by the investigating officer/I.I.C. of the police station;

(ii) the petitioner shall furnish property security worth of Rs.1,00,000/- (rupees one lakh);

(iii) the petitioner shall keep the vehicle insured at all times till the conclusion of the trial and produce the insurance certificates before the Trial Court as and when required;

(iv) the petitioner shall not change the colour or any part of the engine and chassis numbers of the vehicle;

(v) the petitioner shall furnish two photographs of the vehicle before taking delivery of the same;

(vi) the petitioner shall not transfer the ownership of the vehicle in favour of any other person;

(vii) the petitioner shall produce the vehicle before the Court as and when called upon;

(viii) the petitioner shall not allow the vehicle to be used in the commission of any offence.

Accordingly, the Criminal Revision petition is disposed of.

Revision disposed of.

2016 (II) ILR - CUT-1360

J.P. DAS, J.

R.P.F.A.M. NO. 08 OF 2014

NILAMANI SAHU ……..Petitioner

.Vrs.

PRAVATI SAHU ……..Opposite Party

LEGAL SERVICES AUTHORITIES ACT, 1987 – S.21

Exparte order U/s 125 Cr.P.C. – Order passed by Family Court awarding maintenance infavour of O.P.-wife from the date of order – Wife filed revision before this Court claiming maintenance from the date of application – Revision was taken up before High Court Level Lok Adalat and disposed of on consent of parties – Subsequent application by husband before the Family Court to setaside the exparte order which was allowed – Hence this petition – After settlement arrived at by the parties in the High Court Level Lok Adalat, the learned Family Judge becomes functus officio to sit over the matter so far as award of maintenance was concerned – Held, impugned order is setaside. (Paras 9,10,11)

Case Laws Referred to :-

1. AIR 2005, SC 3575 : A.T. Thomas Vrs.Thomas Jaw.
2.(1956)1 SCR72 : Sailendra Narayan Bhanja Deo v. The State of Orissa.

For Petitioner : M/s. A.C. Manungo & S.Barik
For Opp. Parties : M/s. P.K. Mohanty & N.K.Rout

Date of hearing : 04.08 .2016
Date of judgment : 08.09.2016

JUDGMENT

J.P. DAS, J.

This application is directed against the order dated 28.12.2013 passed by the learned Judge, Family Court, Cuttack in C.R.P. No.09 of 1993 granting a monthly maintenance @ Rs.500/- per month from the date of application till the date of order and thereafter @ Rs.2000/- per month in favour of the present Opposite Party to be paid by the present Petitioner-husband.

2. This matter has a checkered career protracting the litigation for more than two decades either due to ignorance of the parties or lack of proper advice, as a result of which the hapless wife has been deprived of getting a monthly maintenance after being separated from her husband, the present petitioner in a proceeding under Section 125 of Criminal Procedure Code.

3. Bereft of unnecessary details, the brief facts are that the marriage between the present petitioner and the opposite party was solemnized on 21.04.1986 and they lived as husband and wife. Some times thereafter, the opposite party-wife was tortured for demand of some cash and jewellery as dowry and the present petitioner-husband also tried to do away with her life on some occasions by sprinkling kerosene, attempting to administer poison or forcibly pushing her inside a tank, etc.. The opposite party-wife was also assaulted on some occasions. The opposite party-wife being rescued by her brother, lodged an F.I.R at Niali Police Station on 30.04.1990 alleging offences punishable under Section 498-A of the Indian Penal Code and other offences which was charge-sheeted after investigation and the accused-husband was convicted therein. Of course, in an appeal preferred by him, he was acquitted of the charges much later in the year 2009. The opposite party-wife filed the application in the year 1993 under Section 125 of the Cr.P.C. claiming maintenance @ 500/- per month from her husband since she apprehended danger to her life, if she would go back to her husband. Since the opposite party-husband did not appear despite notice, he was set exparte and by order dated 08.11.1994 the learned Judge, Family Court passed the exparte order directing the opposite party-husband to pay monthly maintenance of Rs.300/- w.e.f. from the date of passing of the order. The petitioner-wife assailed the order before this Court in Criminal Revision No.90 of 1995 with the submission that the grant of maintenance should have

been from the date of application instead of being from the date of order. In course of pendency of the revision before this Court, the matter was placed before the High Court Level Lok Adalat with the consent of both the parties and it was ordered on 15.10.1996 as follows:

xxxx xxxx xxxx

> Heard learned counsel for parties and on their consent matter was taken up at the High Court level Lok Adalat.
>
> Learned Judge, family Court, Cuttack has awarded a sum of Rs.300/- per month as maintenance from the date of order. The order was passed on 08.11.1994 and application was filed on 08.01.1993.
>
> Considering financial status of the opp.party no.1, I direct that in respect of maintenance keeping in view the quantum fixed by learned Judge, Family Court, arrears upto the end of October, 1996 even on the basis of order of learned Judge, Family Court, comes to Rs.7200/-
>
> Taking all the circumstances into consideration, amount of arrear is fixed at Rs.8500/- to be paid in three instalments i.e. Rs.3000/- by the end of November, 1996, Rs.3000/- by the end of January, 1997 and Rs.2500/- by the end of March, 1997. Monthly maintenance as awarded by learned Judge, Family Court @ Rs.300/- per month shall be payable by 15th of every month beginning from November, 1996.
>
> Criminal Revision is disposed of accordingly."

