AMITAVA ROY, CJ & DR. B.R. SARANGI, J.

W.A. NOs. 181, 182 OF 2012

FOOD CORPORATION OF INDIA,
REGIONAL OFFICE, BBSR & ANR. .....Appellants

.Vrs.

M/S. BINAYAK FOOD PRODUCTS .....Respondent

SALE OF GOODS ACT,1930 – Ss. 19, 23 (2)

Contract – Effect of – Stock lifted subsequent to revision of price – Purchaser required to pay the differential amount prevailing on the date of physical delivery of goods.

In this case stipulations in the contract as well as delivery orders show that prices prevailing on the date of physical delivery would be payable, the deeming provision contained U/s.23 (2) of the Act cannot help the respondents-writ petitioners – Only because the corporation being unaware of the revised price had permitted the respondents to take delivery of their goods at the old price cannot act as estoppel against it or amount to waiver of its claim for the differential amount other wise payable – Held, the impugned demand of the appellant-corporation for differential price qua the respondents-writ petitioners cannot be repudiated to be in repugnance of Sections 19 and 23 of the Act – The impugned judgment passed by the learned single Judge is set aside. (Paras 16, 18)

For Appellants - M/s. Srikanta Ku. Nayak, A.C. Baral, D. Nayak, S.K. Nayak, S.K. Sahoo.
For Respondent - M/s. Akhil Mohapatra, R.C. Sahoo, S.C. Nayak.

Date of hearing : 17.09.2014
Date of Judgment : 30.09.2014

JUDGMENT

AMITAVA ROY, C.J.

These appeals witness a challenge to the judgment and order dated 03.03.2012 rendered, amongst others, in O.J.C. Nos. 4808 &4809 of 1997 respectively thereby sustaining the oppugnment of the demand for payment of differential amount for the price of wheat lifted by the respondents/writ

petitioners from the depot of Food Corporation of India (for short, hereinafter referred to as "the FCI/Corporation") in terms of the release order issued by its District Office at Cuttack.

2. We have heard Mr. Srikanta Ku. Nayak, learned counsel for the appellant-Corporation and Mr. Akhil Mohapatra, learned counsel for respondents/writ petitioners.

3. The backdrop of facts in both these appeals is identical and thus the pleaded narrative would be permissibly common.

4. The respondents/writ petitioners are Roller Flour Mills, carrying on business, inter alia, of milling wheat and converting the same to different wheat products like Suji, Maida, Atta and Bran etc. They have obtained milling licence under the Wheat Roller Flour Mills (Licensing & Control) Order, 1957 (for short, hereinafter referred to as "the Order") framed in exercise of power under Section 3 of the Essential Commodities Act, 1955. As per the pleaded averments in the writ petitions, in terms of Clause 10 of the Order in force at the relevant time, the licensing authority or the specified authority, as the case may be, was authorized to issue directions to the licensee with regard, inter alia, to the source from which and the manner in which wheat should be obtained for the purpose of manufacture of wheat products and disposal thereof. Sub-clause (2) of Clause 10 made it imperative on the licensee to carry out the aforesaid direction of the licensing authority/specified authority. Clause 5 of the licence also made it essential for the licensee to abide by the directions of the licensing authority while purchasing wheat and preparing Suji, Maida, Rawa etc. and also with regard to distribution and disposal of the wheat products. In terms of the above empowerment, the licensing authority/specified authority did direct all the Roller Flour Millers of the State that they would have to purchase wheat only from the Government through the agency of the Corporation and not from open market for the purpose of manufacture of wheat products in their mills.

The Government of Orissa having decided to distribute the wheat by open sale, did invite applications in the month of January, 1997 indicating, inter alia, that maximum 500 MT wheat can be allotted to per flour Miller. The said notice further disclosed that the applications were to be submitted to the Corporation by 13.01.1997 with 10% EMD for the quantity intended and that the allotment would be finalized by 18.01.1997 after which the prospective buyers could have to deposit the cost of the allotted quantity

after adjusting the EMD on or before 31.01.1997. The price for open sale of wheat was fixed as follows:

Balasore / Cuttack	Berhampur/ Bhubaneswar	Sambalpur/ Titilargarh/ Jeypore	Rourkela
Rs.5493 per MT.	Rs.5499 per MT	Rs. 5416 per MT	Rs. 5406 per MT

5. In terms of the said notice, taxes were payable extra in addition and it was stipulated that the prices applicable on the date of issue/lifting/delivery would be collected and the deadline of the issue and lifting of allotted quantities of food grains was prescribed to be 10.02.1997. As the applications were to be submitted before the District Manager, FCI, District Office, Cuttack the respondents/writ petitioners applied on 13.01.1997 along with DCR for Rs. 2.9 lakhs drawn in favour of F.C.I. payable at State Bank of India, Cuttack and requested for allotment of 500 MT of wheat for the month of January, 1997 to be lifted from Cuttack depot of the Corporation.

Thereafter the Senior Regional Manager, FCI, Regional Office, Bhubaneswar intimated the District Manager, FCI, District Office, Cuttack about the allotment of the above quoted wheat in favour of respondents/ writ petitioners. Subsequent thereto, the release orders in favour of the respondents/writ petitioners were issued on 27.1.1997 by this authority to lift 310/210 MT respectively to both the respondents/writ petitioners, which they did on different dates. The respondent/writ petitioner in OJC 4808 of 1997 specifically pleaded that the last date on which it had lifted the wheat was 5.2.1997. The respondents/writ petitioners have averred that thereafter they processed it for conversion to wheat products and had sold the same to the costumers at the rates mentioned in the letter dated 18.01.1997. It was thereafter that the appellant/Corporation by its letter dated 4.3.1997 demanded of respondents/writ petitioners an amount of Rs. 1,25,747.41 / Rs.3,95,132.84 as the differential price in view of the enhancement of the wheat price to Rs.740/- per quintal. Contending that they had lifted the allotted quantity of wheat by paying the price fixed therefor in response to the release orders dated 31.01.1997, whereby the contract between the parties stood concluded, the respondents/ writ petitioners having

unsuccessfully pleaded with the Corporation sought this Court's intervention by instituting the above writ petitions to annul the demand.

6. The appellant/Corporation in its counter, while questioning the maintainability of the writ petitions on the ground of non impleadment of Ministry of Food, Government of India, New Delhi, asserted that the demand was in terms of the agreed clauses in the circular/notice inviting applications for allotment as well as the communication dated 18.01.1997 fixing the price of wheat. They pleaded that prior to 4.2.1997, the price of wheat per MT was fixed by the Central Government at Rs. 5493/- for Cuttack and the same was revised with effect from that date i.e. 4.2.1997 by a Press Note dated 4.2.1997 issued by the Government of India. According to them, the factum of the revision of this rate was conveyed by the headquarters of the Corporation to all its zonal and regional offices so much so that it was received by the office of the District Manager, FCI, Cuttack on 6.2.1997. The Corporation further averred that the information with regard to revision of price was intimated to the food storage depot and Civil Supply Officers for their information. According to the Corporation, this was well known to the respondents/writ petitioners and further in view of the condition that the price as applicable on the date of issue/lifting/delivery of the stock to the dealers would be payable, their (respondents/writ petitioners') plea to the contrary was untenable.

7. Reference, in particular, to Clause-8 of the letter dated 18.01.1997 was made and the Corporation pleaded that vis-à-vis the stock lifted on or after 4.2.1997 i.e. subsequent to the revision of price, the millers were required to pay the differential amount. It was also mentioned that on revision, the price of wheat per MT was enhanced to Rs. 7,400/-. In endorsement to the claim, the Corporation not only insisted that the respondents/writ petitioners being parties to similar transactions from much before were well aware of such covenant, it also referred to a clause in the release order to the effect that price prevailing on the physical delivery would be payable in respect of the stock delivered irrespective of the date on which the order was issued or received by the parties. That by the notice dated 4.3.1997, the differential price of wheat at the enhanced rate was demanded of the respondents/writ petitioners vis-à-vis the quantity lifted after the revision was effected was underlined.

8. The learned Single Judge, by the impugned judgment and order, however, upheld the assailment on the ground that the entire amount having

been paid by the respondents/writ petitioners towards the price of wheat whereafter the delivery orders were issued, the demand for differential price was not sustainable in absence of any clause in the delivery/release orders to the effect that the amount collected would be subject to revision for the reasons whatsoever. The learned Single Judge was of the view that in terms of Section 19 of the Sale of Goods Act, 1930 (hereinafter referred to as 'the Act') as pursuant to the release/delivery orders the goods were delivered to the respondents/writ petitioners, property therein stood transferred to them. Adverting to Section 23(2) of the Act, it was concluded that the appellant/Corporation was deemed to have unconditionally appropriated the goods to the contract. It was observed that not only the appellant/Corporation had directed the respondents/writ petitioners to lift the quantity of wheat mentioned in the release orders, but also stipulated the period within which delivery of the same was to be completed failing which storage charges would be collected. It was concluded thus that as the respondents/writ petitioners had lifted the goods within the stipulated period without being subjected to any condition, the transaction stood completed before the additional demand had been raised.

9. Mr. S.K. Nayak has emphatically argued with reference to the notice for open sale, letter dated 18.1.1997 and Clause 14 of the release order that it being undeniably apparent there from that the price of wheat as applicable on the date of physical delivery of the stock irrespective of the date of delivery of release order was payable, the demand for differential price was wholly in terms of the contract and thus the finding to the contrary is erroneous. As the respondents/writ petitioners had taken physical delivery of the stock of wheat allotted to them, after the revision in the price thereof had been effected by the Central Government, they were obliged under the contract to pay the differential amount, he urged. According to Mr. Nayak, respondents/writ petitioners having subjected themselves to the specific stipulation under the contract, they were estopped from questioning the same and avoid their liability in terms thereof. The learned counsel urged that it being apparent from the condition that the price prevailing on the date of physical delivery of the stock would be payable by the buyer, the property or the goods was not intended to be passed, unless the differential amount payable was disbursed. According to Mr. Nayak, in terms of Section 19 of the Act the differential price is payable by the respondents/writ petitioners and therefore reference to Section 23(2) of the Act in the impugned judgment and order is wholly out of place. Without prejudice to the above,

Mr. Nayak, insisted as well that the writ proceedings instituted to wriggle out of a contractual obligation, being impermissible in law ought to have been dismissed in limine. He placed reliance on the decision of the Hon'ble apex Court in Kulchhinder Singh & ors. Vs. Hardayal Singh Brar & Ors, AIR 1976 SC 2216.

10. Per contra, Mr. Mohapatra, learned counsel for the respondents/writ petitioners has maintained that the appellant/Corporation having permitted them to lift their allotted quota of wheat on payment of the price payable during the relevant time without any reservation, the demand for differential price is ex-facie illegal. As the allotted quantity of wheat had been delivered to the respondents/writ petitioners only on payment of the price thereof, it was clearly intended by the appellant/Corporation that the property therein had passed to them on delivery of the goods and thus the learned Single Judge was perfectly justified in holding so with reference to Sections 19, 20 and 23 of the Act.

While admitting that the goods had been lifted on and after 4.2.1997 and that the enhancement in the price of wheat had been effected from 4.2.1997, the learned counsel insisted that as the appellant/Corporation did not, at any point of time, draw the attention of the respondents/writ petitioners to the revision of price the impugned demand is patently unauthorised and impermissible in law. He argued further that as the transaction is being one of cash sale, where under the commodity has been sold with physical delivery thereof on receipt of cash price, no further demand in connection there with is allowable.

11. We have scrutinized the pleaded facts and the documents on records and have also analyzed the rival arguments.

The materials on records demonstrate that the respondents/writ petitioners had lifted the stock of their wheat during the period beyond 4.2.1997. It is also not disputed that the revision in price of wheat had been made on and from 4.2.1997. The Press Note dated 4.2.1997 is a clear indicator to the effect that thereby the price of the open sale wheat for Cuttack had been enhanced to Rs.7,400/- per MT. On the very same date by a fax message, this decision was communicated to the concerned Offices of the appellant/Corporation. Noticeably, according to the FCI, this intimation reached the Cuttack Office/depot on 6.2.1997. That the revision was in supersession of the earlier price and enforceable with immediate effect is also apparent from the fax message dated 4.2.1997.

12. A plain perusal of the notice for Open Sale of wheat authenticates that though the price for the commodity mentioned had been fixed, it was subject to the rider that the price applicable on the date of issue/lifting/delivery would be payable. Clause-8 of the letter dated 18.01.1997 setting out the conditions in for allotment/release of wheat under OMSSD during January, 1997 being formidably relevant is quoted herein below:

> "8. The price of wheat for Open Sale will be as per revised enhanced rate as communicated vide FCI Hqrs. Fax No. J.I(1)/96-PY/S.III, dt. 18.9.1996 without any change till further orders. *However the prices as applicable on the date of issue/lifting/delivery must be collected as per procedure in vogue*. Rate fixed by Govt. of India/FCI Hqrs. w.e.f. 18.9.1996 and applicable to Centres of Orissa are as under:-
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> | | | |
> |---|---|---|
> | Cuttack | - | Rs.5493/- per MT. |
> | Bhubaneswar | - | Rs.5499/- ,, |
> | Raipur | - | Rs.5416/- ,, |
> | Ranchi | - | Rs.5406/- ,, ." |

This clause underlined as well that the prices would be as applicable on the date of issue/lifting/delivery as per procedure indicated. This indisputably is notwithstanding the prices fixed for wheat at the different stations as mentioned therein. This letter incidentally also fixed the rates for wheat products. In the release orders dated 31.01.1997 issued by the FCI, District Office, Cuttack in favour of the respondents/writ petitioners, against Clause 14 it mentioned PTO and on the reverse page thereof the following was printed:

> "Prices prevailing on the date of physical delivery will be payable for the stock covered by this delivery order/release orders by the purchaser irrespective of the date of issue of this order of receipt of payment etc. The purchaser will be entitled to get delivery of the stocks only after payment of the difference in prices in case of enhancement before physical delivery. This is a condition of sale."

13. The above enjoinment thus was construed to be an integral part of the release order and has been appended as Annexure-C to the counter filed by the appellant/Corporation in the writ proceedings. To complete the factual narration bearing on the adjudication of the issues, suffice it to refer to letter dated 7.2.1997 (Annexure-E to the counter of the Corporation) addressed by

the Senior Regional Manager, FCI to the District Manager, FCI of Cuttack/Bhubaneswar/Balasore etc. fixing the price of Open Sale of wheat for the month of February, 1997. The contents of Clause -9 thereof is quoted herein below:

> "9. The price of wheat for Open Sale will be as per revised enhanced rate as communicated vide FCI Hqrs. Fax No. J.1(1)/96-PY/S.III, dt. 04.02.1997 without any change till further orders. However, the prices as applicable on the date of issue/lifting/delivery must be collected as per procedure in vogue. Rate fixed by Govt. of India/FCI Hqrs. w.e.f. 04.02.1997 and applicable to Centres of Orissa are as under:-
>
> Cuttack - Rs.7,400/- per MT.*(enhanced w.e.f.4.2.1997)*
> Bhubaneswar - Rs.7,400/- per MT.

14. A conjoint reading of these documents, in our considered opinion would testify without any manner of doubt that the parties were *ad idem* that the price of wheat payable on the date of physical delivery thereof would have to be paid. Such an intention thus was the essence of contract. Significantly, the respondents/writ petitioners did not refute the correctness of the averments in the pleadings of the Corporation by filing a rejoinder. Moreover, the assertions of the appellant/Corporation are borne out from contemporaneous official records and there being no overwhelming materials to the contrary, there is no reason to doubt the genuineness thereof. Clause-14 of the release order sets at rest, the speculation if any, about the price payable. The respondents/writ petitioners being consciously a party to the contract, predicating that the price prevailing on the date of physical delivery would be payable, which is clear from the delivery/release order, in our estimate, in the facts and circumstances of the case, they (respondents/writ petitioners) cannot in law be relieved of the liability to pay the differential amount of price for stock lifted after the revision of price w.e.f. 4.2.1997. That the enhanced price of wheat was fixed at Rs.7,400/- per MT with effect from 4.2.1997 is not disputed.

15. Section 19 of the Act for ready reference is quoted herein below:

> "**19. Property passes when intended to pass.**-(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in Section 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer"

16. The transfer of property in a contract for sale of specific or ascertained goods in favour of the buyer eventuates only at such time as the parties under the contract intend it to be transferred. The intention of both the parties, therefore, is the decisive determinant for conveyance of the property in the goods, the subject matter of contract for sale. Section 19(2) predicates that the terms of contract and conduct of the parties and the circumstances of the case would be relevant to ascertain the intention of the parties. Section 19 (3) refers to Sections 20 to 24 for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer unless a different intention appears.

17. The rules contained in Sections 20 to 24 thus would have a determinative bearing only in absence of any different intention of the parties to the contrary as decipherable in the fact situation involved.

18. Having regard to the unequivocal and categorical stipulations in the contract as well as in the release/delivery orders that the prices prevailing on the date of physical delivery would be payable, the deeming provision contained under Section 23(2) of the Act, in our comprehension, cannot come to the rescue of the respondents/writ petitioners. Further, the respondents/writ petitioners, having subjected themselves to the conditions governing the transaction, those are binding on them without any reservation. It being the uncontroverted case of the appellant/Corporation that the intimation about the revision of price with effect from 4.2.1997 had been received by its District Office at Cuttack on 6.2.1997, the benefit of Section 23(2) cannot be extended in the singular facts and circumstances of the case to the respondents/writ petitioners. Only because the Corporation being unaware of the revised price had permitted the respondents/writ petitioners to take delivery of their commodity at the old price cannot act as estoppel against it or amount to waiver of its claim for the differential amount otherwise payable. On an appraisal of the factual and legal aspects, we are thus of the considered opinion that the impugned demand of the

appellant/Corporation for differential price qua the respondents/writ petitioners cannot be repudiated to be in repugnance of Sections 19 and 23 of the Act. We thus find ourselves in respectful disagreement with the learned Single Judge on this count.

19. The appeals thus succeed and are allowed. The impugned judgment and order, so far as it relates to the respondents/writ petitioners, is set aside.

Appeals allowed.

2015 (I) ILR - CUT- 10

AMITAVA ROY, CJ & DR. A. K. RATH, J.

W. A. NO.322 OF 2014

COAL INDIA LTD. & ORS. .....Appellants

.Vrs.

CAPT. HARI SANKAR AIRY .....Respondent

SERVICE LAW – Transfer – Office memorandum Dt. 26.04.2002 and 7/9.1.2009 – Transfer policy stipulates administrative ground is to be given prime consideration in transferring an executive/non-executive, more particularly working in sensitive disciplines even if left with less than two years service – No material on record to suggest that the respondent on transfer has been lowered in status or rank or that any condition of his service has been adversely affected – Transfer being an incidence of service the same cannot be interfered with unless it is vitiated by mala fide – No interference with the decision, posting the respondent from MCL to CCL is warranted – Impugned judgment of the learned single Judge is set aside.

(Paras 9 to 15)

For Appellants - M/s. S. D. Das, Sr. Advocate,
M/s. Debraj Mohanty & A. Mishra.

For Respondent - M/s. Sameer Kumar Das, S.K. Mishra,
P.K. Behera.

Decided on : 16.10. 2014

JUDGMENT

AMITAVA ROY, C.J.

The decision under scrutiny in the instant appeal has been rendered in W.P.(C) No.13570 of 2014 whereby the orders dated 22.07.2014/23.07.2014 transferring/relieving the respondent herein to join the Central Coalfields Limited (for short, hereinafter referred to as the "CCL") under the appellants i.e. the Coal India Limited (for short, hereinafter referred to "CIL") have been nullified.

2. We have heard Mr S.D. Das, learned Sr. Advocate for the appellants and Mr S.K. Das, learned counsel for the respondent.

3. A brief outline of the pleaded assertions would be essential.

The respondent's version is that he had joined as Security Officer in the CIL in the grade of Officer E/2 on 19.03.1986 and rose in its ranks and, eventually, on his promotion to Grade E/7 as Chief Manager (Security), was posted with MCL, Jagannath area vide order dated 03.05.2012. He was thereafter transferred to MCL headquarters at Burla by office order dated 31.08.2013 and, while functioning as such, by the order impugned transfer order, he was posted to another subsidiary company of the CCL headquarters at Ranchi. He was thereafter released by order dated 23.07.2014. Contending that this transfer was close on the heels of the earlier posting and was further in violation of the transfer policy of the CIL as contained, more particularly in the office memorandum dated 07.01.2009 (Annexure-6) to the writ petition, he sought to invoke the writ jurisdiction of this Court for its remedial intervention. He pleaded that in terms of the circular/policy of the CIL no employee either in the executive or in the non-executive grade could be transferred if he/she was left with less than two years of service from superannuation. As he was left with one year service before his retirement, he thus could not have been transferred in the face of such circular/transfer policy, which was binding on the authorities of the CIL. Apart from pleading unfairness in action, the respondent also cited health ground of his wife to demonstrate the inconvenience to which the entire family would be subjected to, if the impugned order of transfer/release was not interfered with. Absence of administrative exigency was also pleaded.

4. The appellants (opp. parties in the writ petition) in their counter while stoutly endorsing the validity of the transfer/release order asserted that the

respondent was beyond the purview of the circular dated 07.01.2009 and thus was not exempted from being transferred on administrative grounds. Referring to the order/circular dated 26.04.2002 embodying the transfer policy of the CIL qua executives and non-executives thereafter working in sensitive disciplines, the appellants averred that in terms thereof in institutional exigency one could be transferred even if he/she had less than two years of service left. They asserted in categorical terms that the transfer of the respondent in his existing capacity from MCL to CIL was essential in administrative need, and that before deciding on the same, due and conscious consideration of the fact that he was left with less than two years of service before superannuation was made. However, as the administrative requirements of a senior executive in security discipline in CCL on urgent basis was of supervening bearing, the respondent, in view of his experience and efficiency, was identified to be posted there on transfer. The appellants specifically denied the imputation of unfairness in action and asserted that consequent upon the order of transfer/release dated 22.07.2014 he stood released on 27.3.2014. That vis-à-vis the respondent in terms of his appointment order, transfer was a condition of service, was clearly underlined as well.

5. As the above narration recites the essence of the rival pleadings, it is considered unnecessary to refer to the additional facts, which only bear repetition thereof.

6. The learned Single Judge by the impugned judgment/order dated 5.9.2014 held that in view of the order/office memorandum dated 26.04.2002 and 7/9.1.2009 engrafting the transfer policy for the CIL, there was binding on the company and, as the same did not permit transfer of a person having left with two years of service, the impugned order of transfer bereft of any reason justifying the same was thus unsustainable. The appellants were directed to allow the respondent to continue in the former post and to release all consequential benefits.

7. Mr S.D. Das, Sr. Advocate for the appellants, has insistently argued that it being apparent on the face of the office memoranda dated 26.04.2002 and 7/9.1.2009 that in administrative requirement, the executives and non-executives working in sensitive discipline can be transferred even they have less than two years of service, the finding to the contrary is apparently erroneous and is liable to be interfered with. Drawing the attention of this Court to the office memorandum dated 7/9.1.2009 in particular the learned

counsel has urged that, as at all relevant time the respondent belonged to E/7 category, he was beyond the purview of exemption as contemplated therein and thus could be transferred by invoking the office memorandum dated 26.4.2002 on administrative grounds. He maintained that the impugned judgment/order is based on an incorrect reading/interpretation of the office memoranda involved and is thus liable to be set aside. The learned counsel underlined that as transfer is an incidence of service, having regard to the limited scope of scrutiny the exercise of the Court's power of judicial review, the challenge made by the respondent ought to have been rejected.

8. Per contra, Mr S.K. Das, learned counsel for the respondent, has argued that as admittedly the respondent had two years of service left, even in terms of the office memorandum dated 26.04.2002, he should not have been transferred. According to him, the ground of administrative exigency is nonest and that the respondent was sought to be shifted on extraneous consideration thus rendering the impugned transfer arbitrary and illegal. He urged as the learned Single Judge had on objective consideration of the pleaded facts and the documents on record, more particularly the transfer policy of the CIL set at naught, the impugned order of transfer and release, no interference is warranted.

9. We have carefully considered the rival versions. That the respondent is in transferable service and is liable to be transferred is evident from his appointment order. This is not disputed by him as well and rightly. The relevant extracts from the office memorandum dated 26.04.2002 and 7/9.1.2009 are quoted herein below:

"OFFICE MRMORANDUM
Dated 26.4.2002

In pursuance of the decision of the Board of Directors of Coal India Limited in its 195th meeting held on 30th April, 2001 at Kolkata, the 'Transfer Policy' in respect of Executive under common Coal Cadre and in respect of Executives & Non-executives working in sensitive disciplines are hereby amended as under:

General:

1) Transfers should normally be programmed during the beginning and end of the academic year.

2) Executives who have less than 02 years service left are not to be transferred normally. They may be given a posting of their choice if vacancy is available, keeping in mind the administrative requirement.

3) Transfer of executives posted in projects are to be covered by the Government guidelines on the subject.

4) Transfer & posting of executives trained specially should be in line with their specialization.

5) Large scale transfer is to be avoided, but at least 10% of the executives satisfying the criteria laid down hereunder be transferred each year.

6) Transfer on 'Administrative Ground' may be effected at any time.

xx xx xx xx xx

OFFICE MEMORANDUM
Dated 7.1.2009

In pursuance of the decision in the 247th meeting of the Board of Directors of Coal India Limited held on 11th December, 2009 at Delhi, the 'Transfer Policy' circulated vide Office Memorandum No.CIL/C5A (vi)/50729/CCC/26 dated 26.4.2002 under the heading "General" are hereby amended as follows:

i) Executives on promotion from E5 to M1 grade (except those posted in CMPDIL, IICM and Coal Videsh) and from non-executive to executive cadre except in Survey Discipline will be transferred out of the Company. However, such executives in D5 grade who have spent less than one year at the existing company and get promoted to M1 grade will be exempted from transfer. Those having less than two years of service will, also be excluded from this provision.

xx xx xx xx

This also supersedes the existing "Transfer Policy" in vogue under the heading "General" circulated vide O.M. No.CIL/C5A(vi)/50729/CCC/18 dated 22.4.2003 & O.M. No.CIL/C5A(vi)50729/CCC/182 dated 23.11.2005. Other terms and conditions of the above mentioned O.Ms. dated 26.04.2002, 22.04.2003 and 23.11.2005 shall remain unchanged."

10. A conjoint reading of the above texts would evince that the benefit of exemption from transfer as contemplated in the office memorandum dated 7/9.1.2009 is not extendable to the respondent, who at the time of his transfer was in E/7 grade. This comprehended, as the language clearly indicates, the executives in E5 having less than two years of service left. It is also apparent that this office memorandum makes applicable the one dated 26.04.2002, so much so that the terms and conditions beyond it (office memorandum dated 7/9.1.2009) and as contained in the office memorandum dated 26.04.2002 would remain unchanged.

11. Though clause (2) of the office memorandum dated 26.04.2002 postulates that executives who have less than two years service left are not to be transferred normally, but can be given a posting of their choice, if vacancy is available, keeping in mind the administrative requirements, Clause (6) enjoins that transfer on "Administrative Ground" may be effected at any time. Thus unless the transfer policy of the CIL thus per se excludes or exempts any executive from the purview of transfer, the same can be ordered and effected on administrative ground at any point of time. The transfer policy of the CIL thus stipulates administrative ground to be of prime consideration in transferring an executive/non-executive, more particularly working in sensitive disciplines even if left with less than two years service. Admittedly, at the time of respondent's transfer, he was serving as Chief Manger (Security)-E/7 grade at MCL headquarters.

12. In our comprehension, he was thus not exempted from being transferred even on administrative grounds as per the order/ memorandum dated 26.04.2002 and 7/9.1.2009. The finding to this effect, as arrived at in the impugned judgment/order, thus cannot be sustained. As would be evident from the extract from the official records (appended to the counter of the appellants in the writ proceedings), the fact that the respondent in the writ proceedings had less than two years service left and that in terms of the memorandum dated 26.04.2002 as an executive he was not liable to be transferred normally, was consciously taken note of by the concerned authorities. It was, however, emphasized that, in view of the administrative exigencies, his transfer from MCL to CCL was warranted and this decision thus was approved. Want of application of mind, as alleged by the respondent, by the authorities of the CIL in making the impugned order of transfer is thus belied by the contemporaneous official records.

13. There is no material on record to even suggest that the respondent on transfer has been lowered in status or rank or that any condition of his service has been adversely affected. That his transfer had been on administrative exigencies is patently borne out by the records. Transfer being an incidence of service, as it is, the same can be interfered with only if it is repugnant to any statutory norm or is vitiated by mala fide. The consideration in the office memorandum dated 26.04.2002 sparing the executives left with less than two years service from being transferred normally is understandably supersedable by the demand of administrative requirements and the latter factor in case of an interface has to be accorded primacy.

14. In that view of the matter, in absence of any overwhelming material on record to suggest that the ground of administrative requirements, as consistently cited by the CIL justifying the respondent's transfer is non-existent, we are constrained to hold that no interference with the impugned decision of posting him out from the MCL to CCL is warranted, in the facts and circumstances of the case.

15. We find ourselves in respectful disagreement with the findings recorded in the impugned judgment/order, which is thus set aside.

16. The appeal succeeds. The appellants will be at liberty to act in terms of the impugned order of transfer and release.

Appeal allowed.

2015 (I) ILR - CUT- 16

AMITAVA ROY, CJ & DR. A. K. RATH, J.

W.P.(C) NO. 8979 OF 2014

M/S. C. P. MOHANTY & ASSOCIATES ……..Petitioner

.Vrs.

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

TENDER – Initially technical bid of O.P.3 was rejected due to lack of "bridge works experience" – Subsequently such decision was recalled and O.P.3 was adjudged to be qualified to participate in the process – Action challenged for not issuing notice to the petitioner – There is no mandate for issuance of notice to other participating bidders in case of re-evaluation of a technical bid, if considered necessary by the accepting authority – No such stipulation in the tender norms essentially requiring issuance of such notice before conducting re-evaluation – "Bridge work experience" was not construed to be an essential condition of eligibility and a bidder lacking on the same would per se stand disqualified – The decision to qualify O.P.3 to facilitate his participation in the process has been taken by a body competent to do so and would only to secure a broader field of competition in public interest – Impugned order does not warrant any interference. (Paras 8 to 11)

For Petitioner - Mr. G. M. Rath.
For Opp.Parties - Mr. J.P. Patnaik, Addl. Govt. Advocate.
Mr. Rajeet Roy.

Date of hearing : 21.10.2014
Date of judgment : 21.10.2014

JUDGMENT

AMITAVA ROY, C.J.

The decision to reevaluate the technical bid of the opposite party No.3 after adjudging the same to be nonresponsive initially is the subject matter of impugnment in the instant petition.

2. We have heard Mr. G.M. Rath, learned counsel for the petitioner, Mr. J.P. Patnaik, learned Addl. Government Advocate on behalf of the State-opposite party and Mr. R. Roy, learned counsel for opposite party No.3.

3. Trimming down the inessentials, the pleaded facts indispensable for the present adjudication are that the Government of Odisha, Works Department through the Chief Engineer (DPI & Roads) Odisha, Nirman Soudha, Unit-V, Bhubaneswar (opposite party No.2) did invite bids vide Bid Identification No. CE-DPI & R-18/2013-14 dated 06.07.2013 through e-procurement Portal for execution of the work of "Construction of Bridge over Dhanua Nallah at 3rd KM on Satyabhampur-Bhingarpur Road under

State Plan for the year 2013-14". The bidding process was proclaimed to be comprised of two parts i.e. technical bid and price bid. In response to that notice, the petitioner and opposite party No.3 offered their bids, whenafter the Technical Evaluation Committee on 02.09.2013 disqualified the technical bid of the opposite party No.3 for not fulfilling the norm of work experience as required under Clause 14(ii) of the Detailed Tender Call Notice (for short, hereinafter referred to as 'the DTCN'). Subsequent thereto, the financial bid of the petitioner was opened on 21.09.2013 and it was intimated to attend the office of the opposite party No.2 for negotiation of the rate offered by it, which in fact followed. Consequently, the petitioner's bid was adjudged to be the lowest.

When the matter stood thus, the opposite party No.3 approached this Court in W.P.(C) No. 23618 of 2013 challenging the rejection of his technical bid and by interim order dated 4.11.2013, this Court directed that further proceedings in the process be kept in abeyance. The petitioner, on receiving the notice/writ petition, entered appearance and filed an application for vacation of the ex-parte interim order contending, inter alia, that the opposite party No.3 had suppressed, more particularly, the fact that its technical bid had been rejected as it was held to be disqualified for not fulfilling the essential condition of work experience as contained in the DTCN. The writ petition, however, was eventually dismissed as withdrawn on a prayer of the opposite party No.3 on 24.04.2014.

On enquiries being made, according to the petitioner, it came to learn that in between, during the pendency of the writ petition, the opposite party No.2 had unilaterally recalled the decision of the Tender Evaluation Committee rejecting the technical bid of the opposite party No.3 as non-responsive and had adjudged it to be qualified for further participation in the process. The petitioner has averred that the withdrawal of the writ petition of the opposite party No.3 thus was, as a consequence of this development stemming from a connivance between the opposite party No. 2 and 3. The challenge has been laid in this backdrop.

4. The opposite party Nos. 1 & 2 in their counter while admitting that the Tender Evaluation Committee initially had disqualified the technical bid of the opposite party No.3 on the ground of lack of 'bridge works experience' as per Clause 14(ii) of the DTCN, have pleaded that subsequent thereto the Tender Committee as designated in paragraph 6.3.15 of the

O.P.W.D. Code Volume-I, re-examined the decision so taken and concluded on 27.09.2013 that the said bid was qualified on the following terms :

(i) Clause 14(ii) of the DTCN was not a mandatory requirement in view of the stipulation in Clause 122 of the said notice.

(ii) The work involved has a major role in facilitating pilgrimage to Lord Jagannath, Puri in the coming Nabakalebara of 2015 and thus warranted time bound completion.

(iii) The issue was resolved within the frame work of the tender conditions bearing in mind also the State Litigation Policy.

The answering opposite party have stoutly denied the allegation of collusion and clandestine and surreptitious review of the earlier decision qua the technical bid of the opposite party No.3.

5. Mr. Rath emphatically argued that the Tender Evaluation Committee once, having on a conscious scrutiny of the tender conditions, held that the technical bid of the opposite party No.3 was non-responsive, it was not open to it to reevaluate the same and declare it to be valid. Referring to Clause 8.5.5 in particular of the 'Procedure to participate in Online biding e-procurement' (for short, hereinafter referred to as 'the Norms of Procedure'), the learned counsel has insisted that even assuming that such a process for reviewing its earlier decision is permissible, it was incumbent on the authority to issue notice to the petitioner, the other contender, and as the same was not done, the decision is in violation of tender norms as well as principles of natural justice.

Contending that in any view of the matter, such a review of the decision disqualifying the technical bid of the opposite party No.3 during pendency of the his writ petition was impermissible in law, Mr. Rath insisted that the 'bridge work experience' was an essential tender condition having regard to the nature of the work to be executed and thus as the opposite party No.3 admittedly lacked in the same, the impugned decision is patently illegal, arbitrary and prompted by extraneous consideration. He urged that as the decision lacks in transparency and fairness, the same is liable to be adjudged invalid and ought to be quashed.

6. Mr. Roy has maintained that it being apparent on the face of Clause 122 of the DTCN, that the 'bridge work experience' was not an essential condition of eligibility, the initial decision disqualifying the technical bid of

the opposite party No.3 was obviously erroneous and thus in order to correct the apparent mistake and enlarge the field of competition, the impugned decision was validly taken. While contending that there is no bar in the tender stipulation to review a decision as has been done present case, Mr. Roy has also argued that no mandate of prior notice to other participating tenderers as asserted has been prescribed. As the opposite party No.3 is otherwise a reputed Special Class/Super Class contractor, the decision to validate his technical bid would ensure enhanced competitiveness in the bidding process and judged on that touchstone as well, the impugned decision is unmistakably valid and in public interest.

7. We have examined the pleaded facts, the documents on record and also the rival submissions.

A plain perusal of the tender notice dated 6.7.2013 would reveal that thereby the participation of Special Class/Super Class contractors registered with the State Governmenrs and contractors of equivalent Grade/Class registered with Central Government/ MES/Railways etc. for execution of civil works was solicited. There is no material on record to show that the opposite party No.3 does not meet the said requirement. Clause 8.5.5. of the norms of Procedure and Clauses 14 and 122 of the DTCN are extracted herein below for ready reference.

> "8.5.5. Immediately, on receipt of these clarifications, the Evaluating Officers, predefined in the system for the bid, will finalize the list of responsive bidders. They will log on to the site with their DSC and record their comments on the Technical evaluation page in the system. The Officer Inviting the Bid if also the accepting authority, shall log on to the system with his digital signature and check the technical evaluation. He can either accept or pass on to the evaluating officers for re-evaluation. Upon acceptance of technical evaluation by the Accepting authority in the system, the system shall automatically generate letter to all the responsive bidders and the system shall forward the letter to all the responsive bidder that their technical bid has been evaluated responsive with respect to the data/information furnished by him and the letter shall also intimate him the date & time of opening of financial bid. The system shall also inform the non-responsive bidders in their e-mail ID that their bid has been found non-responsive."
>
> xxx xxx xxx xxx

"14. (i) Each bidder is to submit along with bid a note regarding his experience on construction of Bridge Works.

(a) Name of the Bridge –
(b) Estimated Cost –
(c) Total length of Span: -
(d) Major Items of work: -
(e) Quantity of items: - i) As per Agreement: -
ii) As per execution: -
(f) Date of Commencement: -
(g) Stipulated date of Completion: -
(h) Actual date of completion: -
(i) Other details if any. : -

(ii) The prospective applicant in its name should furnish list of similar nature of work satisfactorily completed in Schedule- D1 and list of works in progress in Schedule- D2. (Similar nature of work means- Bridge works with well foundation)

xxx xxx xxx xxx

122. ELIGIBILITY CRITERIA : To be eligible for qualification, applicants shall furnish the followings.

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

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

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

d) Information in scanned copy regarding current litigation, debarring/expelling of the applicant or abandonment of work by the applicant in schedule "E' and affidavit to that effect including authentication of tender documents and Bank guarantee in schedule "F" as per clause 11.

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

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

8. Reading between the lines, Clause 8.5.5, clearly conceptualise two different authorities for technical evaluation of the bids and the acceptance thereof on the completion of the process of that segment. There is no mandate for issuance of notice to the competing bidders in case of re-evaluation of a technical bid, if considered necessary by the accepting authority. The learned counsel for the petitioner has not been able to draw our attention to any stipulation in the tender norms essentially requiring issuance of such notice before conducting re-evaluation. In that view of the matter, the plea against fairness in action does not weigh with us.

A conjoint reading of Clauses 14 and 122 of the DTCN read with the annexures to Schedule-C & D thereto would make it abundantly clear that 'bridge work experience' was not construed to be an essential condition of eligibility so much so that a bidder lacking in the same would per se stand disqualified qua its/his technical bid. Noticeably the requirements cataloged as eligibility criteria in Clause 122 do not include Schedule D2 containing the details of work experience. In this view of the matter, the plea of the opposite party Nos. 1 and 2 that the 'bridge work experience' in terms of Clause 122 of the tender norms was not an essential criteria thus commends for acceptance.

9. The reason for holding the opposite party No.3 to be disqualified, as is available from the proceedings of the Technical Evaluation Committee meeting held on 2.9.2013 is extracted below :

Sl. No.	**Name of the Bidder**	**Findings**	**Remarks**
1.	M/s. C.P. Mohanty & Associates, Special Class Contractor.	The bidder has fulfilled all the eligibility criteria as per Clauses of DTCN	Qualified.
2.	Shreenivas Pradhan, Special Class Contractor.	The bidder has fulfilled all the eligibility criteria **except experience in bridge work** and thus liable for rejection as per Clause 14(ii) of DTCN.	Disqualified.

It would be patent from the above extract that the opposite party No.3 was disqualified as, according to Tender Evaluation Committee, experience in bridge work as contemplated in Clause 14(ii) of the DTCN was an essential eligibility criteria and he lacked in the same.

10. This deduction of the Tender Evaluation Committee is per-se in derogation of Clause 122 of the DTCN and thus was erroneous on the face of the records. The grounds set out in the counter of the opposite party Nos. 1 & 2 for review of this decision and not refuted by the petitioner thus have substance. The rejection of the technical bid of the opposite party No.3, in our comprehension, having regard to the frame work of the tender conditions in the instant case by construing the bridge work experience to be an essential norm of eligibility was impermissible. In any view of the matter, the decision to qualify the opposite party No.3 to facilitate his participation in the process has been taken by a body competent to do so and would only to secure a broader field of competition and thus would auger well in public interest.

11. On a cumulative consideration of the above aspects, we are thus of the view that the instant challenge does not warrant any interference as sought for and the writ petition is thus rejected.

12. We make it clear that by the instant adjudication we have not expressed any opinion with regard to comparative suitability of the tenderers involved and it would be wholly within the domain of the opposite party to select the best, strictly on the basis of the tender stipulations and provisions of law applicable. This determination, we add has been in the facts and circumstances of the case and in the frame work of the terms and conditions so designed to govern the process involved.

Writ petition dismissed.

2015 (I) ILR - CUT- 24

AMITAVA ROY, CJ & DR. B. R. SARANGI, J.

A.H.O. NO. 85 OF 1996

UNION OF INDIA **.**……..Appellant

.Vrs.

STEEL AUTHORITY OF INDIA LTD. & ORS. ……Respondents

A. RAILWAY CLAIMS TRIBUNAL ACT, 1987 – S.23 (1)

Appeal before High Court U/s. 23 (1) of the Act against order of the Railway Claims Tribunal – Appeal dismissed by the learned Single Judge – Order challenged in Letters Patent Appeal – Maintainability – Held, Section 23 of the Railway Claims Tribunal Act only permits one appeal against the Order/Judgment of the Railway Claims Tribunal before the High Court – Letters Patent Appeal agnaist the order of the learned single judge is not maintainable. (Paras 30,31)

B. LETTERS PATENT – Meaning of – A letters patent is the charter under which the High Court is established – Power given to a High Court under the Letters Patent are akin to the Constitutional powers of a High Court – Thus when a Letters Patent grants to the High Court a power of appeal against the judgment of a Single Judge, the right to entertain the appeal would not get excluded unless the statutory enactment concerned excludes an appeal under the Letters patent. (Paras 17 to 20)

Case laws Relied on:-

1.AIR 1956 SC 559 : (Hari Khemu Gawali-V- Deputy Commissioner of Police, Bombay & Anr.)
2.(2011) 8 SCC 333 : (Fuerst Day Lawson Ltd.-V- Jindal Exports Limited.)
3.(2004) 11 SCC 672 : (P.S. Sathappan (dead) by L.Rs.-V- Andhra Bank Ltd. & Anr.)

Case laws Referred to:-

1.AIR 1952 SC 369 : (Aswini Kumar Ghose & Anr.-V- Arabinda Bose & Anr.)
2.AIR 1964 SC 207 : (South India Corporation (P) Ltd.-V- Secretary, Board

of Revenue Trivandrum & Anr.)
3.(2002) 3 SCC 705 : (Sarda Devi-V- State of Bihar)
4.AIR 1953 SC 357 : (National Sewing Thread Co. Ltd. Chindambaram-V- James Chadwick & Bros. Ltd.)
5.(2007) 7 SCC 555 : (Girnar Traders-V- State of Maharashtra & Ors.)