Since the opposite party did not carry out the direction passed in the Lok Adalat by making payments, the learned court below issued distress warrant against the opposite party-husband and he was remanded to custody and was released subsequently on making some payment to the opposite party-wife. The payment of maintenance and arrears as per direction of this Court, was monitored by the learned trial court. In the meantime, the present petitioner-husband filed a proceeding before the learned Judge, Family Court, seeking divorce against the wife. Since the wife did not prefer to contest the proceeding, the divorce was allowed ex-parte by the learned Judge, Family Court, on 02.07.1998. The said order has gone unchallenged as yet. While the matter stood thus, the husband-opposite party filed an application to set aside the original order passed ex-parte and it was allowed restoring the original application to file for regular hearing. Since the opposite party-husband again defaulted in attendance of the trial court, on 05.07.2005, the learned Judge, Family Court again passed an exparte order directing the opposite party-husband to pay monthly maintenance @ Rs.400/- per month w.e.f. from the

date of application i.e. 08.01.1993. Thereafter on 23.07.2005 the present petitioner again filed an application before the learned trial court to set-aside the exparte order which was registered as C.R.P No.441 of 2005. By order dated 19.01.2007, the learned trial court set-aside its earlier order subject to payment of certain cost by the petitioner-husband. Thereafter, the opposite party-husband filed show-cause in the original proceeding under Section 125, Cr.P.C., both the parties adduced their evidence and considering the materials placed before the court the learned Judge, Family Court, by order dated 28.12.2013 passed the impugned judgment directing the opposite party-husband to pay maintenance @ Rs.500/- per month from the date of application till the date of order and thereafter @ Rs.2000/- per month.

4. In the present application the findings of the learned trial court have been traversed by the petitioner-husband with the submissions that the petitioner-wife is not entitled for maintenance since she was staying separately out of her own without joining the company of the husband and that she was earning for herself working as Asha Karmi and that the petitioner did not have the financial condition to pay monthly maintenance as directed and, it has also been contended that since there has been a divorce between the petitioner and the opposite party which remains unchallenged, the learned trial court was wrong in allowing the maintenance in favour of the wife-opposite party.

5. At the time of hearing the learned counsel for the petitioner simply submitted that the impugned judgment is not maintainable in law since the matter has already been decided in the High Court Level Lok Adalat. Per contra, the learned counsel appearing on behalf of the opposite party supported the impugned judgment by submitting that the petitioner cannot be allowed to take the benefit of his own misdeeds.

6. In view of the submissions made at the Bar, I feel it appropriate to consider the legal sustainability of the impugned order in view of the provisions made in the Legal Services Act, 1987 (hereinafter referred to as the 'Act') without going into the factual aspects of the case.

7. As mentioned hereinbefore the matter was decided exparte awarding maintenance in favour of the Opposite Party in an exparte order. The opposite party challenged the said order before this Court with the submission that the payment of maintenance should have been from the date of application instead of being from the date of order. Both the parties appeared in the proceeding and the matter was placed before the High Court Level Lok Adalat wherein with the consent of both the parties, the matter was finally

settled. Thus arises the question as to whether after such settlement in the Lok Adalat there remained any scope for the learned trial court to again sit over the matter and to set-aside the exparte order on the application of the present petitioner.

8. Lok Adalat is a sacrosanct provision under the 'Act' for disposal in a summary way and through the process of arbitration and settlement between the parties of a large number of cases expeditiously with lesser cost. Section 21 of the Act deals with award of Lok Adalat as hereunder.

> "21. **AWARD OF LOK ADALAT**.-2(1) Every award of the Lok Adalat shall be deemed to be a decree of a Civil Court or, as the case may be, an order of any other Court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred on it under Sub-section (1) of Section 20, the court fee paid in such cases shall be refunded; in the manner provided under the Court Fees Act, 1870 (7 of 1870)
>
> (2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any Court against the award.

9. The aforesaid provision of the 'Act' makes it abundantly clear that every award of Lok Adalat shall be deemed to be a decree of a Civil Court executable according to law and every award made by a Lok Adalat shall be final and binding on all the parties to the dispute and no appeal shall lie to any court against the award. The only enabling provision is that the decree may be reviewed under Order 47 Rule 1 of Civil Procedure Code provided the pre-conditions enumerated therein are satisfied. This position of law has been settled in a number of pronouncements of the Hon'ble Apex Court. The Hon'ble Supreme Court in the case of ***A.T. Thomas Vrs. Thomas Jaw reported in AIR 2005, SC 3575*** observed that *"the award of Lok-Adalat is fictionally deemed to be decrees of Court and therefore the courts have all the powers in relation thereto as it has in relation to a decree passed by itself"*. In the aforesaid decision, the case of ***Sailendra Narayan Bhanja Deo v. The State of Orissa. MANU/SC/0081/1956: (1956)1 SCR72*** decided by a constitution Bench of the Hon'ble Apex Court was also referred to wherein it was observed that " *a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case*". It was also observed that *"the truth is, a judgment by consent is intended to put a stop to litigation between the parties*

just as much as is a judgment which results from the decision of the court after the matter has been fought out to the end".

10. In view of the aforesaid position of law, after the matter was settled with the consent of both the parties in the High Court Level Lok Adalat there remained no scope for the learned Judge, Family Court, to again sit over the matter and to set aside the order passed earlier, since it has become functus officio after the settlement reached at High Court Level Lok Adalat so far as award of maintenance was concerned. In my considered view, if such a proposition is allowed to continue, that would not only frustrate the sanctity of the Lok Adalat by setting its decision at naught, but also would be a mockery of justice delivery system. Hence, in view of such a situation, the entire proceedings taken up by the learned trial court, which culminated in the impugned judgment, was not permissible under the law and therefore, cannot be allowed to stand. The entire proceedings as referred to have been taken up by the trial court at the behest of the present petitioner who has again come up to take the advantage of his own misdeeds by challenging the impugned order with an enhanced award of maintenance, but the irony is that law stands in his favour.

11. However, in view of the aforesaid positions, the impugned order dated 28.12.2013 passed by the learned Judge, Family Court in C.R.P. No.09 of 1993 is set aside. That makes the final settlement arrived at the High Court Level Lok Adalat dated 15.10.1996 continuing and it is made clear that the opposite party would be at liberty to move for enhancement of the maintenance, if so advised and so entitled. The revision is disposed of accordingly.

Revision disposed of.

2016 (II) ILR - CUT-1366

D.P.CHOUDHURY, J.

W.P.(C) NO. 10491 OF 2014

SATRUGHNA SAHOO ……..Petitioner

.Vrs.

UNION OF INDIA & ANR. ……..Opposite Parties

SWATANTRATA SAINIK SAMMAN PENSION SCHEME, 1980

Freedom fighters' Pension – Pre-conditions – Scheme to be extended to genuine freedom fighters and no technicality should be attached to scrutinize the case – Only requirement is whether he has suffered imprisonment or gone underground – Even genuineness can be found out from one certificate of the Co-prisoner, instead of two as insisted in the scheme.

In this case Certificate of the Co-prisoner Sri B.C. Pradhan who was imprisoned in the same jail where the petitioner was imprisoned for one year is sufficient proof as secondary evidence for his entitlement to the benefit under the scheme – Held, impugned orders passed refusing benefit to the petitioner under the scheme are quashed – Direction issued to O.P. No1 to award Freedom Fighters' pension to the petitioner. (Paras 21,22,23)

Case Laws Referred to :-

1. AIR 1993 SC 2127 : Mukund Lal Bhandari and others -V- Union of India and others.
2. (2001) 8 SCC 8 : Gurdial Singh -V- Union of India and others.
3. 2002 (II) OLR 252 : Smt. Hiramani Panda -V- State of Orissa & another.

For Petitioner : Mr.A.S. Nandy

For Opp. Parties : Mr.H.S.Panda, Central Government Counsel, Miss. S.Mishra, Additional Standing Counsel

---

Date of hearing : 27.10.2016

Date of judgment: 23.11.2016

JUDGMENT

DR. D.P.CHOUDHURY, J.

Challenge has been made to the illegal refusal made by the opposite party no.1 to sanction Freedom Fighters' Pension to the petitioner under Swatantrata Sainik Samman Pension Scheme, 1980 (hereinafter called 'Pension Scheme').

FACTS

2. The unshorn details leading to the case of the petitioner is that the petitioner, being freedom fighter, actively participated during the movement for independence of India and mobilised the people not to give taxes and to object the construction of road and road tax and other taxes to the English people for which the petitioner was imprisoned in Rajdarbar of Talcher from 23.1.1944 to 25.12.1945 with the other punishment of canning and kicks. As such, the petitioner claims for the Freedom Fighters' Pension under the Pension Scheme from the Central Revenue for which he had to file a writ petition bearing O.J.C. No.9074 of 1997 before this Court and vide order dated 26.3.2012, this Court disposed of the said writ petition directing the petitioner to make an application under the Scheme by enclosing all the relevant documents to the Chief Secretary of the State Government, who was further directed to take a decision within certain period.