For Appellant - Mr. A. Pal
For Respondents -Mr. N.K. Sahu.

Date of hearing : 17.09.2014
Date of judgment: 30.09.2014

JUDGMENT

DR. B.R.SARANGI, J.

A judgment of the learned Single Judge of this Court dated 17.09.1996 passed in M.A. No. 172 of 1993 under Section 23(1) of the Railway Claims Tribunals Act, 1987 awarding Rs.1,32,87,749/- towards the claim made by the respondent is under challenge in this appeal.

2. The factual matrix is that the plaintiff-respondent used to get supply of imported coal for production of steel in its plant at Rourkela through Visakhpatnam Port. The coal was to be carried from Visakhpatnam to the Steel Authority of India Limited (SAIL), RSP change yard at Bandamunda. The shortest and cheapest route available on the railways from Visakhpatnam to Bandamunda is via Vijainagram-Titilagarh-Sambalpur-Jharsuguda-Rourkela the distance being 667 Kms. In the absence of any specific instructions of the sender, the goods are to be dispatched and charged in the shortest and cheapest route. But as per the provisions contained in Section 27-A of the Indian Railways Act, 1890, power is conferred on the Central Government directing the Railway Administration to carry any specific goods to a specific destination on a particular route known as "rationalized route". Such power being exercised by the Central Government in General Order No. 1 of 1986 directing the South Eastern Railway Administration that imported coal from Visakhpatnam Port to Rourkela Steel Plant has to be booked and routed through the rationalized route, namely via Vijainagaram-Khurda Road-Kharagpur-Tatanagar-Chakradharpur having a total distance of 1082 Kms, the rationalized scheme having been enforced when the relevant consignments were booked from Visakhpatnam for delivery at Rourkela. In the forwarding note, though it was noted forwarding station and destination station as Visakhpatnam and

Rourkela respectively, it had not been indicated the route though which goods would be delivered, though the Railways authorities issued receipts showing Visakhpatnam being the booking station, Bandamunda via Kharagpur being designation. Accordingly charges calculated and collected from the plaintiff-SAIL. The plaintiff had neither choice of route nor any opportunity to it to know the actual route of transport which was within the special knowledge of the Railway authorities. The booking and dispatch in question were during the period from 15.04.1986 to 28.11.1986 and 05.01.1987 to 28.02.1987. As per the practice prevailing in the Railways, goods have to be carried in a shortest and cheapest route unless the consignor instructs otherwise. In view of the General Order No. 1 of 1986 making it compulsory for booking the consignment through rationalized route and in view of the railway receipts, the plaintiff-SAIL did not make any grievance for payment for the travel of goods through the rationalized routes. As per the provisions contained in Rule 125(1)(h) of the Tariff Rules, the Railways is to book the consignment in the rationalized route and not in the shortest route and to carry the goods in the rationalized route. When the officers of the plaintiff came to know that charges were levied with freight on rationalized route basis instead of shortest and cheapest route, they objected to the same and stated that when the goods were to be dispatched through the shortest and cheapest route, there was no justification for carrying the same otherwise and saddle if with freight for rationalized route. Therefore, the very foundation of the Central Government General Order No.1 of 1986 was absolutely misconceived. Finding no other way out, the plaintiff-SAIL filed Money Suit No.115 of 1989 before the learned Sub-ordinate Judge, Rourkela seeking a decree for Rs.1,32,87,749/- with pendente lite and future interest thereon at the rate prevailing in the Nationalized Bank. When the matter was sub judice before the Subordinate Judge, Rourkela, due to establishment of the Railway Claims Tribunal, Bhubaneswar, the aforesaid Money Suit was transferred to the said Tribunal, which was registered as T.A. No. 289 of 1990. The learned Tribunal after due adjudication directed the defendant-appellant to refund a sum of Rs.1,32,87,749/- and costs amounting to Rs.1,51,608.75 towards Court fees and Rs.1,33,740/- towards lawyer's fees apart from pendente lite interest @12% per annum on the principal sum i.e. Rs.1,32,87,749/- from the date of filing of the suit, i.e. 14.08.1989, till the date of realization. Against the said judgment dated 08.01.1993 passed by the Railways Claims Tribunal, Bhubaneswar in T.A. No. 289 of 1990, the defendant-appellant preferred M.A. No.175 of 1993 before this Court. The

learned Single Judge of this Court vide judgment dated 17.09.1996 dismissed the appeal confirming the order passed by the learned Railway Claims Tribunal, reported in AIR 1997 Orissa 77. Hence the present Letters Patent Appeal.

3. While the matter was taken up for hearing, the respondent raised a preliminary objection with regard to maintainability of the present appeal. Therefore before going into the merits of the case, this Court is to decide whether against a judgment passed in Appeal under Section 23 of the Railway Claims Tribunals Act, 1987, the present Letters Patent Appeal is maintainable or not.

4. Mr. N.K. Sahu, learned counsel for the respondent, strenuously urged that intra Court appeal by invoking Clause-10 of Letters Patent read with Clause-4 of Orissa High Court Order, 1948 is not maintainable against the judgment of learned Single Judge arising out of an appeal under Section 23 of the Railway Claims Tribunals Act, 1987. Referring to Section 23 of the Railway Claims Tribunals Act, 1987 it is urged that intra Court appeal against the judgment of a learned Single Judge is not maintainable. In order to substantiate his submission, he has relied upon the judgments of the apex Court in **Aswini Kumar Ghose and another v. Arabinda Bose and another,** AIR 1952 SC 369, **South India Corporation (P) Ltd. v. Secretary, Board of Revenue, Trivandrum and another**, AIR 1964 SC 207, **Fuerst Day Lawson Limited v. Jindal Exports Limited** (2011) 8 SCC 333, **P.S.Sathappan (dead) by Lrs. v. Andhra Bank Ltd. and others,** (2004) 11 SCC 672, **Hari Khemu Gawali v. Deputy Commissioner of Police, Bombay and another,** AIR 1956 SC 559.

5. Mr. A. Pal, learned counsel for the appellant, argued that the judgment relied upon in **Fuerst Day Lawson Limited** (supra) is not applicable to the present context. Making an analogy of the provisions, under Section 54 of the Land Acquisition Act vis-à-vis Section 23 of the Railway Claims Tribunals Act, 1987, Mr.Pal urged that this Letters Patent Appeal is maintainable. It is further urged that intra Court appeal to the Division Bench against an order passed by the learned Single Judge being a power vested with the Court under the chapter in which the High Court was established and this being a special power, the appeal is clearly maintainable as has been interpreted in various judgments of the apex Court. To substantiate his contention he has relied upon the judgments of the apex Court in **Sharda Devi v. State of Bihar**, (2002) 3 SCC 705, **National Sewing Thread Co.**

Ltd. Chidambaram v. James Chadwick and Bros.Ltd, AIR 1953 SC 357, **Girnar Traders v. State of Maharashtra and others** (2007) 7 SCC 555, and **P.S.Sathappan (supra)**.

6. On the basis of the aforesaid pleaded facts, the following points emerge for consideration.

(i) Whether the construction of Section 23 of Railway Claims Tribunals Act, 1987 contemplates intra Court appeal against the judgment of a learned Single Judge in view of Clause-10 of the Letters Patent?

(ii) Whether the provisions of Section 23 of Railway Claims Tribunals Act, 1987 can be construed to be in pari materia with the provision of Section of Section 54 of the Land Acquisition Act, 1894 so as to bar all appeals against the judgment of a learned Single Judge under Clause-10 of the Letters Patent?

7. Referring to the statements of objects and reasons of the enactment of Railway Claims Tribunals Act, 1987, Mr. N.K. Sahu, learned counsel for the respondent submitted that the Railway Claims Tribunal Act being a complete Code adjudication of the grievance by the claims Tribunal is made subject to a solitary appeal to the High Court as provided under Section 23 of the Railway Claims Tribunal Act, 1987 under Chapter-V and no further, in order to provide complete justice with speedy and effective remedy without lingering the longevity of the litigation. Section 23 of the Railway Claims Tribunals Act, 1987 read as follows:

> "Appeals- (1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in any other law, an appeal shall lie from every order, not being an interlocutory order, of the Claims Tribunal, to the High Court having jurisdiction over the place where the Bench is located.
>
> (2) No appeal shall lie from an order passed by the Claims Tribunal with the consent of the parties.
>
> (3) Every appeal under this section shall be preferred within a period of ninety days from the date of order appealed against."

8. Mr.Sahu has referred to Section 28 of the said Act which has provided overriding effect thereof any provisions of any other law, which are

inconsistent with the Railway Claims Tribunals Act, 1987 and it is urged that on a bare reading of Section 23 of the said Act, except the prohibition of filing of an appeal against an order passed by the claims Tribunal, with the consent of the parties, all other procedures provided for filing of appeal under the Code of Civil Procedure or in any other law (which obviously include appeals under the Letters Patent), have been for all purposes taken away by necessary implication. As the aforesaid appeal provision starts with a non obstante clause, i.e., "notwithstanding anything contained with the code of Civil Procedure, 1908, or in any other law", only one appeal shall lie from every order of the Claims Tribunal to the High Court having jurisdiction. To reinforce the argument, Mr. Sahu has referred to various decisions of the apex Court interpreting the phrase "notwithstanding anything contained".

9. In **Aswini Kumar Ghose case (supra)** "notwithstanding contained" has been interpreted in respect of various provisions of different statute, wherein the apex Court in paragraph 27 held as follows:

> **" x x x x t**he non obstante Clause can reasonably be read as overriding "anything contained" in any relevant existing law which is inconsistent with the new enactment……. The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously; for, even apart from such clause, a latter law abrogates earlier laws clearly inconsistent with it. **"**

10. The apex Court in **South India Corporation (P) Ltd. (supra)** while dealing with the dispute relating to the interpretation of the constitutional provision of Article 227, 278 and 372 of the Constitution of India brought out a distinction between the provision opening out with the expression "subject to" and a non obstante clause with the phrase "notwithstanding anything in the constitution" and held in paragraph-19 of the aforesaid decision as follows:

> **"**That apart, even if Article 372 continues the pre-Constitution laws of taxation, that provision is expressly made subject to the other provisions of the Constitution. The expression "subject to" conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject. Further Article 278 opens out with a non obstante clause. The phrase "notwithstanding anything in the Constitution" is equivalent to saying that in spite of the other

> articles of the Constitution, or that the other articles shall not be an impediment to the operation of Article 278. While Article 372 is subject to Article 278, Article 278 operates in its own sphere in spite of Article 372. The result is that Article 278 overrides Article 372; that is to say, notwithstanding the fact that a pre-Constitution taxation law continues in force under Article 372, the Union and the State Governments can enter into an agreement in terms of Article 278 in respect of Part-B states depriving the state law of its efficacy. In one view Article 277 excludes the operation of Article 372, and in the other view, an agreement in terms of Article 278 overrides Article 372. In either view, the result is the same, namely, that at any rate during the period covered by the agreement the states ceased to have any power to impose the tax in respect of "works contracts.**"**

11. In view of the aforesaid interpretations of the phrases, the expression "subject to" signifies yielding of place to the applicability of another provision or other provisions to which it is made subject. Similarly, the provisions starting with the phrase "notwithstanding anything contained in any other law" conveys that the provisions starting with the aforesaid non obstinate clause would only be operative with an overriding effect, thus overriding any other provisions sought to be excluded.

12. Referring to paragraphs 22 and 36 of the judgment in **P.S. Sathappan case (supra)** which was followed in **Fuerst Day Lawson Ltd. case (Supra)** in paragraph 36(vii), the apex Court held as follows:
"The exception to the aforementioned rule is where the special Act sets out a self-contained code and in that event the applicability of the general law procedure would be impliedly excluded. The express provision need not refer to or use the words "letters patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred."

13. Therefore, it is pleaded that in view of the aforesaid clear position of law laid down by the apex Court and provisions contained under Section 23 of the Railway Claims Tribunal Act, the only reasonable interpretation can be given that the vested right of appeal and the forum of appeal provided to the High Court admits of only one appeal against the judgment of the Railway Claims Tribunal by excluding further intra Court appeal against the judgment of such appeal by taking recourse to clause-10 of the Letters Patent by necessary implication.

14. The applicability of **Fuerst Day Lawson Ltd. case (supra)** to the present context has been refuted by Mr. Pal, learned counsel for the appellant. He has referred to the provisions contained under Section 23 of the Railway Claims Tribunal Act and Section 54 of the Land Acquisition Act, 1894. Section 54 of the Land Acquisition Act reads as follows:

> "**Appeals in proceeding before court:-** Subject to the provisions of the Code of Civil Procedure, 1908 (5 of 1908), applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall only lie in any proceedings under this Act to the High Court from the award or from any part of the award, of the Court and from any decree of the High Court passed on such appeal as aforesaid an appeal shall lie to the Supreme Court subject to the provisions contained in Section 110 of the Code of Civil Procedure, 1908 (5 of 1908) and in order XLV thereof. "

15. Mr. Pal has also referred to Sections 37 and 50 of the Arbitration and Conciliation Act, which read as follows:

> "37.**Appealable orders**.- (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-
>
> (a) granting or refusing to grant any measure under section 9:
>
> (b) setting aside or refusing to set aside an arbitral award under section 34.
>
> (2) Appeal shall also lie to a court from an order of the arbitral tribunal----
>
> (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
>
> (b) granting or refusing to grant an interim measure under section 17.
>
> (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or taken away any right to appeal to the Supreme Court.
>
> **50. Appealable orders.-** (1) An appeal shall lie from the order refusing to—

(a) refer the parties to arbitration under section 45;

(b) enforce a foreign award under section 48 to the court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

16. Referring to above mentioned provisions, it is urged that Section 23 of the Railway Claims Tribunal Act and Section 54 of the Land Acquisition Act both are akin to each other, whereas Sections 37 and 50 of the Arbitration and Conciliation Act, 1996 are different and have expressed words by which the jurisdiction of Second Appeal is taken away. Therefore, the distinction in the appeal provision has different implication so far as maintainability of the Letters Patent Appeals are concerned. Relying upon the judgment in **National Sewing Thread Co. Ltd. Chidambaram case (Supra),** he submitted that the apex Court held that once an appeal reaches the High Court, it has to be determined according to the rules of practice and procedure of that Court and in accordance with the provisions of the Charter under which that Court is constituted, which confers on it the power in respect of the method and manner of exercising that jurisdiction. It has been further held that when a statute directs that an appeal shall lie to a Court already established, that appeal shall be regulated by the practice and procedure of that Court. It is further urged that the decision in **Fuerst Day Lawson Ltd. case (supra)** is not applicable to the present context. There is an express exclusion clause relating to Second Appeals under Section 37 and 50 of the Arbitration and Conciliation Act, 1996. Therefore, the express exclusion clause which bars a Second Appeal before the High Court would include the Letters Patent Appeal. In that context the apex Court in **Fuerst Day Lawson Ltd. (supra)**, held that express exclusion clause bars Letters Patent Appeal also.

17. In the above view of the matter, now it is to be considered what actually "Letters Patent" means.

18. In **Umaji Keshao Meshram v. Radhikabai,** 1986 (Supp.) SCC 401 : AIR 1986 SC 1272, the apex Court held as follows:

"Letters Patent mean writings of the sovereign, sealed with the Great Seal, whereby a person or company is enabled to do acts or enjoy privileges which he or it could not do or enjoy without such

> authority. Letters Patent thus mean an instrument issued by the Crown or government (see Black's Law Dictionary, 5th Edn.) Letter Patent establishing the High Court issued by the Crown would thus fall within the meaning of the term "instrument" as used in Section 8(2) of the General Clauses Act".

19. In **P.V. Hemalatha v. Kattamkandi Puthiya Maliackal Saheeda,** (2002) 5 SCC 548 : AIR 2002 SC 2445, the apex Court in para 36 held as follows:

> "they are open letters; they are not sealed up, but exposed to view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with the great seal, but directed to particular persons, and for particular purposes: which therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs close, literae clausae, and are recorded in the close-rolls, in the same manner as the others are in the patent-rolls"

20. In **Sharda Devi case** (Supra), the apex Court held that a Letters Patent is a Special Law for the High Court concerned and the powers given to a High Court under the Letters Patent are akin to the constitutional powers of a High Court. Thus, when a Letters Patent grants to the High Court a power of appeal against a judgment of a Single Judge, the right to entertain the appeal would not get excluded unless the concerned statutory enactment excludes an appeal under the Letters Patent. Applying the principles laid down in the said case, it is urged by Mr. A. Pal that the said judgment is squarely applicable the reason being Section 23 of the Railway Claims Tribunal Act and Section 54 of the Land Acquisition Act are the similar provisions. He has referred to paragraphs 11, 14 and 15 of the said judgment, which read as follows:

> **"**11. Mr Sharan submits that Section 54 of the said Act contains a non obstante clause. He submits that the words "notwithstanding anything to the contrary in any enactment for the time being in force" would also include the provisions contained in a Letters Patent. We are unable to accept this submission. A Letters Patent is not an enactment. It is the charter of the High Court. A non obstante clause of this nature cannot cover the charter of the High Court.

> 14. In our view, Mr Mathur is right. Section 26 of the said Act provides that every award shall be a decree and the statement of grounds of every award shall be a judgment. By virtue of the Letters Patent "an appeal" against the judgment of a Single Judge of the High Court would lie to a Division Bench. Section 54 of the said Act does not exclude an appeal under the Letters Patent. The word "only" occurring immediately after the non obstante clause in Section 54 refers to the forum of appeal. In other words, it provides that the appeal will be to the High Court and not to any other court e.g. the District Court. The term "an appeal" does not restrict it to only one appeal in the High Court. The term "an appeal" would take within its sweep even a letters patent appeal. The decision of the Division Bench rendered in a letters patent appeal will then be subject to appeal to the Supreme Court. Read in any other manner there would be a conflict between Section 54 and the provision of a Letters Patent. It is settled law that if there is a conflict, attempt should be made to harmoniously construe the provisions.
>
> **15.** We, therefore, hold that under Section 54 of the said Act there is no bar to the maintainability of a letters patent appeal. We therefore agree with the view taken in *Basant Kumar and others v. Union of India and Others,(1996) 11 SCC 542*. The reference is answered accordingly."

Accordingly, it is stated that a Letters Patent Appeal cannot be ousted by implication but the right of an appeal under the Letters Patent can be taken away by an express provision in an appropriate legislation. Such express provision may not refer to nor use the word "Letters Patent", but if on a reading of the provision, it is clear that all further appeals are barred, then the embargo would be vis-à-vis even a Letters Patent Appeal as well.

21. Mr. Pal, learned counsel for the appellant referring to **P.S. Sathappan case (Supra)** submitted that the express provision of exclusion having been provided under Sections 37 and 50 of the Arbitration and Conciliation Act, 1996, in absence of such express provision of exclusion of further appeals under Section 23 of the Railway Claims Tribunals Act, Letters Patent Appeal is maintainable.

22. Per Contra, it is argued the judgment of the apex Court in **Fuerst Day Lawson Ltd. (supra)** has taken note of almost all the decisions in relation to filing of appeal taking recourse to the appeal provision provided under the

Letters Patent and has laid down the law in paragraph-36 of the said judgment, which drawing support of the law enunciated in paragraphs 22 and 30 of the earlier judgment of the apex Court in **P.S. Sathappan case (Supra)** as follows:

> **"22.** Thus the unanimous view of all courts till 1996 was that Section 104(1) CPC specifically saved letters patent appeals and the bar under Section 104(2) did not apply to letters patent appeals. The view has been that a letters patent appeal cannot be ousted by implication but the right of an appeal under the Letters Patent can be taken away by an express provision in an appropriate legislation. The express provision need not refer to or use the words "letters patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred.
>
> **Xx xx xx xx xx**
>
> **30.** As such if an appeal is expressly saved by Section 104(1), sub-section (2) cannot apply to such an appeal. Section 104 has to be read as a whole. Merely reading sub-section (2) by ignoring the saving clause in sub-section (1) would lead to a conflict between the two sub-sections. Read as a whole and on well-established principles of interpretation it is clear that sub-section (2) can only apply to appeals not saved by sub-section (1) of Section 104. The finality provided by sub-section (2) only attaches to orders passed in appeal under Section 104 i.e. those orders against which an appeal under "any other law for the time being in force" is not permitted. Section 104(2) would not thus bar a letters patent appeal. Effect must also be given to legislative intent of introducing Section 4 CPC and the words "by any law for the time being in force" in Section 104(1). This was done to give effect to the Calcutta, Madras and Bombay views that Section 104 did not bar a Letters Patent. As appeals under "any other law for the time being in force" undeniably include a letters patent appeal, such appeals are now specifically saved. Section 104 must be read as a whole and harmoniously. If the intention was to exclude what is specifically saved in sub-section (1), then there had to be a specific exclusion. A general exclusion of this nature would not be sufficient. We are not saying that a general exclusion would never oust a letters patent appeal. However, when Section 104(1) specifically saves a letters patent appeal then the only way such an appeal could be

excluded is by express mention in Section 104(2) that a letters patent appeal is also prohibited. It is for this reason that Section 4 of the Civil Procedure Code provides as follows:

."4. *Savings*.—(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land."

As stated hereinabove, a specific exclusion may be clear from the words of a statute even though no specific reference is made to Letters Patent. But where there is an express saving in the statute/section itself, then general words to the effect that "an appeal would not lie" or "order will be final" are not sufficient. In such cases i.e. where there is an express saving, there must be an express exclusion. Sub-section (2) of Section 104 does not provide for any express exclusion. In this context reference may be made to Section 100-A. The present Section 100-A was amended in 2002. The earlier Section 100-A, introduced in 1976, reads as follows:

"100-A. *No further appeal in certain cases*.—Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such Single Judge in such appeal or from any decree passed in such appeal."

It is thus to be seen that when the legislature wanted to exclude a letters patent appeal it specifically did so. The words used in Section 100-A are not by way of abundant caution. By the Amendment Acts of 1976 and 2002 a specific exclusion is provided as the legislature knew that in the absence of such words a letters patent appeal would

not be barred. The legislature was aware that it had incorporated the saving clause in Section 104(1) and incorporated Section 4 CPC. Thus now a specific exclusion was provided. After 2002, Section 100-A reads as follows:

"100-A. *No further appeal in certain cases*.—Notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment and decree of such Single Judge."

To be noted that here again the legislature has provided for a specific exclusion. It must be stated that now by virtue of Section 100-A no letters patent appeal would be maintainable. However, it is an admitted position that the law which would prevail would be the law at the relevant time. At the relevant time neither Section 100-A nor Section 104(2) barred a letters patent appeal."

23. In view of the aforesaid provisions of law laid down by the apex Court and a bare reading of the provisions contained in Section 23 of the Railway Claims Tribunal Act, the only reasonable interpretation can be given that only one appeal against the judgment of the Railway Claims Tribunal to the High Court is provided by excluding further intra Court appeal against the judgment of such appeal by taking recourse to Clause-10 of the Letters Patent by necessary implication.

24. So far as reply to the second question, it appears that the learned counsel for the appellant had relied upon the appeal provision provided under Section 54 of the Land Acquisition Act, 1894 and has stated that the same is akin to Section 23 of the Railway Claims Tribunal Act. Referring to **Sharda Devi case (Supra)**, it is contended that Letters Patent Appeal is very much maintainable against the judgment of the learned Single Judge. Section 54 of the Land Acquisition Act, 1894 reads as follows:

"**54: Appeals in proceedings before Court:-** Subject to the provisions of the Code of Civil Procedure, 1908 (5 of 1908), applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force,

> an appeal shall only lie in any proceedings under this Act to the High Court from the award, or from any part of the award, of the Court and from any decree of the High Court passed on such appeal as aforesaid an appeal shall lie to Supreme Court subject to the provisions contained in Section 110 of the Code of Civil Procedure, 1908, and in order XLV thereof. "

25. On perusing the above mentioned provision, the only interpretation possible to be given is that conferment of the appellate power to the High Court under the said provision takes within its sweep all other general power of appeal including the appeal under the Letters Patent under the Charter in which the High Court was established, inasmuch as the said provision starts with the phrase "subject to the provisions of the Code of Civil Procedure, 1908 (5 of 1908) applicable to the appeals to the original decree and notwithstanding anything to the contrary in any enactment for the time being in force". The necessary corollary of this provision therefore is that the appellate power vested takes within its ambit all the provisions of the appeal provided under the Code of Civil Procedure along with the procedure for filing of further appeal which are vested under the Code of Civil Procedure along with the procedure of filing of further appeal, which are saved under Code of Civil Procedure notwithstanding anything to the contrary in any enactment.

26. A non obstante clause beginning with "notwithstanding anything contained in the Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force", is sometimes appended to a Section in the beginning with a view to give the rest part of the section, in case of conflict, an overriding effect. This question has been considered by the apex Court in **Union of India v. G.M Kokil,** 1984 (Supp.) SCC 196: AIR 1984 SC 1022. It is identical to say that if a provision recites a non obstante clause, the text following it will have its full operation or that the provisions referred to in the non obstante clause will not be an impediment for the operation of the provisions, suffixed thereto.

27. The learned counsel for the appellant did also refer to Section 96 of the Code of Civil Procedure, which provides a procedure for filing of appeal against the original decree. The said provision in the Code of Civil Procedure is saved under Section 54 of the Land Acquisition Act because that provision starts with the phrase "subject to the provision of the Code of Civil Procedure". However Section 4 of the Code of Civil Procedure provides a

savings clause. Therefore, on conjoint reading of Section 54 of the Land Acquisition Act, Section 96 and Section 4 of the Code of Civil Procedure, the appellate power under Clause 10 of the Letters Patent is also saved and will be made applicable against the judgment passed by the High Court in appeal filed under Section 54 of the Land Acquisition Act.

28. For the analysis made with regard to the provisions contained in Section 54 of Land Acquisition Act vis-à-vis Section 23 of the Railway Claims Tribunal Act, it cannot be construed that both the provisions are akin to each other and rather both are distinct and separate in view of the use of the phrase "subject to" in Section 54 vis-à-vis "notwithstanding anything contained" in Section 23 of the Railway Claims Tribunal Act starting with a non obstante clause.

29. Mr.Pal, learned counsel for the appellant has placed reliance on **Girnar Traders case (supra)** where the apex Court has held that only the ratio decidendi can act as binding or authoritative precedent not mere general observations or casual expression of the Court. In paragraph 46 of the said judgment, the apex Court held as follows :

> **"46.** In *Union of India* v. *Dhanwanti Devi, (1996) 6 SCC 44,* a three-Judge Bench of this Court has observed as follows: (SCC pp. 51-52, paras 9-10)
>
> "*9.* … It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *ratio decidendi*. According to the well-settled theory of precedents, every decision contains three basic postulates—(*i*) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (*ii*) statements of the principles of law applicable to the legal problems disclosed by the facts; and (*iii*) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which

> may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract *ratio decidendi*, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. x x x"
>
> It is therefore, urged that extracting a sentence here and there from a judgment, the respondent cannot build upon it the exposition of the whole law the same being erroneous because the essence of a decision is its ratio, not every observation found therein.

30. To controvert the aforesaid allegation, Mr.Sahu, learned counsel for the respondent has relied upon **Hari Khemu Gawali case (supra**), wherein in paragraph 10, the apex Court, has held as follows:

> "x x x But arguments by analogy may be misleading. ……it is not safe to pronounce on the provision of one Act with reference to the decisions dealing with other Acts, which may not be in parimateria."

As it appears, the view expressed by the apex Court in **Hari Khemu Gawali case (supra**), is fully applicable to the present context to discard the contention raised by the appellant relying on **Sharda Devi case (Supra)** although the said decision was rendered by interpreting the appeal provision under Section 54 of the Land Acquisition Act.

In our considered opinion, the interpretation made in **Sharda Devi case (Supra)** is applicable to its own facts and circumstances and cannot have any application to the present context to give an effective and reasonable interpretation to the appeal provision under Section 23 of the Railway Claims Tribunal Act, which totally prohibits an appeal under the CPC or any other law, including appeals under the Letters Patent. Whereas Section 54 of the Land Acquisition Act completely saves all the procedures of appeal under the Letters Patent by virtue of Section 4 of the Code of Civil Procedure.

31. In view of the aforesaid facts and circumstances, taking into consideration the law decided in **P.S. Sathappan case (Supra)** and **Fuerst Day Lawson Limited (supra)** vis-à-vis Section 23 of the Railway Claims Tribunal Act and the interpretation of the non obstante clause mentioned as discussed, this Court holds that no appeal under Clause-10 of the Letters Patent read with Section 4 of the Orissa High Court Order, 1948 is maintainable as Section 23 of the Railway Claims Tribunal Act only permits one appeal against the order/ judgment of the Railway Claims Tribunal before the High Court. The same remedy having already been exhausted, this AHO cannot be sustained in the eye of law.

32. The AHO therefore fails as not maintainable and is dismissed. No cost.

Appeal dismissed.

2015 (I) ILR - CUT- 41

AMITAVA ROY, CJ & DR. A. K. RATH, J.

W.A. NO. 30 OF 2014

DR. (SMT.) GEETANJALI PANDA ……..Appellant

.Vrs.

DR. PRANAYA BALLARI MOHANTY & ORS. ……..Respondents

CIVIL PROCEDURE CODE, 1908 – O- 1, R-10

Impletion of party – Eventual interest of the appellant in the fruits of a litigation cannot be held to be the true test of impleading her as a party – Appellant is neither a necessary party nor a proper party to the writ petition filed by respondent No.1 – Learned single Judge has rightly rejected her application – Consequently she has no locus standi to maintain the present appeal which is accordingly dismissed.

(Paras 12,13, 14)

Case law Referred to:-

AIR 1963 SC 786 : (Udit Narain Singh Malpaharia-V- Addl. Member Board of Revenue, Bihar & Anr.)

Case law Relied on:-

AIR 1953 SC 521 : (Deputy Commnr., Hardoi, in charge Court of Wards, Bharawan Estate-V- Rama Krishna Narain & Ors.)

For Appellant - Mr. K.K. Swain.
For Respondents - Mr. Sameer Ku. Das.

Date of hearing : 10.09.2014
Date of Judgment: 19.09.2014

JUDGMENT

DR. A.K. RATH, J.

The appellant has prayed, inter alia, to quash the order and judgment dated 02.12.2003 and 18.12.2013 respectively passed by the learned Single Judge in WP(C) No.18138 of 2013. By order dated 02.12.2013, the learned Single Judge dismissed the application filed by the appellant for addition of the party and eventually allowed the writ petition filed by respondent no.1 by judgment dated 18.12.2013.

2. Though the appeal was listed for admission, this Court heard the matter on the maintainability of the application filed by the appellant in WP(C) No.18138 of 2013 for addition of party.

3. Respondent no.1 as petitioner has filed the writ petition to quash the proceedings dated 21.08.2012 of the Examination Committee of the Utkal University cancelling her result of M.A Odia Non-Collegiate Examination, 1991. The case of the respondent no.1 is that she appeared at the M.A Examination, 1986 under Utkal University. Her registration number was 28628/80. She secured 48.87% of marks. Again, she appeared at the examination for enhancement of marks in the year 1991 and secured 58.5% marks. In all the examinations, the registration number assigned by the University was the same. After completion of the examination, she did her Ph.D in Odia. She was appointed as a Lecturer in Odia in Lakheswar Women's College, Phulnakhara on 3.7.1995. While the matter stood thus, in the proceedings dated 21.08.2012, the Examination Committee of the Utkal University took a decision to cancel her result of M.A Odia Non-Collegiate Examination, 1991. Further case of the respondent no.1 is that neither any letter cancelling her result was communicated to her, nor opportunity of hearing was provided. She came to know about the cancellation of the result

in G.I.A. Case No.809 of 2012 filed by the appellant claiming seniority over her and block grant against the 1st post of Lecturer in Odia.

4. Pursuant to issuance of notice, a counter affidavit had been filed by the Utkal University stating that the authorities had rightly cancelled her result.

5. After hearing the matter at length, the learned Single Judge, in an elaborate judgment, quashed the notification cancelling the result of M.A Odia Non-Collegiate Examination, 1991. It is apt to state here that during pendency of the writ petition, the appellant filed Misc. Case No.17846 of 2013 for addition of the party. By order dated 02.12.2013, the learned Single Judge dismissed the said application.

6. Heard Mr.K.K.Swain, learned counsel for the appellant and Mr.S.K.Das, learned counsel for the respondent no.1.

7. Mr.Swain, learned counsel for the appellant, submitted that respondent no.1 is not at all eligible to hold the 1st post of Odia Lecturer in Lakheswar Women's College, Phulnakhara. She appeared at the M.A. Odia Examination as a regular candidate in the year 1986 and secured 48.87% of marks. After lapse of six years, in the year 1991, she again appeared at the said examination as a Non-Collegiate Examination (private candidate) with the same registration number deliberately suppressing the fact that she had already obtained a master degree from Ravenshaw College. She had also appeared at the same examination in the year 1992. He further submitted that the instruction of the Utkal University to Non-Collegiate (Private) Candidate intending to appear at the Master's Degree in Arts/Science/Commerce/Oriental Learning Examinations of 1991 provides that any registered student of the University, who has passed M.A Examination from the said University or some other University recognized by the Academic Council as equivalent thereto may be permitted to appear at the Master of Arts as Non-Collegiate (Private) Candidate in any branch other than in which he/she was previously examined. Though respondent no.1 passed M.A. examination as a regular candidate from Revenshaw College, Cuttack in the year 1986, but then she appeared at the M.A Odia Examination as a private candidate in the year 1991 with the same registration number. He further submitted that the decision of this Court would have a direct bearing in G.I.A. Case No.809 of 2012 pending before the Education Tribunal, Bhubaneswar. Thus the appellant is a necessary party to the writ petition.

8. Per contract, Mr.S.K.Das, learned counsel for the respondent no.1, supported the judgment and order of the learned Single Judge. He submitted that the appellant is neither a necessary party nor a proper party to the writ petition.

9. Though the provision of the Code of Civil Procedure (hereinafter referred to as "the CPC") may not apply with full vigor, nevertheless a writ proceeding would be governed by the principles analogous to those contained in the CPC so far as they are not inconsistent with the rules made by the High Court on the subject. Thus the principle governed under Order 1 Rule 10 CPC applies to a writ proceeding under Article 226 of the Constitution.

10. The distinction between a necessary party and a proper party is well known. In Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and another, **AIR 1963 SC 786**, the apex Court held that a necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

11. On the anvil of the decision cited supra, we have to examine as to whether the appellant is a necessary party or a proper party to the writ petition filed by respondent no.1. Respondent no.1 filed the aforesaid writ petition challenging the proceedings dated 21.08.2012 of the Examination Committee of the Utkal University cancelling her result of M.A Odia Non-Collegiate Examination, 1991. Thus the Utkal University is a necessary party to the writ petition

12. The next question is whether the appellant is a proper party to the said proceeding. As regards proper parties, the question depends upon the judicial discretion of the High Court in the circumstances of each case. Either one of the parties to the proceedings may apply for impleading of such a party or such a party may suo motu approach the court for being impleaded therein. In Deputy Commr., Hardoi, in charge Court of Wards, Bharawan Estate v. Rama Krishna Narain and others, **AIR 1953 SC 521**, the apex Court held that the eventual interest of a party in the fruits of a litigation cannot be held to be the true test of impleading a person as a party (Emphasis ours).

The principles enunciated in the aforesaid decisions apply with full force to the facts and circumstances of the present case.

13. The eventual interest of the appellant in the fruits of a litigation cannot be held to be the true test of impleading her as a party.

14. In view of the analysis made in the preceding paragraphs, we hold that the appellant is neither a necessary party nor a proper party to WP(C) No.18138 of 2013 filed by respondent no.1. The learned Single Judge has rightly rejected her application for addition of party. Consequently she has no *locus standi* to maintain the present appeal, which is accordingly dismissed. No costs.

Appeal dismissed.

2015 (I) ILR - CUT- 45

AMITAVA ROY, CJ & DR. A. K. RATH, J.

W.P.(C) NO. 19472 OF 2014

M/S. LIFE LINE MEDICAL STORE
(DAY & NIGHT) ……..Petitioner

.Vrs.

ALL INDIA INSTITUTE OF
MEDICAL SCIENCE & ANR. …….Opp.Parties

TENDER – Fresh tender notice issued after cancelling earlier tender process – Action challenged – Power of judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process – Bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda – One cannot challenge the terms and conditions of the tender except on the above stated ground.

In this case the decision of the Opp. Parties in any manner is illegal, arbitrary or mala fide – By no stretch of imagination, it can be comprehended that the condition is tailor made to select a particular person – No personal mala fide has been alleged nor there is anything to show that the decision is not bona fide or actuated by any extraneous consideration.

Case laws Referred to:-

1.(2009) 6 SCC 171 : (Meerut Development Authority-V- Association of Management Studies & Anr.)
2.(2008) 16 SCC 215 : (Siemens Public Communication Networks Pvt. Ltd. & Anr. -V- Union of India & Ors.)

For Petitioner - Mr. Prafulla Ku. Rath,
For Opp.Parties - Mr. A.K. Bose,
Asst. Solicitor General

Date of Hearing : 28.10.2014
Date of Judgment: 28.10.2014

JUDGMENT

DR.A.K.RATH, J.

This writ petition seeks quashing of tender call notice dated 1.10.2014, vide Annexure-1.

2. Bereft of unnecessary details, the short facts of the case of the petitioner are that the Administrative Officer, All India Institute of Medical Sciences, Bhubaneswar, opposite party no.1 (hereinafter referred to as 'AIIMS') issued a tender call notice on 28.2.2014 inviting bids for the purpose of opening the 24 hour Pharmacy shop in its premises, vide Annexure-2. The petitioner, being the owner of the 24 hour medicine shop, had submitted his bid, but then his technical bid was rejected on the ground that he had not submitted the self-attested photocopy of the license for supply of medicines/drug/surgical/consumables/implants/Orthotic and Prosthetic Devices etc. Challenging the same, he filed a writ application, being W.P.(C) No.16544, before this Court. The said writ petition was allowed on 17.7.2014 with a direction to the opposite parties therein to open his financial bid and consider the same along with others. Thereafter, he filed a representation. It is stated that in financial bid he offered the maximum discount. Pursuant to the direction of this Court, the opposite parties opened his financial bid. The opposite parties assured him that the result of the tender process shall be

intimated through internet. When the result was not published, he sent a lawyer's notice to the opposite parties. Though the opposite parties received the notice, but maintained a stony like silence.

3. Pursuant to issuance of notice, a counter affidavit has been filed by the opposite parties 1 and 2. The case of the opposite parties is that the tender for 24 x 7 Pharmacy shop for supply of Medicine(s)/ Drug(s)/Surgical(s)/Consumable(s)/Implant(s)/Ortho and Prosthetic Devices etc. was opened on 24.3.2014. Twenty eight bidders were participated. After the technical evaluation, 16 bidders were technically qualified and 12 were disqualified. The price-bid of those who were qualified in the technical bid was opened on 15.5.2014. The petitioner, who was disqualified, filed a representation pursuant to the direction of this Court. The price bid of the petitioner was opened on 1.8.2014. In the meantime, it was observed that due to a clerical oversight the price-bid of M/s.Om Sai Medical, Cuttack (wrongly mentioned as Bhubaneswar in technical evaluation) was opened instead of M/s. Aum Sai Medical, Berhampur, which was otherwise technically qualified. The representative of the said bidder did not point out the error at the time of opening of the price bid. In view of the same, to avoid future legal complications, Central Procurement Committee had recommended to cancel the tender and invite fresh tender. It is further stated that the opposite parties had taken a policy decision that technically qualified bidder giving highest discount to the patients should be selected as H1. The policy decision was taken to help the needy patients, who can purchase the medicines at subsidized rates. After cancellation of the tender, steps were taken for re-tender. Accordingly, the tender notice was published in the newspaper as well as in the official website of the AIIMs. It is further stated that cancellation of the earlier tender process was published on the website for information of the parties on 23.9.2014.

4. We have heard Mr.P.K.Rath, learned counsel for the petitioner and Mr.A.K.Bose, learned Assistant Solicitor General for the opposite parties.

5. Mr.Rath argues with vehemence that action of the opposite parties in issuing a fresh tender call notice is mala fide. He further submits that condition in the tender notice has been designed to select the person of the choice of the opposite parties who was earlier selected by them. Drawing our attention to the tender call notice vide Annexure-1, Mr.Rath submits that the opposite parties invited tender from the manufacturer and their authorized dealers/ distributors for providing medicines/ drugs/surgical/ consumables/

implants/ Orthotic and Prosthetic Devices etc. He further submits that there is no rhyme or reason to invite tender from the manufacturer and their authorized dealers/distributors, though the earlier tender notice was issued inviting tender from pharmacy/chemistry shop. He further submits that when the petitioner was waiting for the result of the earlier tender process, without cancelling the same, a fresh tender notice has been issued. To buttress his submission, Mr.Rath relies on a decision of the apex Court in the case of ***Meerut Development Authority Vrs. Association of Management Studies and another*** *(2009) 6 S.C.C. 171.*

6. Per contra, Mr.Bose, learned Assistant Solicitor General submits that the petitioner was disqualified in technical bid of the earlier tender. Pursuant to the direction of this Court, his financial bid was opened on 1.8.2014. However, it was found that due to clerical oversight, the price bid of M/s.Om Sai Medical, Cuttack (wrongly mentioned as Bhubaneswar in technical evaluation) was opened instead of M/s.Aum Sai Medical, Berhampur, which was otherwise eligible. In order to avoid future legal complications, the Central Procurement Committee unanimously recommended to cancel the tender process and invite fresh tender notice and issued a tender notice.

7. The sole question that hinges for our consideration is as to whether in the facts and circumstances of the case, the decision of the opposite parties to re-tender is liable to be quashed.

8. After survey of the earlier decisions, the apex Court in ***Siemens Public Communication Networks Private Limited and another Vrs. Union of India and others,*** *(2008) 16 SCC 215*, observed as follows:-

> **"20.** In *Master Marine Services (P) Ltd. V. Metcalfe and Hodgkinson (P) Ltd. (2005) 6 SCC 138, it was observed as follows:-*
>
> *"11.* The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three-judge Bench in *Tata Cellular v. Union of India*. It was observed that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to

refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power in exercised for any collateral purpose the exercise of that power will be struck down. ….."

12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure……"

13. In *Sterling Computers Ltd. v. M & N Publications Ltd.(1) SCC 445,* it was held as under.

'18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision-making process……." By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time……." the courts can certainly examine whether "decision-

making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basis in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract.

14. In *Raunaq International Ltd. v. I.V.R. Constitution Ltd. (1999) 1 SCC 49,* it was observed that the award of a contract, whether it is by a private party or by a pubic body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of the ability to deliver the goods or services as per specifications.

15. The law relating to award of contract by the State and public sector corporations was reviewed in *Airport Ltd. (2000) 2 SCC 617,* and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere."

21. In *B.S.N.Joshi and Sons Ltd. v. Nair Coal Services Ltd. (2006) 11 SCC 548: AIR 2007 SC 437*, while summerising the scope of judicial review and the interference of superior courts in the award of contracts, it was observed as under:

"65. We are not oblivious of the expansive role of the superior courts in judicial review.

66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under:

(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not be ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint."

22. In *Reliance Airport Developers (P) Ltd. V. Airports Authority of India,* (2006) 10 SCC 1, it was observed as follows:

"56. One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (see *State of U.P. v. Renusagar Power C., (1998) 4 SCC 59 : AIR 1988 SC 1737*). At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De. Smith in his classic work *Judicial Review of Administrative Action*, 4th Edn. At PP. 285-87 states the legal position in his own terse language that the relevant principles formulated by the coats may be broadly summarized as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates or another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith must have regard to all relevant considerations, must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act and must not act arbitrarily or

capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

57. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troops, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is *'illegality',* the second *'irrationality'*, and the third *'procedural impropriety'*. These principles were highlighted by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service, 1985 AC 374 : (1984) 3 WLR 1174* : (1984) 3 All ER 935(HL) (commonly known as CCSU case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patiently erroneous, such exercise of power will stand vitiated. (See *CIT v. Mahindra and Mahindra Ltd*.) The effect of several decisions on the question of jurisdiction have been summed up by Grahame Aldous and John Alder in their book *Applications for Judicial Review, Law and Practice* thus:

'There is a general presumption against ousting the jurisdiction of the courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is bone fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers

conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service, 1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL),* this is doubtful. Lords Diplock, Scarman and Roskill appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject-matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.'

77. Expression of different views and discussions in different meetings really lead to a transparent process and transparency in the decision-making process. In the realms of contract, various choices were available. Comparison of the respective merits, offers of choice and whether that chose has been properly exercised are the deciding factors in the judicial review." (emphasis supplied)

While arriving at the aforesaid conclusions, this Court took note of the illustrious case of *Tata Cellular v. Union of India, (1994) 6 SCC 651,* wherein at paras 77 and 94, it was noted as follows:-

"77. The duty of the court is to confine itself to the question of legality. Its concern should be:

(1) whether a decision-making authority exceeded its powers?
(2) committed an error of law,
(3) committed a breach of the rules of natural justice,
(4) reached a decision which no reasonable tribunal would have reached, or
(5) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is

fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.
(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secy. of State for the Home Deptt. ex p Brind*, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, 'consider whether something has gone wrong of a nature and degree which requires its intervention'.
94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the meaner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the *invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an

administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

23. In *Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.(1997) 1 SCC 738,* it was held as follows:

"10. Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favoritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. But on examining the facts and circumstances of the present case and on going through the records we are of the considered opinion that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the appellant. We are not entering into the controversy raised by Mr.Parasaran, learned Senior Counsel that the High Court committed a factual error in coming to the conclusion that Respondent 1 was the lowest bidder and the alleged mistake committed by the consultant in the matter of bid evaluation in not taking into account the customs duty and the contention of Mr.Sorabjee, learned Senior Counsel that it has been conceded by all parties concerned before the High Court that on corrections being made Respondent 1 was the lowest bidder. As in our view in the matter of a tender a lowest bidder may not claim an enforceable right to get the contract though ordinarily the authorities concerned should accept the lowest bid. Further, we find from the letter dated 12-7-1996 that Pradip Port Trust itself has come to the following conclusion;

'The technical capability of any of the three bidders to undertake the works is not in question. Two of the bids are very similar in price. If additional commercial information which has now been provided by

> bidders through Paradip Port Trust, had been available at the time of assessment, the outcome would appear to favour the award to AFCONS."

9. In *Meerut Development Authority* (supra), on which reliance has been placed by Mr.Rath, the apex Court held that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the binding process. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground.

10. On the anvil of the decisions cited supra, we have examined the case. We are unable to hold that the decision of the opposite parties in any manner is illegal, arbitrary or mala fide. The averments are omnibus. AIIMS is a reputed institution of the country. It invited tender from the manufacturer and their authorized dealers/ distributors for providing medicines/drug/surgical/ consumables/ implants / Orthotic and Prosthetic Devices etc. for a period of one year. By no stretch of imagination, it can be comprehended that the condition is tailor made to select a particular person. No personal mala fide has been alleged, nor there is anything to show that the decision is not bona fide or actuated by any extraneous considerations.

11. On an anatomy of the pleadings of the parties and the submissions advanced by the learned counsel for the parties, we are on ad idem that the writ petition, sans any merit, deserves dismissal. Accordingly, the writ petition is dismissed. No costs.

Writ petition dismissed.

2015 (I) ILR - CUT- 58

PRADIP MOHANTY, J & BISWAJIT MOHANTY, J.

W.P.(CRL.) NO. 241 OF 2014

ISWAR CHANDRA BEHERA & ORS. .....Petitioners

.Vrs.

STATE OF ODISHA .....Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S. 2 (u), 24 (8)

Whether Addl. Special Public Prosecutor is competent to initiate confiscation proceeding before the Authorized Officer ? – Held, a Special Public Prosecutor, who is also a public prosecutor is competent to file an application U/s. 13 of Odisha Special Courts Act 2006 before the Authorized Officer and can conduct cases before the said officer.

Case law Referred to:-

1989 Cri. L. J. 2482 : (P.V. Antony & Anr.-V- State of Kerala).

For Petitioners -M/s. G.K.Mishra
For Opp.Party -Mr. Srimanta Das, S .C. (Vigilance)

Date of Order 13.05.2014

ORDER

PRADIP MOHANTY, J.

Heard Mr. Mishra, learned counsel for the petitioner and Mr. Srimanta Das, learned Standing Counsel (Vigilance) Department.

In this writ application, the petitioner prays for quashing of the confiscation proceeding No. 6 of 2012 pending before the Authorized Officer, Cuttack on the ground that the Additional Special Public Prosecutor is incompetent to initiate such a proceeding.

Mr. Mishra, learned counsel for the petitioner submits that the application under Section 13 of the Orissa Special Courts Act 2006 read with Rule 13 (1) of the Orissa Special Courts Rule, 2007 has been filed by the Additional Special Public Prosecutor on 1.6.2012, who according to him is not the competent authority to file such an application. According to him only the Public Prosecutor is competent to file such an application.

Mr. Das, learned Standing Counsel submits that though on 1.6.2012 the confiscation case was initiated by the Additional Special Public Prosecutor, but a notification was published on 25.10.2012 re-designating Additional Special Public Prosecutor in the Court of the Authorized Officer, Special Court, Cuttack as the Special Public Prosecutor and it was indicated in the said notification that the same shall take effect from 21.9.2011. Thus for all purposes a Special Public Prosecutor has filed the application on 1.6.2012.

Mr. Das, learned counsel relying on the decision of the High Court of Kerala in the case of ***P.V. Antony and Anr. V. State of Kerala, reported in 1989 Cri LJ 2482*** submits that the appeal has been filed by the Special Public Prosecutor and the Special Public Prosecutor appointed under sub-section (8) of Section 24 of the Code of Criminal Procedure is a Public Prosecutor and as such a Special Public Prosecutor is competent to file the appeal.

There is no dispute that in this case, the appeal has been filed by a Special Public Prosecutor.

The definition of Public Prosecutor as has been given under Section 2(u) of the Cr.P.C. since relevant, is quoted as hereunder.

2(u) "Public Prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor.

Now coming to Section 24 of Cr.P.C., it may be seen that Sub-section (1) of Section 24, nowhere says that the persons appointed under sub-section (1) of Section 24 alone would be known as Public Prosecutors. Rather, Section 2 (u) of Cr.P.C. makes it clear that any person, who is appointed vide Section 24 is a Public Prosecutor. So, the definition of Public Prosecutor as given in Section 2 (u) of the Cr.P.C. includes a Special Public Prosecutor as appointed under section 24 (8) of the Code of Criminal Procedure.

Further let us have a look at Rule-9 (3) of the Orissa Special Courts Rules, 2007. The same reads as follows:-

> 9. Authorized Officer-
>
> … … …
>
> (3) The State Government may appoint one or more Special Public Prosecutors on such terms and conditions to

make application to the authorized officer and conduct cases before the said officer for confiscation of the money and the other property under the Act.

Considering the aforesaid aspect, it is crystal clear that a Special Public Prosecutor, who is also a Public Prosecutor is competent to file an application under section 13 of Orissa Special Courts Act 2006 before the Authorized Officer and he can conduct cases before the said officer for confiscation of the money and the other property under the said Act.

In the case in hand, the Special Public Prosecutor has filed the application on 1.6.2012, which this Court finds to have been filed in accordance with law. Mr. Mishra, learned counsel for the petitioner urges no other point.

In view of the above, this Court is not inclined to interfere with the impugned order and the writ petition is accordingly dismissed.

A free copy of this order be handed over to Mr. Srimanta Das, learned Standing Counsel (Vigilance).

Writ petition dismissed.

2015 (I) ILR - CUT- 60

PRADIP MOHANTY, J & BISWAJIT MOHANTY, J.

RVWPET NO. 49 OF 2007

LAXMIDHAR DAS ……..Petitioner

.Vrs.

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

CIVIL PROCEDURE CODE, 1908 – S. 114

Review – Order impugned in review petition was passed in the absence of the counsel for the review petitioner – Held, review petition is to be allowed and the matter should be heard on merits.

(Para 10)

Case laws Referred to:-

1.AIR 2013 SC 3301 : (Kamlesh Verma-V- Mayawati & Ors.)
2.2014 (1) OLR (SC) 642 : (N. Anantha Reddy-V- Anshu Kathuria & Ors.)
3.(2000) 10 SCC 264 : (Mahakali Engineering Corporation & Anr.-V- Subramanyam & Ors.)

For Petitioner - M/s. S.S. Das, R. Sahoo, K.Ch. Mohapatra, J.K. Swain.

For Opp.Parties - M/s. B. P. Pradhan, Addl. Govt. Advocate, M/s. T. Pattnaik & S. Pattnaik, M/s. A.P. Bose, R.K. Mohanty, M. Pradhan, S.K. Mohanty & N. Hota.

Date of Judgment: 28.11.2014

JUDGMENT

B. MOHANTY, J.

This Review Petition has been filed by one Laxmidhar Das, who was opposite party no.5 in OJC No.13273 of 2001, with a prayer to review the order dated 5.5.2005 passed by this Court in the said writ application.

2. Heard Mr. S.S. Das, learned counsel for the petitioner, Mr. B.P. Pradhan, learned Additional Government Advocate for opposite party nos.1 to 3 and Mr. A.P. Bose, learned counsel for opposite party nos.6 to 12. None appeared on behalf of opposite party nos.4 and 5.

3. Mr. Das, learned counsel for the petitioner submitted that on 8.7.2000, Pandua Grama Panchayat vide Annexure-1 resolved to appoint a permanent Secretary in the said Grama Panchayat after withdrawal of ban order by the Government. Vide Annexure-2, an advertisement was made on 9.7.2000 fixing various eligibility criteria for the purpose of recruitment of a whole time Secretary. The said advertisement was sent to the offices of the District Panchayat Officer, Jagatsinghpur, Sub-Divisional Panchayat Officer, Block Development Officer, Kujanga and to all the Sarpanchs of different Grama Panchayats falling under Kujanga Panchayat Samiti. A copy of the said advertisement was also sent to the Employment Exchange Officer, Paradeep. As per the advertisement under Annexure-2, it was made clear that the candidates should have passed matriculate Examination and in case, the candidates with matriculation qualification did not apply, candidates with

Class-VII pass and above could also apply. The advertisement dated 9.7.2000 also made it clear that the last date for submitting application form was 24.7.2000. According to Mr. Das, the petitioner put in his application form within due date and supplied necessary certificates. In his application form, the petitioner clearly indicated that his educational qualification was Class-IX pass. In support of that, the petitioner supplied his School Leaving Certificate. According to Mr. Das, only three candidates including the petitioner had put in their application forms for the post of Secretary of Pandua Grama Panchayat. Further according to him none of the candidates was a matriculate. On 25.7.2000, Pandua Grama Panchayat resolved to conduct the necessary tests on 28.7.2000. Accordingly, in the said tests, the petitioner secured highest marks, i.e., 18 out of total 20. This fact has been reflected in Annexure-3. Since the petitioner was found to be more meritorious amongst the available candidates, a Resolution was passed by the Grama Panchayat to appoint the petitioner as Secretary of the Panchayat. In the Resolution under Annexure-3, it was also resolved to write to the District Panchayat Officer–opposite party no.2 for his approval. Accordingly, vide Annexure-4 dated 30.6.2001 the appointment of the petitioner was approved by the District Panchayat Officer with a consolidated pay of Rs.2200/- per month until further orders on certain terms and conditions. One of such condition was to produce the original H.S.C. Examination Certificate. Mr. S.S. Das further submitted that though the petitioner had never claimed that he had passed matriculation Examination, however, a strange condition by way of a direction to produce H.S.C. Certificate was put in the approval order. Mr. Das reiterated that a perusal of the advertisement under Annexure-2 made it clear that in case matriculate candidates were not available, the authorities would consider the case of those candidates, who had passed Class-VII. Since the petitioner had passed Class-IX as indicated earlier, he was rightly allowed to participate in the test conducted by the Pandua Grama Panchayat. Further, Mr. Das submitted that proviso to Rule- 212(b) also made it clear that if any matriculate candidates were not available, a Grama Panchayat can take into consideration the candidates, who had passed M.E. Examination or any other equivalent Examination. Therefore, the petitioner was legally selected in accordance with law and was correctly appointed against the post of Secretary.

4. While the matter stood thus, some of the villagers claiming to be the Ward Members filed OJC No.13273 of 2001 before this Court challenging the appointment of the petitioner as Secretary. In the said writ application, it

was alleged that the present petitioner (who happened to be opposite party no.5 in the writ application) had never passed the matriculate Examination and the so-called certificate furnished by the petitioner (opposite party no.5 to the writ application) is a forged one. The petitioners in OJC No.13273 of 2001 have been arrayed as opposite party nos.6 to 12 in the review petition. The present opposite party nos.6 to 12, in the above noted writ application filed by them also pleaded that the procedure needed for recruitment of Secretary had not been followed. They also pleaded that there was no provision for temporary approval for appointment of Grama Panchayat Secretary. Notice was issued in the writ application and the review petitioner, who happens to be opposite party no.5 in the writ application, appeared through his lawyer by filing Vakalatnama on 18.6.2002. It appears that neither the District Panchayat Officer nor the Pandua Grama Panchayat, who were arrayed as opposite party nos.2 and 4 respectively filed any reply and the review petitioner always remained under the impression that since opposite party nos.2 and 4 were the main parties involved in recruiting him, they would defend his recruitment and appointment. He also remained under the impression that the learned counsel engaged by him would defend his interest. From the order dated 5.5.2005 passed in the writ application, i.e., OJC No.13273 of 2001 it reveals that none has cared to defend his recruitment and appointment and ultimately the matter was disposed of by directing opposite party no.4 to undertake the process of recruitment of Secretary in accordance with Rules 212 and 213 of the Orissa Grama Panchayats Rules, 1968. It was further directed that opposite party nos.2 and 3 to the writ application should implement the aforesaid order dated 5.5.2005 in letters and spirit and no further extension of appointment be granted to the review petitioner (opposite party no.5 in the writ application) even on ad hoc basis and he should not be permitted to handle cash and to directly deal with any other movables and assets of the Panchayat without the prior approval of opposite party no.2. Mr. Das further submitted that in due deference to the order dated 5.5.2005 passed in OJC No.13273 of 2001, the review petitioner was relieved from his post on 16.11.2005 vide Annexure-5 and a Village Level Worker was put in-charge of the post of Secretary of Pandua Grama Panchayat as per Annexure-6. Being aggrieved by the said order, the present review petition was filed by the petitioner.

5. After condoning the delay, notice was issued to the opposite parties on 19.5.2012. Mr. A.P. Bose, learned counsel entered appearance on behalf of opposite party nos.6 to 12. On 29.4.2014, this Court directed opposite

party no.2-District Panchayat Officer, Jagatsinghpur to produce the records of recruitment of Secretary of Pandua Grama Panchayat, 2000. Accordingly, the same was produced before this Court.

6. None of the opposite parties have filed any counter-affidavits. Only opposite party no.2 filed an affidavit pursuant to order dated 24.4.2008 with regard to implementation of order dated 5.5.2005. In the said affidavit, opposite party no.2 made it clear that the post of Secretary in Pandua Grama Panchayat had not yet been filled up and no advertisement had been published for filling up the said post as because the State Government had taken a policy decision to ban the recruitment of the Grama Panchayat Secretaries.

7. According to Mr. Das though after service of notice, the petitioner had appeared through his counsel in the aforesaid writ application, however, without any fault of the petitioner, he went unrepresented on 5.5.2005. As a result of this, in the order dated 5.5.2005 it was indicated that the petitioner, who was opposite party no.5 in the writ application had not appeared even after service of notice. According to Mr. Das, this was clearly an error apparent on the face of record. He further submitted that the petitioner should be allowed to suffer for the fault of his the then Advocate. Secondly, he submitted that the petitioner had never supplied any forged matriculate certificate and accordingly, he pleaded that the Court should go through the records produced by the District Panchayat Officer. Thirdly, he submitted that the records would nowhere show that numerous matriculate candidates applied pursuant to the advertisement and by ignoring such matriculate candidates, the petitioner was selected. Lastly, he submitted that though in the writ application, the petitioners have prayed for quashing Annexures-1, 6 and 7, the Court without quashing the same, had directed opposite party no.4 to undertake the process of recruitment of Secretary in accordance with law. According to Mr. Das, these are all mistakes/ errors, which were apparent on the face of record, which necessitated a review of the order dated 5.5.2005 failing which his client, i.e., the review petitioner would be highly prejudiced.

8. Opposing the submissions made by Mr. Das, Mr. Pradhan, learned Additional Government Advocate vehemently submitted that the review petitioner had not been able to make out a case for review within the parameters of law. Hence, he prayed for dismissal of the review petition. In this context, he placed reliance upon the decisions of the Hon'ble Supreme

Court in the cases of **Kamlesh Verma** v. **Mayawati and others (AIR 2013 SC 3301)** and **N. Anantha Reddy** v. **Anshu Kathuria and others (2014 (1) OLR (SC) 642)**.

9. Mr. Bose, learned counsel for opposite party nos.6 to 12 did not object to the prayer made by the petitioner in the peculiar facts and circumstances of the case.

10. A perusal of record of OJC No.13273 of 2001 would show that the review petitioner had appeared through his lawyer by filing Vakalatnama on 18.6.2002. Once a person engages a lawyer, he naturally remains under the impression that his case would be best defended by the Advocate. However, in the present case, it appears that while the matter was taken up on 5.5.2005, nobody appeared on behalf of the petitioner (who was opposite party no.5 in the writ application) as a result of which this Court recorded a finding that opposite party no.5, who happened to be the review petitioner, has not appeared after service of notice. Thus, the review petitioner has gone unrepresented while the matter was disposed of on 5.5.2005. It is well settled that for the fault of the Advocate, a party should not be penalized. In the case of **Mahakali Engineering Corporation and another** v. **R.C. Subramanyam and others** reported in **(2000) 10 Supreme Court Cases 264,** it has been held that where an order impugned in the review petition was passed in absence of counsel for the review petitioner, the High Court ought to have allowed the review and heard the matter on merits. In *N. Anantha Reddy's* case (supra) and *Kamlesh Verma's* case (supra) the facts are totally different. Those cases do not involve lack of due diligence on the part of the Advocate when the matter was being heard. Thus, the facts of both the cases are different from the facts of the present case. Even otherwise in both the above noted cases, the Hon'ble Supreme Court had made clear that the order/judgment should not be reviewed if there is no error/mistake apparent on the face of the record. Here, the finding of this Court on 5.5.2005 that opposite party no.5 (review petitioner) after service of notice has not appeared is clearly mistake or error apparent on the face of record inasmuch as by filing Vakalatnama on 18.6.2002, the present petitioner as opposite party no.5 in the writ application has clearly appeared through an Advocate. Thus, it is a case where for the fault of the lawyer, the petitioner has suffered the order passed on 5.5.2005.

11. In view of the above, this Court sets aside the order dated 5.5.2005 passed by this Court in OJC No.13273 of 2001 and restores the writ application to its original file. The Review Petition is accordingly allowed. No costs.

Petition allowed.

2015 (I) ILR - CUT- 66

VINOD PRASAD, J & PRAMATH PATNAIK, J.

CRLA NO.16 OF 2006

MANGALA GOUDA ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

CRIMINAL TRIAL – Murder of wife – Younger son and elder daughter-in-law of the appellant are eyewitnesses to the occurrence – No reason for them to falsely implicate the appellant – Motive for committing the crime is that the appellant had extra marital relationship with another lady for which the deceased refused to provide him food – Son of the appellant though an infant at the time of occurrence was six years of age at the time of deposing in the Court – He was tested by the presiding officer and was found to be fit to give evidence in the Court – Held, the conviction and sentence recorded by the trial Court is confirmed. (Paras 9 to 13)

Case laws Referred to:-

1.(2014) 57 OCR 249 : (Birbara Kandi-V- State of Orissa)
2.1995 CRI. L.J. 1484 : (Madkami Laka-V- State of Orissa)

For Appellant - M/s. J.K. Panda, A.R. Mohanty, Anima Kumari Dei
For Respondent – Mr. Sk. Zafarulla, Addl. Standing Counsel

Date of hearing : 20.11.2014
Date of judgment: 20.11.2014

JUDGMENT

VINOD PRASAD, J.

Challenge in this appeal by the sole appellant- Mangala Gouda, who is the husband of the deceased, is to the impugned judgment of his conviction dated 30.09.2005 for offence U/s 302 I.P.C. and sentence of life imprisonment with fine of Rs.5000/- and in default of payment of fine to serve six months additional rigorous imprisonment recorded by Additional Sessions Judge, Jeypore, in Crl. Trl. No. 10 of 2005.

2. Shorn of unnecessary details, the charge against the appellant is that on 9.9.2004 at 2 P.M. he has committed uxoricide by murdering his wife Bimala Gauda, in their house by slicing her neck with a knife for the motive that appellant had extra marital relationship with another woman for which deceased had declined to prepare meals for him.

This murder was reported to Balram Gauda/PW6, elder son of the appellant and the deceased in the cashew nut field by his younger brother Purna Gauda/PW2 and in turn PW6 reported the incident to Ward Member Smt. Sombari Polai/PW4, who got the FIR, Ext.2, slated through her husband Gopinath Polai/ PW.5 and then she lodged it same day at 4 P.M. at Koraput Town Police Station after tramping a distance of 5 Kms.

Officer-in- charge Koraput P.S. Hemant Kumar Pandhi/PW7, who is the I.O. of the crime, immediately commenced investigation of the incident, during course of which conducted inquest on the dead body of the deceased and prepared inquest memo, Ext.3, slated down the interrogative statements u/s 161, Cr.P.C. of the informant and the witnesses, collected blood stained and sample plain earths from the spot vide seizure memo Ext.4, seized weapon of assault, i.e. knife lying at the spot and prepared it's seizure memo,Ext.8 and sketched spot map, Ext 7. Cadaver of the deceased was dispatched for autopsy through constable Bhagaban Bhotra with command certificate Ext.1. Dead body chalan is Ext.9. Subsequently the I.O. got information from Gopinath Polai on 10.9.2004 that the present appellant-accused had also attempted to commit suicide by jumping from the roof of a railway cabin and had sustained fracture of his right leg and was admitted in the hospital and there he was arrested by the I.O.

Autopsy on the deceased corpse was performed by the doctor Dr. Kedarnath Choudhury/ PW.8 on 10.9.2004 at 10 A.M. Rigor mortis was

present over the dead body. From doctor's deposition it is evident that the deceased had sustained one deep stab wound on the left side of the neck about 10 C.M. away from the root of the neck. The wound was 25 C.M. deep and 5 C.M. in length with 2 C.M. width extending from the root of the neck down to the shoulder and media stinum. It had cut the muscles of the root of the neck and also the internal carotid artery of the left side. The wound had pierced through the apex portion of upper lobe of left lung cutting the left lung. There was huge collection of blood in the left mediastival cavity. The cut had also fractured the first and second ribs of the left side. According to doctor the injury was possible by a sharp cutting weapon and was ante-mortem in nature and cause of deceased death was haemorrhage and shock as there was cut of the internal carotid artery and upper part of left lung with huge collection of blood. The injury was on the vital part of the body, which was grave in nature and was sufficient in the ordinary course of nature to cause death.

Having found sufficient evidence and prima facie case for prosecuting the appellant, I.O./PW7 Charge Sheeted the appellant under Section 302 IPC.

3. In usual course, observing the criminal trial procedure, case of the appellant was committed to the Court of Session for trial, where it was registered as Criminal Trial No. 10 of 2005. Appellant was charged with the offence u/s 302 IPC and since he abjured that charge, to establish his guilt, his prosecution for that offence commenced.

4. During course of trial, prosecution, in an endeavour to establish the charge against the accused appellant, examined in all eight witnesses, out of whom Purna Gouda/ PW.2 and Mahima Gouda/ PW.3, son and daughter-in-law of the deceased as well as of the appellant, appeared as eye witnesses to the incident. Elder son of the appellant and the deceased Balram Gauda/PW6, who is also the husband of PW4 also testified against the appellant father. Dr. Kedarnath Choudhury/PW.8 had performed autopsy on the cadaver of the deceased. Hemanta Kumar Padhi/ PW.7 is the I.O. Samari Palei/ PW.4, Ward Member is the informant and her husband Gopinath Palei/ PW.5 is the scriber of the FIR.

5. Learned trial judge after scanning through the evidence both oral and documentary and after vetting through facts and circumstances concluded through the impugned judgment and order that prosecution had successfully

anointed appellants guilt convincingly and therefore, convicted him for the framed charge of murder under section 302, IPC and sentenced him to imprisonment for life with fine of Rs.5000/-(Rupees five thousand) and in default to undergo additional six months R.I. Challenge in this appeal is to the aforesaid conviction and sentence.

6. In the background of the aforesaid facts and circumstances, that we have heard Sri J.K.Panda, learned counsel for the appellant and Sri Sk. Zafarulla, learned Additional Standing Counsel for the State for and against this appeal.

7. Assailing and castigating impugned trial court's order, appellant's counsel incisively urged that prosecution version is full of discripancies galore and do not inspire confidence and consequently appellant's conviction is unsustainable and in any view the offence established will not traverse purview of Section 304, Part-I, IPC. Articulating the submissions and elaborating it, learned counsel harangued that the incident was preceded by an altercation and all of a sudden in the heat of moment loosing self control that the appellant had inflicted a single blow and therefore, guilt of the appellant will not be covered within the purview of Section 302 IPC and in support of the submission, learned counsel relied upon decisions in **Birbara Kandi Vrs. State of Orissa**, (2014) 57 OCR 249 and **Madkami Laka Vrs. State of Orissa**, 1995 CRI.L.J. 1484.

9. Submitting to the contrary learned Additional Standing Counsel refuted appellant's contentions and argued that close relatives and family members of the appellant, who had no reason to falsely implicate him are the eye witnesses of the incident and have nailed-in the appellant as the perpetrator of the crime and hence there is total absence of any reason to absolve the appellant of the crime. Motive to commit the murder existed because of illegal infatuated relationship of the appellant and was enough for the appellant to satiate his grouse. Examined from any angle , the guilt is well established and resultantly the appeal lacks merit and be dismissed and impugned decision be concurred.

10. We have weighed to the argument of both the sides and have gone through the record. The fact in the present case, like in a very very monogamous where the appellant was charged with slicing the neck of his wife. The younger son of the appellant, namely, Purna Gouda (PW.2) and his daughter-in-law PW.3-Mahaima Gouda (elder son's wife) have appeared as

eye witnesses. PW.2 was a boy at the time of giving evidence; he was six years of age. To understand his mental faculty, learned trial judge had taken a precautionary step of examining him by putting certain questions. The aforesaid witness in no uncertain terms categorically replied to those questions with lucidity and, therefore, he was found to be fit to give statement in court. In his examination in chief, PW.2 has graphically described the incident and has deposed before the court that on the date of incident, i.e. on a Thursday, at 2.00 P.M., when he was sitting with his mother and elder brother's wife inside their house, appellant arrived there threatening his mother and suddenly stabbed his mother on the left side of her neck with a knife. The mother sustained bleeding injury and died at the spot and thereafter the appellant ran away from the spot throwing away the knife. Prior to the incident, the mother had taken her lunch. In cross-examination, this portion of the incident has not been challenged by the defence at all. No questions have been put to this witness (PW.2) to discredit his otherwise trust inspiring testimony. Therefore, we do not find any reason to disbelieve the son, who was a witness to the murder of his own mother. In view of the aforesaid, since we find that PW.2 is a reliable witness and his testimony cannot be discredited, therefore, we hereby find no reason to absolve the appellant of the said crime.

11. The doctor PW.8 has specifically stated that the injury sustained by the deceased was sufficient in ordinary course of nature to cause death. According to his deposition, the deceased had sustained Thus, the deposition of the doctor leaves no manner of doubt that the deceased met with a homicidal death because of the above sustained injury. In the cross examination of the doctor, not even one question has been asked regarding such an injury described as above and therefore, we reach at the irresistible conclusion that the deceased had died an homicidal death because of the aforesaid injury.

12. In view of the aforesaid fact, reading the evidence of the doctor, supplemented by the evidence of eye witness PW.2, which is also corroborated by PW.3, we do not find any reason favouring the appellant.

13. At this juncture, we would like to advert to the appellant's contention that the crime will not be one of murder under section 302 IPC, but will be within the ambit of Section 304, Part-I, IPC. We are unable to subscribe to the said view and in our opinion the said contention must be repelled out right. There was no reason for the appellant to come to the house, where the

deceased was lying after having lunch and to slice her neck without any rhyme or reason and inflict on her such an injury as has been described above. The motive for committing the crime was also spelt out by the witnesses, wherein it is said that the appellant was having an extra marital relationship with another lady and was living with her away from the family, because the wife was not providing food to him and, because of his above licensus conduct. She had to give her life because of the most disrespectable attitude of the appellant.

14. Turning to both the judgments, we do not find that the facts and circumstances were akin to the present case and therefore, we do not consider it necessary to delve deep into the above cited judgments. In none of the two judgments the son was a witness against the father in the murder case of his mother. That apart, every case has to be decided on its own peculiar facts and circumstances and in the light of the evidence against the accused. In the present case since we find that there was no reason for the son to tell a story against his own father, we find the present appeal is meritless.

15. We don't find any merit in this appeal for the reasons stated hereinabove. Since we find that PW.2 is reliable and trustworthy witness and is corroborated by PW.3, we don't find any reason to scale down the offence.

16. The appeal is meritless and is hereby dismissed and the conviction and sentence of the appellant as recorded by the learned trial judge is confirmed. The appellant is in jail, he shall remain in jail to serve out the remaining part of the sentence.

17. Let a copy of this judgment be communicated to the learned Trial Judge for intimation.

Appeal dismissed.

2015 (I) ILR - CUT- 72

VINOD PRASAD, J & PRAMATH PATNAIK, J.

CRLA NO. 492 OF 2012

POTI @ SUNDARSINGH GOND .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Murder of two kids – None has seen the appellant with the deceased kids prior to their missing – Confessional statement of the appellant before police was not strong enough to fasten guilt on him – Prosecution has failed to examine the priest of the deity where the appellant in order to satisfy the Goddess had committed murder of the kids – Neither the weapon of offence nor the wearing apparels of the accused recovered on the basis of his disclosure statement contain any blood, which castes serious doubt on the prosecution case – The entire case having based on circumstantial evidence and the chain having not been completed, the benefit of doubt ought to be extended to the appellant – Held, the impugned judgment of conviction and sentence are set aside.

(Para 16)

(**Case laws Referred to:-**

1.AIR 1992 SC 840 : (State of U.P.-V- Ashok Kumar Srivastava)
2.AIR 1984 SC 1622 : (Sharad Birdhichand Sarada-V- State of Maharastra).
3.AIR 1990 SC 79 : (Padala Veera Reddy-V- State of Andhra Pradesh & Ors.)
4.AIR 1996 SC 3390 : (C. Chenga Reddy & Ors.-V- State of A.P.)

For Appellant - M/s. Niranjan Panda, S.K. Rout
For Respondent - Mr. S.K. Safarulla (ASC).

Date of hearing : 13.11.2014
Date of judgment : 03.12.2014

JUDGMENT

PRAMATH PATNAIK, J.

This criminal appeal has been preferred challenging the impugned judgment dated 30.07.2012 passed by the learned Sessions Judge, Nabarangpur in Criminal Trial No.11 of 2008 convicting the appellant under

Sections 364/302/201, I.P.C. and sentencing him to undergo R.I. for life and pay fine of Rs.10,000/- and to undergo further R.I. for two years, under Section 302, I.P.C. and to undergo R.I. for 10 years under Section 364, I.P.C. and to undergo R.I. for two years, under Section 201, I.P.C. and learned Sessions Judge directed all substantive sentences to run concurrently subject to set off all the period already undergone by the appellant convict as U.T.P. as per Section 428, Cr.P.C.

2. Shorn of unnecessary details, the prosecution case as revealed from the F.I.R. in a nut-shell is that on 11.09.2007 two small kids both aged about five years old namely Gudu, son of Manbodh Gond (P.W.9) and Dablu son of Kartik Gond (P.W.4) were found missing from the rear side of the house of the informant namely Duksai Gond (P.W.2) while they were playing. After being informed about the missing of the said two kids from his wife, P.W.2 along with others made frantic search in different places to trace out the missing kids. Ultimately, the informant and father of the two kids were able to locate the beheaded body of the two kids from the nearby nursery adjacent to the village and the cut heads of the two kids were found at a distance kept lying beneath a tree wrapped with a towel. The said unfortunate incident was reported to the Raigarh Police Station and the case was registered thereon. In course of investigation, inquest was held over the dead bodies and the same was sent for post mortem examination. The witnesses were examined and the accused was apprehended. While in police custody it came to the notice of the Investigating Officer that the appellant accused under superstition and blind belief to satisfy one goddess sacrificed the two kids in a brutal and gruesome manner by means of an axe which was the admission of the appellant accused in extra judicial confession. The appellant accused also disclosed the place of concealment of the weapon of offence, i.e., axe with which two kids were killed, which led to recovery and seizure of the said weapon of offence along with his lungi and banian from his house. After completion of investigation, the police submitted charge sheet under Sections 364, 302 and 201, I.P.C. against the accused. The case was committed to the Sessions Court for trial, where the accused was charged with offences as above and since he denied those charges his prosecution commenced.

3. The prosecution to prove the case to the hilt has examined as many as 15 witnesses including the informant P.W.2. P.W.1 is the autopsy doctor. P.W.3 is the wife of the informant. P.Ws.4 and 9 are the fathers of the two deceased kids, namely, Dablu and Gudu, who were witnesses to the inquest. P.W.5 is the scribe of the F.I.R. so also P.Ws.5 and 6 are witnesses to the

confessional statement made by the accused before the I.O. followed by recovery and seizure of the weapon of offence and wearing apparels of the accused. P.Ws. 7 and 12 are witnesses to the collection of nail clippings of the accused by the doctor. P.W.8 is the police constable, who was escorted the dead bodies for post mortem examination. P.W.13 is the witness to the seizure of wearing apparels of the deceased kids. P.W. 14 is the post occurrence witness. P.W. 15 is the initial I.O. and P.W. 10 is the subsequent I.O. who submitted the charge sheet after completion of investigation.

4. The defence plea is one of denial and false implication.

5. Learned trial court taking into account the cumulative effect of circumstantial evidences which were found to be in-compatible with the innocence of the accused or with the guilt of any other person, came to the conclusion that in all probabilities it was the appellant accused who committed gruesome murder of the two deceased kids and the conduct of the appellant unerringly pointed out his guilt and to be the author of the crime. Accordingly learned trial court from the evidence on record, fastened the culpability on the appellant accused under Section 302, I.P.C. and convicted and sentenced him as above. Hence this appeal.

6. Mr. N. Panda, learned counsel for the appellant has assailed the impugned judgment mainly on the following grounds :-

(i) That the entire case of prosecution which is built up on circumstantial evidence has not been supported by any corroborative material to fasten the guilt on the accused.

(ii) Learned Sessions Judge ought not to have relied on the extra judicial confession of the accused appellant to sustain the guilt under Section 302, I.P.C. and convict the appellant considering the extra judicial confession before the police was hit by Section 25 of the Indian Evidence Act. Moreover the circumstantial evidence being a weak piece of evidence, no conviction could have been made basing on a circumstantial evidence.

(iii) Learned Sessions Judge although admitted the entire contents of Ext.13 are not admissible in the evidence under Section 27 of the Indian Evidence Act but failed to appreciate settled position of law that the burden lies on the prosecution to establish a close link between the discovery of material objects and its use in the commission of offence.

(iv) Learned Sessions Judge has erred in accepting the evidence leading to discovery the alleged weapon Tangia which did not contain any blood spot/stain and the same was hit by Section 8 of the Indian Evidence Act.

(v) Learned Sessions Judge ought to have considered the omission on the part of prosecution for not examining the priest of the deity before whom the alleged sacrifice of the two kids have been made which whereby prosecution failed to prove the case to the hilt.

(vi) Learned Sessions Judge ought to have considered on the evidence of P.Ws.5 and 6 which appeared to be discrepant so far as disclosure statement of the accused appellant before the I.O. relating to Oriya, Linea or Chhatisgarh language are concerned though the learned Sessions Judge has not given much credence to that part of the testimony of P.Ws.5 and 6.

7. On the other hand, Mr. S.K. Zafarulla, learned Additional Standing Counsel vehemently submits that from the totality of circumstances the irresistible conclusion is that the accused appellant after kidnapping the two deceased kids with intention to sacrifice them to the deity and deliberately beheaded the head from the trunk so as to cause disappearance of evidence of commission of murder and to screen himself from legal punishment therefor. Therefore, none but the appellant was the author of the crime. Learned counsel for the State supports the conviction recorded by the learned Sessions Judge and submits that the impugned order of conviction and sentence does not warrant any interference by this Court.

8. We have perused the lower court record and gone through the evidence of the prosecution witnesses minutely. At the outset, it may be noted that none has disputed that the death of the two deceased kids was a homicidal one.

9. P.W.1 is the Medical Officer who conducted the autopsy of two deceased kids Dablu Gond and Gudu Gond has opined that the cause of death is due to complete transaction of spinal cord, treachea, oesaphagus, blood vessels and mussle mass due to sharp cutting wound at the base of neck and the nature of death is homicidal.

P.W.2, the informant, has testified that on being informed by his wife about missing of the two children playing near his house, he reported the

matter on the next day, i.e., Wednesday at the police station. On Thursday the informant along with villagers made frantic search and could detect the dead body of the two kids lying inside the nursery of his village which is one kilometer away from his village. The dead bodies were found without their heads. The cut heads were found at a distance kept lying beneath a tree being wrapped with a towel. He had further testified that his wife reported that the accused appellant had been to their house on Tuesday during his absence and the informant put his LTI in the F.I.R. The F.I.R. being drafted by one Raisingh and the F.I.R. was read over and explained to him. The dead bodies were identified by them.

P.W.3 in her deposition had stated that at the relevant time the appellant accused came to her house and asked whereabout her husband. The appellant then went away to the backside yard of her house. When she went backside, she did not find the two kids playing there. The appellant was wearing a banian and a towel was on his shoulder and the appellant was holding an axe. At about 4 P.M. she reported the matter to her husband regarding missing of the two kids. During search on Wednesday, the villagers found the appellant accused moving around the place from where the dead bodies were recovered on Thursday by police. She also stated before the police that she suspected the appellant accused to have had killed the two children.

P.W.4 is the father of deceased kid Dablu Gond. He had stated that the two kids were playing behind the house of Duksai Gond (P.W.2). He had informed at 4 P.M. that his son and son of Manbodh Gond were missing. It was the Tuesday. P.W. 4 and the villagers searched but could not trace out the kids on that night. On the next day the matter was reported at the police station. On Thursday during search the villagers found the dead body of the two children without their heads. The two dead bodies were lying at two different places. Then his brother Duksai Gond went to the police station to lodge an F.I.R. They had also found two cut heads of the said two kids being wrapped with a towel kept beneath a tree. They identified the dead bodies of said two kids. The appellant had been to their house on the date of occurrence as reported by Jaybati (P.W.3). In the cross-examination by the defence, P.W.4 had testified that the appellant accused used to come to their house.

P.W.5 drafted the F.I.R. as per the instruction of P.W.2 and the contents of the F.I.R. was read over and explained to the informant and after

going through the contents, the informant P.W.2 has put LTI. P.W.5 had stated that in his presence that the appellant had confessed before the police that 20 days prior to the incident out of illness his daughter succumbed to the death and it was rumored in the village that his daughter was killed by the goddess. P.W.5 had further testified that the appellant has confessed his guilt to have committed the murders of two kids and the appellant also disclosed before the police that he had kept concealed the alleged weapon tangia, lungi and banian in his house. Ext.11 is the seizure list. Ext. 11/1 is his signature. M.O.I is the tangia recovered by the police. M.O.II is the lungi and M.O.III is the banian. The wearing apparels of the appellant were seized in his presence. Ext.12 is the seizure list. Ext.12/1 is his signature. The confessional statement was recorded by the police in his presence. Ext. 13 was the statement recorded under Section 27 of the Indian Evidence Act. Ext.13/1 is his signature.

P.W.6 in his deposition had stated that he along with Raisingh P.W.5 had been to the police station where the appellant accused was found there being arrested by police. The appellant accused confessed to have killed two kids by means of a tangia. The appellant also disclosed that he would give recovery of the alleged tangia. Accordingly, P.W.6 along with P.W.5 and police went to the house of the appellant. The police seized the articles. Ext.11/2 was his signature. The confessional statement of the appellant accused was recorded in his presence. Ext.13/2 was his signature.

P.W.9 is the father of deceased Gudu. He has corroborated the version of P.W.4.

P.W.15 is the O.I.C. of Raigarh Police Station who has conducted the investigation. In course of investigation, P.W.15 examined the complainant and other witnesses. He also held inquest over the dead bodies of the two kids. The post mortem was conducted by the doctor over the dead bodies of the two kids and P.W.15 seized the wearing apparels of two deceased kids along a towel and prepared the seizure list. On 15.09.2007, P.W.15 apprehended the appellant and brought him to police station for interrogation. In course of interrogation, the appellant while in police custody had confessed his guilty for commission of killing two kids.

10. The sole question to be determined/answered in this appeal is whether the prosecution has proved its case against the appellant to the hilt and beyond all reasonable doubts basing on circumstantial evidence.

11. The Hon'ble apex Court for proper appreciation of circumstantial evidence, in the case of ***State of U.P. –vrs.- Ashok Kumar Srivastava,*** AIR 1992 SC 840, observed in paragraph-9 that:-

> "xx xx xx only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negatived on evidence." Great care must be taken in evaluating circumstantial evidence and if the evidence relied on "is reasonably capable of two inferences, the one in favour of the accused must be accepted." The circumstance relied upon must be found to have been fully established and the "cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. xx xx xx"

12. In the case of ***Sharad Birdhichand Sarda –vrs.- State of Maharastra,*** AIR 1984 SC 1622, the apex Court observed that while dealing with circumstantial evidence, the onus is on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in appraising circumstantial evidence as laid out in paragraph- 153 are :

> "(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 so 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."

13. The Hon'ble Supreme Court also laid out the following grounds in ***Padala Veera Reddy –vrs.- State of Andhra Pradesh and others,*** AIR 1990 SC 79 at paragraph-10 that :-

> "(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

14. The Hon'ble Supreme Court further observed in the case of ***C. Chenga Reddy and others –vrs.- State of Andhra Pradesh,*** AIR 1996 SC 3390, at paragraph-20-A that :-

> "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."