3. In pursuance of the order dated 26.3.2012, the petitioner made representation on 10.8.2012 to the State Government and the Union of India along with the supported documents. After receiving the application, the Union of India sent a letter to the State Government on 6.9.2012 along with the application of the petitioner and all documents for verification and to give report on that application for implementation of the order passed by this Court on 26.3.2012. Thereafter, again the Union of India asked for some documents which are not possible on the part of the petitioner to arrange. However, the petitioner applied to the Jail Authority of Special Jail, Talcher requesting him to furnish the details of the detention in jail custody and also requested the co-prisoners namely Bichhanda Ch. Pradhan and Dila Sahu to give co-prisoner certificate. After arranging document, the petitioner made representation whereafter the matter was referred to the Union of India by the State Government. By virtue of the letter dated 6.2.2014, opposite party no.1 informed the petitioner through the State Government that the request for Freedom Fighters' Pension has been rejected because the State Government has not sent the required information or documents. The State Government, on 6.2.2014, also issued a letter to the petitioner asking to furnish the co-prisoner certificate in the prescribed formant from the freedom fighter who had undergone jail to the State Government for recommending the case of the petitioner to Government of India for reconsideration by the Union of India for grant of Freedom Fighters' Pension. The petitioner also complied the requirement but the State Government informed the petitioner that the Union of India has suo motu rejected his representation again on flimsy grounds

although in absence of jail records for the period between 1944 and 1945, the petitioner has already furnished certificate of co-prisoners to receive the Freedom Fighters' Pension under the Pension Scheme. Since both the opposite parties did not consider the sanction of pension under the Scheme to the petitioner, the petitioner filed the present writ petition.

4. Per contra, the opposite party no.1 has filed counter affidavit stating therein that under the Pension Scheme, the persons are entitled to pension, if they fulfil the criteria mentioned therein. Be it stated that the petitioner ought to have furnished the following documents to claim pension under the Pension Scheme as per the criteria herein below:

"xx xx xx xx

(a)In case of imprisonment a certificate from the concerned jail authority, District Magistrate or the State Government indicating the period of sentence awarded, date of admission, date of release, facts of the case and reasons for release.

(b)In case the records of the relevant period are not available with the State Govt., a Non-Availability of Records Certificate (NARC) in prescribed formant from the concerned State Government is required along with two Co-Prisoner Certificates (CPC) from freedom fighters who had a proven jail sufferings of minimum 1 year and who were with the applicant in the jail for a minimum period of six months. In case the certifier happens to be a sitting M.P. or MLA or Ex. M.P./M.L.A., only one Co-Prisoners' Certificate in place of two is required."

5. It is also revealed from the counter affidavit that the petitioner should have made two applications enclosing the required documents, one directly to the Union of India and the second one to be filed before the State Government, who would verify the documents and recommend the case to the opposite party no.1, but failing to do so, the representation of the petitioner is liable to be rejected. It is also stated that the Court have passed the order on 26.3.2012 directing the petitioner to make fresh representation within 21 days, but the petitioner applied beyond the time stipulated by this Court, i.e. on 10.8.2012 for which the application of the petitioner was not liable to be allowed. Further, the Union of India found that the Government of Orissa has not verified the jail sufferings of the petitioner and the certificate of the co-prisoners did not accompany with the jail suffering records. Be it stated, one freedom fighter, namely, Dila Sahu whose name has been mentioned by the petitioner would go to show that Sri Sahu has

undergone imprisonment for 1938 to 1939, but not during the time of incarceration of the present petitioner. Further, the positive recommendation of the State was absent and even if it is sent, the same is not binding on the Union of India. So, the Union of India, following the dictum of the Hon'ble Supreme Court and other Courts and finding that the Scheme is not available, the opposite party refused to grant the Freedom Fighters' Pension to the petitioner.

6. The opposite party no.2 has filed separate counter affidavit refuting the relief claimed by the present petitioner. According to the opposite party no.2, the petitioner has invoked the secondary evidence but the freedom fighter certificate issued by one Bichhanda Ch. Pradhan to the petitioner did not mention about the exact dates of imprisonment and release of the petitioner from jail. The second certificate given by Dila Sahu shows that he is not a co-prisoner. The opposite party no.2 averred that the certificates produced by the petitioner from Sri Bhajaman Behera, Ex-MP issued in the co-prisoner format is not acceptable under the Scheme for which the A.D.M., Angul failed to recommend the case of the petitioner to the Union of India for sanction of Freedom Fighters' Pension. So, it is stated that the action of the Union of India and the State Government are legal and proper.

SUBMISSIONS

7. Mr.Nandy, learned counsel for the petitioner submitted that the petitioner, having approached this Court in OJC No.9074 of 1997 where an order was passed on 26.3.2012 to make fresh representation enclosing all the documents, had submitted representation with all documents to the State Government and same was forwarded to the Central Government as the concerned pension is to be received from the Central Revenue. He further submitted that under the Pension Scheme, the claim of imprisonment is considered subject to furnishing primary evidence and in absence of primary evidence, secondary evidence can be adduced in the following manner:

> "**Imprisonment Suffering**: a person who had suffered minimum imprisonment of six months (3 months in case of women, SC/ST freedom fighters) on accounts of participation in freedom struggle subject to furnishing of the following evidence:-
>
> (a) **Primary Evidence**:- Imprisonment/detention certificate from the concerned jail authority, District Magistrate or the State Government indicating the period of sentence awarded, date of admission, date of release, facts of the case reasons for release.