15. In the instant case, learned Sessions Judge basing on the evidence of P.Ws.2 and 3 came to the conclusion that the appellant accused was seen with a Tangia prior to the missing of the deceased two kids. Secondly the suspicious movement of the accused appellant near the place where the cut

heads of the deceased kids were lying wrapped in a towel and the confessional statement of the appellant accused before the police coupled with medical evidences indicating the possibilities of the deceased kids being killed by the said weapon vide M.O.I. were also found establishing culpability of the appellant.

16. The prosecution case appears to have been based on assumption, presumption surmises and conjectures. The most notable feature which has been lost sight by the learned Sessions Judge is that none has seen the appellant accused with the deceased kids prior to their missing. Therefore it raises serious doubt as to the culpability of the appellant accused in the commission of offence. Moreover the confessional statement before the police by the appellant accused was not strong enough of evidence to fasten guilt on the appellant accused. The prosecution has failed to examine the priest of the so-called deity so as to come to a definite finding that the appellant accused in order to satisfy the goddess had kidnapped the deceased kids for commission of murder. Had the priest of the goddess would have been examined it would have thrown light on the culpability of the appellant, the same having not been done, it has weakened the prosecution case. The so-called weapon of offence which has been recovered on the basis of the disclosure statement of the accused appellant did not contain the blood so also the wearing apparels of the accused appellant did not contain any blood which castes serious doubt on the prosecution story. Since the entire case hinges on the circumstantial evidence, the chain having not been completed, the benefit of doubt ought to be extended to the appellant accused. Therefore we are unable to appreciate the conclusion arrived at by the learned Sessions Judge so as to conclusively find the guilt of the accused appellant established beyond all reasonable doubts.

17. In view of the discussions made in the foregoing paragraphs, we are not able to concur with the findings of the learned Sessions Judge. We hold that the prosecution has failed to establish the case against the appellant beyond all reasonable doubts.

18. In the result, the appeal is allowed and the impugned judgment dated 30.07.2012 and order of conviction and sentence are set aside and the appellant is acquitted of the charge under Sections 364/302/201, I.P.C. He shall be set at liberty forthwith, if not required, in connection with any other offences. The appeal is allowed.

Appeal allowed.

2015 (I) ILR - CUT- 81

INDRAJIT MAHANTY, J & B.N.MAHAPATRA, J

W.P.(CRL) NO. 223 OF 2014

PRASANT @ KALIA SUNDRAY .....Petitioner

.Vrs.

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

NATIONAL SECURITY ACT, 1980 – S. 3(2)

Order of detention – Unexplained delay of 17 days by the state Government in forwarding the detenu-petitioner's representation to the central Government – There is also delay by the Central Government in dealing with such representation – Representation of the petitioner not having attended properly, it infringes the fundamental right of the petitioner guaranteed Under Article 22 of the Constitution of India – Detenue petitioner is entitled to be set at liberty forthwith if his detention is not required in connection with any other case.

(Para-6)

Case laws Referred to ;-

1. 2014(I) ILR-CUT-889 : (Bikash Munda vs. State of Odisha & Ors.,)
2. AIR 1989 SC 1403 : (Aslam, Ahmed Zahire Ahmed Shaik vs. Union of India and Ors,,)
3. AIR 1981 SC 1077, : (Smt. Khatoon Begum Vs. Union of India and Ors,)
4. AIR 1981 SC 111, : (Saleh Mohammed vs. Union of India and Ors,)
5. AIR 1994 SC 575 : (Noor Salman Makani vs. Union of India & Ors.)
6. (2010) 47 OCR (SC) 684 : (Smt. Pebam Ningol Mikoi Devi vs. State of Manipur and Ors.,)
7. 2006 (II) OLR 591 : (Bijaya Parida vs. State of Orissa and Ors,)
8. 2000(2) Crimes 424 : (Shanina Begum vs. State of Orissa and Ors,)

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

For Opp. Party - M/s. M.S. Sahoo Addl. Standing Counsel
M/s. J.K.Khandayatra Central Govt. Counsel

Date of hearing : 25.11.2014
Date of Judgment: 29.11.2014

JUDGMENT

I. MAHANTY, J.

This writ application in the nature of habeas corpus has been filed by the petitioner-Prasant @ Kalia Sundray, inter alia, seeking to challenge his detention under Section-3(2) of the National Security Act, 1980.

2. Shorn of unnecessary detail suffice it is to note herein that, the petitioner has been detained on 1st of March, 2014 under Section-3(2) of the National Security Act, 1980 and till date, he is under jail custody at the Special Jail, Bhubaneswar. The petitioner was served with a copy of the detention order on 03.03.2014 purportedly without enclosing necessary documents basing upon which the charges had been made.

On 11.03.2014, the petitioner has submitted his representation to the State Government, Central Government as well as to the N.S.A. Advisory Board through the Superintendent of Special Jail, Bhubaneswar. The State Government on 28.03.2014 has forwarded the representation of the petitioner along with the para-wise comments to the Central Government as well as to the N.S.A. Advisory Board. The Central Government in the Ministry of Home Affairs received the representation of the detenu on 04.04.2014. Thereafter on 10.04.2014 the State Government has rejected the detenu's representation but failed to communicate the same to the petitioner and on 11.04.2014, the Central Government in the Ministry of Home Affairs has also rejected the representation and sends a copy of the same to the petitioner through post. On 20.04.2014, the petitioner has received the rejection order of the Central Government. Ultimately, the order of rejection of the petitioner's representation by the State Government was also communicated to the petitioner on 21.04.2014.

3. The aforesaid facts and dates are not in dispute. Although various contentions were raised in the pleadings as well as in course of hearing, learned counsel for the petitioner confined his arguments to the alleged undue delay caused by the State Government and the Central Government in dealing with the representation of the petitioner.

Mr. K.P. Mishra, learned counsel for the petitioner submits that it is not in controversy that the petitioner made his representation to the State Government, Central Government and N.S.A. Advisory Board on 11.03.2014 and the State Government forwarded the same to the Central

Government as well as to the N.S.A. Advisory Board only on 28.03.2014 i.e after a period of delay of 17 days. Thereafter, although the State Government purportedly rejected the petitioner's representation on 10.04.2014, orders thereof were communicated to the petitioner only on 21.04.2014. Insofar as the representation to the Central Government is concerned, it is submitted that although, the Central Government received the petitioner's representation (sent through the State Government) on 04.04.2014 along with the para-wise comments of the State, admittedly the Central Government ultimately rejected the representation of the petitioner on 11.04.2014 which was received by the petitioner only on 20.04.2014.

4. Learned counsel for the petitioner submits that neither in the affidavit of the State Government nor in the affidavit of the Central Government have any explanation been given as to the delay caused in dealing with the petitioner's representation and in this respect placed reliance upon a judgment of this Bench in the case of ***Bikash Munda vs. State of Odisha & Ors., 2014(I) ILR-CUT-889.***

5. In the aforesaid judgment this Court referring the judgment of the Hon'ble Supreme Court in the cases of ***Aslam, Ahmed Zahire Ahmed Shaik vs. Union of India and others***, AIR 1989 SC 1403, ***Smt. Khatoon Begum Vs. Union of India and others,*** AIR 1981 SC 1077, ***Saleh Mohammed vs. Union of India and others,*** AIR 1981 SC 111, ***Noor Salman Makani vs. Union of India & Ors.*** AIR 1994 SC 575 and ***Smt. Pebam Ningol Mikoi Devi vs. State of Manipur and Ors.***, (2010) 47 OCR (SC) 684 as well as the judgment of this Court in the cases of ***Bijaya Parida vs. State of Orissa and others,*** 2006 (II) OLR 591 and ***Shanina Begum vs. State of Orissa and others,*** 2000(2) Crimes 424 concluded as follows:

> "Law is well settled that the representation of the detenu under the Act must be attended to promptly, as the same infringes the fundamental rights of the detenu guaranteed under the Article 22 of the Constitution."

6. In view of the aforesaid authoritative pronouncement as noted hereinabove, there has been unexplained and arbitrary delay of 17 days by the State Government in forwarding the detenu-petitioner's representation to the Central Government and, consequently, there has also been unexplained delay by the State Government as well as by the Central Government in dealing with the representation made by the detenu-petitioner. Therefore, since the representation of the detenu-petitioner has not been dealt with or

attended to promptly, the same infringes the fundamental rights of the detenu-petitioner guaranteed under Article 22 of the Constitution.

7. In view of the above, this writ application is allowed and the order of detention of the petitioner dated 1st March, 2014 passed by the Commissioner of Police, Bhubaneswar-Cuttack (opposite party No.2) under Anenxure-2 is quashed and the detenu-petitioner be set at liberty forthwith, if his detention is no longer required in connection with any other case.

Writ petition allowed.

2015 (I) ILR - CUT- 84

INDRAJIT MAHANTY, J & B.N.MAHAPATRA, J

W.P.(C) NO. 4370 OF 2012

M/S HARSHPRIYA GRANITES PVT.LTD., ...Petitioner

.Vrs.

THE DEPUTY COMMISSIONER OF SALES TAX. BHUBANESWAR II CIRCLE ..... Opp. Party

CENTRAL SALES TAX (ODISHA) RULES , 1957 – RULE 12 (1) (b)

Provisional assessment of tax – Assessing authority not only allow due opportunity to the dealer to furnish required declaration forms / certificates in support of his claim but also grant further time for the said purpose.

In this case the petitioner was served with a notice Dt. 15.12. 2011 to appear before the assessing officer on 23.12.2013 – petitioner appeared on 23.12.2013 and prayed for two months time to provide necessary declaration form but the Assessing officer instead of allowing time passed the impugned order Dt. 02.01.2012 – The Assessing officer has not only violated the principles of natural justice

but also failed to exercise the statutory power vested on him – Held, the impugned order of assessment and demand is setaside and the matter is remanded for fresh adjudication . (para-6)

For Appellant - M/s.N. Paikray
For Respondents- M/s M.S.Raman, S.C.

Date of Order : 10.11.2014

ORDER

I.MAHANTY, J

Heard Mr. B.P. Mohanty, learned counsel for the petitioner and Mr. M.S. Raman, learned Standing Counsel for the opposite party-Revenue.

2. Challenge in the present writ petition has been made to the order of provisional assessment dated 02.01.2012 in Form-VIA (Annexure-4).

3. Mr. Mohanty, learned counsel for the petitioner places reliance upon Rule 12(1)(b) of the Central Sales Tax (Orissa) Rules, which reads thus:

> "12. Assessment
>
> 1(a) xxxxxxx
>
> (b) In cases where any or more of the conditions as mentioned in clause (a) above is not fulfilled, the assessing authority shall proceed to assess the tax due provisionally, giving due opportunity to the dealer, on account of-
>
> (i) declaration forms/certificates not furnished in support of claim for exemption, deduction and/or concession claimed in the return(s); or the declarations and/or certificate(s) so furnished being not in order/incomplete/defective;
>
> (ii) arithmetical mistake apparent on the face of such return(s) resulting in less payment of tax, and/or
>
> (iii) the return(s) so furnished being not in order/incomplete/incorrect;
>
> Provided that, in case of failure to furnish the declaration and certificates as required under sub-section (4) of Section 8 of the Act, the Assessing Officer may, for sufficient cause, permit such further ime to the dealer for furnishing the required declaration forms/ certificates."

He submits that the aforesaid provision has not been complied with neither in letter nor in spirit. The petitioner was served with a notice dated 15.12.2011 (Annexure-2) calling upon to him to appear before the Assessing Officer on 23.12.2011 to furnish declaration forms/certificates. On the said date, though the petitioner appeared but sought for two months time to provide necessary declaration form for the period 01.04.2010 to 31.03.2011, the impugned order has come to be passed on 02.01.2012, i.e., within 10 days of the first date fixed for assessment.

4. On perusal of Rule 12(1)(b) of CST (O) Rules, it is clear that a dealer is entitled to an opportunity to provide declaration form/certificates in support of his claim for exemption, deduction or concession and also to correct any arithmetical error apparent on the face of the record. More importantly, Rule 12 (1)(b) of the CST (O) Rules and its proviso also vest adequate authority with the Assessing Officer, in appropriate cases, not only to grant time to an assessee to provide declaration form but also vests with power and authority to grant further time to a dealer for furnishing required declaration form/certificate, as may be justified.

5. On perusal of the aforesaid facts, it clearly appears that the petitioner appeared on 23.12.2011 before the Assessing Officer and sought for two months time to provide declaration form/certificate and without considering such prayer or allowing further time, the assessment order came to be passed within 10 days from the date of appearance of the petitioner. He asserts that in the meantime the petitioner is in possession of the declaration form in support of its claim for deduction towards exemption thereon.

6. We are of the considered view that the impugned order under Annexure-4 has been passed in clear violation of principles of natural justice and in non-compliance of Rule 12(1)(b) of the CST (O) Rules. The Assessing Officer has failed to exercise the statutory power vested on him. Consequently, we set aside the impugned order of assessment and the consequent demand and remand the matter back to the Assessing Officer for fresh adjudication. In this regard, the petitioner is directed to appear before the Assessing Officer on 01.12.2014 and to file all such declaration forms which are in its possession. Thereafter, the Assessing Officer shall pass order of assessment afresh in accordance with law expeditiously after affording the petitioner adequate opportunity.

7. With the aforesaid observation and direction, the writ petition and the Misc. Case stand disposed of.

Urgent certified copy of this order be granted on proper application. A free copy of this order be handed over to learned Standing Counsel for opposite party-Revenue.

Writ petition disposed of.

2015 (I) ILR - CUT- 87

I. MAHANTY, J & B. N. MAHAPATRA, J.

W.P.(C) NO. 5330 & 6242 OF 2014

ALAKANANDA PHILONTHROPIC TRUST & ORS. .....Petitioners

.Vrs.

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

A. ODISHA PROFESSIONAL EDUCATIONAL INSTITUTIONS (REGULATION OF ADMISSION & FIXATION OF FEES) ACT, 2007 – S. 2 (u) (xii)

Whether Diploma Engineering Courses are Educational Courses for the purpose of the Act, 2007 ? – Held, Yes. (Para 11)

B. ODISHA PROFESSIONAL EDUCATIONAL INSTITUTIONS (REGULATION OF ADMISSION & FIXATION OF FEES) ACT, 2007 – S.3

Whether the State Government is justified in rejecting the decision of PPB Dt. 20.12.2013 recommending abolition of the Diploma Entrance Test and giving admission basing on HSC marks ? – Held, the decision of the PPB Dt. 20.12.2013 recommending abolition of the Diploma Entrance Test and giving admission on the basis of HSC marks is not permissible and the State Government is wholly justified in rejecting the said decision of the PPB in exercise of power conferred on it U/s. 3 of the Act, 2007 – Consequentially issuance of notices Dt.

14.02.2014 and 09.03.2014 respectively for holding Entrance Test are sustainable in law. (Para 24)

C. ODISHA PROFESSIONAL EDUCATIONAL INSTUTITIONS (REGULATION OF ADMISSION & FIXATION OF FEES) ACT, 2007 – S. 9 (6) (b)

Diploma Courses – Qualification required is HSC with 35% marks – Students of lower strata in the society are aspirants – Directions issued to provide them sufficient opportunity to participate in the admission process – Authorities to open counseling centers in all districts – If after first DET, seats remain vacant, O.Ps shall hold second DET and after second DET if seats still remained vacant and students whose names find place in the merit list of Ist and 2nd DET, approach any technical institution for taking admission, the said institution shall produce the students in the counseling centre for counseling within the period stipulated there in – However the entire admission process shall be completed by 15.08.2014.

(Para 29)

Case laws Referred to:-

1.AIR 2005 SC 3226 : (P.A. Inamdar & Ors.-V- State of Maharashtra & Ors.)
2.AIR 2003 SC 3724 : (Islamic Academy of Education & Ors.-V- State of Marnataka &Ors.)
3.(2002) 6 SCC 269 : (Mor Modern Cooperative Transport Society Ltd. -V- Financial Commissioner & Secretary to Govt. of Haryana & Anr.)
4.AIR 2012 SC 3396 : (Asha-V- Pt. B.D. Sharma, University of Health Science & Ors.)
5.2013 (3) SCC 355 : (Parasnath Charitable Trust & Ors.-V- All India Council of Technical Education & Ors.).

For Petitioners - M/s. Sanjit Mohanty, S. Nanda.
For Petitioners - M/s. B. Routray, D. Routray, B. Singh, P.K. Sahoo, S. Das, S. Jena, S.K. Samal.
For Opp.Parties - Advocate General
For Opp.Parties - M/s. V. Narasingh, S.K. Senapati, P. Das.

Date of Judgment: 14.05.2014

JUDGMENT

B.N.MAHAPATRA,J.

The petitioners in W.P.(C) No. 5330 of 2014, which are Trusts as well as the members of Orissa Private Engineering School Association (OPESA), writ petitioner in W.P.(C) No. 6242 of 2014, imparting technical education in Diploma Engineering Courses in their respective institutions, have filed these Writ Petitions challenging the action of the State Government for not acting in terms of the decision of the Policy Planning Body (PPB) dated 20.12.2013 as well as the norms prescribed by All India Council for Technical Education (AICTE) regarding admission to Diploma Engineering Courses for the Session 2014-15. Petitioners further challenge the notice dated 14.02.2014 published in the local daily newspaper "The Samaja" in fixing tentative date for holding Diploma Entrance Test 2014 (for short, 'DET 2014') and notice dated 09.03.2014 published in the local daily newspaper "The Samaja" fixing schedule for DET 2014 on the ground that such notices are contrary to the decision of the PPB.

2. The grievance of the petitioners in a nut shell is that though as per the norms of the AICTE, Entrance Test is not mandatory for admission to Diploma Courses like other under-Graduate and Postgraduate Courses and that the PPB, which is the apex Body under the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fees) Act, 2007 (for short, 'Act, 2007'), has clearly recommended in its meeting dated 20th December, 2013 to abolish DET on the basis of a report of a Sub-Committee and further recommended to go for admission on the basis of Higher Secondary Certificate marks with effect from academic Session 2014-15, the State Government instead of acting in terms of the said decision has illegally published the notice dated 09.03.2014 fixing schedule for DET 2014. According to the petitioners, all of them are imparting Diploma Engineering Courses duly approved by the AICTE under the AICTE Act. The number of seats of the above institutions in different Diploma Engineering Courses both Private and Government institutions comes to 39,319 which include 34,000 seats approximately in respect of Private managed Polytechnic/Engineering Schools, which are the members of the petitioners' Association. Diploma Engineering and Non-Engineering courses were brought under the purview of Act, 2007 by virtue of Notification dated 18.06.2010. Thereafter, admission to all the Courses, both engineering and non-engineering in all the institutions were held through DET followed by other counseling. Second Diploma entrance test was also conducted as per the recommendation of the PPB to fill up vacant seats. During

the academic Session 2010-11, even after giving admission through DET, large number of seats also remained vacant in most of the private Engineering Schools. As per the eligibility norms prescribed for taking admission in different Diploma Engineering courses by AICTE during the academic session 2011-12, a candidate is required to pass HSC with minimum 35% marks. The AICTE has not prescribed any entrance examination for admission to Diploma courses. However, AICTE has made entrance test mandatory for admission into Under-Graduate and Postgraduate courses. The PPB in its meeting held on 24.11.2011 decided that the Government in Industries Department had to take a decision in the matter of giving admission in the vacancies without going for any entrance test. During the academic session 2011-12, Directorate of Technical Education and Training (DTET) made advertisement for counseling for admission to Diploma Non-engineering courses at institution level, wherein the students were allowed to take admission on the basis of qualifying marks secured, i.e., 35% marks at 10^{th} standard. For the academic Session 2013-14, since no action was taken by the PPB to fill up large number of vacant seats in different engineering courses in private Engineering schools after first counseling was over, the Odisha Private Engineering Schools Association finding no way out, approached this Court in W.P.(C) No.14030 of 2013 with a prayer to direct opposite parties to conduct the second DET and allow the counseling to be made pursuant to second DET. The Writ Petition was disposed of by a learned Single Judge of this Court directing to hold the second DET keeping in view that large number of seats were lying vacant in various institutions. The said judgment of the learned Single Judge was challenged in Writ Appeal before a Division Bench of this Court, wherein the Division Bench of this Court was pleased to direct for second DET within a stipulated period for the Session 2013-14. Even after the second DET, a large number of seats could not be filled up due to shortage of candidates. During the academic Session 2014-15, several representations were made by several private Engineering Schools' Association to the authorities to discontinue the entrance test and allow admission to Diploma courses on merit basis as per the marks secured in the qualifying examination. The above request of the petitioners was not acceded to by the present opposite parties. Hence, the present writ petitions.

3. Mr.Sanjit Mohanty and Mr.B.Routray, learned Senior Advocates appearing for the petitioners submitted that as per the AICTE process Hand Book, which is a Regulation of the AICTE for the session 2013-14 Entrance Test, is not mandatory for admission in diploma courses. In many States,

admission to diploma course is being made on the basis of the merit of qualifying examination, i.e., 10th standard marks. Opposite party No.2-Department of Technical Education and Training has also invited applications through advertisement from intending orthopaedically handicapped students for admission to Diploma Engineering and Non-Engineering courses under persons with disability Scheme of M.H.R.D. Government of India, wherein 75 number of supernumerary seats in different Government Engineering Schools/Polytechnics were advertised and admission in those 75 numbers of seats was made on the basis of the marks secured in the qualifying examination, i.e., 35% of the marks secured in the 10th standard examination. The method of admission, i.e., e-admission to +2 courses in the Colleges throughout the State takes two and half months time, but the method of admission adopted for Diploma Engineering courses, conducted by the DTET, takes more than seven months time to complete the entire process of admission and large number of seats are lying vacant due to such method of admission adopted by the opposite parties. The decision of the PPB dated 22.11.2013 to abolish the Diploma Entrance Test is based on expert opinion which cannot be disregarded by the Government without any further adequate material.

4. It was further submitted that insofar as Diploma Engineering is concerned, particularly DET is not coming under the purview of the 2007 Act like JEE, except by virtue of the Notification dated 18.06.2010, which was issued in exercise of power conferred under sub-clause (xii) of Clause (u) of Section-2 of the 2007 Act. No further amendment has been made to the said Act. There cannot be violation of any of the provisions of the 2007 Act in the event students are allowed to take admission on the basis of AICTE norms. The action of the State Government in not approving the decision of the PPB is not only arbitrary but also contrary to law. The Hon'ble Supreme Court in the case of *P.A. Inamdar and others vs. State of Maharashtra and others, AIR 2005 SC 3226 and Islamic Academy of Education and others vs. State of Karnataka and others, AIR 2003 SC 3724* has clearly held that, to impart technical education, the norms prescribed in the AICTE Hand Book as well as the Act should not be violated. At the same time, the private institutions, which are imparting technical education, must be allowed to exist without compromising the quality of education. The viability and existence of private professional educational institutions cannot be ignored but at the same time the viability as well as the existence of such institutions depends upon the strength of the students who have taken admission into such institutions. But more than 50% seats are lying vacant for the last four years due to holding of entrance test

to get admission into such institutions. Short-listing is necessary where the aspirants/candidates are more than the numbers of seats available. The entrance test is not necessary when the number of vacancies is much more than the aspirants. Since fifty percent of the seats are lying vacant in different technical institutions, in the event DET is conducted to select the candidates to take admission in the institutions imparting Diploma courses, certainly the number of admissions to the vacant seats will further go down. In that event, such institutions will be closed. Concluding the argument, learned Senior Advocates submitted to issue appropriate direction to the opposite parties to ensure that the private technical institutions must survive without being closed.

5. Learned Advocate General, Mr. Asok Mohanty appearing for the State-opposite parties vehemently argued that the decision of the Government to hold Diploma Entrance Test, 2014 is in consonance with the provisions of the Act, 2007 and there is no illegality in doing so. The PPB is a recommending Body and the final approval as per the schematic arrangement of Act, 2007 vested in the Government in E&T & ET Department. After careful consideration of the recommendation of the PPB in accordance with the provisions of Section 3 (i) of the said Act, 2007 and in order to maintain excellence in Diploma Education, the State Government in consultation with the Government in Law Department have decided that the admission to Diploma programmes shall be made through DET and a merit list of the students shall be drawn up on the basis of marks secured by the candidates in Diploma Entrance Test vis-à-vis marks obtained in the qualifying examination with weightage 60% and 40% respectively. The CBSE while drawing the merit list for admission to Engineering programme through All India Test JEE (Main) 2014 have prescribed the same procedure for drawing the merit list. In order to maintain excellence in Diploma Education and to follow a fair, transparent and merit based admission procedure, the State Government in exercise of power conferred under Section-2(u)(xii) of the Act, 2007 issued Notification No. 8571 dated 18.6.2010. In the AICTE Hand Book, the eligibility criteria for admission to Diploma Programmes has only been prescribed. There is no mention regarding the method of admission to Diploma Programmes as mentioned in case of under graduate and post-graduate programmes. Thus, the State Government has not deviated the provision of the AICTE so far as admission procedure is concerned. The State Government has adhered to the minimum eligibility criteria prescribed by the AICTE for admission to Diploma programmes. There is no embargo in law for authorities to prescribe the modalities of admission in addition to the

prescription of the AICTE. Therefore, the assertion that the AICTE has not prescribed any entrance examination for admission to Diploma courses has no bearing on the point at issue.

6. Learned Advocate General further submitted that Diploma Engineering and Non-Engineering courses belong to different and distinct classes. Moreover, from the academic session 2012-2013 onwards, the admission to Non-Engineering courses is being made through Diploma Entrance Test. Admission to Diploma Engineering and Non-Engineering Courses for orthopaedically handicapped students was made against the supernumerary seats approved by AICTE. Persons with Disabilities (PWD) Scheme of MHRD, Government of India prescribed the method of admission and the students admitted under the scheme are exempted from paying admission fees etc. and financial incentives will be given as per the norms of MHRD, Government of India. Therefore, the State Government is not denuded of power to direct for particular mode of admission including entrance test for Diploma Education. As per the schedule of the Diploma Entrance Test, 2014, the examination will be conducted on 18.5.2014 and admission through e-counselling will commence tentatively from 1st week of June, 2014 and continue up to 2nd week of August, 2014 including vacancy round, if any. Thus, approximately the admission through e-counselling process will take 2½ months and not seven months as stated by the petitioners. The decision to hold the DET, 2014 has been taken in exercise of power conferred under Section 3 of the Act, 2007, which is in vogue in view of the direction of the Hon'ble Supreme Court. Hence, the recommendation of PPB cannot confer any vested right on the petitioners as claimed nor it can be said to curtail the power of the Government to act in an independent manner as envisaged in the Act, 2007. There is no illegality in the action of the Government in directing to hold DET, 2014 and prescribing the modality of admission as per the impugned notifications dated 14.2.2014 and 9.3.2014. The decision of PPB is not binding on the State Government. In view of the provisions of the Act, 2007, the interest of the students, who are intending to take admission in the institutions imparting Diploma Education, is in no way compromised in conduct of DET, 2014 and prescribing the modality of admission in terms of the impugned notifications dated 14.2.2014 and 9.3.2014. During the academic year 2013-14, 51751 candidates appeared in the DET, 2013 and got valid rank for admission to Diploma in Engineering courses against the total intake of 37975, both Government and private institutions. This shows that the number of aspirants are more than the

number of seats available. The number of candidates admitted during the year 2013-14 is 3927 against the intake capacity of 4795 for Government Engineering Schools and Polytechnics and 14481 against the intake capacity of 33180 for Private Engineering Schools. So far as the intake capacity of Government institutions is concerned, there are more number of candidates/aspirants than the available seats for which short listing is necessary for giving justice to meritorious students for availing best seat of their choice.

7. Placing reliance on the provisions of Section 2(u)(xii), Section 2(z) and Section 3 of the Act, 2007, learned Advocate General submitted that the State Government has rightly declared the Diploma Engineering Courses as the educational course for the purpose of the Act, 2007. It was further argued that the provisions of Section 9 of the Act, 2007 dealing with the reservation of seats and admission against the unfilled seats are subject to the provisions of Section 3 of the Act, 2007. Further, placing reliance on the provisions of Section 11 of the Act, 2007, it was argued that any admission made in violation of the provisions of the Act, 2007 and the rules framed thereunder shall be invalid. Concluding his argument, Mr. Mohanty, learned Advocate General submitted that the writ petition being devoid of merit is liable to be dismissed.

8. On rival contentions of the parties, the following questions arise for consideration:

(i) Whether Diploma Engineering Courses are Educational Courses for the purpose of the Act, 2007?

(ii) Whether the State Government is justified in rejecting the decision of PPB dated 20.12.2013 recommending abolition of the Diploma Entrance Test and giving admission on the basis of H.S.C. marks?

(iii) Whether the notices dated 14.2.2014 and 9.3.2014 respectively issued for holding Diploma Entrance Test are sustainable in law?

(iv) What order?

9. Question No.(i) is whether Diploma Engineering Courses are Educational Courses for the purpose of the Act, 2007?

At this juncture, it would be necessary to reproduce herein below relevant portion of Section-2 (u) (xii) of the Act, 2007.

> "**2(u)** "professional educational institution" means college or school or an institute, by whatever name called, imparting professional education or conducting professional educational courses leading to the award of a degree, diploma or a certificate by whatever name called, approved or recognized by the competent statutory body or affiliated to a University, in any of the following disciplines, namely:--
>
> (i) xxx xxx xxx
>
> (xii) any other educational courses as may be declared by Government, by notification, from time to time;"

10. Undisputedly State Government in exercise of the power conferred by Sub-clause- (xii) of Clause-(u) of Section 2 of the Act, 2007 has declared the Diploma Engineering Courses as educational courses for the Act, 2007 vide Notification No.IX-TTI-30/2010/8571 dated 18th June, 2010.

11. In view of the above, we are of the considered opinion that the Diploma Engineering courses are educational courses for the purpose of Act, 2007.

12. Question Nos. (ii) and (iii) being interlinked they are dealt with together.

13. We have already held that Diploma Engineering Courses are educational courses for the purpose of Act, 2007. Therefore, admission into Diploma Engineering Courses shall be governed by the provisions of the Act, 2007. Under the Act, 2007, admission to technical courses in different technical institutions has been made through a single window system.

14. At this juncture, it would be relevant to know what is contemplated in Sections 2(z), 3, 9 and 11 of the 2007 Act.

> "**Section 2(z)** "single window system" means the centralized system for admission administered by the Policy Planning Body";
>
> **Section 3**. "Subject to the provisions of this Act, admission of students in all private professional institutions, Government institutions and sponsored institutions to all seats including lateral entry seats, shall be made through JEE conducted by the Policy Planning Body followed by centralized counseling in order of merit, in accordance with such procedure as recommended by the said body and approved by the Government."

"**Section 9.** (1) In every professional educational institution admissions shall be in accordance with the reservation policy of the Government notified for the purpose of this Act:

Provided that nothing in the sub-section shall be applicable to the minority institutions.

(2) in a private professional educational institution other than minority institution not exceeding fifteen per centum of the approved intake may be filled up by NRI from the merit list prepared on the basis of JEE.

(3) Where any shortfall in filling of seats from NRI occurs, such vacant seats may be filled up from the merit list of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, conducted by Central Board of Secondary Education :

Provided that while filling up such vacant seats NRI shall be preferred.

(4) In a private professional educational institution fifteen per centum of the approved intake may be filled up strictly from the merit list of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, conducted by Central Board of Secondary Education.

(5) Where the seats remain unfilled due to non-availability of candidates in the list specified in sub-sections (3) and (4) or where student out of such lists leaves after selection to such seats, the same shall be filled up by the candidates belonging to the general category from the merit list of the JEE.

(6) (a) Where seats for reserved category are left unfilled due to non-availability of candidates from a particular category in the list of JEE, such seats shall be filled up by candidates of same category from the merit list of All India engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, failing which such vacant seats shall be filled up by candidate not belonging to any reserved category in accordance with the merit list of JEE.

(b) If still seats remain vacant, a second JEE may be conducted.

(7) (a) In a Minority institution, not less than fifty per centum of the approved intake shall be filled up by minority students from which the State belonging to the minority community to which the institution belongs on the basis of inter se merit in the merit list of the JEE.

(b) The remaining seats shall be for the general category out of which up to fifteen per centum may be filled up by NRI."

"**Section 11**. "Any admission made in violation of the provisions of this Act or the rules made thereunder shall be invalid."

15. Section 2(z) provided for a "centralized window" system, which means a centralized system for admission.

A plain reading of Section 3 makes it clear that admission of students in all private professional educational institutions, Government institutions and sponsored institutions to all the seats including lateral entry seats shall be made through JEE. The expression of "all seats" appearing in Section 3 includes admission of students under Section 9 of the 2007 Act.

16. Section 9 of 2007 Act provides for reservation of seats in a particular manner. Section 9 cannot be read in isolation. Provisions of Section 9 are subject to Section 3 of 2007 Act. Any attempt to read Section 9 in isolation would completely defeat/frustrate the object, reason and purpose of 2007 Act. Section 3 of 2007 Act makes it mandatory that all admissions shall be made through JEE conducted by the PPB followed by centralized counseling in order of merit. Section 3 of 2007 Act envisages for admission of all students through OJEE in order of merit and in a transparent manner. Thus, all admissions including the admission for seats reserved under Section 9 of 2007 Act are to be done either directly by the OJEE or under its direct supervision and any admission made to any Private Professional Institution, Government Institution and Sponsored Institution in violation of Section 3 of the 2007 Act, i.e., not through OJEE is invalid.

17. Law is well-settled that the statute must be read as a whole. No part of a statute can be construed in isolation. The Hon'ble Supreme Court in the case of ***Mor Modern Cooperative Transport Society Ltd. vs. Financial Commissioner and Secretary to Government of Haryana and another,*** *(2002) 6 SCC 269,* held as under:

> "14**.** .....It is trite to say that the intention of the legislature must be found by reading the statute as a whole. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs. The rule is of general application as even the plainest terms may be controlled by the context. The expressions used in a statute should ordinarily be understood in a sense in which they best harmonize with the object of the statute, and which effectuate the object of the legislature...."

18. It may be relevant to refer here the decision of the Hon'ble Supreme Court in the case of ***Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd.*** *(supra),* wherein it has been held as under:

> "**33.** Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression "Prize Chit" in *Srinivasa* and we find no reason to depart from the Court's construction."

19. At this juncture, it will be beneficial to refer to the Preamble of 2007 Act:

> "Preamble of 2007 Act specifically provides that "Whereas the Hon'ble Supreme Court of India in its judgment in P.A. Inamdar and others vs. State of Maharastra reported in AIR 2005 SC notifications dated 14.2.2014 and 9.3.2014 3226 has held that having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb malpractices, it would be permissible to regulate admission by providing a centralized and single window procedure which, to a large extent, can secure grant of merit based admission on a transparent basis.
>
> "And whereas, it is further held that no capitation fee can be charged directly or indirectly or in any form and if charging of capitation fee and profiteering is to be checked, the method of admission is to be regulated so that the admissions are based on merit and transparency and the students are not exploited."
>
> "And whereas, the Hon'ble Supreme Court in P.A. Inamdar Case has observed that it is for the Central Government or for the State Governments, in absence of a Central legislation, to come out with a detailed thought out legislation on the subject, which is long awaited."
>
> The aforesaid preamble of the 2007 Act clearly indicates the object and purpose of enacting the said legislation by the State Legislatures. Therefore, while applying/interpreting the provisions of the 2007 Act, the intention behind having such an Act has to be kept in mind."

20. The source of 2007 Act is the judgments of the Hon'ble Supreme Court of India in the cases of ***P.A. Inamdar and others vs. State of Maharashtra and others,*** AIR 2005 SC 3226 *and* ***Islamic Academy of Education and others vs. State of Karnataka and others,*** AIR 2003 SC 3724. The Constitution Bench in both the above mentioned cases laid emphasis on merit based, transparent admission procedure to be regulated by the State through a centralized and single window mechanism.

21. In the case of ***Asha –v- Pt. B.D. Sharma, University of Health Sciences and others,*** AIR 2012 SC 3396, the Hon'ble Supreme Court held as under:

> "36. (a) The rule of merit for preference of course and colleges admits no exception. It is an absolute rule and all stakeholders and concerned authorities are required to follow this rule strictly and without demur.
>
> xx xx xx"

22. The matter can be looked at from a different angle. AIEEE and OJEE allot rank number to the participants according to their merit. According to their merit, participants are entitled to a particular subject and the college, and in the process a meritorious student gets a better subject and better college in comparison to a less meritorious student. Therefore, if admission given to a student holding AIEEE and OJEE at College level in technical courses without counseling among other interested left out OJEE and AIEEE mark holder students, more meritorious students may be deprived of getting admission in technical courses in a better college.

23. Further, it may be noted here that under Section 3 of the Act, 2007 power is vested in the State government to approve or disapprove any recommendation made by the PPB. Moreover, the State Government had adhered to the minimum eligibility criteria prescribed by AICTE for admission to Diploma programmes. Under the law, there is no embargo for the opposite party-authorities to prescribe modalities of admission in addition to the prescription of the AICTE regarding minimum eligibility criteria.

24. In view of the above settled legal position and the statutory provisions, the decision of the PPB dated 20.12.2013 recommending abolition of the Diploma Entrance Test and giving admission on the basis of HSC marks upon which the petitioners placed strong reliance is not permissible and the State Government is wholly justified in rejecting the said decision of the PPB in exercise of power conferred on it under Section 3 of the Act, 2007. Consequentially, issuance of notices dated 14.02.2014 and 09.03.2014 respectively for holding Entrance test are sustainable in law.

25. Question No.(iv) is what order?

Admittedly, after first counseling of DET a good number of seats are lying vacant in every year and considerable number of seats are filled up subsequently through second DET. It is further noticed that even after second DET, a large number of seats are lying vacant. There cannot be a denial to the fact that neither the institutions, nor the State Government nor any student will be gainer if some seats are allowed to remain vacant in technical institutions. It will be beneficial to all concerns if more number of seats are filled up in the technical institutions without compromising merit. If large number of seats remain vacant in both Government and private technical institutions, that will be a national waste.

6. At this juncture, it will be beneficial to refer to the order of this Court dated 11.09.2012 passed in W.A. Nos.249 and 250 of 2012. Paragraph-11 of the said order is as follows:

> "11. Having answered the first point in favour of the appellants, it is necessary to consider point Nos.2 and 3. It is an undisputed fact that nearly about 15, 053 seats in the Diploma Engineering Course are vacant. It is also a fact that the admission is already over and classes have already commenced. But having regard to the fact that large number of students who could not be able to participate in the examination though they have secured more than the prescribed qualifying marks and might have come out successful in the entrance examination, if taken, may loose one academic year which is most previous for the students community, and keeping the seats vacant for an academic year will also be a national waste, to do complete justice to the parties, it would be appropriate for this Court while setting aside the impugned order in exercise of its extra ordinary jurisdiction, and having regard to Section 9(6)(b) of the 2007 Act, which has rightly been interpreted by the learned Advocate General with reference to sub-Sections (3), (4), (5) and (6) of the Act, to direct that a second entrance examination be conducted by the first appellant to fill up the seats. We cannot give direction to the Policy Planning Body as the constitutional validity of the Act, 2007 is pending consideration before the apex Court, but certain provisions have not been stayed. Therefore, the Policy Planning Body has determined the eligibility criteria, conduct of examination and process of selection etc. to fill up the seats. Learned Advocate General submits that as the permission to the PPB for doing this is only for a limited period and that period is over, appropriate direction may be given to the State Government the first appellant herein. Having regard to the submissions made by the learned Advocate General, we give the following directions to the first appellant while setting aside the impugned order of the learned Single Judge."

27. It may be relevant to note here that Section 9(6)(b) of the Act, 2007 provides that if the seats remain vacant a 2nd JEE may be conducted.

28. This Court vide order dated 22.07.2013 passed in W.P.(C) No.14030 of 2013 held as under:

> "Keeping in view the decision of this Court referred to above, provision of Section 9 (6)(b) of the Act, 2007 and that for the academic session 2009-10 and 2010-11 the 2nd DETs were conducted

by the opposite parties to fill up the vacant seats and that a substantial number of seats are lying vacant after candidates got allotment in 1st round provisional allotment pursuant to 1st DET, 2013, this Court for the benefit of all concerns, thinks it proper to direct opposite parties to hold the 2nd DET….."

29. In the fact situation, keeping in view the above legal position, we think it proper to issue following directions:-

(i) Since the courses in question are Diploma courses and the required qualification is HSC with 35% marks, mostly students of lower strata of the society are aspirants/applicants to take admission in above courses. Therefore, it is necessary that sufficient opportunity should be given to them to participate in the admission process. To ensure that they should get sufficient opportunity to take admission in technical /professional courses, the opposite party-authorities should ensure that counseling centers are located/opened in all districts;

(ii) If after 1st DET, seats remain vacant, opposite parties shall hold second DET as provided under Sections 9(6)(b) of the Act, 2007 through OJEE and as directed by this Court vide order dated 11.09.2012 passed in W.A. Nos.249 and 250 of 2012 and judgment dated 22.07.2013 passed in W.P.(C) No.14030 of 2013;

(iii) After second DET, if seats still remain vacant and students, whose names find place in the merit list of 1st and 2nd DET, approach any technical institution for taking admission, the said institution shall produce the students in the counseling centre for counseling within the period stipulated hereunder.

However, the entire admission process shall have to be completed by 15th August, 2014 in view of the judgment of the Hon'ble Supreme Court in the case of ***Parasnath Charitable Trust and others Vs. All India Council of Technical Education and others***, 2013 (3) SCC 355. The schedule for conducting the above Diploma Entrance Test as suggested by opposite parties 1 to 3 in W.P.(C) No.6242 of 2014 is given below:-

SCHEDULE FOR WEB BASED E-COUNSELLING DET-2014
(1st Semester Diploma Engineering)

1st phase counseling

Activities	**Date**
Registration, Choice filling & finalization of choice	
Registration, Choice filling & finalization of choice by Candidates from any Internet point	06.06.2014 to 20.06.2014
Deposit of Counseling fee of Rs.200/- in Cash, Document verification, Choice locking at tagging NCC (Check www.detodisha.nic.in for Tagging list) (9.00 AM to 6.00 PM)	08.06.2014 to 20.06.2014
Round-1 (Provisional Allotment)	
Allotment of seats of candidate including TFW (After 3.00 PM)	25.06.2014
Deposit of Admission Fee through ATM cum Debit/Credit Card/Net Banking/e-Chalan at any branch of AXIS/IDBI Bank. **(Candidate shall not come to NCC for this purpose)**	25.06.2014 to 30.06.2014
Round-2 (Provisional Allotment)	
Registration & fresh Choice Filling by the non-allotted of 1st round, non-registered ST/SC candidates and choice locking at NCC. (The candidates already allotted with a seat in 1st round, but did not deposit Admission Fee are not allowed)	04.07.2014
Result Publication after auto-sliding and de-reservation from SC & ST seats to General (After 3 PM)	07.07.2014
Deposit of Admission Fee through ATM cum Debit/Credit Card/Net Banking/e-Chalan at any branch of AXIS/IDBI Bank. **(Candidate shall not come to NCC for this purpose)**	07.07.2014 to 09.07.201
Final Allotment	14.07.2014
Reporting of candidate at Finally allotted Institute	15.07.2014 to 21.07.2014
Commencement of 1 month bridge course	17.07.2014

2nd DET-214 Programme (Tentative) for 1st semester Diploma in Engineering	
Submission of ONLINE Application	18.07.2014 to 15.07.2014
Deposit of Application Fee	08.07.2014 to 16.07.2014
Availability of Admit Card & Centre list	18.07.2014
2nd DET Examination	**20.07.2014 (SUNDAY)**
Result Publication	23.07.2014
Registration, choice filling & finalization of choice by Candidates from any Internet point, Document verification, Choice locking and Deposit of Counseling Fee at NCC	24.07.2014 to 28.07.2014
Allotment of seats	30.07.2014
Deposit of Admission Fee through ATM cum Debit/Credit Card/Net Banking/ e-Chalan at any branch of AXIS/IDBI Bank.	30.07.2014 to 01.08.2014
Final Allotment	02.08.2014
Reporting of candidate at Finally allotted Institute	03.08.2014 to 05.08.2014

Final phase counseling against the non-allotted seats
(For left out DET Rank holders for 1st semester Engineering)

Registration, Choice filling & finalization of choice

Activities **Date**	
Registration, Choice filling & finalization of choice by Candidates from any Internet point, Document verification, Choice locking and Deposit of Counseling Fee at NCC located in all districts	**04.08.2014 to 10.08.2014**
Allotment of seats	12.08.2014
Reporting and deposit of admission fee by candidate at Finally allotted Institute	**13.08.2014 to 14.08.2014**

30. With the above observations and directions, the writ petitions are allowed in terms of the directions given herein above, but without any order as to costs.