(b) **Secondary Evidence**:- In case records of the relevant period are not available, secondary evidence in the form of 2 co-prisoner certificates (CPCs) from freedom fighters who have proven jail suffering of minimum 1 year and who were the applicant in the jail could be considered provided the State Government/Union Territory Administration concerned, after due verification of the claim and its genuineness, certifies that the documentary evidence from the official records in support of the claimed suffering are not available. In case the certifier happens to be a sitting or Ex.MP/MLA, only one certificate in place of the two is required."

8. He further contended that on 31.5.2013, the A.D.M., Angul informed that the relevant records pertaining to 1944 to 1945 in which year the petitioner was imprisoned are not available in the office of the Superintendent of Special Sub-Jail, Talcher and accordingly primary evidence is not made available for which the petitioner has got secondary evidence in his favour. It is submitted on behalf of the petitioner that according to the provisions of secondary evidence, the petitioner has got two co-prisoner certificates, one from Bichhanda Ch. Pradhan and the another from Dila Sahu, but the opposite parties have illegally rejected those certificates on the ground that the certificate of B.C.Pradhan does not disclose the offence and the case number in which he was imprisoned and the statement of Dila Sahu does not disclose that he was a co-prisoner during 1944 to 1945 in which period, the petitioner claimed to be a prisoner. He further submitted that in addition to those documents, the petitioner has also submitted a certificate of Ex-MP Bhajaman Behera but that was also rejected by the opposite parties for the reasons best known to them. He further submitted that the petitioner is a bona fide freedom fighter and has adduced sufficient evidence under the Scheme to receive the Freedom Fighters' Pension.

9. Learned counsel for the petitioner submitted that the pension for the freedom fighter is a great honour to the freedom fighters who had shed their blood like Netaji Subhash Ch. Bose for the independence of the country and if they are not honoured and their claim is rejected like the present case, the patriotism of the people shall go always as in question. He further submitted that in the similar nature of case, this Court in the case of ***Smt. Hiramani Panda –V- State of Orissa and another; 2002 (II) OLR 252*** have been pleased to observe that under secondary evidence, two alternative modes of proof of suffering imprisonment of a person, i.e, firstly by producing two co-prisoner certificates or in absence of it, one co-prisoner certificate from the

Ex-MP/MLA or sitting MP/MLA would fulfill the requirement to receive such pension under erstwhile Freedom Fighters' Pension Scheme, 1992, which is now liberalized as the Pension Scheme, 1980. So, he submitted to award the pension from the date of the order passed by this Court in the earlier writ petition, i.e., 26.3.2012 so that the object of the Scheme would be properly implemented and the right of the present petitioner would be successfully adjudicated.

10. Mr.Panda, learned Central Government Counsel for the Union of India submitted that the petitioner is not entitled to get the benefit of the Scheme because the reply of the Ministry of Home Affairs sent on 6.2.2014 under Annexure-3 is self-explanatory. According to him, since the petitioner has not filed the supported documents to the satisfaction of the Union of India and the State Government also did not recommend the case of the petitioner properly, the petitioner is not entitled to the benefits under the Scheme. He reiterated that the certificate of the co-prisoner B.C.Pradhan does not disclose about the year of imprisonment and the offences in which charge-sheet submitted or convicted and also there is no positive recommendation on behalf of the State Government for which the representation of the petitioner was short of requirements to receive pension under the Scheme.

11. Miss.Mishra, learned Additional Standing Counsel for the State Government, opposite party no.3, submitted that in pursuance of the order dated 26.3.2012 passed by this Court in OJC No.9074 of 1997, the petitioner submitted representation along with the required document, but the Union of India on 1.1.2014 asked the State Government to verify the co-prisoner certificates which lack some information as stated by the learned counsel for the Union of India, but due to lack of information obtained from the concerned jail, the State Government wrote letter to the Union of India who did not allow any pension. But, the State Government again asked the petitioner to submit the documents for sending the same to the opposite party no.1 for reconsideration of the representation. Since the State Government has no role except recommending the case, the petitioner has no claim against the State Government, opposite party no.2.

POINT FOR CONSIDERAITON

11. The main point for consideration in this case is:

"(1) Whether the petitioner is entitled to Freedom Fighters' Pension under the Pension Scheme?"

DISCUSSION
ISSUE NO.(1)

12. It is admitted fact that the petitioner had filed OJC No.9074 of 1997 before this Court and vide order dated 26.3.2012, the petitioner was directed to submit representation enclosing the required documents and in pursuance of that, the petitioner submitted representation. It is also admitted fact that under the Scheme, there are provisions for adducing evidence of primary nature and in absence of primary evidence, the secondary evidence can be adduced and all are subject to satisfaction of the concerned authority. The petitioner claims to be a freedom fighter being imprisoned for one year, i.e, from 1944 to 1945.