In view of the most urgency involved, urgent certified copy of the judgment be granted on proper application in course of the day and free copies of the judgment be handed over to learned counsel for opposite parties for necessary compliance.

Writ petitions allowed.

2015 (I) ILR - CUT-105

I. MAHANTY, J & B. N. MAHAPATRA, J.

W. P. (C) NO. 16426 OF 2014

M/S. ABB INDIA LTD. .....Petitioner

.*Vrs.*

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

ODISHA VAT ACT, 2004 – S. 42

Audit assessment – Whether Opp.Party No.3, Deputy Commissioner of Sales Tax, Bhubaneswar-II Circle, Bhubaneswar having issued letter No.747 Dt. 21.01.2014 relying upon which the Audit visit Report was prepared is competent to assess the petitioner-Company U/s. 42 of the OVAT Act – Held, No.

In this case there is violation of natural justice which demands that no body shall be a judge of his own case – Held, the impugned order of assessment is set aside and the matter is remanded for fresh assessment by the competent authority having jurisdiction over the dealer, who is in no way connected with the tax audit of the petitioner.

(Para 11)

Case laws Referred to:-

1.(2012) 49 VST 33 (Orissa) : (Tata Sponge Iron Ltd.-V- Commissioner of Sales Tax, Orissa & Ors.)
2.(1969) 2 SCC 262 : (A.K. Kraipak & Ors.-V- Union of India & Ors.)

For Petitioner - M/s. B.K. Mohanty, Sr. Advocate, Mr. Satyajit Mohanty.
For Opp.Parties -M/s. R.P. Kar, S.C.

Date of Judgment : 26.09.2014

JUDGMENT

B.N. MAHAPATRA, J.

In the present writ petition, challenge has been made to the legality and validity of the Audit Visit Report dated 03.02.2014 (Annexure-2) issued by the Sales Tax Officer, Bhubaneswar-I Circle, Bhubaneswar and the order of assessment dated 01.08.2014 (Annexure-6 series) passed by the Deputy Commissioner of Sales Tax, Bhubaneswar-II Circle, Bhubaneswar-opposite party No.3 under Section 42(4) of the Orissa Value Added Tax Act, 2004 (for short, "the OVAT Act") for the period from 01.04.2011 to 31.03.2013 on the basis of such audit visit report.

2. Though several grounds have been taken in the writ petition, Mr. B.K. Mohanty, learned Senior Advocate appearing for the petitioner has confined his argument to one of the grounds of challenge for quashing the impugned order of assessment. According to Mr. Mohanty, the Sales Tax Officer, Bhubaneswar-I Circle, Bhubaneswar while preparing the Audit Visit Report has relied upon letter No.747 dated 21.01.2014 of the DCCT, Bhubaneswar-II Circle, Bhubaneswar and the materials contained therein regarding business transaction of the petitioner-company and thus abdicated his jurisdiction to the direction of the superior officer. The Audit Visit Report is nothing but outcome of influence and bias on the part of the Assessing Officer, on whose instigation, the Audit Visit Report has been prepared. The Deputy Commissioner of Sales Tax-opposite party No.3 being the purported author of the Audit Visit Report could not have utilized the said report to assess the petitioner-company under Section 42 of the OVAT Act. Mr. Mohanty further submitted that a person cannot be a judge of his own cause. Hence, he impugned order of assessment dated 01.08.2014 passed by the

Deputy Commisioner of Sales Tax-opposite party No.3 on the basis of the Audit Visit Report, which again relied on the letter dated 21.01.2014 of the DCCT, Bhubaneswar-II Circle, Bhubaneswar is illegal, arbitrary, perverse, vitiated and violative of principles of natural justice and is liable to be quashed. In support of his contention, he relied upon the judgment of this Court in the case of *Tata Sponge Iron Ltd. vs. Commissioner of Sales Tax, Orissa and others, (2012) 49 VST 33 (Orissa).*

3. Mr. R.P. Kar, learned Standing Counsel appearing for the Revenue supporting the impugned order of assessment submitted that the impugned order of assessment suffers from no infirmity and illegality.

4. On rival contentions of the parties, the sole question that arises for consideration by this Court is whether opposite party No.3-Deputy Commissioner of Sales Tax, Bhubaneswar-II Circle, Bhubaneswar having issued letter No.747 dated 21.01.2014 relying upon which the Audit Visit Report was prepared is competent to assess the petitioner-company under Section 42 of the OVAT Act.

5. To adjudicate the issue, it is relevant to refer to the Audit Visit Report dated 03.02.2014 (Annexure-2) submitted under sub-rule (3) of Rule 45 in Form VAT 303 and the order of assessment dated 01.08.2014 (Annexure-6) passed on the basis of the Audit Visit Report to find out whether the Audit Visit Report has been prepared on the basis of the letter dated 21.01.2014 of DCCT, Bhubaneswar-II Circle, Bhubaneswar and the self-same DCCT, Bhubaneswar-II Circle, Bhubaneswar has passed the order of assessment dated 01.08.2014 (Annexure-6).

6. Relevant portion of the Audit Visit Report (Annexure-2) is extracted hereunder:

> "But examination of books of accounts furnished by the dealer company and the letter received from the DCCT, Bhubaneswar-II Circle, Bhubaneswar bearing letter No.747 dated 21.01.2014 regarding the business transaction of the dealer the following information has been gathered regarding the sale in transit of the dealer for the period covered under audit:
>
> 1. The instant dealer enters into a prior agreement before the goods occasions interstate movement.

2. The perspective buyer offers the product specification of the goods to be purchased and accordingly goods are purchased from outside the State.

3. Interstate Purchase bill has been issued in the name of ultimate buyer in each and every case reflecting name of instant dealer (i.e. consignee-name of the ultimate buyer of Odisha and invoiced to M/s. ABB India Ltd.)

4. LR copy has been issued in the name of consignee (ultimate buyer) and consignor (the outside state seller) reflecting interstate purchase bill no and date of bill, bill value, consignment details, etc. meaning thereby the goods have been dispatched directly to the ultimate buyer from the point of its original interstate purchase.

In course of audit verification a confidential letter along with some documents related to business transaction (**transit sale**) of the instant dealer was received from the DCCT, BBSR-II Circle, Bhubaneswar which was transmitted by the STO, Unified Check Gate, Gobindpur Jharsuguda. On careful examination of said letter and materials contained therein it is revealed that one LR consignment No.7083855/dt, 27.12.2011 (Enclosed in **Annexure-2)** obtained by the STO, Gobindpur Check Gate, Jharsuguda reveals the name of the **consignor** to be M/s. Raychem RPG Pvt. Ltd., Telegaon Road, Chakan, Pune and the name of the **consignee** is M/s IND Barath Energy (Utkal) Ltd., Jharsuguda, Odisha. The said document reveals that as on the date and time of **interception of the consignment** of three nos of transformers carried from Pune to Jharsuguda at Unified Check Gate, Gobindpur, Jharsuguda there was **no endorsement of transfer of document of title to the goods by M/s ABB Ltd.** to M/s Ind Barath Energy (Utkal) Ltd. But the waybill used to bring the consignment into the State of Odisha has been supplied by M/s. Ind Barath Energy (Utkal) Ltd. means the goods have been handed over to ultimate buyer *without transfer of document of title to the goods by M/s. ABB India Ltd.* Moreover analysis of the aforementioned LR and other documents like the invoice issued by the outside state party, i.e. M/s. Raychem RPG Pvt. Ltd. attached in the report reveals that bill no.4201100380/27.12.2011 has been invoiced to M/s ABB Ltd.

> where the ultimate consignor is M/s Ind Barath Energy (Ltd.) against WB No.BBB-0041163. Further, the documents enclosed with the report which potentially carries the statement of the Manager, Accounts & Finance, M/s Ind Barath Energy (Utkal) Ltd. states that there is no documents mentioning any kind of endorsement anywhere and this is a regular recurring phenomenon for effecting such transaction. *(underlined for emphasis)*

7. A perusal of the assessment order dated 01.08.2014 under Annexure-6 reveals that tax audit of the dealer-company for the period 01.04.2011 to 31.03.2013 was conducted by the audit team headed by the Sales Tax Officer, Bhubaneswar-I Circle, Bhubaneswar who submitted the audit report in Form VAT-303 under sub-rule (3) of Rule 45 of the OVAT Rules, 2005 and the said audit report has been utilized against the petitioner for passing the impugned assessment order. The impugned assessment order further reveals that same has been passed by the Deputy Commissioner of Sales Tax, Bhubaneswar-II Circle, Bhubaneswar as Assessing Authority. A portion of the audit visit report under Annexure-2 quoted above reveals that opposite party No.3-Deputy Commissioner of Sales Tax, Bhubaneswar had issued letter No.747 dated 21.01.2014 relying upon which audit visit report was prepared.

8. In view of the above, we are of the view that the Deputy Commissioner of Sales Tax, Bhubaneswar-II Circle, Bhubaneswar-opposite party No.3, who has passed the impugned order of assessment on the basis of the audit visit report is involved in the audit process.

9. The principle of natural justice demands that nobody shall be a judge of his own cause.

The Hon'ble Supreme Court in the case of ***A.K.Kraipak and others Vs. Union of India and others***, (1969) 2 SCC 262 held as under:

> "20 The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (1) no one shall be a judge in his own case (*Nemo debet esse*

> *judex propria causa*) and (2) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice..."

10. At this juncture, it is relevant to refer to the judgment of this Court in the case of ***Tata Sponge Iron Ltd.*** *(supra),* wherein it has been held as follows:

> "Therefore, we are of the view that in order to maintain transparency, any officer who is involved in any manner or has acted with the process of audit and preparation of the audit report in respect of the dealer should not be the Assessing Officer of that dealer. Otherwise, there will be violation of cardinal principles of natural justice. Our view is fortified by the judgment of this Court in ***National Trading Co.*** *(supra)* wherein this Court held as follows:
>
> "……Although many contentions were raised in support of the writ petition, we need not examine them as the matter can be decided on the following : short point being that the reporting officer himself cannot be the assessing officer. It is said that justice should not only be done but should manifestly be seen to be done. Justice can never be seen to be done if a person acts as a Judge in his own cause or is himself interested in its outcome. This principle applies not only to judicial proceedings but also to quasi-judicial and administrative proceedings. In the case at hand, there is no dispute that the reporting officer himself took up the impugned assessment proceedings and completed the same. This he could not have done."

11. In the facts situation, we set aside the order of assessment dated 01.08.2014 (Annexure-6) passed by the Deputy Commissioner of Sales Tax, Bhubaneswar-II Circle, Bhubaneswar and remand the matter for fresh assessment by the competent authority having jurisdiction over the dealer, who is in no way connected with the tax audit of the petitioner. We make it clear that we have not expressed any opinion on the merit of the case except on the question of jurisdiction/authority of opposite party No.3, who has passed the impugned order of assessment. The fresh assessment process shall

be completed within a period of eight weeks from today after giving opportunity of hearing to the petitioner-company.

12. With the aforesaid observations and directions, this writ petition is disposed of. No costs.

Writ petition disposed of.

2015 (I) ILR - CUT-111

SANJU PANDA, J.

C.M.P. NO.458 OF 2014

MAMATANJALI SAHOO … …..Petitioner

.Vrs.

ARNAPURNA MEMORIAL CHARITABLE TRUST ……Opp.Party

CIVIL PROCEDURE CODE, 1908 – O-7, R-11

Suit for permanent injuction – During pendency of the suit plaintiff forcibly entered in to the suit premises by breaking the lock – No dispute regarding title of the defendant over the land – Counter claim by defendant seeking decree of mandatory injunction directing the petitioner to restore possession of the suit property in his favour – Plaintiff sought rejection of counter claim questioning its valuation – Parties will prove their respective plea by adducing evidence – Impugned order needs no interference. (Paras 8,9)

Case laws Referred to:-

1.AIR 2008 Supreme Court 2033 : (Anathula Sudhakar-V- P. Buchi Reddy (Dead) by L.Rs. & Ors.)
2.2007 (II) OLR 521 : (M/s. Jagannath Motors & Anr.-V- Rushikulya Gramya Bank & Ors.).

For Petitioner - M/s. Biswanth Rath, J.N. Rath, S.K. Jethy & S.K. Mishra.

For Opp.Party - M/s. S.P. Mishra, S. Mishra,
S.K. Samantaray, D. Priyanka & S. Modi.

Date of judgment : 25.06.2014

JUDGMENT

SANJU PANDA, J.

In this petition, the petitioner has challenged the order dated 22.03.2014 passed by the learned District Judge, Khurda, Bhubaneswar in C.R. P. No.7 of 2013 confirming the order passed by the learned Civil Judge (Junior Division), Bhubaneswar in C.S. No. 466 of 2009 rejecting the application of the plaintiff-petitioner under Order 7 Rule 11 of the Code of Civil Procedure to reject the counter claim filed by the defendant.

2. To appreciate the contentions raised by the parties, the facts pleaded in the suit are necessary which are as follows:

The petitioner as plaintiff filed the suit for permanent injunction restraining the opposite party-defendant from coming upon the suit land and interfering with the possession till evicted there from in due process of law. The plaintiff pleaded that her husband was inducted as a tenant and after his death, she is in possession of the ground floor of the house. The said possession was never disturbed by the recorded owner. The defendant tried to disturb the possession of the plaintiff illegally on the ground that he has purchased the land. Hence, the suit.

3. The defendant after receiving summon appeared and filed his written statement taking a stand that he has purchased the suit property for a consideration of Rs.28,00,000/- and traversed the claim of the plaintiff and prayed for dismissal of the suit. He has also filed a counter claim for passing a decree of mandatory injunction directing the petitioner to restore possession in his favour. He valued such relief of counter claim to the tune of Rs.5,000/-. It is the further plea that the defendant has purchased the land from his vendor excluding the suit house, as the house in question was in a dilapidated condition and as such the same was not valued. In the counter claim also the defendant has taken a specific stand that one Joginath Sahoo was a tenant under the recorded owners with respect to the ground floor of the building, who vacated the same at the end of October and handed over the key to the Landlord in the month of November, 2004 with a letter of request on

4.11.2004 to take over the possession and relieve him from tenancy from November, 2004. The plaintiff is neither a tenant nor a law full occupant of the suit premises and the said Joginath Sahoo has duly surrendered the possession and as such the tenancy was terminated from November, 2004. After getting information that the defendant has purchased the suit property under a registered sale deed, some mischief mongers to grab the suit property blackmailed the defendant and advanced a claim relating to the possession over the ground floor of the building with all evil intention to extend claim covering entire suit property and obtained ad-interim injunction order from the court. Thereafter, they broken the lock put in the ground floor and put a lock of their own on the ground floor on 20.12.2009. As there was an order of injunction obtained from the court, the defendant having no alternative than to watch such conduct of the plaintiff, who forcibly entered in to the dilapidated premises without any actual use, was nothing, other than the sporadic act of trespasser and the plaintiff is residing with her paternal family members in Rasulgarh in stead of the suit premises. The defendant, in the counter claim, has also specifically pleaded that before purchase of the land, there was a wide publication made in the newspaper. Thereafter, formalities of mutation have been dully carried out by the defendant and a holding number was also allotted and the cause of action of the counter claim arose on 20.12.2009. Therefore, it is impossible to accept that a person in possession could not know all those facts. In view of the above pleading, he has valued the counter claim at Rs.5,000/- and relief of mandatory injunction at Rs.500/- and court fee on the said valuation was paid. After receiving the copy of the counter claim, the petitioner filed an application under Order 7 Rule 11 of the Code of Civil Procedure to dismiss the said counter claim as the defendant himself has stated that he has purchased the land at Rs.28,00,000/-. It is also stated that since the valuation of the counter claim is Rs.28,00,000/-, the court has no pecuniary jurisdiction to tray the same and as such it needs to be rejected or return to the defendant to file a properly constituted suit. Therefore, the valuation of the counter claim was unreasonable, arbitrary and as such is liable to be rejected.

4. The defendant has filed objection to the said application taking a stand that the building was a dilapidated condition and the same was all along under its possession. After getting an ad-interim injunction, the plaintiff has forcibly entered into the suit premises on 20.12.2009 and put lock to the ground floor of the dilapidated building for which the relief of mandatory injuction has been prayed for by the defendant and as such the defendant has

valued the relief of counter claim properly. Therefore, question of rejecting the counter claim does not arise and the court has jurisdiction to try the same.

5. Considering the respective pleas of the parties, the trial court has come to a conclusion that the valuation made by the defendant for the purpose of relief, as disputed by the plaintiff, can be determined after assessing the evidence during course of trial. The court has option to ask for required court fee to be paid by the defendant, if the same is within the pecuniary jurisdiction of the court or otherwise, the court may return the same. Since there are no sufficient material to hold that the relief claimed in the counter claim was undervalued as such rejected the said contention.

6. Being aggrieved, the plaintiff has filed revision. The revisional court held that the decision of the court on the issue of valuation of the suit is final between the parties. However, the court is required to see the valuation of the suit should not be unreasonable or arbitrary low or undervalued. In that case, the court may direct the parties to correct it and as the question of valuation involved, the court below has dealt with all aspects and in absence of any material to assess the valuation, the valuation made by the defendant at that stage was accepted. On such finding, the revisional court dismissed the revision.

7. Learned counsel for the petitioner submitted that the counter claim raised by the defendant being unreasonable and undervalued, involved a complicated question of title. In support of this contention, he has relied the decisions rendered in the cases of Anathula Sudhakar v. P. Buchi Reddy (Dead) by L,Rs. & Ors. AIR 2008 Supreme Court 2033 and M/s. Jagannath Motors and another v. Rushikulya Gramya Bank and others, 2007 (Ii) OLR 521. In the case of Anathula Sudhakar (supra) the apex Court has deprecated the view that valuation of the suit shall be examined at the time of trial is not correct. In the case of M/s. Jagannath Motors and another (supra) this Court has also taken a similar view.

8. Learned counsel for the opposite party, however, submitted that since the counter claim is for mandatory injunction and specifically the defendant has stated that the plaintiff has forcibly entered into the premises after breaking the lock on 20.12.2009, during pendency of the suit and there is no dispute regarding title of the defendant over the land. Hence, the valuation of the counter claim is correct and the impugned order may not be interfered with.

9. Considering the rival submissions of the parties and the plea taken by them in the plaint as well as in the written statement and counter claim, it reveals that the defendant categorically alleged that the plaintiff entered into the premises on 20.12.2009 during pendency of the suit and defendant seeks relief for mandatory injunction, which are subject to trial and parties will prove their respective plea by adducing evidence. The court below taking into consideration the above position of law correctly passed the impugned order. Therefore, as there is no error apparent on the face of record, this Court is not inclined to interfere with the impugned order. The CMP is accordingly dismissed.

Application dismissed.

2015 (I) ILR - CUT- 115

S. PANDA, J.

MATA NO.15 OF 2014

KANAK MANJARI KAR .....Appellant

.Vrs.

SUSANTA KUMAR DASH .....Respondent

A. HINDU MARRIAGE ACT, 1955 –S.13 (1)

Divorce – Exparte decree – Proceeding initiated by respondent-husband within six months of the marriage – Bar U/s. 14 (1) of the Act – Appellant-wife became aware of the decree when she filed petition for restitution of conjugal rights – Trial Court dismissed application U/s.9 of the Act on the ground of the above exparte decree – The husband ,though alleged character of the wife in the divorce proceeding did not name the person with whom the wife had relationship – Wife was dark about such proceeding – Husband obtained exparte decree by suppressing material facts – Held, the exparte-decree is set aside and the matter is remitted back to the learned Court below for fresh disposal as to whether notice has been made sufficient on the appellant-wife and to consider maintainability of the application filed within six months of marriage. (Paras 5,6,7)

B. HINDU MARRIAGE ACT, 1955 –S.14 (1)

Divorce petition presented within six months of marriage – Proviso to the said provision provides leave for the parties in exceptional cases – Provision is not mandatory but directive in case prima facie exceptional hardship case is made out.

(Para 4)

Case laws Referred to:-

1.(1998) IIIMLJ 435 : (Indumathi-V- Krishnamurthy)
2.(2010) 4 SCC 393 : (Manish Goel-V- Rohini Goel)
3.AIR 2000 SC 1221 : (G.P. Srivastava-V- R.K. Raizada & Ors.)

For Appellant - M/s. Rajashree Bahal, K. Mohanty & S. Nayak.
For Respondent - M/s. M. K. Mohanty, M.R. Pradhan & T. Pradhan

Date of Judgment : 29.10.2014

JUDGMENT

S. PANDA, J.

This appeal has been filed by the appellant-wife challenging the *ex parte* decree of divorce dated 25.7.2002 passed by the learned Judge, Family Court, Bhubaneswar in C.P No.856 of 2011 under Section 13 (1) of the Hindu Marriage Act, 1955.

2. The facts leading to the present appeal are that the marriage between the appellant-wife and respondent-husband was solemnized on 05.5.1996 as per Hindu rites and customs at Bhubaneswar. Out of their wedlock they have blessed with a male child. As there was dissension between the parties, the respondent filed O.S No.439 of 1996 before the learned Civil Judge (Senior Division), Bhubaneswar under Section 13 of the Hindu Marriage Act, 1955 alleging that the appellant behaved him in a peculiar manner few days after the marriage and she has disclosed that she was not interested to lead marital life as she had affairs with many persons. It was further stated that the appellant constrained to marry the respondent due to the pressure of her family members. The respondent also pleaded regarding the character of the appellant and that he persuaded her to maintain the conjugal life, however, the appellant continued with her own temperaments and wanted to stay in a rented house. On 10.5.1996 dissension arose between the parties and by that

time the marriage has been consummated. It was further alleged that the appellant is a Post Graduate and arrogant person and she did not engage herself in the household activities. The appellant prior to her marriage was working as Lecturer in City Women's College, Cuttack. The aforesaid behavior of the appellant caused mental cruelty to the respondent for which he has filed the suit for divorce.

2.1 The respondent was examined as P.W.1, however no documentary evidence was adduced on behalf of him. The respondent though alleged about the character of the appellant, he has failed to name any particular person with whom the appellant had relationship and as the appellant attempted to kill him the court below has accepted that the appellant has done mental cruelty to the respondent. Accordingly, the court below by order dated 10.7.2002 decreed the suit *ex parte* against the appellant without cost and directed that the marriage between the parties stand dissolved from the date of the decree.

3. Learned counsel appearing for the appellant submitted that the appellant was residing with the respondent and they have a grown up son, who is prosecuting his studies at D.A.V Public School, Bhubaneswar. She has further submitted that the appellant has filed C.P No.856 of 2011 before the learned Judge, Family Court, Bhubaneswar under Section 9 of Hindu Marriage Act, 1955 for restitution of conjugal rights. In the said proceeding for the first time, the appellant came to know about the *ex parte* decree passed earlier and on that ground the learned Judge, Family Court by judgment dated 04.7.2013 dismissed the Civil Proceeding. She also submitted that as the appellant had no knowledge about the *ex parte* decree she has filed the present appeal. Admittedly the marriage between the appellant and respondent was solemnized on 05.5.1996 and O.S No.439 of 1996 was filed on 29.11.1996 i.e. within the period of six months from the date of marriage, as such the suit is not maintainable. Further the allegation of the respondent with regard to the character of the appellant as well as mental cruelty has not been proved rather the mental cruelty was imposed on the wife by the husband with false allegation regarding her character. Therefore, the *ex parte* decree is liable to be set aside and in the alternative liberty may be given to the appellant to contest the said suit as till date the respondent is coming to the appellant though they are residing separately. She further stated that the respondent has obtained the *ex parte* decree by practising fraud on the Court as well as on the appellant.

4. Learned counsel appearing for the respondent submitted that though the appellant has appeared in the suit through her counsel, she has not filed her written statement therefore rightly she was set *ex parte*. He further submitted that the court below has passed the *ex parte* decree accepting the mental cruelty done by the appellant and the same need not be interfered with. In support of his contention he has relied on a decision of the Madras High Court in the case of **Indumathi Vs.Krishnamurthy** reported in **(1998) IIIMLJ 435** wherein the Court taking into consideration the proviso to Section 14 (1) of the Hindu Marriage Act held that the provisions requiring intervention of one year between the date of marriage and the date of presentation for petition for divorce are not that mandatory. The proviso provides for leave to the parties by the Court to present petition before the expiry of such period on the ground that the case is of exceptional hardship to the petitioner or of exceptional depravity on the pan of the respondent. But the proviso proceeds to provide that at the trial "if appears to the court at the hearing of the petition that the petitioner obtained leave "to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until the expiry of one year from the date of marriage. xx xx xx Now a leave obtained by *supperesio veri or suggestio falsi* should be treated as vitiated to the extent of being *non est* and the Proviso, therefore, provides that "the Court may dismiss the petition" but without prejudice to any petition which may be brought after the expiry of one year as aforesaid. But since the Court may also decree the petition only with the rider that the decree shall not be operative before one year from the date of the marriage, the petition, though filed before the prohibited period of one year, and that too on misrepresentation or concealment, stands fully legalised and regularised and the prohibition that the decree shall not be effective until one year from the date of marriage may itself become of no practical effect or utility as in contested divorce cases, a decree is seldom available before that period, notwithstanding the directive in sec. 21-B(2) of the Act.

In the aforesaid decision the Court has considered Section 14 (1) of the Hindu Marriage Act and held that a petition for divorce could be entertained as the said provision is not mandatory but directive in case prima facie exceptional hardship case is made out.

5. After hearing learned counsel for the parties and going through the materials available on record, it appears that admittedly the appellant is under the impression that she is leading the conjugal life though the respondent is residing separately for which she has filed C.P No.856 of 2011 under Section 9 of the Hindu Marriage Act, 1955 before the learned Judge, Family Court, Bhubaneswar for restitution of conjugal rights. Out of their wedlock they have blessed with a male child, who is prosecuting his studies at D.A.V Public School, Bhubaneswar. However, the said fact was not before the court below while passing the *ex parte* decree and the respondent has not disputed the fatherhood of the son. It further appears that the appellant has lodged an F.I.R against the respondent for commission of offences under Sections 498-A / 34 of I.P.C read with Section 4 of D.P Act, which was registered as Capital P.S Case No.507 of 1997 and subsequently the same was converted to G.R Case No.3408 of 1997 before the learned S.D.J.M., Bhubaneswar. Though the respondent has alleged regarding the character of the appellant he could not be able to prove the same and in view of those allegations the suit is also not maintainable as per rules made in the Hindu Marriage Act. The respondent has obtained the *ex parte* decree by suppressing material facts before the court below and the appellant is in dark about pendency of the said proceeding.

6. The Apex Court in the case of **Manish Goel Vs. Rohini Goel** reported in **(2010) 4 SCC 393** held that waiver of the statutory period of six months as stipulated under Section 13–B (2) and 13-B (1) read with Section 12 of the Hindu Marriage Act can only be granted by Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution of India. The said statutory period has been prescribed for giving opportunity to parties to reconcile and withdraw petition for dissolution of marriage and the power is to be exercised exceptionally with caution and only in extraordinary situation. No vested right in parties to approach the Supreme Court directly under Article 136 of the Constitution of India.

6.1 Apex Court in the case of **G.P.Srivastava Vs. R.K.Raizada and others** reported in **AIR 2000 SC 1221** held that Courts have wide discretion if non-appearance of a party is not *mala fide* or intentional. If sufficient cause has been stated in the petition, the same shall be considered liberally and liberty should be given to the parties to contest the case on merits without lingering the same and the Courts have wide discretion in deciding the

sufficient cause keeping in view the peculiar facts and circumstances of each case.

7. In view of the discussions made above, this Court while setting aside the impugned order dated 25.7.2002 passed by the learned Judge, Family Court, Bhubaneswar in C.P No.856 of 2011 remits the matter back to the court below for fresh disposal. However, liberty is granted to the parties to prove the fact before the court below as to whether notice has been made sufficient on the appellant-wife or not and whether the application filed by the opposite party-husband under Section 13 of Hindu Marriage Act, 1955 for dissolution of marriage is maintainable or not. The MATA is accordingly disposed of.

Appeal disposed of.

2015 (I) ILR - CUT- 120

B. P. RAY, J.

CRLA. NO.271 OF 1991

AMBIKA PRASAD MOHANTY & ANR. .....Appellants

.Vrs.

STATE OF ORISSA .....Respondent

PENAL CODE, 1860 – S. 307

Conviction U/s. 307 I.P.C. challenged – Trial Court sentenced the appellant to under go R.I. for four years – In the meantime twenty three years have passed and appellants are now more than fifty years of age – No useful purpose will be served sending the appellants to custody at present – Interest of justice would be best served if the substantive period of sentence is reduced to the period already undergone by the appellants and a fine of Rs.10,000/- is imposed on them as compensation to the injured informant or his legal heirs and for payment of Rs.1000/- each to Bolangir Bar Association and to the State. (Para 7)

Case law Relied on:-

(2009) 16 SCC 479 : (Sarup Singh-V- State of Haryana represented by the Home Secretary).

For Appellants - M/s. S.K. Mund, D.P. Das & J.K. Panda.
For Respondent - Addl. Govt. Advocate.

Date of hearing : 20.03.2014
Date of judgment. : 20.03.2014

JUDGMENT

B. P. RAY, J.

This appeal has been filed challenging the judgment and order dated 10.10.1991 passed by the learned Sessions Judge, Bolangir in Sessions Case No.16 of 1991 convicting the appellants under Section 307, IPC and sentencing each of them to undergo R.I. for four years.

2. The prosecution case is that the informant – Manoj Kumar Swain had opened a grocery shop in Bolangir Town and the appellants also owned a grocery shop. The parties had business transaction. A dispute arose over payment of dues. On 30.10.1990 morning in between 6.30 A.M. to 7.00 A.M., when the informant-Manoj Kumar Swain was proceeding to his grocery shop, near Mahadev Temple of Tulasinagar, the appellants, who are brothers, suddenly appeared armed with a Gupti and a piece of iron rod and obstructed the informant. Appellant, Ambika Prasad Mohanty dealt him blows by the Gupti. The other appellant, Subrata Kumar Mohanty assaulted the informant by the iron rod, for which the informant was severely injured and fell down. The appellants thinking that the informant was dead, left the place of occurrence. On these allegations, charges under Section 341 IPC for unlawful restraint and under Section 307 IPC for attempt to murder have been framed against the appellants-accused.

3. In order to prove the case, the prosecution has examined as many as seven witnesses, out of whom, P.W.1 is the informant, P.W.2 is an occurrence witness, P.Ws. 3 and 4 turned hostile, P.Ws.5 and 6 are two Medical Officers and P.W.7 in the Investigating Officer. However, the defence did not examine any witness.

4. The appellant-accused, who pleaded not guilty, rather complained that the informant took grocery articles worth Rs.10,000/- from them to open his

new shop and avoided to re-pay the amount and in order to escape from the liability, he lodged F.I.R. against them.

5. Learned counsel for the appellants vehemently urges that if the evidence of the witnesses is taken into consideration, the appellants would be liable for acquittal of the charges leveled against them. He also submitted that the dispute is of the year 1990 and in the meantime more than twenty three years have passed and the appellants are now more than fifty years of age.

6. Learned counsel for the State, on the other hand, contended that the sentence imposed on the appellants by the trial court is just and reasonable and this Court should not interfere with the same.

7. However, taking a lenient view of the matter and considering the fact that the incident has taken place more than twenty three years back, no useful purpose will be served best in sending the appellants to custody at present.

Following the decision in the case of Sarup Singh-V- State of Haryana represented by the Home Secretary, (2009) 16 SCC 479, this Court is of the view that interest of justice would be best served if the substantive period of sentence is reduced to the period already undergone by the appellants and a fine of Rs.10,000/- (rupees ten thousands) is imposed on them, as compensation to the injured informant/Manoj Kumar Swain or his legal heirs, as the case may be and further directing them to pay a sum of Rs.1000/- (rupees one thousand) to the Bolangir Bar Association and Rs.1000/- (rupees one thousand) to the State,

Ordered accordingly.

The aforesaid amount shall be deposited before the learned trial court by the end of November, 2014, failing which the judgment and order of conviction passed by the learned Sessions Judge shall remain operative. The Criminal Appeal is accordingly disposed of.

Appeal disposed of.

2015 (I) ILR - CUT-123

S.C. PARIJA, J

A.R.B.A. NO. 4 OF 2009

UNION OF INDIA ……..Appellant

.Vrs.

M/S. VAISHNODEVI CONSTRUCTION …..… Respondent

ARBITRATION & CONCILATION ACT, 1996 - Ss. 31 (7) (a), 34

Award of interest – Clause 16 (2) of GCC governing the contract between the Parties bars payment of interest – Arbitrator is bound by the terms of the contract – Held, award of interest by the learned Arbitrator both on earnest money and security deposit is set aside.

Case law Relied on:-

AIR 2010 SC 3337 : (M/s. Sree Kamatchi Amman Constructions-V- Divisional Railway Manager (Works) Palghat & Ors.

For Appellant - M/s. Anindya Ku. Mishra
For Respondent - M/s. S.K. Sangneria

Date of Order : 04.09.2014

ORDER

S.C. PARIJA, J

Heard learned counsel for the parties.

This appeal is directed against the judgment dated 17.11.2008, passed by the learned District Judge, Khurda, at Bhubaneswar, in ARBP No.31 of 2007, dismissing the application of the appellant filed under Section 34 of the Arbitration and Conciliation Act, 1996.

The brief facts of the case, as detailed in the appeal memo, is that the appellant invited sealed tender in the prescribed form for execution of "Balance left over works of earth work in formation, construction of bridges and other allied works in Section-M at Talcher end from CH 23000 to CH 24000 (1.00 KM distance) of Sambalpur –Talcher Rail link".

The respondent participated in the tender and the offer made by it was accepted by the appellant vide letter dated 14.07.1990. The value of the

contract work was Rs.44,68,087/- and the period of completion was 15 months, with effect from 14.08.1990. The contract agreement was executed between the parties on 30.10.1990.

The respondent having failed to complete the contract work within the stipulated period, they requested for extension of time and on their request, time for completion of the contract was extended from time to time. Ultimately, the respondent completed the contract work on 30.11.1996.

After completion of the contract work and payment of the final bill, the respondent raised a claim for compensation on the ground that they sustained loss due to delay in handing over possession of the work site, supply of the plants, lay out of the profile of the drawing and designs. The appellant having not accepted the claims of the respondent, the dispute was referred to the sole Arbitrator, Hon'ble Shri Justice S.K.Mohanty, Retd. Judge of this Court, for adjudication.

The respondent raised the following claims before the learned Arbitrator.

(1)	Compensation for the idle period of expenditure on establishment held	Rs.76,59,773/-
(2)	Compensation for monetary loss on contract value during non-working period	Rs.18,09,575/-
(3)	Quantity variation of transported earth till materials and differential cost of item of work not paid	Rs.26,24,474/-
(4)	Interest of blockage amount	Rs.1,08,27,473/-

Learned Arbitrator, after considering the statement of claims made by the respondent and the counter statement filed by the appellant, vide award dated 30.09.2006, allowed the claims of the respondent in respect of claim item nos.3 and 4 and rejected claim item nos.1 and 2. Accordingly, the appellant was directed to pay Rs.11,13,266/- towards the outstanding dues and Rs.12,46,784/- as interest on the said outstanding dues and Rs.7800/- as interest on the outstanding security deposit till 7.2.2001, along with cost of Rs.50,000/-, to be paid within a period of three months, failing which, interest @ 18% per annum shall be payable on the total awarded amount.

Being aggrieved by the award passed by the learned Arbitrator, the appellant filed application under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act" for short), for setting aside the award, which having been rejected by the learned District Judge, Khurda, vide impugned judgment dated 17.11.2008, the present appeal has been filed.

Learned counsel for the appellant submits that as the final bill in respect of the contract work was passed after furnishing of "no claim certificate" by the contractor-respondent, they were not entitled to raise any subsequent claim for compensation. It is submitted that the respondent having received the final bill without any protest, on submission of "no claim certificate", they are estopped from raising any further claim by way of compensation, as has been awarded by the learned Arbitrator.

It is the further case of the appellant that the award of interest by the learned Arbitrator for the period from the date of the cause of action till the date of the award is ex facie illegal and contrary to the terms and conditions of the contract agreement and therefore, the same cannot be sustained in law. In this regard, it is submitted that Clause 16(2) of the General Conditions of Contract ('GCC' for short), which is a part and parcel of the contract agreement, specifically prohibits any interest, either on the earnest money and on the security deposit or any amount payable to the contractor under the contract. Therefore, learned Arbitrator erred in allowing the claim item no.4 and awarding interest amounting to Rs.12,46,784/- on the outstanding dues and Rs.7800/- as interest on the outstanding security deposit, from the date of the cause of action to the date of the award.

In this regard, learned counsel for the appellant has relied upon a decision of the apex Court in **M/s Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager (Works), Palghat and Ors.**, AIR 2010 SC 3337, in support of his contention that in view of bar under Clause 16(2) of the GCC, no interest for the pre-reference period or pendent lite is payable, as has been awarded by the learned Arbitrator.

It is accordingly submitted that the learned District Judge has erred in not considering the relevant fact that the award of interest by the learned Arbitrator is contrary to Clause 16(2) of the GCC, which is a part and parcel of the terms and conditions of the contract agreement and therefore, the award is in conflict with the public policy, as provided under Section 34(2) of the Act.

Learned counsel for the respondent submits that the finding of facts recorded by the learned Arbitrator cannot be assailed either in an application under Section 34 of the Act or in the present appeal, as this Court does not sit in appeal over the award passed by the learned Arbitrator. In this regard, it is submitted that as the learned Arbitrator, on the basis of the evidence on record, both oral and documentary, has passed the award in respect of the claim item no.3 towards outstanding dues, the same cannot be interfered with, especially when the appellant has failed to make out a case for setting aside the award in respect of the said item of claim, as provided under Section 34 of the Act.

As regard the award of interest by the learned Arbitrator, learned counsel for the respondent fairly accepts the position that Clause 16(2) of the GCC prohibits award of interest either on the earnest money and security deposit or any amount payable to the contractor under the contract. However, it is submitted that the respondent is entitled to interest on the awarded amount of Rs.11,13,266/- @ 18% per annum, from the date of award to the date of payment, as provided under Section 31(7)(b) of the Act.

On a perusal of the impugned order, it is seen that the learned District Judge has come to find that there is no justification for setting aside the award as regard claim item no.3, as the learned Arbitrator has considered all aspects of the matter and has given his findings on the basis of the materials available on record. As regard the plea of the appellant that the contractor-respondent having furnished "no claim certificate" prior to the payment of final bill, no claim for any further amount by way of compensation is maintainable, learned District Judge has dealt with the same in detail and has come to hold that mere furnishing of a "no claim certificate" cannot be bar, to prevent the contractor for raising a justified claim, by invoking the arbitration clause. This finding of the learned District Judge cannot be faulted.

Coming to the question regarding the award of interest by the learned Arbitrator, from the date of cause of action to the date of award, learned District Judge has come to hold as under:-

> "xxx The withholding is permissible only if there is any claim of the Railway against the contractor, whereas in the present case there was no such occasion. Neither before the learned Arbitrator nor before this Court any material was placed to show that the Railway authority had any claim whatsoever against the contractor. Moreover, the work

> was completed on 30.11.1996 and 90% of the security money was released on 12.01.1998 and the balance was released only on 08.01.2001 when the final bill was passed after singing of no claim certificate by the contractor. The learned Arbitrator has awarded interest on the unpaid security amount from 31.05.1997 till 09.02.2001. Further the rate of interest has been calculated at the rate of 12 per cent per annum which is not unreasonable."

Clause 16(2) of the GCC governing the contract between the parties bars payment of interest, which is extracted below:

> "16(2) **Interest on amounts**: No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon.
> Interest on the said Government Security will be drawn by the Railway Administration and credited to the Contractor and the Contractor shall not be entitled to claim any other sum by way of interest or profit on the said Security Deposit than the amount actually drawn by the Railway Administration from the Government."

It is now well settled that if there is a bar against payment of interest in the contract, the Arbitrator cannot award any interest for the pre-reference period or pendent lite. The apex Court in **M/s Sree Kamatchi Amman Constructions (**supra), has reiterated that Section 31(7)(a) of the Act by using the words "unless otherwise agreed by the parties" categorically clarifies that the Arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to date of award. Therefore where the parties had agreed that no interest shall be payable, arbitral tribunal cannot award interest between the date when the cause of action arose to date of award.

Section 31(7) (b) of the Act provides that a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest @ 18% per annum from the date of the award to the date of payment.

In view of the specific bar under Clause 16(2) of the GCC, which governs the contract between the parties, the award of interest by the learned

Arbitrator amounting to Rs.12,46,784/-, on the awarded outstanding dues of Rs.11,13,266/- from the date of cause of action till the date of award and Rs.7800/- as interest on the outstanding security deposit till 08.02.2001 was not proper and justified and the same is accordingly set aside.

However, the respondent is entitled to interest on the awarded amount of Rs.11,13,266/- @ 18% per annum, from the date of the award till the date payment. The appeal is accordingly allowed to the extent indicated above.

Appeal allowed.

2015 (I) ILR - CUT- 128

B. K. PATEL, J.

W.P.(C) NO. 9997 OF 2014

DHABAL PRASAD PRADHAN .....Petitioner

.Vrs.

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

REGISTRATION ACT, 1908 – S 22- A (2) (Odisha Amendment 2013)

Registration of sale deed – Provision does not require the transferor to produce ROR in his name in respect of the land transferred – However production of ROR is required only for the satisfaction of the Registering officer that the transferor has right, title and interest over the property so transferred.

In this case the petitioner has not only produced the RSD executed by his vendor but also the ROR in the name of his vendor to establish the flow of title to him – Held, the impugned order refusing to register the sale deed is quashed – Direction issued to the District Sub-Registrar, Cutttack to effect registration of the sale deed on presentation.

Petitioner - M/s. Susanta ku. Dash.
Opp. Party.- Addl. Govt. Adv.

Date of Order : 21.10.2014

ORDER

B. K. PATEL, J.

Heard learned counsel for the petitioner and learned counsel for the State appearing for the opposite parties.

In this writ petition, petitioner has made prayer to direct opposite party no.4-District Sub-Registrar, Cuttack to effect registration of the sale-deed executed by the petitioner in favour of the vendee Akshya Kumar Jena for sale of the case land.

Khata No.285 in Mouza-Gopalpur including plot No.1708 stands recorded solely in the name of petitioner's vendor Jadunath Behera under Record-of-Rights at Annexure-1 to the writ petition. Petitioner purchased land comprising of an area of Ac.0.22 decimals out of plot No.1708 on the strength of registered sale-deed dated 8.2.2013/11.2.2013 at Annexure-2. In order to meet expenses for treatment of his cardiac ailments, the petitioner negotiated with the vendee Akshya Kumar Jena for sale of Ac.0.04 decimals out of the land purchased under sale deed at Annexure-2. While preparing for purchase of stamp papers for execution of sale-deed the petitioner came to know that no sale deed is accepted for registration by the registering officer at Cuttack unless name of the transferor is recorded in the Record-of-Right on the pretext of the bar contained under Sub-section (2) of Section 22-A of the Registration Act,1908 (for short, 'the Act') incorporated into the statute by the Registration (Odisha Amendment) Act,2013. Sub-Section(2) of Section 22-A of the Act reads as follows:

> "22-A(1) xxx xxx xxx
>
> (2) Notwithstanding anything contained in this Act, the registering officer shall not register any document presented to him for registration unless the transferor produce the record of rights, for the satisfaction of the registering officer that such transferor has right, title and interest over the property so transferred.
>
> Explanation- For the purpose of this sub-section, 'record-of-rights' means the record of rights as defined under the Odisha Survey and Settlement Act,1958."

Apprehending that the sale-deed executed by him in favour the vendee shall not be registered by the District Sub-Registrar, the petitioner filed the present writ application.

During the pendency of the writ petition, in view of the statement made by the learned counsel for the State that if sale-deed executed by the petitioner is presented for registration appropriate order shall be passed in accordance with the statutory provisions, the following order was passed on 6.8.2014:-

> "On instructions, learned counsel for the State submits that sale deed has not been presented by the petitioner for registration so far and that appropriate order with regard to registration/ non-registration shall be passed on presentation of the sale deed. There is no hindrance in registering the documents in case the sale deed satisfies requirement under the Indian Registration Act and Indian Stamp Act.
>
> In view of such submissions, learned counsel for the petitioner submits that the documents shall be presented for registration within a period of seven days from today.
>
> On presentation of the sale deed along with the records-of-right pertaining to the land proposed to be sold along with any other documents indicating the petitioner's title over the said land, the registering authority shall proceed to consider registration in accordance with law forthwith.
>
> Put up this matter on 25.8.2014.
>
> Urgent certified copy of this order be granted on proper application.
>
> A free copy of this order be handed over to the learned counsel for the State."

On 22.8.2014 petitioner filed additional affidavit stating therein that the sale deed, copy of which is at Annexure-3 to the additional affidavit, executed by the petitioner in favour of the vendee was refused to be registered by the opposite party no.4-District Sub-Registrar, Cuttack on the strength of endorsement dated 12.8.2014 made in the sale deed. The endorsement reads as follows:

> "The document presented for registration cannot be registered as the transferor could not produce the R.O.R. in his favour regarding right,

title, interest over the property so transferred as contemplated under Sub-section 2 of Section 22-A of the Registration(Odisha Amendment) Act,2013."

It is contended by the learned counsel for the petitioner that along with the sale deed at Annexure-3, petitioner also filed Record-of-Rights at Annexure-1 as well as registered sale deed at Annexure-2 to establish petitioner's right, title and interest over the case land. However, the opposite party no.4-District Sub-Registrar, Cuttack appears to have misconstrued the provisions under Sub-section(2) of Section 22-A of the Act to mean that sale deed cannot be registered unless the land proposed to be sold stands recorded in favour of the transferor in the Record-of-Rights. It is argued that such interpretation is illegal as well as unconstitutional. Such an interpretation to the above said provision would amount to conferring jurisdiction on the registering officers to decide right, title and interest over landed property. Such an interpretation also negates the settled position of law that Record-of-Right is not a document of title and that Record-of-Rights can neither create nor extinguish title. Moreover, preventing a person from selling his land acquired on the strength of valid deed of transfer would be contrary provision under Section 8 of the Transfer of Property Act,1882 which provides that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. Learned counsel for the petitioner also argues that preventing a person from selling a piece of land which he has purchased on the strength of registered sale deed amounts to preventing a person from dealing with his own property and thereby is violative of Article 300-A of the Constitution of India which provides that no person shall be deprived of his property save by authority of law. By refusing registration of the sale deed executed by the petitioner in respect of the case land which he has purchased, the petitioner is being deprived of his right to deal with his own property without any authority of law. Such a narrow interpretation by the District Sub-Registrar is prima facie not tenable. On a plain reading, it is evident that the provision under Sub-section(2) of Section 22-A of the Act nowhere stipulates that registration of a transfer deed shall be refused in case the land sought to be transferred is not recorded in the Record-of-Rights in the name of the transferor.

A counter-affidavit has been filed on behalf of opposite parties 1,3 and 4. It is candidly admitted therein that registering authority is not the authority to decide title of the property of the vendor or vendee who are

approaching for registration of the sale deeds. However, it is averred in the counter-affidavit that on a simple interpretation of provisions under Sub-section(2) of Section 22-A of the Act it is manifestly clear that if a person wants to transfer his property, he has to submit Record-of-Rights at the time of registration showing that the property in question has been recorded in his name. Object of incorporation of the provision under Sub-Section(2) of Section 22-A of the Act is to prevent illegal and fake sale transactions. It is not disputed that on the strength of registered sale deed at Annexure-2 recorded tenant of Record-of-Rights at Annexure-1 has sold a piece of land recorded in his name to the petitioner. Paragraph-7 of the counter-affidavit reads as follows:

> " That there is absolutely no doubt that as is event from Annexure-2 the Sale Deed the petitioner is the purchaser of the land from one Jadumani Behera who is the recorded tenant as per Annexure-1, but the fact remains that after purchasing of the property vide Annexure-2 the Sale Deed, the petitioner has not mutated the land in his favour and has not corrected the ROR as under Annexure-1 and therefore the requirement being to produce the ROR showing the name of the transferor in respect of the property wanted to be transferred, the refusal by Registering Officer to register the Sale Deed cannot be said to be illegal or in violation of any right enshrined under the Constitution of India and under the provisions of Transfer of Proper Act."

It is further averred that the opposite party no.4-District Sub-Registrar, Cuttack having acted in accordance with the provision under Sub-section(2) of Section 22-A of the Act, refusal to register the sale deed at Annexure-3 does not violate provisions under Section 8 of the Transfer of Property Act. It is also argued by the learned counsel for the State that the Registration (Odisha Amendment) Act,2013 incorporated Section 22-A including Sub-Section (2) thereof, has been made in order to prevent illegal and fake sale transactions. Provision under Sub-Section(2) does not confer jurisdiction on the Registering authority to decide title over the land proposed to be sold which power can be exercised by competent courts only. However, keeping in view the object, jurisdiction has been conferred on the registering authority to refuse registration of sale deeds upon being prima facie satisfied regarding transferor's title over the land proposed to be sale by producing Record-of-Right in respect of such land in the name of the transferor. In the present case, the petitioner having not mutated the case

land in his name, the opposite party no.4-District Sub-Registrar, Cuttack refused to effect registration of the sale deed.

On a plain reading of Sub-section(2) of Section 22-A of the Act, it is found that nowhere the provision requires production of Record-of-Rights in respect of the land transferred in the name of vendor or transferor. It simply requires production of the Record-of-Rights for satisfaction of the registering officer that such transferor has right, title and interest over the property so transferred. It is well settled that Record-of-Rights neither creates nor extinguishes title. The contention advanced by the learned counsel for the petitioner that interpretation of the provision under Sub-section(2) of Section 22-A of the Act assigned on behalf of the opposite parties is contrary to such settled principle of law is not unfounded. Moreover, it is rightly contended that such a narrow interpretation to the provision would be contrary to the provision under Section 8 of the Transfer of Property Act with regard to transfer of all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof forthwith. Title of the land passes upon valid execution of sale deed. Constitutional right conferred under Article 300-A of the Constitution of India has also to be given a meaningful interpretation to include right to deal with one's own property. In such circumstances, narrow interpretation of the provisions under Sub-Section(2) of Section 22-A of the Act by the opposite parties is unwarranted and not acceptable.

Accordingly, it is held that Sub-section(2) of Section 22-A of the Act does not require production by the transferor of Record-of-Rights in which land transferred is recorded in transferor's name. Any interpretation of the provision to the contrary is arbitrary, illegal and unconstitutional.

In the present case, along with the sale deed at Annexure-3 petitioner has produced not only registered sale deed at Annexure-2 executed by his vendor but also Annexure-1 the Record-of-Rights in which land purchased by the petitioner including land proposed to be sold by the petitioner to the vendee stands recorded in the name of petitioner's vendor. Petitioner has filed documents to establish the flow of title to him. Therefore, there is no reason for the opposite party no.4-District Sub-Registrar, Cuttack not to be satisfied that the petitioner has right, title and interest over the case land. Hence, refusal of registration is not sustainable.

In view of the above, the writ petition is allowed. Order of refusal to register sale deed is quashed. Opposite party no.4-District Sub-Registrar,

Cuttack is directed to effect registration of the sale deed at Annexure-3 executed by the petitioner forthwith on presentation.

Petition allowed.

2015 (I) ILR - CUT-134

B. K. NAYAK, J.

O.J.C. NO. 4854 OF 1995

KANHEI CHARAN DAS ……..Petitioner

.Vrs.

RAMAKANTA DAS & ORS. ……Opp.Parties

HINDU MINORITY & GUARDIANSHIP ACT, 1956 - Ss. 6,8, 11, 12

Joint Hindu Family – Alienation of property for legal necessity – Karta or adult member can sale property including the undivided interest of minor – Such sale shall be governed by the un-codified Mitakshara School of Hindu law, according to which sale by the Karta or Manager, without any legal necessity or benefit of estate shall be voidable at the option of the minor with regard to his undivided interest.

In this case Banamali being the brother guardian sold the total suit land including the undivided interest of the minor brother Ramakanta – Both parties have argued that the sale was for legal necessity – Section 8 of the Act does not apply to such sale but it has to be read conjointly with Section 6 & 12 – Held, the impugned orders of the Consolidation Authorities that the sale of Ramakanta's undivided interest in the disputed joint family property by Banamali was void and invalid being in contravention of Section 11 of the Act, cannot be sustained. (Paras 13, 15)

Case laws Referred to:-

1.AIR 2002 SC 215 : (Madhegowda-V- Ankegowda)
2.(1996) 8 SCC 54 : (Sri Narayan Bal & Ors.-V- Sridhar Sutar & Ors.)

3.AIR 1963 PATNA 146 (V 50 C 42) : (Nathuni Mishra & Ors.-V- Mahesh Misra & Ors.)

4.1994 (I) OLR 313 : (Pranakrushna Sahu & Ors.-V- Raghunath Sahu & Ors.).

For Petitioner - M/s. S.K. Nayak-2, S.R. Ahamed, K.K. Rout & B.K. Sahoo.
For Opp.Parties - M/s. N. Behuria & C.R. Behera. Addl. Govt. Advocate.

Date of hearing : 14.07.2014
Date of judgment: 05.08.2014

JUDGMENT

B.K.NAYAK, J.

Common order dated 19.8.1983 passed by the Consolidation Officer, Simulia, in objection case nos.1045/82 and 1121/82 (Annexure-1) and the confirming order dated 13.1.1995 (Annexure-2) passed by the Additional Commissioner, Settlement and Consolidation, Bhubaneswar in consolidation revision case no.394 of 1993 are the subject matters of challenge in this writ application.

2. The undisputed facts are that the case land appertaining to Sabik Plot nos.792, 796 and 789 measuring total area of Ac.0.40 under Khata No.66 was the ancestral land of Krutibas Das and stood recorded in his name. After the death of Krutibas and his wife, the property devolved on his two sons, namely, Banamali and Ramakanta as joint owners thereof, both having 50% share each. Ramakanta being a minor was being looked after by his major brother-Banamali, who was managing the joint family properties including the undivided interest of Ramakanta. By registered sale deed dated 18.6.1975 Banamali sold the entire disputed land of 40 decimals on behalf of himself and also as brother guardian of Ramakanta in favour of one Agani Dash. Agani in his turn sold the disputed land to one Sanatan and the present petitioner Kanehei by registered sale deed dated 26.7.1977 and 1.12.1983.

3. During the consolidation operation, the disputed land was recorded as plot no.696-Ac.0.40 under consolidation Khata No.103 in the name of Sanatan Dash and petitioner- Kanhei. Ramakanta, the present opposite party no.1, filed objection case no.1045/82 claming to record his half share in the

disputed land in his name on the ground that his brother- Banamali had no right to alienate his share. Another objection case bearing no.1121of 1982 was filed by petitioner Kanhei to delete name of Sanatan Dash, on the ground that he has sold his entire share in the disputed land in his favour.

4. By the impugned order under Annexure-1, the Consolidation Officer directed to record the case land jointly in the names of Kanhei(petitioner), Ganesh Prashad Das and Suresh Kumar Das(opposite party nos.4 and 5), sons of Sanatan Das and Ramakant Das. Challenging the order of the Consolidation Officer, the present petitioner and opposite party nos.4 and 5 filed consolidation revision case no.394 of 1993 before the Additional Commissioner, Settlement and Consolidation, Bhubaneswar. By the impugned order under Annexure-2 the Additional Commissioner confirmed the order passed by the Consolidation Officer. For allowing the claim of Ramakanta, both the consolidation authorities, held that Banamali was merely defacto guardian, but not the legal guardian of minor, Ramakanta and, therefore, he had no authority to deal with and transfer the properties of the minor, in view of the bar contained in section-11 of the Hindu Minority and Guardianship Act, 1956, and, therefore, the sale to the extent of the minor's half share in the disputed property is void, and that the sale is valid only to the extent of 50 % share of Banamali and as such Kanhei and Sanatan, by virtue of their purchase from Agani, were entitled to only 50 % share in the property.

5. Learned counsel for the petitioner submitted that Banamali and Ramakanta being members of joint Hindu Family, no guardian in respect of the undivided interest of Ramakanta in the disputed property which was the joint family property of both, could have been appointed in view of the provision of section-12 of the Hindu Minority and Guardianship Act, and that Banamali being the adult male member of the joint family sold the disputed land in his capacity as Karta or Manager of the family, for legal necessity, and, therefore, the finding of the consolidation authorities that Banamali could not have sold the undivided interest of minor- Ramakanta is untenable. His further submission is that the finding of consolidation authorities that sale was void being in contravention of section-11 of the Hindu Minority and Guardianship Act is not sustainable for the reason that section-12 of the Act is by-nature an exception to section-11. His last submission is that Banamali having sold the interest of the minor Ramakant in case it is proved that there was no legal necessity or benefit of estate,the sale would be voidable only at

the instance of Ramakanta and not void, and that in case Ramakanta wanted to avoid the sale on such ground, he should have approached the Civil Court, since, the consolidation authority lacks power and jurisdiction to decide the voidabililty of the sale transaction.

Learned counsel appearing for opposite party no.1- Ramakanta contended that the prohibition for sale of minor's property by a de-facto guardian under section-11 of the Act applies to the minors separate property as well as his undivided interest in the joint family property and any sale of minors property in contravention of section-11 is void, and, therefore, the impugned orders warrant no interference. For such contention he relies on the decision of the Apex Court reported in ***AIR 2002 S.C.215: Madhegowda v. Ankegowda*.**

6. To appreciate the contentions raised by the learned counsel for the parties, it is appropriate to see some relevant provisions of the Hindu Minority and Guardianship Act, 1956 (in short 'the Act')

Section 6 of the Act declares the natural guardians of the Hindu Minor in following terms:-

> " 6.**Natural guardians of a Hindu Minor.**- The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-
>
> (a) in the case of a boy or an unmarried girl- the father, and after him, the mother; provided that the custody of a minor who has not complete the age of five years shall ordinarily be with the mother;
>
> (b) in the case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;
>
> (c) in the case of a married girl-the husband:
>
> Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-
>
> (a) if he has ceased to be a Hindu, or
>
> (b) if he has completely and finally renounced the world becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).
>
> *Explanation*.- In this section, the expressions "father" and "mother" do not include a step-father and a step-mother".

7. Section 8 of the Act deals with the powers of natural guardian. Sub-sections (1) to (4) of the said section which are relevant for our purpose are quoted hereunder:-

> "**8.Powers of natural guardian**.-(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal convenant.
>
> (2) The natural guardian shall not, without the previous permission of the Court,-
> (a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor; or
> (b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.
>
> (3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.
>
> (4) No Court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor."

8. Section 11 of the Act prohibits the de facto guardian to dispose of and deal with minor's property, whereas Section 12 bars appointment of a guardian for minor's undivided interest in joint family property. The said sections are extracted hereunder:-

> "**11. De facto guardian not to deal with minor's property**- After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the de facto guardian of the minor".
>
> "**12**. **Guardian not to be appointed for minor's undivided interest in joint family property**-Where a minor has an undivided interest in joint family property and the property is under the

management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest:

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest".

9. In case it be held that the transfer of the undivided interest of Ramakanta in the disputed property by his adult brother, Banamali was void and invalid, then the further question as to how the transaction shall be avoided by Ramakanta needs no consideration. In case it is held that the sale of minor's undivided interest by his brother Banamali was voidable at the instance of Ramakanta, then the question of modalities for avoidance would fall for consideration.

10. Learned counsel for the petitioner contends that Banamali being the adult member of the joint family of himself and Ramakanta sold the case land including Ramakanta's undivided interest therein as Karta and Manager of the joint family and therefore if such sale is for legal necessity or for benefit of estate, the sale would be valid, and on the other hand, if the sale is with out legal necessity or benefit of estate, it would be voidable at the instance of Ramakanta and not void. It is also submitted that for avoiding the sale of minor's undivided interest, the minor on attaining majority shall have to file a suit in the Civil Court within the prescribed period of limitation, and that the consolidation authorities being not empowered to decide the question of voidability of a sale transaction, the impugned orders are liable to set aside.

11. In the case of ***Madhegowda*** *(supra*) on which the learned counsel for opposite party no.1 placed reliance was a case where the original owner of the property died living behind two daughters, one of whom was major and the other a minor, and that the major daughter sold the land including the undivided interest of the minor sister acting as her de facto guardian. In such circumstances the Hon'ble Apex Court held that the transfer of minor's property being in contravention of section 11 of the Act was void and invalid.

12. In the case of ***Sri Narayan Bal and others v. Sridhar Sutar and others : (1996) 8 SCC 54*** considering the relative scope of Sections 6, 8, and 12 of the Hindu Minority and Guardianship Act,1956, the Hon'ble Supreme Court held as follows :

"**5.** With regard to the undivided interest of the Hindu minor in joint family property, the provisions afore-culled are beads of the same string and need to be viewed in a single glimpse, simultaneously in conjunction with each other. Each provision, and in particular Section 8, cannot be viewed in isolation. If read together the intent of the legislature in this beneficial legislation becomes manifest. Ordinarily the law does not envisage a natural guardian of the undivided interest of a Hindu minor in joint family property. The natural guardian of the property of a Hindu minor, other than the undivided interest in joint family property, is alone contemplated under Section 8, where under his powers and duties are defined. Section 12 carves out an exception to the rule that should there be no adult member of the joint family in management of the joint family property, in which the minor has an undivided interest, a guardian may be appointed; but ordinarily no guardian shall be appointed for such undivided interest of the minor. The adult member of the family in the management of the joint Hindu family property may be a male or a female, not necessarily the Karta. The power of the High Court otherwise to appoint a guardian, in situations justifying, has been preserved. This is the legislative scheme on the subject. Under Section 8 a natural guardian of the property of the Hindu minor, before he disposes of any immovable property of the minor, must seek permission of the court. But since there need be no natural guardian for the minor's undivided interest in the joint family property as provided under Sections 6 and 12 of the Act, the previous permission of the court under Section 8 for disposing of the undivided interest of the minor in the joint family property is not required. The joint Hindu family by itself is a legal entity capable of acting through its Karta and other adult members of the family in management of the joint Hindu family property. Thus Section 8 in view of the express terms of Sections 6 and 12, would not be applicable where a joint Hindu family property is sold/disposed of by the Karta involving an undivided interest of the minor in the said joint Hindu family property. The question posed at the outset therefore is so answered."

The aforesaid observation in ***Sri Narayan Bal and others*** (supra) as also the Division Bench decision of the Patna High Court in the case of ***Nathuni Mishra and others v. Mahesh Misra and others : AIR 1963***

PATNA 146 (V 50 C 42) where it was held that Section 11 does not deal with the disposal of the undivided interest of minor in a joint Hindu Family governed by the Mitakshara school of law and therefore, cannot be pleaded as a bar for disposal of joint family property by the Manager or the Karta of the family for legal necessity was taken note of in ***Madhegowda*** (supra).

In ***Madhegowda*** (supra) therefore, in paragraph-23 of the judgment the apex Court explained that case of ***Madhegowda*** (supra) is not one of alienation of a minor's interest in a joint family property since it was not the case of any of the parties that the suit property was a joint family property in the hands of the father of the two daughters and that the transfer by major daughter was a transfer of the minor's interest in the joint family property.

13. It is thus clear that the apex Court while not doubting the correctness of the proposition and principles laid down in ***Sri Narayan Bal and others*** (supra) and ***Nathuni Mishra and others*** (supra), decided the question of sale of minor's property by a de facto guardian excluding the minor's undivided interest in the joint family property. Therefore, the proposition in ***Madhegowda*** (supra) that sale of minor's property in contravention of Section 11 of the Act is void and invalid must be held to be applicable to all properties of minor except where the sale is by a Karta or Manager of a joint Hindu Family of the undivided interest of the minor in the joint family property. The observations made in ***Sri Narayan Bal and others*** (supra) also holds good to the extent that Section 12 of the Act is also by nature an exception to the provision of Section 11 of the Act. In other words, it must be held that where the de facto-guardian of a minor is also the Karta or Manager or an adult member of the joint family including the minor himself, for sale by him of the joint family property including the undivided interest of the minor in such property, no permission of the court is necessary. Such sale shall be governed by the un-codified Mitakshara school of Hindu law, according to which sale by the Karta or Manager of the Hindu Joint Family Property without any legal necessity or benefit of estate shall be voidable at the option of the minor with regard to his undivided interest.

14. With regard to the mode of avoiding a voidable transaction it has been held by Division Bench of this Court in the case of ***Pranakrushna Sahu and others v. Raghunath Sahu and others : 1994 (I) OLR 313*** that in case of voidable document the competent forum is the civil court and not the Consolidation Authorities.

15. It is not clear from the impugned orders as to whether the challenge to the sale transaction by opposite party no.1-Sri Ramakanta Das was on the ground of want of legal necessity or not. However, since the learned counsel for both the parties have argued the case on the ground of want of legal necessity for sale of the joint family property by Banamali including undivided interest of Ramakanta Das, who was then a minor, and that the sale of Ramakanta's undivided interest is voidable at his option, it must be held that the Consolidation Authorities have no jurisdiction to decide such question. The finding of the Consolidation Authorities in the impugned orders that the sale of Ramakanta's undivided interest in the disputed joint family property by Banamali was void and invalid being in contravention of Section 11 of the Hindu Minority and Guardianship Act,1956 cannot be sustained. Accordingly, this writ petition is allowed and the impugned orders under Annexures-1 and 2 are quashed. No costs.

Writ petition allowed.

2015 (I) ILR - CUT- 142

B.K.NAYAK, J.

O.J.C. NO. 8879 OF 1994

BIKAL ROUT .....Petitioner

.Vrs.

DHOBANI BEWA & ORS. .....Opp.Parties

ODISHA LAND REFORMS ACT, 1960 – S.22

Vendor of the case land did not belong to scheduled caste on the date of execution of the sale deed i.e. Dt.28.05.1978 – He was declared a scheduled caste in the presidential order as per Government of India Notification Dt.18.02.2002 – Held, no permission U/s.22 of the Act was required at the time of execution of the sale deed and the sale was not void for want of such permission.

Case laws Referred to:-

1.AIR 2001 SC 393 : (State of Maharashtra-V- Millind & Ors.)
2.(1990) 3 SCC 130 : (Merri Chandra Sekhar Rao-V- The Dean, Seth G.S. Medical College & Ors.)
3.AIR 1995 SC : (Kumari Madhuri Palit & Anr.-V- Addl. Commissioner Tribal Development & Ors.)

For Petitioner - M/s. B.H.Mohanty
For Opp.Parties - A.S.C.

Date of Order : 2010.2014

ORDER

B.K.NAYAK, J.

Heard learned counsel for the petitioner and learned Additional Government Advocate for opposite party nos.3 to 5. Learned counsel for opposite party nos.1 and 2 does not appear in spite of repeated calls.

Order dated 04.05.1994 under Annexure-3 passed by the Collector, Jajpur-opposite party no.5 in OLR Revision No.2 of 1994 setting aside the order of the Additional District Magistrate (LR) passed in OLR Appeal No.19 of 1989 and restoring the order of the Revenue Officer, Jajpur passed in OLR Case No.23 of 1988 with regard to restoration of the case land in favour of opposite party nos.1 and 2 is assailed in this writ petition.

One Daitari Behera, the husband of opposite party no.1 and father of opposite party no.2, sold the case land in favour of the petitioner by virtue of registered sale deed dated 24.05.1978. After his death, the present opposite party nos.1 and 2 filed an application under Section 23 of the Orissa Land Reforms Act for restoration of the case land in their favour on the assertion that though their ancestor belonged to 'Keuta' caste, which is a scheduled caste as per the Presidential order for the State of Orissa, he sold the land to the petitioner without permission of the competent authority as required under Section 22 of the OLR Act and, therefore, the sale is void and the property is liable to be restored in their favour. The writ petitioner contested the case, but the Revenue Officer held that the caste, 'Keuta' is synonymous to the caste, 'Dewar' which is a scheduled caste as per the Presidential order for the State of Orissa and, therefore, the sale in favour of the purchaser (writ petitioner) being without permission of the competent authority is void. Accordingly, the Revenue Officer directed for restoration of property in question in favour of present opposite party nos.1 and 2.

The order of the Revenue Officer as aforesaid was challenged by the petitioner in OLR Appeal No.19 of 1989 before the Additional District Magistrate (LR), Cuttack-opposite party no.4. By his order dated 21.03.1990 (Annexure-2) the Additional District Magistrate allowed the appeal and set aside the order passed by the Revenue Officer, Jajpur. Opposite party nos.1 and 2 challenged the order of the appellate authority before the Collector, Jajpur in OLR Revision No.2 of 1994. By the impugned order, the Collector allowed the revision and set aside the appellate order and held, in agreement with the finding of the Revenue Officer, that the caste 'Keuta' is synonymous to 'Dewar' which is a scheduled caste.

The only point that arises is whether the caste 'Keuta' was scheduled caste on the date of execution of the sale deed so as to require permission of the competent authority under Section 22 of the OLR Act for its validity. Admittedly, on the date of execution of the sale deed dated 24.05.1978, the caste 'Keuta' was not a scheduled caste as per the Presidential Order for the State, though subsequently it was included in the Presidential order as per Government of India Notification dated 18.02.2002.

It is the submission of the learned counsel for the petitioner that it is not permissible to hold an enquiry or to accept any evidence to decide or declare that any caste or community or part or group of any caste or community is included in the general name of a particular caste which is included in the presidential order. In this respect, he has made a reference to the constitutional bench decision of the apex court reported in **AIR 2001 Supreme Court 393 (State of Maharashtra-v.-Millind and others)**

In the case reported in **(1990) 3 SCC 130 – Merri Chandra Sekhar Rao v. The Dean, Seth G.S. Medical College and others**, the apex Court declared that :

> "subject to law made by the Parliament under Article-342, the tribes or tribal communities or parts of or groups within tribes or tribal communities specified by the President by public notification shall be final for the purpose of the constitution. They are the tribes in relation to that State or Union Territory and that any tribe or tribes or tribal communities or parts of or groups within such tribe or tribal communities, not specified therein in relation to that State, shall not be scheduled tribes for the purpose of the constitution."

The view as aforesaid has also been approved in the case of **Kumari Madhuri Patil and another v. Additional Commissioner Tribal Development and others:- AIR 1995 Supreme Court**. It is therefore clear that the name of a particular tribe or sub-tribe which has not been specifically included in the Presidential Order cannot by application of analogy or otherwise be said to be included in a particular tribe specified in the Presidential Order.

It has been held by the apex court in the case of **State of Maharashtra** (supra), as referred to above by the learned counsel for the petitioner, to the following effect.

> **"10.** By virtue of powers vested under Articles 341 and 342 of the Constitution of India, the President is empowered to issue public notification for the first time specifying the castes. Races or tribes or part of or groups within castes, races, or tribes which shall, for the purposes of the Constitution be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or Union Territory, as the case may be. The language and terms of Articles 341 and 342 are identical. What is said in relation to Article 341 mutatis mutandis applies to Article 342. The laudable object of the said Articles is to provide additional protection to the members of the Scheduled Castes and Scheduled Tribes having regard to social and educational backwardness from which they have been suffering since a considerable length of time. The words 'castes' or 'tribes' in the expression 'Scheduled Castes' and 'Scheduled Tribes' are not used in the ordinary sense of the terms but are used in the sense of the definitions contained in Articles 366 (24) and 366 (25). In this view, a caste is a Scheduled Caste or a tribe is a Scheduled Tribe only if they are included in the President's Orders issued under Articles 341 and 342 for the purpose of the Constitution. Exercising the powers vested in him, the President has issued the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950. Subsequently, some Orders were issued under the said Articles in relation to Union Territories and other States and there have been certain amendments in relation to Orders issued, by Amendment Acts passed by the Parliament."

It is clear from the above that the words 'caste' or 'tribes' in the expression 'Scheduled Caste' and "Scheduled Tribe' is not used in ordinary sense of terms, but used in sense of definition contained in Article 366 (24)

and (25). In this view, the caste is a Scheduled Caste or a Tribe is a Scheduled Tribe only if they are included in the President's orders issued under Article 341 and 342 for the purpose of the Constitution.

Finally, in pargraph-35 of the judgment in the said case the apex Court held as follows:

"35. In the light of what is stated above, the following positions emerge:-

1. It is not at all permissible to hold any enquiry or let in any evidence to decide or declare that any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the concerned Entry in the Constitution (Scheduled Tribes) Order 1950.

2. The Schedule Tribes Order must be read as it is. It is not even permissible to say that a tribe, sub-tribe, part of or group of any tribe or tribal community is synonymous to the one mentioned in the Scheduled Tribes Order if they are not so specifically mentioned in it.

3. A notification issued under clause (1) of Article 342, specifying Scheduled Tribes, can be amended only by law to be made by the Parliament. In other wards, any tribe or tribal community or part of or group within any tribe can be included or excluded from the list of Scheduled Tribes issued under clause (1) of Article 342 only by the Parliament by law and by no other authority.

4. It is not open to State Governments or courts or tribunal or any other authority to modify, amend or alter the list of Scheduled Tribes specified in the notification issued under Clause(1) of Article 342."

In view of the position of the law as aforesaid, it cannot be said that the caste, 'Keuta' must be held to be synonymous to 'Dewar' and as such a scheduled caste on the date the sale in favour of the petitioner was effected. Since on the date of the sale the vendor, ancestor of opposite party nos.1 and 2, was not scheduled caste, no permission under Section 22 was required. Therefore, the sale was not void for want of such permission and, therefore, it cannot be restored in favour of opposite party nos.1 and 2. The impugned revisional order Annexure-4 is, therefore, set aside and the order passed by the appellate authority is restored. The writ application is accordingly allowed.

Writ petition allowed.

2015 (I) ILR - CUT-147

S. K. MISHRA, J.

W.P.(C) NO.23296/2012 & 626/2013

ORISSA CAMPUS CHEMISTS ASSOCIATION ……..Petitioner

.Vrs.

STATE OF ORISSA. ……...Opp.Party

CONSTITUTION OF INDIA, 1950 – ART. 226

Government Resolution Dt. 17.11.2012 – Clause 16 of the resolution directing allottees to supply drugs at a discount price, challenged – The prices of any drug can be regulated by the Central Government but not the State Government – Government of Odisha giving orders to allow discount to customers by certain types of medicine shops is also an effective steps in regulating the prices of drugs – Held, Clause 16 of the impugned notification being without jurisdiction is quashed. (Para 10)

For Petitioners - M/s. Sidheswar Mallik & P.C. Das,
Mr.Jayant Das, Sr. Advocate,
Mr. Budhadeb Routray, Sr. Advocate.
M/s. D. Routray, K. Mohanty, S. Das,
S. Jena, S.K. Samal & S. Rout.

For Opp.Parties – Mr. A. K. Mishra, Standing Counsel for State.

Date of hearing : 23.04.2014
Dae of judgment: 23.04.2014

JUDGMENT

S.K.MISHRA, J.

In these two writ petitions, the petitioners being Orissa Campus Chemists Association and M/s. Oracle Drugs, M.K.C.G. (MCH) Campus and others have assailed Clause 16 of the Resolution of the Government issued on 17.11.2012 by the Health and Family Welfare Department of the Government of Orissa, whereby directions have been given that the allottees shall supply drugs at a discount price to the public in a given percentage.

2. In the first writ petition, the petitioner is the Orissa Campus Chemists Association represented by its Joint Secretary has prayed the Court to quash

the Resolution dated 17.11.2012, in so far as it imposes for supply of drugs at discounted price being without any authority in law and violative of Articles 14, 19, and 21 of the Constitution of India and in second writ petition M/s. Oracle Drugs, M.K.C.G. (MCH) Campus represented through its Proprietor has filed the writ petition seeking quashing of the order dated 17.11.2012 under Annexure-4.

3. It is apparent from the records that in the year 2004, as per the Government of Orissa in Health and Family Welfare notification dated 28.01.2004, certain guidelines were issued for opening of 24 hours Day and Night Medicine shop within the premises of the Hospital. Such a guideline was issued in suppression of all previous circulars and orders the Government have passed earlier. It was directed that the allottee shall be an unemployed registered pharmacist or a person who is willing to engage registered pharmacists and young persons who are just above the maximum age limit admissible for Government employment and just below 45 years may be given preference over older persons. At clause 7, the license fee structure has been given for renewal of existing medicine shop and fresh medicine shop within the campus of three medical college and hospitals at Rs.75,000/- per annum was fixed as the licence fee. Similarly, for the District Headquarters Hospital, the fee is Rs.30,000/- per annum. The allottee has to construct their structure in the land provided by the Hospital. It should be furnished and Air-conditioned and should be fit for use as a Day and Night shop. There are also other conditions also to that allotment.

4. On 17.11.2012, the Government of Orissa in Health and Family Welfare Department issued another Resolution regarding revision of guidelines for opening of 24 hours medicine shop inside the campus of government Health Institutions. Among other things, at Clause 16, the Government have stipulated that the allottee shall supply drugs at a discounted price to the public as under:

(a)	Medical College Hospital & Capital Hospital.	…	15% on maximum retail price.
(b)	District Headquarters Hospital and Hospitals equivalent in the status of DHH.	…	10% on maximum retail price
(c)	Sub-Divisional Hospital.	…	7.5% on maximum retail price.
(d)	C.H.C./PHC(N)/Ayurvedic/ Homeopathic Hospitals.	…	5% on maximum retail price.

The petitioners assail this provision of prescribing a discount for sale of medicine to the general public.

5. In course of hearing, the issues boiled down to two important aspects of the case. Firstly, it is stated that as per the previous guidelines, they have entered into an agreement with the Government and lease has been granted to them and that lease period is valid for five years. So during the subsistence of a contract an unilateral decision cannot be made by the Government changing the conditions of the contract and thereby asked the petitioners to supply the medicines at a discounter rate.

6. The second aspect that arose in course of hearing is that the Central Government in Ministry of Chemicals and Fertilizers (Department of Pharmaceuticals) on 15th May, 2013, in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 and supersession of the Drug (Prices Control) Order 1995, made a new order. At Clause 7, the Central Government has fixed the margin to the retailer at 16% at the price of the retailer, in other words, the Central Government has issued guideline to the effect that while fixing a ceiling price of the scheduled formulations and retail prices of new drugs 16% of price to retailer as a margin to retailer shall be allowed.

7. Emphasizing on this issue, learned counsel appearing for the parties emphatically argued that the State Government does not have the powers to control the price of the drugs. Accordingly, this Court has directed the learned Standing Counsel to file an affidavit on these two aspects of the case. Today, an affidavit has been filed by the Officer on Special Duty, Health and Family Welfare Department. In the said affidavit, the deponent, inter alia, has stated that the prices in respect of 392 items of drugs included in the

schedule to the Drugs (Prices Control) Order, 2013 is fixed by the Government of India. However, in respect of remaining drugs available in the market, the prices are fixed by the manufacturers themselves. Under the provisions of Drugs Price Control Order, 2013, 16% profit margin is allowed to the retailers in respect of the scheduled drugs and in respect of the remaining drugs, there is no limit of profit margin. The state Government has admitted that it has no role to play in price fixation of the drugs. As such no norms of Essential Commodities Act or Drugs (Price Control) Order, 2013 has been violated by the Government stipulating 15% discount on M.R.P. to the customers by the shop owners.

8. As regards the first point is concerned, it is stated by the opposite party that on the modification/alternation of conditions embodied in the agreement, the Government have only issued a guideline revising the earlier guideline directing therein for allowing discount to the customers by the shop owners which is the discretion of the Government in the interest of the public. It is further reiterated that it is the Government of India who have the power to fix up the prices of the scheduled drugs under Drugs (Prices Control) Order, 2013. The price fixed by the Government of India is binding for all retail medicine shops. The State Government have only directed the Medicine shops operating 24 hours within the campuses of Government Health Institutions to extend 15 discount to the public.

9. In course of hearing, Mr. Jayant Das, learned Senior Advocate has also stated that as far as the shops operating in the private partnership basis, this discount is not applicable and therefore, it is violative of Article 14 of the Constitution of India. It is further borne out that the retailers have to pay V.A.T. on the maximum retail price and not on the discounted price.

10. Section 3 of the Essential Commodities Act, 1955 provides for powers to control production, supply, and distribution etc. of essential commodities. Sub-Section (1) provides that if the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the defence of India or the efficient conduct of military operations, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Sub-section (2) provides that without prejudice to the generality of the powers conferred by sub-section (1), an order made there under may provide

at clause (c) that for controlling the price at which any essential commodity may be bought or sold. Sub-section (2)(a) of the Act provides for essential commodities declaration etc. Sub-section (1) provides that for the purpose of the Act, the essential commodities means the commodities specified under the schedule. Examination of the schedule appended to the Act reveals drugs is the first item which has been mentioned as an essential commodity. Thus, the prices of any drugs can only be controlled by the Central Government and it is the occupied field of the Central Government. The State does not have any jurisdiction to fix the prices of the commodities. The learned Standing Counsel has submitted that the Central Government by virtue of the impugned notification has not fixed the price of the commodities, rather it has asked for grant of discounts to certain kinds of shops operating inside the campus of the Hospitals and Medical Colleges etc. However, keeping in view the principles that guide the essential commodities, this Court is of the opinion that giving orders to allow discount to the customers by certain types of medicine shops is also an effective steps in regulating the prices of the essential commodities i.e. the drugs.

In that view of the matter, this Court is of the opinion that Clause 16 of the impugned notification is without jurisdiction and, therefore, the same is quashed. The rest part of the Notification is left undisturbed. With the above observation, both the writ petitions are disposed of.

Writ petition disposed of.

2015 (I) ILR - CUT-151

C. R. DASH, J.

W.P.(C) NO.10330 OF 2014

MALAYA KUMAR DURGA ……..Petitioner

.Vrs.

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

ODISHA GRAMA PANCHAYAT ACT, 1964 – S. 26 (2)

Disqualification incurred by Sarpanch – Collector has to enquire suo motu or on an application filed by any person including a defeated candidate instituting an election case – He must be satisfied about the prima-facie case, after giving an opportunity of hearing to the person whose disqualification is in question.

In this case the petitioner-Sarpanch though appeared and taken unnecessary adjournments he was not given chance to rebut the reports submitted by BDO and GPEO against him – No opportunity of hearing given to the petitioner – Held, the impugned order is set aside subject to payment of cost of Rs.5000/- to O.P.4 – Parties are directed to appear before the Collector for disposal of the Case.

(Paras 9 to 11)

Case laws Referred to:-

1.2007 (Supp.-I) OLR 400 : (Chandrakanti Bhoi -V- The Collector, Bolangir & Anr.)
2.2011 (Supp.-II) OLR 594 : (Smt. Mithila Seth -V- The Collector, Bolangir)
3.2014 (I) OLR (FB) 867 : (Debakit Jani-V- The Collector & Anr.)

For Petitioner - M/s. Amit Prasad Bose, N. Hota, S.S. Routray, V. Kar, D.J. Sahoo, S.K. Dwibedi.
For Opp.Party - Addl. Government Advocate, Md. G. Madani.

Date of judgment: 28.11.2014

JUDGMENT

C.R. DASH, J.

Order dated 25.04.2014, passed by the Collector, Kalahandi, (Opp. Party No.2) in exercise of power under Section 26 (2) of the Orissa Grama Panchayat Act, 1964 (for short 'the Act') vide Annexure- 1 to the writ application, is brought under challenge in this writ application.

2. The petitioner is the returned candidate so far as the post of Sarpanch of Rengalpali Grama Panchayat in the district of Kalahandi is concerned. The opposite party No.4 lost to him in the said election. The opposite party No.4 filed compliant under Section 26 (2) of the Act before opposite party

No.2 on 19.03.2012 alleging that the petitioner has begotten three children after the cut off date and has thus incurred disqualification under Section 25 (1) (v) of the Act. After filing of the aforesaid complaint, opposite party No.4 raised an election dispute in the court of the learned Civil Judge (Junior Division), Jaipatna. There was some delay in preferring the election dispute. Learned Civil Judge (Junior Division), Jaipatna, without hearing the present petitioner in the election dispute, condoned the delay and admitted the election petition. The petitioner had impugned such order in W.P.(C) No.10212 of 2013. This Court, vide order dated 13.05.2013, passed in the aforesaid W.P.(C), set aside the impugned order passed by the learned Election Tribunal in the election dispute and directed the learned Election Tribunal to hear the question of limitation afresh in accordance with law giving opportunity of being heard to both the parties concerned. Thereafter, the limitation petition was heard afresh and the election petition was dismissed as not maintainable as barred by the law of limitation. The said order of the learned Election Tribunal is the subject matter of W.P.(C) No.22796 of 2013, which is pending adjudication.

3. In the meantime, the Collector, Kalahandi (opposite party No.2) proceeded on the basis of the complaint filed by opposite party No.4 under Section 26 (2) of the Act and issued notice to the present petitioner to file show cause. The present petitioner appeared through his counsel. The proceeding before the Collector, Kalahandi (opposite party No.2) suffered several adjournments, on the basis of the adjournment petitions filed by learned counsel for the petitioner and ultimately, the Collector, Kalahandi (opposite party No.2), vide order dated 25.04.2014, disposed of the proceeding holding that the petitioner is disqualified under Section 25 (1) (v) of the Act, as he has begotten three children after the cut off date.