13. The scheme, as detailed by the learned Central Government Counsel for the opposite party no.1, has asked for primary evidence to claim the benefit under the Scheme and in absence of that, direction for filing of documents which are pre-condition for receiving the Freedom Fighters' Pension. The petitioner has brought to the knowledge of this Court about the letter of the ADM, Angul dated 31.5.2013 whereby it has been communicated to the State Government that records pertaining to the year 1944 to 1945 are not available in the office of the Superintendent of Special Sub-Jail, Talcher. So, according to first criteria, primary evidence is not available in this case.

14. While the petitioner intends to adduce secondary evidence in support of his plea, he relies upon the certificates given by the co-prisoners Sri B.C.Pradhan and Sri Dila Sahu and the certificate of one Bhajaman Behera**,** who was an Ex-MP.

15. The purpose of the Scheme is well delineated in the decision reported in **Gurdial Singh –V- Union of India and others; (2001) 8 SCC 8** and Their Lordships, at paragraph-6, have observed as follow:

> **"6.** The scheme was introduced with the object of providing grant of pension to living freedom fighters and their families and to the families of martyrs. It has to be kept in mind that millions of masses of this country had participated in the freedom struggle without any expectation of grant of any scheme at the relevant time. It has also to be kept in mind that in the partition of the country most of citizens who suffered imprisonment were handicapped to get the relevant record from the jails where they had suffered imprisonment. The problem of getting the record from the foreign country is very

cumbersome and expensive. Keeping in mind the object of the scheme, the concerned authorities are required that in appreciating the scheme for the benefit of freedom fighters a rationale and not a technical approach is required to be adopted. It has also to be kept in mind that the claimants of the scheme are supposed to be such persons who had given the best part of their life for the country. This Court in **Mukand Lal Bhandari's** case(supra) 1993 Supp (3) SCC 2 observed:

"The object in making the said relaxation was not to reward or compensate the sacrifices made in the freedom struggle. The object was to honour and where it was necessary, also to mitigate the sufferings of those who had given their all for the country in the hour of its need. In fact, many of those who do not have sufficient income to maintain themselves refuse to take benefit of it, since they consider it as an affront to the sense of patriotism with which they plunged in the Freedom Struggle. The spirit of the Scheme being both to assist and honour the needy and acknowledge the valuable sacrifices made, it would be contrary to its spirit to convert it into some kind of a programme of compensation. Yet that may be the result if the benefit is directed to be given retrospectively whatever the date the application is made. The scheme should retain its high objective with which it was motivated. It should not further be forgotten that now its benefit is made available irrespective of the income limit. Secondly, and this is equally important to note, since we are by this decision making the benefit of the scheme available irrespective of the date on which the application is made, it would not be advisable to extend the benefit retrospectively. Lastly, the pension under the present Scheme is not the only benefit made available to the freedom fighters or their dependents. The preference in employment, allotment of accommodation and in admission to schools and colleges of their kith and kin etc., are also the other benefits which have been made available to them for quite sometime now.

xx xx xx xx"

With due respect to the above decision, it appears that the Scheme was launched with avowed object and it is purely based on the honour for the freedom fighters who have sacrificed their lives for the country. In the same decision, the standard of proof required to prove for obtaining pension is well discussed at paragraph-7 of the judgment of the Hon'ble Supreme Court in the case of **Gurdial Singh (Supra)**, which is reproduced as under:

> **"7.**The standard of proof required in such cases is not such standard which is required in a criminal case or in a case adjudicated upon rival contentions or evidence of the parties. As the object of the scheme is to honour and to mitigate the sufferings of those who had given their all for the country, a liberal and not a technical approach is required to be followed while determining the merits of the case of a person seeking pension under the scheme. It should not be forgotten that the persons intended to be covered by scheme have suffered for the country about half a century back and had not expected to be rewarded for the imprisonment suffered by them. Once the country has decided to honour such freedom fighters, the bureaucrats entrusted with the job of examining the cases of such freedom fighters are expected to keep in mind the purpose and object of the scheme. The case of the claimants under this scheme is required to be determined on the basis of the probabilities and not on the touch-stone of the test of 'beyond reasonable doubt'. Once on the basis of the evidence it is probabilised that the claimant had suffered imprisonment for the cause of the country and during the freedom struggle, a presumption is required to be drawn in his favour unless the same is rebutted by cogent, reasonable and reliable evidence.**"**

16. From the above discussion, it appears that in every case the freedom fighter is not required to prove the case beyond all shadow of doubts but the preponderance of probability which is basic norms to prove the case in every civil case is the call of the day to expound the objective of granting or sanctioning the Freedom Fighters' Pension. In the present case, the attitude of the opposite parties to the claim of the petitioner in a very nitty-gritty manner does not spell out positive to achieve the objective of granting of Freedom Fighters' Pension. When the petitioner has adduced the certificate of co-prisoner in the prescribed format and the prescribed form does not disclose about the offence of the IPC in which a co-prisoner has undergone imprisonment and the case number to be mentioned, it is not for the authority to demand for the same for granting such pension. While the freedom fighter was fighting for the nation, he has never thought to keep in the memory or taken note of the case number or the offences which would be required for the future benefits as he/she sacrificed the life for the nation without having any self vested interest and the only aim was there to keep the nation free from the outsiders or foreigners.