4. The said order of the learned Collector, Kalahandi (opposite party No.2) is impugned in this writ application on two grounds :-

(i) Whether the opposite party No.4 being the defeated candidate could have filed an application under Section 26 of the Act, when he has also moved the election petition under Section 30 of the Act ?

(ii) Whether the proceeding could have been disposed of on the basis of the report of the Block Development Officer, Jaipatna regarding the birth of three children of the petitioner after the cut off date without such report being confronted to the petitioner and the petitioner

having not been given opportunity to rebut such report ?

5. Mr. Amit Prasad Bose, learned counsel for the petitioner, in order to substantiate his contention, relies on the case of ***Chandrakanti Bhoi vs. The Collector, Balangir and another***, **2007 (Suppl.-I) OLR – 400**, ***Smt. Mithila Seth vs. The Collector, Balangir***, **2011 (Supp.-II) OLR – 594** and the Full Bench decision of this Court in the case of ***Debaki Jani vs. The Collector and another***, **2014 (I) OLR (FB) – 867**.

6. In the case of ***Chandrakanti Bhoi vs. The Collector, Balangir and another*** (supra), it was held that a person, who contested the election, cannot file an application under Section 26 of the Act and he is only to file an election petition.

7. This Court, in the case of ***Smt. Mithila Seth vs. The Collector, Balangir***, had taken somewhat contrary view. The Full Bench of this Court, in the case of ***Debaki Jani vs. The Collector and another***, in paragraph-9 of the judgment, has held that the power of the Collector to enquire into the matter suo motu cannot be cabined, cribbed or confined. The power is wide enough. The power of the Collector to act suo motu on the question of disqualification of a Sarpanch or Naib-Sarpanch is enshrined in Section- 26 (2) of the Act. Again in the aforesaid paragraph-9 of the judgment, the Full Bench has observed thus :-

> *"……. The Collector has to prima facie satisfy himself and apply his mind before issuing any notice to the person whose disqualification is in question. The only rider is to observe principles of natural justice. The legislature in its wisdom thought it proper to grant ample power to the Collector to see that purity and sanctity in the election process is maintained and no unqualified person holds the post. The same also does not exclude any other person to bring the notice of the Collector about the disqualification incurred by any Sarpanch or Naib-Sarpanch or any other member of the Grama Panchayat. The Collector exercising the suo motu power is not debarred from obtaining information and materials from various sources……"*
>
> Proceeding further the Full Bench, in paragraph-10, held thus :-
>
> *"In view of the analysis made in the preceding paragraphs, we hold that the ratio laid down in Chandrakanti Bhoi and Smt. Mithila Seth,*

which run contrary to the observations made supra, is not correct enunciation of law."

8. Needless to mention here that the Hon'ble Full Bench, before arriving at a conclusion, has analysed the meaning of the Latin word *suo motu*. From the observation of the Hon'ble Full Bench, it is, therefore, clear that the Collector, while exercising power under Section 26 (2) of the Act, has authority to obtain information and materials from various sources and any person can bring to the notice of the Collector any fact about the disqualification incurred by any Sarpanch or Naib-Sarpanch or any other member of the Grama Panchayat. On receipt of information, requirement is that the Collector is to conduct an enquiry to prima facie satisfy himself about the veracity of the complaint so that he can act suo motu. The aforesaid observation of the Hon'ble Full Bench, therefore, makes it clear that "any person" even includes a defeated candidate and he can also bring to the notice of the Collector any fact touching on disqualification incurred by any Sarpanch, Naib-Sarpanch or any other member of the Grama Panchayat.

In view of such fact, I do not find any merit in the first contention raised by Mr. Amit Prasad Bose, learned counsel for the petitioner.

9. Coming to the second contention, it is an admitted fact that notice was issued by the Collector, Kalahandi (opposite party No.2) to the petitioner; petitioner received the notice and entered appearance through counsel. From the counter affidavit filed by opposite parties 1 to 3, it is found that the counsel for the petitioner filed adjournment petitions before the Collector on 27.09.2012, 01.11.2012, 29.11.2012, 20.12.2012 and 16.12.2013. All the adjournment petitions were allowed and time as a last chance was granted on 16.02.2013 adjourning the case to 16.03.2013. Thereafter, the case has been adjourned, though last chance was granted on the basis of the petition filed by learned counsel for the petitioner on 16.03.2013, 27.04.2013, 25.05.2013, 29.06.2013 and 27.07.2013. Ultimately on 25.04.2014, the proceeding was disposed of by the Collector, Kalahandi under Section 26 (2) of the Act holding that the petitioner has begotten three children after the cut off date. The basis of such finding was the report of the Block Development Officer, Jaipatna and the field enquiry report of the Grama Panchayat Extension Officer, Jaipatna. From the course of proceeding and the manner, in which it suffered adjournments at the behest of the petitioner, it is clear that sufficient opportunity was given to the petitioner, but he unnecessarily filed adjournment petitions to gain time, as he was sitting pretty in the elected

office. At the same time, it is, however, a matter of judicial concern that the petitioner, though acted at his own peril, had lost the chance to rebut the report of the B.D.O., Jaipatna and the field enquiry report of the Grama Panchayat Extension Officer, which he was entitled to do, had he participated in the proceeding diligently.

10. The petitioner is, however, an elected representative of the inhabitants of a Gram Sasan and he is holding the office by the will of the people. The order of the Collector passed vide Annexure-1 has the consequence of unseating the petitioner. The consequence being so harsh in spite of callousness by the petitioner, I deem it proper and in the interest of justice to afford him an opportunity of being heard in the matter.

11. In view of such fact, both the petitioner and opposite party No.4 are directed to appear before the Collector, Kalahandi on 06.01.2015. No further notice need be issued to them. On the date of appearance on 06.01.2015, the petitioner shall file his show cause, if any. No further opportunity shall be given to him to file show cause in the matter. Learned Collector, Kalahandi is directed to dispose of the proceeding within three months from the date of appearance of the parties on 06.01.2015. Any rebuttal evidence to be given by the petitioner, shall be given within the time prescribed. This order shall be effective subject to payment of Rs.5,000/- as cost to the opposite party No.4 on or before 06.01.2015. Consequently, the impugned order vide Annexure-1 is set aside and the writ application is accordingly disposed of.

Writ petition disposed of.

2015 (I) ILR - CUT- 156

RAGHUBIR DASH, J.

MISC APPEAL NO.666 OF 1996

LAXMIDHAR KUMBHAR ……..Appellant

.Vrs.

D.M., O.F.D.C., LTD., SAMBALPUR ……..Respondent

WORKMEN'S COMPENSATION ACT, 1923 – S.3

Deceased employed by the respondent for cutting bamboos – He was trampled to death by wild elephant while sleeping in a hut near the work side – Commissioner refused compensation – Hence the appeal – Evidence of the co-worker shows that the deceased used to stay at the work side as his native place was at a far off place – The employer had not compelled him to stay there – Death of the deceased had no nexus with his bamboo cutting work – Held, impugned judgment is confirmed. (Para 14)

Case laws Referred to:-

1.104 (2007) CLT 343 : (Divisional Manager, M/s. Oriental Insurance Co. Ltd.-V- Subas Chandra Swain & Anr.)
2.1969 (2) SCC 607 : (Mackinnon Machenzie & Co. (P) Ltd.-V- Ibrahim Mahmmed Issak)
3.AIR 1997 SC 432 : (Regional Director, E.S.I. Corporation & Anr.-V- Francis De Costa & Anr.)

For Appellant - M/s. P.C. Rout & P.K. Pattanaik.
For Respondent- M/s. S.K. Pattanaik, U.C. Mohanty, P.K. Pattanaik, D. Pattanaik & S. Pattnaik.

Date of hearing : 12.09.2014
Date of judgment : 17.09.2014

JUDGMENT

R. DASH, J.

This appeal is in challenge of the judgment dated 25.02.1995 passed by the learned Commissioner for Workmen's Compensation-cum-Assistant Labour Commissioner, Sambalpur in W.C. Case No.3 of 1991 dismissing the claim for compensation made by the appellant consequent upon the accidental death of his father late Netra Kumbhar on the ground that the accident and the death of the deceased had no nexus with his employment nor was it incidental to his employment.

2. There is no dispute that the deceased Netra Kumbhar was employed by the respondent for cutting of bamboos in Podadihi Forest on piece-rate

basis. On 04.03.1993 night, while he was sleeping in a hut near or at the worksite, a wild elephant trampled him to death. There is evidence to the effect that after the day's work, some workers, including deceased, were sleeping in a hut at the worksite. A wild elephant chased them and trampled the deceased to death.

3. Learned Commissioner took the view that the accident caused by the wild animal has no nexus with the employment of the deceased, nor was it incidental to his duties.

4. Learned counsel for the appellant argues that the learned Commissioner should have appreciated that the deceased workman had stayed in the hut provided by the respondent to achieve better outturn of work, otherwise the deceased should not have stayed there exposing himself to the violence of wild animals in the forest. It is further argued that the course of employment started from the time when the workman left his residence towards his workplace and was to continue till the workman's return to home.

Learned counsel for the respondent, however, argues in support of the conclusion arrived at by the learned Commissioner.

5. Learned counsel for the appellant has cited decision of this Court reported in **104 (2007) CLT 343 (Divisional manager, M/s. Oriental Insurance Co. Ltd. -Vrs.- Subas Chandra Swain & another)** and presses the following observations into service:

> Apart from that, this Court is reminded of its duty while construing the provisions of the Workmen's Compensation Act, which is a social welfare legislation. In construing such legal provision the Court has a duty to construe it in a manner which preserves the right of the workman belonging to a socially weaker Section and to eschew an interpretation which takes away the benefit, provided the interpretation in favour of the workman is reasonably possible in the facts and circumstances of the case.

6. In the reported case the workman was deputed to a garage to look after the repairing of the employer's vehicle and on 3.2.1991, after taking permission of his employer, the workman was returning home riding on a bicycle. On the way a truck dashed him as a result of which he sustained fracture. Their Lordships under such circumstances held that since the

accident took place after the commencement of the duty and while the claimant was coming back after discharging his duty, the accident could be said to have taken place out of his employment.

7. On factual aspect, the aforecited decision has no application to the case in hand. No authority has been cited in support of the contention that the course of employment starts from the time when the workman starts his journey from his residence towards the place of employment and it continues till he comes back home. The expression "in course of employment" cannot be given elasticity to such an extent. Rather, this proposition does not find support from the aforecited decision wherein it has been observed that when accident takes place but at a distance from place of employment, there is no casual connection between the injury/death and the employment.

8. It is well settled that the expression 'in course of employment' means within the currency of employment and the expression 'out of employment', in relation to the injury caused in accident, connotes that the injury might have been caused as a result of some causal connection between the employment and the injury.

9. In Subas Chandra Swain's case (supra) it is observed that if the injury is in some way incidental to the duties of the workman and unless the workman has invited the injury by endangering himself in any unreasonable way, the injury will be one out of employment.

10. In the judgment in **Mackinnon Machenzie and Co. (P) Ltd. v. Ibrahim Mahmmed Issak, reported in 1969 (2) SCC 607**, Hon'ble Supreme Court held that the words arising out of employment are understood to mean that during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered. In other words, there must be a casual relationship between the accident and the employment.

11. Unless it is proved that the accident had a casual connection with the employment and it was suffered in course of employment, the claimant is not entitled to get any compensation.

12. Learned counsel for the respondent has relied on a decision of the Supreme Court in **AIR 1997 SC 432 (Regional Director, E.S.I. Corporation and another -Vrs.- Francis De Costa and another)** which

deals with a situation where the workman was going from his home to his place of work and on the way he suffered injury in an accident. Under such fact-situation it is held that the accident cannot be said to have arisen out of and in course of his employment. On factual aspect this judgment is also not applicable to fact situation of the case in hand.

13. Learned Commissioner in the impugned judgment has referred to a decision of this Court in a case between **D.M., New India Assurance Co. -Vrs.- G. Krishna Rao and others** decided on 27.04.1994 stating that in that case the deceased was a labourer employed by a contractor and was engaged in construction of Koraput-Rayagada Railway Line. The deceased was provided with a hut by the contractor at the worksite. The deceased on the date of incident after the day's work was sleeping at night in the hut. A fire broke out which gutted the hut and deceased workman was burnt alive. In the said facts and circumstances, this Court is quoted to have observed as follows:

> Such accommodation by itself cannot form a basis to claim compensation on the ground that death by accident was caused out of and in the course of employment. The accident caused by fire has no nexus to the employment of the deceased, nor was it incidental to her duties. In the circumstances, no reasonable or legitimate reference can be drawn that the accidental death arose out of and in the course of employment of the deceased.

This decision is found reported in I (1995) ACC 582 (ascertained from the website http://indiankanoon.org). The fact situation in the case G. Krishna Rao (supra) is almost identical to that of the case in hand.

14. That apart, it is stated by one of the co-worker examined before the Commissioner that the deceased used to stay at the worksite as because his native place was at a far off place. It implies that the night stay in the worksite had no nexus with the deceased's bamboo cutting work for which he was engaged on piece-rate basis. The deceased was at liberty to reside somewhere else as well. The employer had not compelled him to stay at the worksite. Under such circumstances, it cannot be said that the accidental death in question had any nexus with the deceased's employment or that there was any causal relationship between the accident and the employment. Therefore, findings of the learned Commissioner is not liable to be disturbed.

15. In the result, the appeal is dismissed and the impugned judgment is confirmed. Appeal dismissed.

2015 (I) ILR - CUT-161

DR. B. R. SARANGI, J.

W.P.(C) NO. 19362 OF 2010

MINAKETAN KANHAR ……..Petitioner

.Vrs.

UNION OF INDIA & ORS. ……..Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART. 226

Writ petition – Jurisdiction – Petitioner failed to avail alternative remedy under the relevant statute – No exceptional case is made out to by pass such alternative remedy – Writ petition is to be dismissed.

In this case the petitioner was an employee in C.R.P.F. – He was removed from service by the disciplinary authority which was confirmed by the appellate authority – He referred writ petition without filing revision under Rule 29 of the C.R.P.F. Rules, 1955 – He has also not made out an exceptional case to by pass the revisional authority – Held, writ petition is liable to be dismissed.

(Paras 7 to 10)

Case laws Referred to:-

1.2007 (1) SCC 338 : (Govt. of Andhra Pradesh & Ors.-V- A. Venkata Raidu)
2.2013 (II) OLR SC 48 : (Rajednra Yadav-V- State of M.P. & Ors.)
3.(2010) 5 SCC 783 : (State of Uttar Pradesh & Ors.-V- Raj Pal Singh)
4.(2005) 10 SCC 84 : (Damoh Panna Sagar Rural Regional Bank & Anr.-V- Munna Lal Jain)
5.AIR 1994 SC 215 : (Union of India-V- Giriraj Sharma).
6.1990(1) SCC 209 : (Sheela Devi-V- Juspal Singh)
7.2011(Supp.II) OLR (SC) 601 : (Bijay Kumar Singh-V- Union of India & Ors.).

For Petitioner - M/s. C.R. Pattnaik, S.Ch. Padhy.
For Opp.Parties- M/s. S.K. Patra.

Date of hearing : 21.07.2014
Date of Judgment: 05.08.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner has filed this petition assailing the order of his removal from service passed by the Disciplinary Authority dated 24.08.2007 vide Annexure-4 and confirmation thereof by order of the Appellate Authority dated 05.04.2008, vide Annexure -5, the petitioner has filed this application seeking direction to reinstate him in service with all consequential benefits.

2. The short fact of the case, in hand, is that the petitioner being successful in all tests of selection was appointed as a Constable/GD in Group Centre CRPF, Bhubaneswar on 01.04.1988. After his joining, he was sent to Group Centre CRPF Mukamghat in 95 Battalion CRPF. Thereafter on completion of training, he was posted to 4th Battalion CRPF and while he was continuing in that Battalion he was promoted to the post of HC/GD(Havildar) in the year 2004 and posted to D Company of 4th Battalion CRPF, which was deployed in the residence of the Hon'ble Chief Minister, Jammu and Kashmir for security purpose. In that Company there were 14 guard posts and in each post three constables and one Havildar were deployed. The petitioner, being a Havildar, was deployed in Post no.11 as Guard Commander. On 03.04.2006 a Constable known as CT/GD- Anand Singh from Post No.3 became violent and opened fire at three CRPF personnel, such as, Inspector Mohan Shyam (Company Commander) was deployed in front of Kote guard of the said company, HC/GD-H.N.Pandey was deployed in front of ORS Line No.3 and HC/GD-Yogendra Jha was deployed at ORS Mess, consequent upon which they succumbed to the injuries on the very date. After hearing the sound, all the company personnel including the petitioner became stand still to but taking advantage of darkness, the assailant escaped from the place and surrendered in the nearby Police Station. After the above incident, inquiry was conducted by the authorities and after completion of the same, charge-sheet was submitted by the Disciplinary Authority namely, Commandant 4th Battalion CRPF against three persons including the petitioner. Thereafter on 12.12.2006 vide Annexure-1, the petitioner was called upon to show cause. In compliance with the same, the petitioner submitted his show cause reply on 09.01.2007 denying the allegation of negligence. The Disciplinary Authority without considering the same, appointed one Sri Jaikisan A/C 4th Battalion CRPF as Enquiring Officer to enquire into the matter under Sub-Rule (b) of Rule 27 of CRPF Rules, 1955 under Annexure-2. Pursuant to the above order, the inquiry was conducted by the Enquiring Officer and report was submitted before the Disciplinary Authority against the petitioner on 23.04.2007 finding him guilty of the charges. The said inquiry report was

sent to the petitioner by the Disciplinary Authority to file representation, if he desired, within 15 days from the date of receipt of that report vide Annexure-3. In obedience to the order of the Disciplinary Authority, the petitioner filed his reply denying his fault in the said incident, but without examining the same in a proper perspective, the DIGP, CRPF, Patna removed the petitioner from service on 24.08.2004 vide Annexure-4. Being aggrieved by the said order, the petitioner preferred an appeal before the Inspector General, CRPF, Bihar for setting aside the same but the Appellate Authority without application of mind confirmed the order of removal of the petitioner from service by rejecting his appeal vide Annexure-5.

3. Mr. C.R. Pattnaik, learned counsel for the petitioner, strenuously urged that the impugned order has been passed without application of mind in as much as in non-compliance with the provisions contained in CRPF Rules, 1955. To substantiate his contention he has relied upon the judgment of the Apex Court in **Govt. of Andhra Pradesh and Others v. A.Venkata Raidu,** 2007 (1) SCC 338, **Rajendra Yadav v. State of M.P. & Others,** 2013 (II) OLR SC 48, **State of Uttar Pradesh and others v. Raj Pal Singh,** (2010) 5 SCC 783, **Damoh Panna Sagar Rural Regional Bank and another v. Munna Lal Jain,** (2005) 10 SCC 84 and **Union of India v. Giriraj Sharma,** AIR 1994 SC 215.

4. Mr. S.K. Patra, learned counsel for the Union of India, strenuously urged that the punishment imposed by the authority is well within its jurisdiction and as such, this Court has no jurisdiction to interfere with the quantum of punishment and more so, when there is alternative remedy available under the Rule-29 of the CRPF Rules to prefer revision without availing of the revisional jurisdiction, the petitioner should not have approached this Court by filing the present writ petition. To substantiate his contention, he has relied upon the judgment of the apex Court in **Sheela Devi v. Juspal Singh**, 1990(1) SCC 209 and **Bijay Kumar Singh v. Union of India and others**, 2011(Supp.II) OLR (SC) 601. Therefore, he sought dismissal of the same.

5. Learned counsel for the petitioner has relied upon the judgment in **A.Venkata Raidu case (supra)** stating that the charge sheet should not be vague but should be specific. In **Rajendra Yadav case (supra),** it was held that punishment should not be disproportionate while comparing the involvement of co-delinquent who are parties to the same transaction or incident. The Disciplinary Authority cannot impose punishment, which is

disproportionate, i.e. lesser punishment for serious offences and stringent punishment for lesser offences. The Disciplinary Authority imposing a comparatively lighter punishment to the co-delinquent and at the same time, harsher punishment to the appellant cannot be permitted in law, since they were all involved in the same incident. In **Raj Pal Singh case (supra)** it is held that different punishment for identical charges, delinquency and incident on the same day, would amount to discrimination and when charges are same and identical in relation to one and the same incident, to deal with the delinquents differently in the award of punishment would be discriminatory. In **Munna Lal Jain case (supra)** it is held that the Court should interfere with the punishment if it is called for only when it is so disproportionate as to shock the judicial conscience. In **Giriraj Sharma case (supra)**, it is held that if the punishment awarded is disproportionate to the grant of misconduct, it would be arbitrary and would violate the mandate of Article 14 of the Constitution of India.

6. Mr. Patra, learned counsel for the Union of India, has relied upon the judgment in **Bijay Kumar Singh case (supra)** it is held that whether the punishment is disproportionate to the charges alleged, the Court has to keep in view the various factors like the nature of job, the standard of honesty and integrity required of the employees and various other aspects.

7. As it appears, Rule 29 of the CRPF Rules, 1955 deals with revision. The petitioner has not preferred the revision before the competent authority. Mr.Patra, learned counsel for the opposite parties has relied upon the judgment of the Apex Court in **Sheela Devi case (supra),** wherein the Apex Court has held that if the petitioner has bypassed the alternative remedy, he has to mention why he has not availed the same. As it appears from the pleadings available in the writ petition, the petitioner has not substantiated the fact by giving any cogent reason as to why he has not availed the remedy available under the statute under Rule 29 of CRPF Rules by preferring a revision. If alternative remedy is available and there is every likelihood that the revisional authority can consider the same in accordance with law, the contentions which have been raised before this Court, in that case extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India should not have been invoked. The contentions raised by the learned counsel for the petitioner and the law referred to substantiating his contention, can also be considered by the revisional authority while adjudicating the case in conformity with the provisions of law.

8. This Court in **Gopal Krishna Behera v. Union of India and others**, WP(C) No.7949 of 2014 disposed of 1.7.2014 in paragraph 9 observed thus:

> "In view of the aforesaid law laid down by the apex Court mentioned supra where the party had a statutory remedy available under the relevant statute, he cannot bypass the said remedy and file a writ petition under Article 226. It was held that if such a procedure is allowed, it may enable the litigant to defeat the provisions of the statute. The normal rule is that a writ petition should not be entertained when statutory remedy is available under the concerned legislation unless exceptional cases are made out in view of the ratio decided by the apex Court in **Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke**, (1976) 1 SCC 496, **Rajasthan SRTC v. Krishna Kant**, AIR 1995 SC 1715, **Scooters India v. Vijai E.V.Eldred**, (1998) 6 SCC 549, **Chndrakant Tukaram Nikam v. Municipal Corpn. of Ahmedabad**, (2002) 2 SCC 542, **Seth Chand Ratan v. Pandit Durga Prasad**, AIR 2003 SC 2736 **U.P. State Bridge Corpn. Ltd. v. U.P.Rajya Setu Nigam S.Karmachari Sangh**, (2004) 4 SCC 268, **U.P. State Spinning Co. Ltd. v. R.S.Pandey and another**, 101(2006) CLT 160(SC) and **Uttaranchal Forest Development Corporation v. Jabar Singh,** (2007) 2 SCC 112.

9. Taking into consideration the above provision of law and the CRPF Rules, 1955, since provision of revision is made available and no exceptional case is made out by the petitioner to bypass the revisional authority, this Court is of the view that without availing the alternative remedy prescribed under the Statute, the writ petition cannot be entertained.

10. In the aforesaid facts and circumstances of the case and keeping in view the law discussed above, the writ petition is disposed of observing that the petitioner may ventilate his grievance by approaching the revisional forum under Rule 29 of CRPF Rules, 1955.

Writ petition disposed of.

2015 (I) ILR - CUT- 166

DR. B. R. SARANGI, J.

W.P.(C) NO.14122 OF 2014

ARINDAM CHAKRA .....Petitioner

.Vrs.

BIJU PATTNAIK UNIVERSITY OF TECHNOLOGY & ANR. .....Opp.Parties

A. CONSTITUTION OF INDIA, 1950 – ART.14

Clause-12.0 (a) of the Academic Regulation while allowing re-totaling/rechecking of marks for regular students, denied the same for the candidates of Special examination, though all are prosecuting the same courses of studies with same academic curriculum – Violation of Article 14 of the Constitution of India – Held, impugned clause is declared as ultra vires – Direction issued to University Authorities to make necessary re-totaling/re-checking of the answer sheets of the petitioner and to declare his result. (Paras 24,15)

B. DOCTRINE OF "UTRA VIRES" – Meaning of – It refers to not only lack of power to do any act but also to any situation like improper or unauthorized procedure, purpose or violation of the law of natural justice in exercising the power that is lawfully conferred on the authority concerned. (Para 22)

Case laws Referred to:-

1.AIR 2010 SC 2620 : (H.P. Public Service Commission-V- Mukesh Thakur)
2.(1993) 3 SCC 259 : (D.K. Yadav-V- J.M.A. Industries Ltd.)
3.AIR 2003 SC 2725 : (Savitri Cairae-V- U.P. Avas Ebam Vikas Parishad)
4.(2002) 4 SCC 34 : (Ashutosh Gupta-V- State of Rajasthan)
5.AIR 1978 SC 597 : (Menaka Gandhi-V- Union of India)
6.AIR 1981 SC 487 : (Ajay Hasia-V- Khalid Mujib)
7.AIR 1990 SC 1277 : (Shri Sitaram Sugar Company Ltd.-V- Union of India)

For Petitioner - M/s. Trilochan Rath, H.K. Tripathy, R.S. Singhar
For Opp.Parties – M/s. Subir Palit, A. Mishra, R. Tripathy & A. Parija.

Date of hearing : 29.10.2014
Date of judgment: 11.11.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who completed 8th Semester in Electrical Electronic Engineering Branch bearing registration No. 0901289371 of 2009-13 Batch of Biju Pattnaik University of Technology has filed this writ petition seeking following relief :

> " ……. to direct the opposite parties to produce the answer scripts in 'Electro Magnetic Fields and waves' paper of the petitioner who appeared in"4th Semester (Special/Back) Examination, 2012-2013" vide University registration No. 0901289371 of 2009-13, for kind perusal;
>
> Declare the clause "This facility is, however, not available for special examinations" of para-12.0 (a) of the academic regulation of BPUT as *ultra vires*;
>
> Direct the university authorities to award appropriate marks to the petitioner against the unevaluated questions and give grace mark against out of course question and also full marks against correct answer as more fully described in the foregoing paras; and
>
> Pass appropriate order against the university authorities awarding exemplary cost and compensation for putting the petitioner under undue mental agony and harassment."

2. The short facts of the case in hand are that the petitioner, who was prosecuting his studies in Electrical Electronic Engineering Branch under Biju Pattnaik University of Technology could not be successful in securing pass marks in 'Electro Magnetic Fields of Web' subject of the 4th semester and as a result, he had to appear in the '4th Semester (Special/Back) Examination, 2012-13. The examination was held on 20th March, 2014 and result thereof was declared in the month of June, 2014. The petitioner was awarded less marks and declared 'fail' once again though he did well in the examination and was expecting pass in the examination with good marks. However, having applied for xerox copies of the answer sheets and on

receipt of the same, he came to know that his answer to question no. 1(i) was not evaluated at all, although he had given correct answer to the said question. That apart, in respect of question No.1(b) although he had answered correctly. 'zero' was assigned against that answer. Similarly, against question No.1(g), question No.7(b) and question No.8(b), which were numerical questions, he was awarded one mark less than the pass mark although question of awarding less mark to such answer was not permissible for the reason that the question mostly required a student to enter a number for the answer. The question might also require a student to enter units or to specify the correct number of significant figures, which means always a correct answer carrying full mark or no mark in the event it is wrong. Besides the above, although grace mark of 5 was awarded as against question no. 2(a) in favour of all the candidates by taking into account the fact that the same was set out of syllabus, the petitioner had been deprived of that without any rhyme or reason. As a result of all the aforesaid illegalities and erroneous evaluation, he was awarded 21 marks in toto as against the required pass mark of 25 in the paper. Therefore, the petitioner submitted an application to the authority concerned for recounting/rechecking of the said paper in his own institute, namely, Trident Academy of Technology. While the petitioner's application was recommended to the university, the institution submitted its own recommendation pointing out the error in evaluating the answer sheets of the petitioner and assessed the answer script of the petitioner to be awarded 27 marks instead of 21 marks and such recommendation was made on 01.07.2014. It is alleged that till date no action has been taken by the university nor has any intimation been issued in that respect. Hence, this writ petition.

3. Mr. T. Rath, learned counsel for the petitioner, strenuously urged the inaction of the university authorities in not evaluating and awarding the marks in the subject 'Electro Magnetic Fields of Web' and submitted that there was inaction of opposite parties 1 and 2 in re-totaling and re-adding marks in respect of the 'special examinations' which they ought to have done vide para 12.0(a) of the 'Academic Regulations Governing B.Tech/B.Pharm/B.Arch Programmes' prescribed by the BPUT authorities. Consequently, he seeks the provisions contained in para 12.0(a) of the academic regulation to be declared *ultra vires* with direction to the opposite parties for re-total and recheck the marks on the basis of the recommendation made by the institution in the subject 'Electro Magnetic Fields of Web' of the 4th semester (special/back) examination, 2012-13.

4. Mr. Subir Palit, learned counsel for the Biju Pattnaik University of Technology, argued with vehemence justifying the action of the university stating that as per the provision contained in clause-4.5 of the academic regulation, re-valuation of any subject of special examination is not permissible. Since the petitioner appeared in special examination, question of re-valuation does not arise though such plea is not canvassed in the counter affidavit save and except stating that the academic regulation prescribed to conduct one special examination for the students who had failed in the regular examinations. Since such examination being over and above the regular examination and no such rechecking facility being prescribed, as a student gets chance in all the semesters to clear his back papers.

5. He has relied upon paragraphs-19 and 20 of the judgment in ***H.P. Public Service Commission v. Mukesh Thakur***, AIR 2010 SC 2620, wherein it was held that it was not permissible for the High Court to examine the question paper and answer sheets itself, particularly, when the Commission had assessed the inter se merit of the candidates and as such it was not permissible on the part of the High Court to go for examining the answer sheet. Basing on observation of the Supreme Court, Mr. Palit, submitted that this Court cannot examine this question and the relief sought by the petitioner cannot be granted by this Court.

6. Considering the contention raised by learned counsel for the parties and after going through the records and the facts pleaded, it is revealed that admittedly the petitioner has completed 8th semester successfully in Electrical Electronic Engineering Branch of 2009-2013 batch of BPUT. Admittedly also he could not secure pass marks in 'Electro Magnetic Fields of Web' a subject of the 4th semester for which he had to appear in "4th Semester (special/back) Examination 2012-13, which was held on 20.03.2014 the result whereof was declared in the month of June, 2014. He was awarded less mark and was declared 'fail' on the said subject though he had done well in the examination and expected good marks. When he saw the result, he applied for xerox copies of the answer sheet which was supplied to him vide Annexures-1 and 2 and on perusal of the same his apprehension was found correct. Therefore, he has pleaded the same in paragraph-5 of the writ petition as follows:-

> "5. That it will be appropriate here to submit that after getting answer sheet vide Annexure-2, the petitioner was surprised to found that his answer to Question NO.1(i) has not been evaluated at all,

> although he has given correct answer to the said question. That apart, question No.1(b) although he has been answer correctly but the same has been awarded (0) mark. Similarly, against question No.1(g), question No.7(b) and question No.8(b), which were numerical in questions, were awarded one mark less of the total marks although question of awarding less marks to such answer is not permissible for the reason that such questions mostly requires a student to enter a number for the answer. The question might also require a student to enter units or to specify the correct number of significant figures. Which means always a correct answer, carries full mark or no mark in the event of being wrong. Besides the above, although grace mark of 5 has been awarded as against question no. 2(a) in favour of all the candidates by taking into account the fact that the same was set out of syllabus, but the petitioner has been deprived of benefit without assigning any rhyme or reason. As a result of all the aforesaid illegalities and erroneous evaluation, he has only been awarded 21 marks in total as against required pass marks of 25 in the paper."

7. No specific answer has been given to the aforesaid facts mentioned in paragraph-5 of the writ petition by the university in its counter affidavit. In paragraph-5 of the counter affidavit, the university has pleaded, as follows:

> "5. That in reply to the averments made in Paragraph No.5 of the writ petition, it is humbly and most respectfully submitted that the answer scripts have been evaluated by the registered teacher of the University (teachers from affiliated and constituent college) and after such evaluation, the results of the petitioner along with similarly situated students were published. Therefore, challenging the evaluation by the candidate himself is bad in law as there are experts who really judge the best marks to be awarded to any answer. Furthermore, the evaluation is such a process where no one feels satisfied with end result and if one will fulfil the general demand, it will lead to a situation where no finality will ever come; rather it would result in collapsing the entire system and public at large will be seriously affected and also the schedule of examination will not be completed within the academic session which is non negotiable.
>
> Therefore, the claim of the petitioner is misconceived and without any substance. The petitioner is required fulfil the mandatory

requirement as prescribed in Academic Regulation of the University which is framed by the Academic Council of the University."

8. From the above pleadings, it appears that the university has not given any specific reply to the contention raised by the petitioner and rather the reply of the university is totally fake and evasive.

9. The State Legislature enacted an Act to provide for the establishment and incorporation of a technological university in the State of Orissa and matters connected therewith or incidental thereto called 'The Biju Patnaik University of Technology Act, 2002'. Sub-section (a) of Section 2 defines 'Academic Council' of the University. Section 19 of the said Act defines Academic Council, which states that it shall be the principal academic body of the University and, subject to the provisions of this Act and the Statutes, it shall coordinate and exercise general supervision over the academic programmes and policies of the university and shall be responsible for the maintenance of standards of instruction, research, education and examination within the University and shall exercise such powers and perform such other duties as may be conferred on it by Statutes. Section 20 of the said Act deals with the powers and functions of Academic Council. As per sub-section (ii) (c) of Section 20, the academic council prescribes qualification for admission of student to various courses of studies, to research degrees and to the examinations and the conditions under which exemptions may be granted. Sub-section (ii) (d) of Section 20, the academic council prescribes standards of evaluation of the performance of students and classification of students on the basis of their performance in the examination. Therefore, the academic programme of the university is guided by its academic council which consists of all Principals of affiliated and constituted colleges, eminent Professor of the Govt. of Orissa and Govt. of India as well as the Industries of repute numbering around 165. On due deliberation and consultation, regulation has been prepared by the university called ''Academic Regulations Governing B.Tech/B.Pharm/B.Arch Programmes''.

10. Mr. Palit, learned counsel for the University, referred to regulation 4.5 of the said Academic Regulations, which reads as follows:-

"4.5. There shall be a Special examination after the 8th semester examination for 7th and 8th semester subjects. Students who have failed in subjects registered by them in 7th and 8th semesters, may avail this opportunity to clear these subjects. Students, after completion of 8th semester, can register in any number of subjects (failed) for the

> Special examinations. The Special Examination will start after 30th June of every year.
>
> There shall not be any re-valuation for any subjects of the Special Examination."

He advanced his argument strenuously submitted that there shall not be any revaluation of special examination paper as that is not permissible under the regulation. Since the petitioner had appeared in special examination and revaluation was prohibited under the Regulations, his claim cannot be acceded to and rightly such benefit has not been extended to him. He further submitted that there was a special examination after the final semester examination for 3rd to final semester subjects. Students who have appeared the final semester examinations are eligible to appear in the special examination and the students who had appeared in the semester examination (3rd to final semester) and had secured 'F' grade in the subjects, were eligible to avail this opportunity to clear these subjects. Students after completing final semester examination, can register in any number of subjects (failed) for the special examination. The special examination is to start after 30th June every year. It is submitted that this facility having been availed of by the petitioner as per the regulations, he cannot claim the benefit of re-totaling/rechecking of the answer sheets as the regulations prohibit to do so. Clause-12.0 (a) of the Academic Regulation deals with Re-totaling/rechecking, which reads as follows:-

> "12.0 (a) – Re-Totalling/Re-Checking: A student may apply through his/her college for Re-totaling/Re-checking of a paper within 10 calender days from the date of publication of the results in each Semester. However, evaluation be done for un-evaluated questions, if any. This facility is however not available for special examinations"

11. Mr. T. Rath, learned counsel for the petitioner assails the very same condition stipulated in clause-12.0 (a) to the extent "This facility is however not available for special examinations" and states that the clause itself create hostile discrimination among the students those who have prosecuted their studies in the same university and as such this amounted to arbitrary and unreasonable exercise of power and is hit by Article 14 of the Constitution as the same is unreasonable. Therefore the regulation as per clause-12.0 (a) to the extent mentioned above be declared *ultra vires*. He has pleaded the same in paragraph-11 of the writ petition, which reads as follows:-

> "11.That the conduct of university in restricting the facility of Re-totalling/Re-checking as provided at para 12.0 (a) of the aforesaid Academic Regulation of BPUT only to the regular students is nothing but an act of discrimination and clever ploy of the university authorities to protect the interest of the careless an dishonest examiners at the cost of the interest of the students. Hence, the clause "This facility is, however, not available for special examination" appearing at para 12.0 (a) of the aforesaid Academic Regulation of BPUT is liable to be struck down by this Hon'ble Court"

12. To such pleading of the petitioner, in paragraph-12 of the counter affidavit no specific reply has been given, save and except stating as follows:-

> "12. That the averment made in para-11 of the writ petition that the university is restricting the facility of re-checking/re-totalling as provided in para 12.0 (a) of the aforesaid academic regulations of BPUT only to the regular students is nothing but an act of discrimination is totally incorrect.
>
> Further, the Academic regulation of the university is being framed by the Academic Council to ensure that quality and standard of education is maintained and preserved. The regulation in force has been formulated by the Academic Council. The Academic Council in its collective wisdom never thought it prudent to abolish such breaks for weaker students. Its regulation permits a weak student to study at his/her own pace and complete the credit requirements for a degree in his/her comfortable speed. This is in line with the National and International practice. Further, BPUT Act, 2002 has also empowered Academic Council to frame, modify and re-visit to the regulation. The petitioner has to accept the mandatory requirements as prescribed by the Academic Council."

13. As it appears, as per clause-4.5 there is a restriction imposed i.e. "There shall not be any re-valuation for any subjects of the special examination" whereas in clause-12.0 (a) further restriction has been imposed i.e. "This facility is however not available for special examinations". The facility regarding re-totaling/rechecking has not been made available for special examination. Thereby by invoking clause-4.5, restriction is imposed with regard to re-valuation. Similarly, by invoking clause-12.0 (a) restriction is imposed for re-totaling/rechecking in respect of special examination. But

there is no nexus of imposing such restriction in case of special examination has been indicated by the university. As it appears, there is arbitrary and unreasonable exercise of power of the university authorities putting a restriction under clause 4.5 with regard to re-evaluation and in clause-12.0 (a) with regard to re-totaling/rechecking so far as the special examination is concerned. By this the university authorities have created a discrimination among the regular examinees vis-à-vis candidates of special examination though all are prosecuting the same course of studies with same academic curriculum. While in case of regular examines facilities of re-totaling/rechecking is admissible that could not have been denied to the candidates of special examination so far as revaluation of marks is concerned under clause-4.5.

14. Mr. T. Rath, learned counsel for the petitioner, states that he does not claim for revaluation as there is a prohibition under the regulation, but at the same time he lays emphasis on clause-12.0 (a) stating that putting a condition re-totaling/rechecking is not permissible in respect of special examination candidates itself amounted to hostile discrimination and that violates Article 14 of the Constitution.

15. Article 14 of the Constitution guarantees to every person equal treatment before law and extends protection of the laws in equal measures to all. "Equality before law" declares that every person is equal before law, no one can claim special privilege and that all classes are equal subject to the ordinary law of the land.

16. In ***D.K. Yadav v. J.M.A. Industries Ltd.,*** (1993) 3 SCC 259, the apex Court held that Article 14 has a pervasive processual potency and versatile quality, equalitarian in its social and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness.

17. In ***Savitri Cairae v. U.P. Avas Ebam Vikas Parishad,*** AIR 2003 SC 2725, the apex Court held that equality clause in Article 14 is of wide import and it permits reasonable classification based on intelligible differentia having nexus with the object sought to be achieved. Equality before law is a dynamic concept having many facets. One facet-the most commonly acknowledged is that there shall be no privileged person or class and that none shall be above law.

18. In ***Ashutosh Gupta v. State of Rajasthan***, (2002) 4 SCC 34, the apex Court held that the concept of equality before law does not involve the idea

of absolute equality amongst all, which may be a physical impossibility. All that Article 14 guarantees is the similarity of treatment and not identical treatment.

19. In ***Menaka Gandhi v. Union of India***, AIR 1978 SC 597, the apex Court held that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.

20. In ***Ajay Hasia v. Khalid Mujib***, AIR 1981 SC 487, the apex Court while settled the principle held that Article 14 strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. Therefore, where there is arbitrariness in State action, Article 14 springs to the action and judicial review strikes such action down. Every action of the executive authority must be subject to rule of law and must be informed by reason and whatever be the activity of the public authority, it should meet the test of Article 14.

21. Applying the above analogy to the present context while putting a restriction under clause-12.0 (a) of the academic regulation, no reasons have been assigned why the candidates of special examination are to be treated differently from the regular students in the matter of re-totaling/rechecking of marks. Therefore, clause-12.0 (a) to the extent of putting a restriction of re-totaling/rechecking of marks in a special examination is hit by the vice of the doctrine of *ultra vires*.

22. The doctrine of *ultra vires* refers to not only lack of power to do any act, but also to any situation like improper or unauthorized procedure, purpose or violation of the law of natural justice in exercising the power that is lawfully conferred on the authority concerned.

23. In ***Shri Sitaram Sugar Company Ltd. v. Union of India,*** (1990) 3 SCC 223 : AIR 1990 SC 1277, the Apex Court dealt with "*ultra vires"* and held that a repository of power acts *ultra vires* either when it acts in excess of its power in the narrow sense or by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. Any repository of power, whether legislative, administrative or quasi-judicial, is open to challenge if it violates the provisions of the Constitution or the governing Act or the

general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it.

24. Applying such doctrine to the present context, this Court is of the view that putting a restriction under clause-12.0 (a) to the extent that the facility of re-totaling/rechecking is not available for special examination amounted to arbitrary and unreasonable exercise of powers, thereby it is hit by Article 14 of the Constitution of India. Accordingly, to that extent the provision contained in clause-12.0 (a) is declared as *ultra vires*.

25. In the aforesaid facts and circumstances, the provisions contained in clause-12.0 (a) to the extent the facilities of re-totaling/rechecking is not available for special examination being declared *ultra vires*, necessary corollary will be that the University authorities should make necessary re-totaling/rechecking of the answer sheets of the petitioner in subject "Electro Magnetic Fields of Web" subject of his 4th Semester (Special/Back) Examination, 2012-13 on the basis of the recommendation made by Trident Academy of Technology, Bhubaneswar, an institution affiliated to the said University and declare the result of the petitioner within a period of three weeks hence.

26. With the above observation and direction, the writ petition is allowed. No order to costs.

Writ petition allowed.