17. Now, adverting to the present case and keeping in mind the object of the scheme as expounded by the Hon'ble Supreme Court, it appears that the certificate given by B.C.Pradhan clearly shows in the following manner:

"CO-PRISONER CERTIFICATE

(To be signed by a freedom fighter who have undergone imprisonment for at least one year and is the receipient of Tamrapatra and Pension from Government of India"

I (the undersigned) Bichhanda Charan Pradhan, Son of Sri Sudarsan Pradha, village-Kansamunda, Po-Kansamund, District-Angul am a freedom fighter and I am a receipient of Tamrapatra and pension from the Central Revenue vide P.P. No.3159/CE.

I suffered imprisonment during the freedom struggle and was lodged in Talcher Sub-Jail in Angul district during the period from 23.1.1944 to 15.4.1946.

I hereby certify that Sri Satrughna Sahoo, resident of Palasabahali, Anugl district, is a bona fide freedom fighter who was also imprisonment on account of his participation in the freedom movement during the freedom struggle, and was lodged in the same jail along with me during the period from 1944-45. To the best of my knowledge and belief, he was not prematurely released from jail on account of any oral or written apology tendered by him.

Place:Kansamudna Sd/-Bichhanda Charan Pradhan
Central PP No.3159/CE,
Odisha State PP No.4615/P"

18. The aforesaid certificate unquestionably shows that the present petitioner was a co-prisoner during the period from 1944 to 1945. Of course, the certificate of Dila Sahu clearly shows that he was a prisoner during the period from 1938 to 1939 but he was not a co-prisoner as the present petitioner has purportedly claimed to be a prisoner from 1944 to 1945. So, the said certificate cannot be said as a certificate of a co-prisoner. Another certificate has been submitted by Bhajaman Behera, Ex-MP in the following manner:

"Annexure I
CO-PRISONER CERTIFICATE
(To be signed by a Sitting M.P/M.L.A or an Ex-MP/ex-MLA)

I (the undersigned) Sri Bhajaman Behera, Son of Shri Late Bhagirathi Behera, am a sitting member of /an ex-member of the Lok Sabha, Delhi, Legislative Assembly/Council of the State of Odish from the Constituency of Dhenkanal in the State/Union Territory of Odisha

xx xx xx xx

I hereby certify that Sri Satrughan Sahoo, Son of Shri Late Surendra Sahoo, resident of Palasabahali, in Angul District, is a bona fide freedom fighter who has also imprisoned on account of his participation in the freedom Movement during the freedom struggle, and was lodged in Talcher Sub-Jail during the period from 1944-45. To the best of my knowledge and belief, he was not prematurely released from jail on account of any oral or written apology tendered by him.

Date.10.3.2014 Sd/-Bhajaman Behera

10.3.2014"

19. In the aforesaid certificate, it is clear that he being the MP has got knowledge that the present petitioner is a bona fide freedom fighter, who has been imprisoned on account of freedom struggle and lodged in Talcher Sub-Jail from 1944 to 1945 but he candidly admitted that the petitioner was not his co-prisoner. Now, it is to be seen that what is the requirement of the certificate of an Ex-MP/MLA.

20. It is reported in the case of ***Smt. Hiramani Panda (Supra)*** where Their Lordships, at paragraph-6, have observed in the following manner:

"6. Xx xx xx xx

Thus two alternative modes have been given in the said scheme for proof of suffering of a person by way of imprisonment for a minimum period of six months in the mainland jail before independence, Either certificates from the concerned jail authorities, District Magistrate or State Government may be produced or in case of non-availability of such certificates, co-prisoners' certificate from a sitting M.P. or M.L.A. or from an Ex-M.P. or Ex-M.L.A. specifying the jail period has to be produced. The scheme does not provide that in all cases certificates from the concerned Jail authorities or District Magistrate or the State Government have to be produced and makes a provision that if such certificates are not available, the co-prisoner certificate of a sitting or Ex-M.P. or M.L.A. will be taken as proof."

With due respect to the above decision, it appears that in the said decision, this Court considered the case under erstwhile Freedom Fighters' Pension Scheme, 1972 which is later liberalized and came with the Pension Scheme of 1980. From the aforesaid decision, it is clear that in absence of two certificates by co-prisoners, the only certificate of sitting or Ex-MP/MLA who has become the co-prisoner of the concerned person seeking pension under the Scheme would be suffice to meet the requirement. So, in the present case, the certificate of Bhajaman Behera, Ex-MP who is not a co-prisoner does not fulfil the requirement.

21. Out of three certificates furnished in this case, one certificate of B.C.Jena who is a co-prisoner is valid and can be considered for testing the genuineness of the claim of the petitioner. The requirement under the secondary evidence is to produce two co-prisoners certificates but in the event of one co-prisoner certificate by sitting or Ex-MP/MLA, requirement would be well met. Thus, from the clear interpretation of said clause for secondary evidence is to find out the genuineness of the claim of the freedom fighter inasmuch as the real purpose of granting or sanctioning the Freedom Fighters' Pension under the Pension Scheme is to honour them for their noble deed and it is to be only seen whether he has undergone imprisonment suffering during the freedom movement. The very purpose and object of the Pension Scheme is well delineated in the decision of the Hon'ble Supreme Court rendered in the case of ***Mukund Lal Bhandari and others –V- Union of India and others; AIR 1993 SC 2127*** where Their Lordships, at paragraph-4, has observed as follows:

> "xx xx xx
>
> What is more, if the Scheme has been introduced with the genuine desire to assist and honour those who had given the best part of their life for the country, it ill-behoves the Government to raise pleas of limitation against such claims. In fact, the Government, if it possible for them to do so, should find out the freedom fighters or their dependents and approach them with the pension instead of requiring them to make applications for the same. That would be the true spirit of working out such Schemes. The Schemes has rightly been renamed in 1985 as the Swatantra Sainik Samman Pension Scheme to accord with its object.
>
> xx xx xx"

The Hon'ble Supreme Court in the case of ***Mukund Lal Bhandari and others (Supra)***, at paragraph-5, has observed as follows:

"xx xx xx

There is no doubt that if the object of the Scheme is to benefit the freedom fighters, theoretically they should be entitled the freedom fighters, theoretically, they should be entitled to the benefit from the date the Scheme came into operation. But the history, the true spirit and the object of the Scheme would itself probably not support such straight-jacket formula

xx xx xx."

With due respect to the aforesaid decision, it appears that Their Lordships were considering from which date a freedom fighter would get the pension whether from the date of application or from the date of the order. Their Lordships in the above case have clearly observed that the benefit of the Scheme should be extended to the genuine freedom fighters and no technicality should be attached to scrutinize the case and the only requirement is whether he has suffered imprisonment or gone underground or otherwise suffered during freedom movement as required under the Scheme. Keeping in view the avowed object of the scheme, the only requirement is to find out the genuineness of the claim of the person to be a freedom fighter. So, in my considered view, while keeping in view the object and the reasons behind the scheme as delineated by the Hon'ble Supreme Court, the genuineness can be also found out from one certificate of the co-prisoner instead of two as insisted in the Pension Scheme of 1980. While adverting to the present case, it appears that there is clear certificate of the co-prisoner Sri Bichhanda Ch. Pradhan, who was also imprisoned in the same jail where the present petitioner was imprisoned for one year is sufficient, that is sufficient proof as the secondary evidence for his entitlement to get the Freedom Fighters' Pension under the Pension Scheme of 1980.

22. Now, adverting to the rival submissions of the learned counsel for the opposite parties that the criteria under the Pension Scheme, being not fulfilled by the petitioner, petitioner falls short of the parameters of the Scheme is thus indefensible. Reiterating the requirement of the Pension Scheme where the secondary evidence can be taken into consideration to award Freedom Fighters' Pension and taking the purposive interpretation of such clause in the instant case, the co-prisoner certificate of B.C.Pradhan is a good secondary evidence for claiming participation of the petitioner in the freedom struggle for a period of one year, i.e, from 1944 to 1945. Thus, the petitioner has imprisoned actually during the freedom struggle qualifying himself to claim for pension under the Pension Scheme.

CONCLUSION

23. In view of the aforesaid discussion and the genuineness of the claim of the petitioner being well proved by the petitioner through the certificate of one co-prisoner B.C.Pradhan, the application of the petitioner should be considered favourably by the opposite parties. So, considering the avowed object of the scheme and the secondary evidence being adduced by the petitioner, fact that awarding the Freedom Fighters' Pension being not charity but an honour to the petitioner, there nothing remains to deny his claim. Thus, the Court is of the view that Annexures-3 and 5 being de hors to the object and intent of the Scheme, same are liable to be quashed and the Court do so. It is directed that the only certificate of his co-prisoner is to be scrutinized with reference to documents of B.C.Pradhan as pension holder by the opposite party no.2 and after that, the opposite party no.1 is further directed to award Freedom Fighters' Pension to the petitioner after observing the formalities under the Pension Scheme. The entire exercise must be completed within a period of two months as it is stated at the Bar that the petitioner is already at the advance age. The writ petition is disposed of accordingly.

Writ petition disposed of.