2015 (I) ILR - CUT- 176

D. DASH, J.

JCRLA NO. 23 OF 2006

JADUMANI NAIK ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

EVIDENCE ACT, 1860 – S. 32

Dying declaration – Victim suffered burn injuries – Doctor (PW.8) recorded dying declaration as per the dictation of another doctor

(P.W.6) – When both the doctors deposed with clarity absence of endorsement on the statement to that effect is of no consequence – Moreover as the victim died fifteen days after the occurrence and facial portion of the victim was not severally burnt it is not correct to hold that she was not in a fit state of mind to give the declaration – Held, the dying declaration is truthful and voluntary – Impugned judgment of conviction and sentence are confirmed. (Paras 7, 9)

For Appellant - M/s. Susamarani Sahoo,
Mr. Chitaranjan Sahu.
For Respondent – Mr. A.K. Mishra, Standing Counsel

Date of hearing : 28.10.2014
Date of judgment : 30.10.2014

JUDGMENT

D. DASH, J.

The appellant from inside the jail has preferred this appeal challenging the judgment of conviction and order of sentence passed by the learned Adhoc Additional Sessions Judge, Fast Track, Keonjhar (FTC) in S.T. No.143/12 of 2003/04. By the said judgment the appellant has been found guilty for commission of offence punishable under section 304 Part-II, I.P.C. and thus having been convicted thereunder, he has been ordered to undergo rigorous imprisonment for a period of 10 years.

2. Prosecution case is that on 24.03.2003 around 2 P.M. the appellant set her wife Jatri Naik (deceased) to fire after sprinkling kerosene on her and then to have fled away from the spot. Prior to the said incident, the appellant is said to have brought a doctor, who had pushed two injections to the deceased as she was ill.

The brother of the deceased having lodged the F.I.R. at Ghatgaon police station, necessary case was registered and the investigation commenced. On completion of investigation, charge-sheet having been submitted against the appellant placing him to be tried in the court of law for offence punishable under section 302, I.P.C., he faced the same.

3. The case of the defence is that of complete denial and false implication.

The prosecution in order to establish its case when examined ten witnesses, the defence has examined none. The doctor who conducted the autopsy over the dead body of Jatri has been examined as P.W.7. P.W.1 is the brother of the deceased and the informant whereas P.W.2 is deceased's mother. Brother's wife of the deceased has come to the dock as P.W.3. P.Ws.4 and 5 are two neighbours. Another doctor has been examined for proving the dying declaration in course of treatment as P.W.6. P.W.8 is the other doctor, who had recorded the dying declaration as per the dictation of P.W.6. The doctor conducting the post-mortem examination is P.W.7. The I.O. has come to the dock at last as P.W.10. Prosecution more importantly has proved the F.I.R. (Ext.1), dying declaration (Ext.3), bed head ticket (Ext.5) and post mortem examination report (Ext.6).

4. On evaluation of evidence the trial court has found the prosecution to have proved the factual aspect of the case that it is the appellant who had set his wife (Jatri Naik) ablaze and had lit the fire over the clothings put on her after sprinkling kerosene upon her. However, taking into account that the deceased had sustained burn injuries and was making improvement in course of treatment when she left the hospital, when other features like enlargement of liver, spleen etc. have not been ruled out to be on account of prior ailment and having not been shown as only due to burn injuries, the trial court taking a view that the death cannot be said to have been the direct connection with such burn injury has found the appellant guilty of offence under section 304, Part-II IPC. Therefore, the trial court has recorded conviction for offence under section 304, Part-II, I.P.C. and has accordingly sentenced.

5. Learned counsel for the appellant submits that the appreciation of evidence on the score that it is the appellant, who had set his wife ablaze having lit the fire over her after sprinkling kerosene, is not believable. It is further stated that the dying declaration proved in the case in view of the infirmity and in view of the evidence on record ought not to have been believed to have been the true version of the deceased and as such ought not to have been relied upon. He further submits that the delay in lodging of the F.I.R. ought to have been viewed as a circumstance against the prosecution case that they have ultimately done so by concocting a story.

6. Learned counsel for the State, on the other hand, supports the finding. He contends that the trial court did commit no mistake in accepting the prosecution case with regard to the role of the appellant in the said incident. It is also his submission that here as there is direct evidence on record which

clearly go to show that it was the appellant, who was inside the room when his wife was burning and then he fled away on the spot the complicity gets well established in the absence of any explanation by the appellant. Therefore, he contends that such evidence is enough to establish the guilt of the appellant. So, he urges that the appeal bears no merit. However, he submits that as per the informations gathered, the State has not preferred any appeal challenging the acquittal of the appellant of the offence under section 302 IPC.

7. Keeping in mind the above submission now the evidence adduced from the side of the prosecution are required to be examined. As regards the nature of death, the trial court has held the death to be homicidal in nature. It is seen from the evidence of P.W.7 that the deceased had sustained seventy percent burn injuries. However, despite of burn injuries he has not given any definite opinion with regard to cause of death in the particular case, since other organs like lever, spleen and kidney were enlarged which according to him might have also been due to malaria and malnutrition. That apart the admitted fact stands that the deceased was ailing at the time of the incident. When the treatment was continuing in the hospital and was improving in her condition as stated by P.W.6 the deceased was taken to the house and she died there. She had survived for about fifteen days after the incident. It has also been stated by P.W.6 that taking note of her condition on 27.03.2003 and her condition on 06.04.2003, on account of lack of proper treatment, thereafter, the fatal consequence as met is not ruled out with all other existing and intervening factors.

7. Now coming to the evidence as regards the complicity of the appellant, it is seen from the evidence of P.W.1, the younger brother of the deceased that at the time of the incident she was not present in the house but she was informed about the incident by his wife and others and he asked the deceased, who was then in her sense and able to communicate, when she disclosed before him that it is the appellant, who had caused burn injuries. So, he had lodged the F.I.R. During cross-examination, he has stated that he had asked her sister about the reason of her sustaining the burn injuries when she was in the hospital as by the time he arrived at the home, deceased was shifted to the hospital. In spite of scathing cross-examination, no such material has emerged out to discard his evidence as regards declaration made by the deceased before him implicating the appellant to have set her to fire. The evidence of P.W.2, who is the mother of the deceased is also to the

effect that on her return home she found her to have sustained burn injuries and on being asked the deceased disclosed that the appellant had called the doctor who gave two injections and after the departure of the doctor, the appellant put some clothing materials over her body, then sprinkling kerosene had set fire to it and fled away from the spot. This witness has further stated that on her asking the deceased had given the answer implicating the appellant as above. P.W.3, who is the wife of P.W.1 has clearly stated that the appellant came along with the doctor, who pushed two injections to the deceased and after he left, the appellant spread clothing materials over the deceased, poured kerosene and lit fire. She has stated to have raised immediate alarm when the neighbours arrived and put off the fire. It is also stated that the appellant then fled away from the place. During cross-examination she has further reiterated that she had seen the appellant in the room on her arrival getting the smell of kerosene and no sooner did she arrive there, the appellant fled away. P.W.4 a neighbour has further stated that when she rushed to the house hearing hue and cry, he found that the body of the deceased had caught fire and saw the appellant running away towards jungle. He has withstood the searching cross-examination successfully in further stating that he found appellant coming out of the house and running towards the jungle as soon as he came out of the house. He as it appears has truthfully given an explanation that as he and others remained engaged in sending the victim to the hospital immediately no search for the appellant was made. The evidence of P.W.5 is also in the same line, that on reaching near the house of P.Ws.1 and 2, he saw the appellant running away from the place towards the jungle and immediately on entering into the house, he noticed smoke to have been filled with emission of of kerosene smell out and at that time P.W.3 was very much there in the house by the side of the deceased. He has also stated the presence of P.W.4 and about subsequent arrival of other villagers. No such material is forthcoming in his evidence to disbelieve his version in any way It may be stated that nothing has been shown or culled out to infer even for a moment that these witnesses had any such reason to falsely implicate the appellant being enemically disposed of towards him. The doctor P.W.6 was present while recording of the dying declaration of the deceased, which has been marked as Ext.3. He has stated that as it was a case of burn injury of more than fifty percent, it was thought proper to immediately record her version. As per his evidence P.W.8, the other doctor so recorded Ext.3 as proved by him. He has also stated that such recording was with prior intimation to the Police Station

and with prior permission of A.D.M.O, Medical. He claims that such recording was made by P.W.8 to his dictation and LTI of Jatri Naik was taken. The narration therein remains the same as has been stated by the P.Ws.1 and 2. The doctor, P.W.8 has recorded Ext.6. He has clearly stated that they found the deceased to be in a fit condition to depose and there was clarity in her mind. He stated to have translated the Oriya version of deceased into English and to have accordingly written. It is also his evidence that he has read over the contents to the deceased, who having admitted the narration to be her true version put her L.T.I. He has proved the signature of P.W.6. During further cross-examination, he has assertively stated that before recording the statement, he asked Jatri, her name and husband's name which she bluntly replied being conscious.

Learned counsel for the appellant attacks the dying declaration (Ext.3) on the ground that it carries no such certificate that the deceased was in a fit state to speak and that P.W.8 has not given any endorsement that he wrote it as dictated by P.W.6. In view of clear evidence of P.Ws.6 and 8, who have no such apparent reason to falsely implicate the respondent non attachment of such a certificate is of no significance to reject their testimony saying that the deceased was not in a position to talk. It may be stated that it has also not been stated by other prosecution witnesses like P.Ws.1 and 2 that during treatment she had no sense. Similarly absence of endorsement of P.W.8 cannot be taken as a circumstance to outweigh the positive evidence of P.Ws. 6 and 8. The incident having taken place on 24.03.2003, on that very day the dying declaration has been recorded. The next challenge to this dying declaration is that it is not in question and answer form. In the facts and circumstances of the case when the doctors as well as the prosecution witnesses have stated that the deceased was in a position to clearly talk such non-recording of dying declaration in question and answer form pales into insignificance. Such a course in my considered view may be insisted upon to examine the truthfulness and voluntariness of the declarant in making the version if the condition of the declarant is so serious that the talking is feeble, with pain and difficulty. The evidence of P.Ws. 6 and 8 thus inspire confidence. There is no reason why they should make up a story when they have no prior acquaintance with the deceased and her family and the appellant as well. Both have stated that deceased was in a fit state of mind and gave out the declaration with clarity.

The certification of the doctor about fitness is a rule of caution. When the doctor states that deceased was in a fit state of mind being in a position to make statement which was made and recorded accordingly, the absence of endorsement on the statement to that effect is of no consequence. Moreover, the deceased died fifteen days after and thus it is not possible to hold that she could not have made any dying declaration which is ordinarily not expected from a patient with burn injury when facial portion is not severally burnt making it difficult to open mouth which is not the case here. In view of above discussion, this Court find no hesitation to record that both the doctors are truthful and their evidence are safe to be relied upon for acceptance of the dying declaration as truthful and voluntary. The settled law is that a conviction can be recorded on a dying declaration recorded properly when the declarant is in a fit mental state to make it and it passes the test of truthfulness land voluntariness. Thus the appellant's complicity is established beyond reasonable doubt.

8. The other circumstance as has been established that the appellant was seen running away from the spot is of great importance. This has been proved by all the witnesses such as P.W. 3 and other independent witnesses who arrived there on hearing cry. This conduct of appellant shows that had there been no apprehension in his mind seeing wife having caught fire, he being husband how would run away instead of providing or facilitating for putting off the fire and then for treatment.

9. For the aforesaid discussion of evidence and their reappreciation, this Court agree with the finding of the trial court as regards the complicity of the appellant to have been established beyond reasonable doubt through clear, cogent and reliable evidence. Therefore, the judgment and conviction and order of sentence are hereby confirmed.

10. Resultantly, the JCRLA stands dismissed. The appellant if not in jail custody be forthwith taken to custody to serve out the remaining part of the sentence.

Appeal dismissed.

2015 (I) ILR - CUT- 183

D. DASH, J.

G.A. NO.30 OF 1997

STATE OF ORISSA ……..Appellant

.Vrs.

BUDHIA @ BABULI NAIK ……..Respondent

A. CRIMINAL TRIAL – Rape Case – Acquittal by trial Court – Re-appreciation of evidence by High Court – Evidence of the victim that when the respondent touched his penis with her private part there was ejaculation and after discharge the respondent pushed his penis in to her vagina – Trial Court disbelieved her evidence on the ground that there being ejaculation, the sexual inter course is improbable – No evidence that the discharge was to the fullest extent and the penis being not in a position of erection penetration was quite impossible – It is also not universal but depends on the quantum of discharge so as to make the penis totally incapable, even slight erection is enough for penetration – When the victim (P.W.1) has stated that the appellant pushed his penis, it pre-supposes that the penis was having the erection to have slight penetration – Penetration even to slight extent is enough for the offence – Held, view taken by the trial Court is perverse – Impugned order of acquittal is set aside – Respondent is convicted for commission of offence U/s. 376 I.P.C. (Paras 10 to 15)

B PENAL CODE, 1860 - S. 376

Rape – Solitary testimony of the victim – It can form the foundation of a finding of guilt for commission of offence of sexual assault upon her and absence of corroboration does not stand on the way of acceptance of the same – However corroboration may be considered essential when the evidence of the victim suffers from basic infirmity and the probability factors render it unworthy of credence.

In the present case solitary testimony of P.W.1 gets further corroboration from the doctor (P.W.15) – Held, the respondent is liable to be convicted U/s.376 I.P.C. (Para 8,15)

Case laws Referred to:-

1.(2014) 57 OCR 1044 : (Basappa-V- State of Karnataka)
2.(2009) 10 SCC 639 : (Gamini Bala Koteswara Rao & Ors.-V-State A.P.)

3.(2008) 1 SCC 258 : (K. Prakashan-V- P.K. Survenderan)
4.(2006) 1 SCC 401 : (T. Subramaniam-V- State of Tamil Nadu)
5.(2002) 10 SCC 461 : (Bhima Singh-V- State of Haryana)
6.AIR 1957 SC 216 : (Balbir-V- State of Punjab)
7.(1970) 2 SCC 450 : (Khedu Mohtam-V- State of Bihar)
8.(1975) 4 SCC 497 : (Ram Narain Singh-V- State of Punjab)
9.(1978) 4 SCC 371 : (Ganesh Bhabam Patel-V- State of Maharastra)
10.(1988) 2 SCC 557 : (Awadhesh-V- State of Madhya Pradesh)
11.1995 Supp-1 SCC 248 : (Ram Kumar-V- State of Haryana)
12.(2002) 4 SCC 85 : (Bhagwan Singh & Ors.-V- State of Madhya Pradesh)
13.(2007) 3 SCC 755 : (State of Goa-V- Sanjay Thakram)
14.(2008) 3 SCC 795 : (Puram Singh-V- State of Uttaranchal)
15.(2009) 11 SCC 337 : (Mahendra Pratap-V- State of Utter Pradesh)
16.(2013) 5 SCC 705 : (Shivasharanappa & Ors.-V- State of Karnataka).

For Appellant - Mr. A.K. Mishra, Standing Counsel.
For Respondent - M/s. Almas Yusuf Fayaz, K. Mishra, S.K. Mund,
Mr. Tapas Kr. Dwibedy –amicus curie

Date of hearing : 28.10.2014
Date of judgment: 10.11.2014

JUDGMENT

D. DASH, J.

The State in this appeal has called in question the order of acquittal dated 21.6.1995 passed by the learned Assistant Sessions Judge, Talcher in S.T. No.56(A) of 1994/17 of 1994 acquitting the respondent of the charge under section 376, I.P.C.

2. Facts necessary for disposal of the above appeal run as under:

On 19.02.1994, the victim girl (P.W.1) was sitting on the varanda of her house with one of her friends (P.W.2). It is around 2 P.M. she went to the backyard of her house to urinate where the respondent arrived. It is stated that seeing the respondent, the victim stood up when the respondent dragged her saree from behind which resulted her fall on the ground and in the process her saree was torn. The victim when objected, the respondent asked

her to keep quiet and offered money. However, she raised cry. It is further alleged that the respondent then closed her mouth, carried her to nearby jungle. At that point of time the victim asked her friend to call the father of the respondent. The respondent having taken the victim inside the jungle removed her saree and making her completely naked made her lie on the ground. Thereafter he removed his own pant and forcibly went for sexual intercourse with her. He also pressed her breasts causing injuries. It is also stated that because of forcible intercourse the victim sustained injuries on her right hand finger and her bangles were broken. At that time when the father of the respondent arrived at the spot, seeing him the respondent fled away. The victim narrated the incident to the wife of a neighbour who had come after taking bath and then she narrated the incident to her mother and uncle on their return from NTPC. Lastly she lodged the F.I.R. which necessitated the registration of the case and commencement of investigation thereafter.

On completion of investigation, charge-sheet having been placed, the respondent finally faced the trial.

3. During trial, the respondent has taken a plea of complete denial and false implication.

From the side of the prosecution twenty witnesses have been examined when the defence has examined none. Out of the witnesses examined on behalf of the prosecution, the investigating officer has come at last as P.W.20. The doctors examining the victim and the accused are P.Ws.14, 15 and 19. As already stated the victim has been examined as P.W.1 and her friend is P.W.2. Parents of the victim are P.Ws.7 and 16. Besides the above, other witnesses to the seizure have also been examined. That apart more importantly, from the side of the prosecution, the F.I.R. (Ext.2), medical report Exts.10, 11 and 12 have been admitted in evidence.

4. The trial court on evaluation of evidence first of all has come to the conclusion that the age of the victim was less than 16 years. However, on examination of the evidence of victim and also her friend in its wisdom has rendered a finding that their evidence are unsafe to be relied upon to fasten guilt upon the appellant for the offence under section 376, I.P.C. Accordingly, the incident as projected by the prosecution having been held to have not been proved beyond reasonable doubt, the respondent has been acquitted of the charge.

5. Learned counsel for the appellant-State submits that the evidence of the P.W.1 ought to have been relied upon by the trial court in holding the respondent guilty for commission of offence under section 376, I.P.C. According to him, the evidence of P.W.1 does not suffer from any basic infirmity and she has deposed in a very natural manner wherein even no doubtful feature surfaces. Therefore, he urges that the said evidence of P.W.2 when tested with the medical evidence and the evidence of other witnesses go to establish the charge against the appellant beyond reasonable doubt. He further submits that appreciation of evidence in the present case has been wholly perverse and the finding based on the said appreciation of evidence has caused serious miscarriage of justice which should not be allowed to stand. Therefore, he with vehemence urges that it is a fit case where the order of acquittal required to be set aside.

6. Learned counsel for the respondent, on the other hand, supports the finding of the trial court in further contending that the appreciation of evidence is just and proper. According to him, the trial court has rightly found it unsafe to rely upon the evidence of P.Ws.1 and 2 and thus finding rendered against the case of prosecution with regard to rape is not liable to be interfered with.

Alternatively, it is submitted that at this distant point of time after lapse of nineteen and half year alteration of acquittal to conviction will not be in the interest of justice and the direction that the respondent has to serve out the sentence for a long period will not meet the ends of justice as by now the appellant must be having family needing his support and they are now likely to be driven to street being pushed to the abject of poverty ruining their life.

7. On such rival submission this Court is called upon to reappreciate the evidence in the light of the contentions as advanced. But before taking up that exercise it is felt apposite to take note of the settled position of law with regard to the scope of this appeal and power of this Court for interference with the order of acquittal.

It has been held in case of ***Basappa Vrs. State of Karnataka***; (2014) 57 OCR 1044 that the High Court in an appeal under section 378 Cr.P.C. is entitled to reappraise the evidence and put the conclusions drawn by the trial court to test but the same is permissible only if the judgment of the trial court is perverse. Relying the case of ***Gamini Bala Koteswara Rao and others –***

Vrs. State of Andhra Pradesh; (2009) 10 SCC 639, it has been held that the word "perverse" in terms as understood in law has been defined to mean 'against weight of evidence'. In '***K. Prakashan Vrs. P.K. Survenderan***; (2008) 1 SCC 258, it has also been held that the Appellate Court should not reverse the acquittal merely because another view is possible on evidence. It has been clarified that if two views are reasonably possible on the very same evidence, it cannot be said that prosecution has proved the case beyond reasonable doubt (Ref.:- ***T. Subramaniam Vrs. State of Tamil Nadu***; (2006) 1 SCC 401). Further, the interference by appellate Court against an order of acquittal is held to be justified only if the view taken by the trial court is one which no reasonable person would in the given circumstances, take (Ref.:- ***Bhima Singh Vrs. State of Haryana;*** (2002) 10 SCC 461). It has been held in case of ***Anjanappa vrs. State***; ((2014) 57 OCR 51:-

" An order of acquittal it not to be set aside lightly. If the view taken by the trial court is a reasonably 'possible view, it is not to be disturbed. If two views are possible and if the view taken by the trial court is a reasonably possible one, then the appellate court should not disturb it just because it feels that another view of the matter is possible. However, an order of acquittal will have to be disturbed if it is perverse.

The said principles have been followed in pronouncements in ***Balbir vrs. State of Punjab***, AIR 1957 SC 216; ***Khedu Mohtam vrs. State of Bihar***; (1970) 2 SCC 450, ***Ram Narain Singh vrs. State of Punjab***; (1975) 4SCC 497, ***Ganesh Bhabam Patel vrs. State of Maharastra***; (1978) 4SCC 371, ***Awadhesh vrs. State of Madhya Pradesh***; (1988) 2 SCC 557; ***Ram Kumar vrs. State of Haryana***; 1995 Supp (1) SCC 248, ***Bhagwan Singh and others vrs. State of Madhya Pradesh***; (2002) 4 SCC 85, ***State of Goa vrs. Sanjay Thakram***; (2007) 3 SCC 755, ***Puram Singh vrs. State of Uttaranchal***; (2008) 3 SCC 795; ***Mahendra Pratap vrs. State of Utter Pradesh***; (2009) 11 SCC 337 and ***Shivasharanappa and others vrs. State of Karnataka***, (2013) 5 SCC 705.

8. At this stage, it is also felt the need to take note of the settled position of law with regard to acceptance of solitary testimony of the victim in case of rape. It has been held :-

The principle of law is well settled in plethora of decisions of the Hon'ble Apex Court as well as this Court that the solitary testimony of the victim can form the foundation of a finding of guilt for commission of offence of sexual assault upon her and absence of corroboration does not

stand on the way of acceptance of the same. However, corroboration may be considered essential when the evidence of the victim suffers from basic infirmity and the probability factors render it unworthy of credence.

9. The finding of the trial court that victim was 14 years of age at the relevant time of the incident is not under challenge. Victim has stated her age to be 14 years at the time of examination and it has been the estimation of the court as 15 years when her examination has taken place one year after the incident. P.W. 7 is the uncle of the victim who after the death of victim's father had married the mother of the victim; he has not stated anything about the age of the victim. Now the evidence of P.W. 15, doctor bears importance. He has conducted ossification test for determination of age of the victim. His opinion is to the effect that the victim was more than 14 years of age and less than 16 years. P.W. 9 has stated that in the school admission register, the date of birth of the victim has been indicated as 07.02.1980. However, the register not been proved nor school leaving certificate basing on which the entry was made therein. Mother of the victim has also not given evidence about the age of the victim. The trial court while examining the victim has administered oath upon her having certified that she understood the implication of oath as she gave rational answer to the questions put prior to examination. Taking the totality of evidence on the score into consideration thus the conclusion stands that the victim was within the age group of 14 to 16 years.

10. P.W. 1 the victim has stated that on the relevant date and time, her mother P.W. 16 and uncle P.W. 7 had gone to NTPC and after cooking food, when she was sitting on their verandah around 2.00 pm she went to their backyard to urinate. She has further stated that the respondent came there and seeing him, she immediately got up and tried to run away. But being chased, the respondent pulled her saree which resulted her fall. She has further stated that at that time she objected, when the respondent asked her to maintain silence and allured her that he would be paying money for the same. She has further stated to have raised shout when the respondent was dragging her by holding saree. It is also her evidence that the appellant having closed her mouth carried her to a nearby jungle. She has stated to have called Malli, (P.W. 2) who was also sitting on the verandah of their house at that time and she also states that she asked P.W.2 to call the father of the appellant. Then she has given the narration that the respondent pulled down her clothes inside the jungle, made her completely naked, forced her to lie on the ground,

pressed her chest and buttock and then removing his own pant, ravished her (P.W. 1-victim). Whereafter appellant's father came and hearing his voice, he took to his heels. The victim further stated to have narrated the incident before a village lady who was coming from the river after taking bath and lastly to her mother and uncle when they returned.

The trial court has taken serious view finding the victim stating during cross-examination that on the next day of the occurrence, the F.I.R. was lodged when it was actually lodged on the very day. Then he having found the statement of the victim recorded in course of investigation as the replica of the F.I.R. version, the same has again been taken as an adverse circumstance to doubt the veracity of the prosecution case. On the whole, the trial court has found that the P.W. 1 has deposed being tutored and for the purpose, the trial court has again gone to give much stress upon that discrepancy with regard to the date of the lodging of the F.I.R. Also it is said that the evidence of P.W.1 expose the improbabilities. With such reasonings, this Court without hesitation offer total disagreement which can be seen from the discussions to follow.

The victim's mental condition at the relevant time matters and especially in the case when she was fatherless and the incident is said to have been taken place when she was alone in a helpless condition together with the very fact that she hails from rural background with low level of intelligence and education. So, this discrepancy with regard to the date of lodging of the F.I.R., that too the difference of one day has absolutely no impact on the case and is of no significance. Assuming for a moment that there was delay when the FIR is not found to be a got up document, this delay is in no way fatal in a case of this nature. That apart the Investigating Officer's recording the statement of the victim in a manner as stated that it is replica of the FIR narration can't lead to doubt the prosecution case provided of course the evidence of the said witness is otherwise found to be reliable and worthy of credence. The FIR and recording of statement are almost simultaneous. So the victim having stated exactly what she narrated in FIR cannot also be taken to say that she had given no such statement earlier. Furthermore, it is not understood as to how the same is a ground to discard the evidence of victim in the absence of any basic infirmity being noticed. The I.O. even reproducing the FIR version of the informant as also the statement in course of investigation cannot lead to say that what the informant states in evidence is unbelievable when there is no such material

discrepancy and when the evidence is free from any such infirmity giving rise to grave doubt in mind. The trial court as it appears has not at all made any critical examination of the evidence rather than finding these flimsy reasons which are having no legal sanction.

The next ground taken is that as per the evidence of P.W. 1, there was discharge of semen prior to penetration of the penis of the appellant into her private part and that after ejaculation, the respondent forcibly pushed his penis into her private part. Thus the trial court has found to be is improbable. So, he has found the evidence of P.W. 1- victim to be unworthy of credence so as to inspire confidence. From this suspicion has been raised with regard to the happening of the incident and simply for this reason, when the evidence of P.W. 1 has remained practically un-shaken with regard to the incident, no credence has been attached to it.

Let it be seen as to what P.W.1 has deposed. In her examination-in-chief she has stated about rape by the respondent. During cross examination, it is stated that the respondent had put his penis into her vagina and then he had caught hold of her hands. She has stated that when respondent sat over her and his penis touched the vagina there was ejaculation and seminal fluid fell over her thigh and after discharge the respondent pushed his penis into vagina and had the sexual intercourse. The trial court has found this sexual intercourse after ejaculation as improbable. However, it has not been taken notice of that there is no evidence that the discharge was to the fullest extent that insertion or penetration was quite impossible, the penis being not in a position of erectment It is this P.W.1 who has clearly stated that thereafter the respondent pushed his penis into her vagina. This Court without least hesitation differs with the view of the trial court that it is improbable. The trial court with above evidence has unjustifiably gone to hold that the evidence that there being ejaculation, the sexual intercourse is improbable. It is not universal and it depends on the quantum of discharge so as to make the penis totally incapable of having remained even slightly erected for penetration. When P.W.1 has stated that appellant pushed his penis, it presupposes that the penis was having the erection to have slight penetration. Moreover, penetration even to slight extent is enough.

Considering her age it can well be visualized as to what it would have been prevailing in her mind at the relevant time. So her stating something as above cannot be taken amiss so as to discard her credible version. Thus this Court is in total disagreement with the view taken by the trial court. These

two views weighing in the mind of the trial court in rendering the finding against the prosecution, in my considered view are perverse.

12. Next, the trial court has found the evidence of P.W. 1 and 2 who was then sitting on the verandah to be discrepant on material particular and that as the reason to doubt the veracity of the prosecution case. This view is also not sustainable.

It has been clearly stated by P.W. 1 that she had gone to the backyard when P.W. 2 was sitting on the verandah. After sometime she raised hullah and asked P.W. 1 to call father of the respondent and sometime later being called he came and on hearing his voice, the respondent fled away. This Court feel at a loss to understand as to where arose the discrepancy and for what reason the evidence of P.W. 1 and 2 have been found to be quite discrepant on material particular so as to discard the version of P.W.1. The evidence of P.W.2 rather provides ample corroboration to the evidence of P.W.1. She has stated that while P.W.1 was being taken, she was asked by P.W.1 to call appellant's father. Furthermore, the evidence of P.W.3 is to the effect that on that day, she found P.W.1 crying sitting on their verandah and on being asked she narrated that she was ravished by the respondent. The evidence of P.W.7, uncle of the victim also run in the same vain that he found P.W.1 crying sitting on the verandah and when he asked she narrated the incident. Evidence of P.W.1 and narration as made by her before this P.W.7 are quite consistent. Mother-P.W.16 has also stated about the disclosure made by P.W.1, after she found P.W.1 crying. That apart there remains absolutely no reason whatsoever as to why the P.W.1 would be having even any tendency or bent of mind to falsely implicate this respondent alleging penetrative sexual assault upon her that too risking her life throwing her dignity, chastity to winds and inviting social trauma which the victim at that age was quite capable of thinking and understanding.

13. Besides the above, it is seen that the medical evidence provides further corroboration to the evidence of P.W.1. Three injuries have been found near the breast of the victim by P.W.15, the doctor who has examined her which clearly shows that there was resistance to the said act of respondent which has also been stated by P.W.1 and thus it provides corroboration. The prosecution has also proved the seizure of some broken bangles, one hair clip from the spot itself which is inside the jungle and the relevant seizure list has been proved as Ext.4 which lends assurance to the evidence of P.W.1.

Taking into consideration the overall circumstances and on reappreciation of evidence, this Court find that the charge under Section 376 IPC against the respondent is well established beyond reasonable doubt though the solitary testimony of P.W.1 which in addition has received corroboration from other evidence including medical evidence. This Court find that the acquittal in the present case is based on a finding which is the outcome of perverse appreciation of evidence which no reasonable person in the given circumstances would arrive at. This Court find the said order of acquittal to have been recorded by discarding the clear, cogent, reliable evidence emanating from the lips of trustworthy witnesses, safe to be acted upon on some unwarranted and flimsy reasons also without keeping the ground reality in mind and being alive to it. It is also noticed that the trial court has obstinately blundered and has reached at such a distorted conclusion as to produce a positive miscarriage of justice.

14. Now stands for consideration, the submission of the learned counsel for the respondent that the respondent having enjoyed liberty for all these years since 1995 onwards and after more than 19 years it would serve no useful purpose to put him behind the bar for a long time when he must be having his family and dependents who would again be driven to the street and their life would be ruined and in that event rather it would be travesty of justice.

This Court having already found the acquittal to be wholly unmerited one, especially taking into consideration, the nature and gravity of the crime which is not only against an individual but a crime which destroys the basic equilibrium of the social atmosphere and viewing the plight and shock suffered by the victim as well as the torment upon her having the potentiality to corrode the poise and equanimity of the civilized society, the lapse of time do not stand on the way and weigh in any manner in mind of this Court to convert the acquittal to one of conviction when the societal cry to curb these offences is at its peak. In my considered view when the order needs reversal to prevent positive miscarriage of justice, for the lapse of time in between the said reversal cannot lead to travesty of justice and rather would be to meet the ends of justice and further its cause.

Furthermore, the ground urged in essence to show leniency on the base of the mitigating factors put forth to invite mercy gets repelled as the factual matrix cannot allow the rain bow of mercy to magistrate. Here also the crime test stands on a higher pedestal than that of the criminal test.

Therefore, no adequate or special reason is seen for consideration in the matter of imposition of lesser sentence than the prescribed minimum.

15. For the aforesaid discussion and finding, the order of acquittal is liable to be set aside.

The respondent is convicted for commission of offence under section 376 IPC and is sentenced to undergo rigorous imprisonment for a period of seven years.

16. Resultantly, the appeal is allowed as above. The respondent be taken to custody forthwith to serve out the remaining part of the sentence.

Appeal allowed.

2015 (I) ILR - CUT- 193

S. PUJAHARI, J.

BLAPL NO. 21142 OF 2014

SHAJI THOMAS ……..Petitioner

.Vrs.

STATE ……Opp.Party.

NARCOTIC DRUGS & PSYCHOTROPIC SUBSTANCE ACT, 1985 – S. 37 (1) (b)

Bail – Offence U/s. 20 (b) (ii) (c) of the Act – Seizure of 20 kgs of Ganja – Less than the "Commercial quality" as defined U/s. 2 (viia) of the Act – Limitation as provided U/s. 37 (1) of the Act for grant of bail has no application to this case – Ganja seized from the dickey of the vehicle driven by the owner-cum-driver who fled away – Petitioners were allegedly there in that vehicle – Investigation has progressed substantially – No material to show that the petitioners are likely to abscond or tamper with the prosecution evidence – Held, Section 20 (b) (ii) (c) having no application to the present case the petitioners deserve to be released on bail.

Case law Referred to:-

(2004) 3 SCC 619 : (Narcotics Control Bureau -V- Dilip Pralhad Namade)

For Petitioner - M/S. Biraja Pr. Das.
For Opp.Party - A.S.C.

Date of Order: 04.12.2014

ORDER

S. PUJAHARI, J.

I have heard the learned counsel for the petitioners and the learned counsel for the State.

The petitioners in this case have been indicted in C.T. Case No.172 of 2014, arising out of Padmapur P.S. Case No.49 of 2014, pending in the court of the learned Sessions Judge-cum-Special Judge, Rayagada and the offence alleged against them is punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "N.D.P.S. Act").

The prosecution allegation against the petitioners is that on 14.10.2014 at about 4.30 a.m., the S.I. of Police, Kenduguda Police Outpost under Padampur Police Station along with other Police staff while conducting patrol duty, intercepted a vehicle, i.e., a Tata Sumo bearing registration No.OR-07D-8886 at Mandiguda Chowk and on search, they found two HDPE bags, each containing ten Kgs. of 'Ganja' in the dickey of the said vehicle. It is alleged that the present petitioners were there in the said vehicle including owner-cum-driver – Dama Majhi, but he could manage to escape from the spot. After conducting all formalities, police seized the aforesaid 'Ganja', apprehended the petitioners and another and forwarded them to the Court as they alleged to have committed offence under Section 20(b)(ii)(C) of the N.D.P.S. Act. The prayer for bail of the petitioners having been rejected by the learned Special Judge-cum-Sessions Judge, Rayagada, this petition under Section 439 Cr.P.C. has been filed for their release on bail.

It has been submitted by the learned counsel for the petitioners that since in this case the owner himself was driving the vehicle and the petitioners were the bonafide passengers in the said vehicle, they cannot be attributed with the conscious possession of 'Ganja' in the vehicle which is a sine-qua-non to fasten the criminal liability under the Act. Therefore, the prayer for bail of the petitioners deserves sympathetic consideration , more particularly when they have no chance of abscondance or tampering with the prosecution evidence, if released on bail.

Learned counsel for the State, however, drawing notice of this Court to the facts that the offence alleged is an offence against the Society and prima-facie material is there disclosing that the petitioners were involved in an offence of such nature which provides stringent punishment and, as such,

he does not deserve to be released on bail, more particularly when Section 37(1) of the N.D.P.S. Act provides that 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 where the Public Prosecutor opposes the application, unless 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, which satisfaction is difficult to record in this case with the available materials on record.

From the mandate of Section 37(2) of the N.D.P.S. Act, it appears that the limitation provided to grant bail for the offences involving commercial quantity is in addition to the limitations for grant of bail provided under the Code of Criminal Procedure, 1973 or any other law for the time being in force on grant of bail. The Hon'ble Apex Court in the case of ***Narcotics Control Bureau vrs. Dilip Pralhad Namade, reported in (2004) 3 S.C.C. 619,*** have taken note of the earlier decision of the Hon'ble Apex Court in the case of *Union of India vrs. Thamisharasi* and 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."

From the aforesaid law laid down, it appears that when a question of grant of bail of a person accused of commission of offence under the N.D.P.S. Act arises on merit if the quantity of Narcotic Drugs and Psychotropic substance appears to be commercial one, then the Court without complying the mandate of Section 37(1) of the N.D.P.S. Act should not release him on bail.

But, the limitation of Section 37 of the N.D.P.S. Act applies in a case where the quantity of Narcotic Drugs and Psychotropic substance involved is of commercial quantity. The materials available on record must prima-facie disclose the indictment of the petitioners in an offence involving commercial quantity of Narcotic Drugs and Psychotropic substance in order to attract the limitations of Section 37 of the N.D.P.S. Act. Mere registration of a case for commission of offence involving commercial quantity does not attract *per se* the limitation of Section 37 of the N.D.P.S. Act. "Commercial quantity" has been defined in Section 2(viia) of the N.D.P.S. Act as thus;

> "2(viia). "commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazettee."

In this regard, the Notification of the Central Government which has been made in exercise of the power conferred by Section 2(viia) of the N.D.P.S. Act, 1985 on 19.10.2001 vide S.O.1055(E) in case of 'Ganja' of 20 Kgs. In such view of the matter, it can very well be said that quantity of 'Ganja'

seized in this case being 20 Kgs., the same is not greater than the quantity specified in the aforesaid Notification. Therefore, in this case, there is no material to show that the petitioners are prima-facie indicted in an offence involving commercial quantity, but they are involved in an offence less than commercial quantity and more than small quantity. Hence, the limitation as provided in Section 37(1) of the N.D.P.S. Act for grant of bail has no application to this case.

From the materials available on record, it would go to show that 20 Kgs. of 'Ganja' was seized when the same was being transported in the dickey of the vehicle which was then being driven by the owner-cum-driver of the vehicle who fled away. The petitioners were allegedly there in the said vehicle. Investigation in this case has substantially progressed. There is no material to show that the petitioners are likely to abscond or tamper with the prosecution evidence, if released on bail.

Regard being had to the aforesaid facts and submissions made, especially the fact that Section 20(b)(ii)(C) of the N.D.P.S. Act has got no application to the present case and also the circumstances in which the petitioners said to have been indicted in this case, substantial progress of investigation and hardly any material being there to suggest that the petitioners are likely to abscond or tamper with the prosecution evidence, if released on bail, I am of the view that they deserve to be released on bail.

Hence, the petitioners be released on bail in the aforesaid case on each of them furnishing a bail bond of Rs.20,000.00 (twenty thousand) with two solvent sureties each for the like amount to the satisfaction of the Court in seisin over the matter with the conditions that they shall appear in person before the Court in seisin over the matter on each date, to which the case against them stands posted and shall not leave the jurisdiction of Padmapur Police Station without the leave of the Court concerned. Violation of any of the aforesaid conditions shall entail cancellation of bail. Accordingly, the BLAPL stands disposed of being allowed. Issue urgent certified copy as per rules.

Application allowed.

2015 (I) ILR - CUT-198

BISWANATH RATH, J.

W.P.(C) NO. 25587 OF 2013

SANATAN NAHAK ……..Petitioner

.*Vrs.*

STATE OF ODISHA & ORS. ……Opp.Parties

SERVICE LAW – Recruitment for Switch Board Attendant – Petitioner was found suitable – Assessment sheet shows that there was deliberate interpolation, raising the marks in respect of O.P.5 and reducing the marks in respect of the petitioner – No reasonable cause for such correction – Held, appointment of O.P.5 is set aside and it is open for the authority to proceed for fresh selection.

(Paras 5,6)

For Petitioner - M/s. Deepali Mohapatra, S. Parida.
For Opp.Parties - Addl. Government Advocate,
M/s. Srimanta Das, A. Mohanty,
M.K.Swain & A.R. Mallik.

Date of hearing :19.09.2014
Date of Judgment : 26.09.2014

JUDGMENT

BISWANATH RATH, J.

Even though the matter was listed under the heading "For Orders" but, on the request of learned counsels for the parties this matter was taken up for final disposal. Order sheet shows even though notice on all the opposite parties is duly served but, the opposite party no.5 chose not to contest the case. The matter is finally disposed of after hearing the appearing contesting parties.

2. The petitioner is aggrieved by order dated 01.12.2012 vide Annexure-5 passed by opposite party no.3 appointing opposite party no.5 as a Switch Board Attendant in the opposite party no.2-company on clear manipulation/interpolation of the recruitment records. The petitioner alleges that even though his case was considered for the purpose of selection and he was found most suitable but by manipulation/interpolation made raising the marks in respect of opposite party no.5 and reducing the marks in respect of

the petitioner as clearly appearing from the assessment sheet at page-22 vide Annexure-4 to the brief, the opposite party no.5 has been shown a favour. The petitioner further alleges that due to interpolation, in the personality test category, the position of the opposite party no.5 is deliberately raised above the petitioner placing him at Sl. No.1 of the said list.

3. Learned counsel for the opposite party no.2 filed the only counter and submits that the selection is made for the seasonal purpose, the appointment lost force on expiry of the said season in 2012-13 and there is no cause of action in pursuing the present writ petition.

4. Perusal of the advertisement as appearing at Sl. No.7 vide Annexure-1 to the writ petition, no where discloses that the appointment is for periodic purpose. Similarly, the appointment order vide Annexure-5 at page-23 to the brief also no where discloses that the engagement of the opposite party no.5 in the opposite party no.2 company was for periodic purpose on the other hand it is a permanent one.

5. On perusal of the document at page-22 of the brief the allegation of the petitioner becomes apparent, opposite party no.2 even though has filed a counter, in Para-6 therein even though admitted that there has been increase and decrease in the marks as against opposite party no.5 and the petitioner but, it is averred that the same has been done by the previous selection committee. I am not inclined to accept the explanation given by the opposite party no.2 as the document vide Annexure-4 at page-22 to the brief establishes that there has been increase in the category of personality test from 1 to 7 in respect of the opposite party no.5 making his total marks from 11.1 to 17.1. Similarly, the said sheet also discloses at item no.6 in respect of the petitioner that even though he has scored 7 in the personality test, the same has been reduced to 4 thereby reducing his total scoring from 18.4 to 15.4. The corrections are apparent and I do not find any reasonable cause for entering into such corrections in the list appended at Page-22 of the brief.

6. Under the facts and circumstances of the case and for the reasons as indicated above, I set aside the appointment of opposite party no.5 vide Annexure-5 and make it open to the opposite party no.2-company to enter into the fresh selection.

7. The writ petition succeeds. However, there shall be no order as to costs.

Writ petition allowed.

2015 (I) ILR - CUT- 200

BISWANATH RATH, J.

W.P.(C) NO.13531 OF 2012

DEBAHUTI PARIDA & ANR. .....Petitioners

.Vrs.

THE GENERAL MANAGER,
EAST COAST RAILWAY & ANR. .....Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART. 226

Railway accident – Compensation claimed in writ petition – F.I.R. lodged by Railway Authority involving death of the deceased – Section 124 Railway Act, 1989 made provision for 'no fault liability' of Rs.4,00,000/- in case of accident involving Railway read with the Railway Accident and Untoward Incident (Compensation) Rules, 1990 – Held, direction issued to the Opp.Parties for payment of Rs.4,00,000/- as interim compensation to the petitioners (Victims) towards 'no fault liability' along with interest 10% P.A. from the date of accident till the date of payment, keeping it open for the petitioners to raise further compensation before the appropriate Forum. (Para 5)

Case law Relied on:-

AIR 2012 Orissa 38 :

For Petitioners - M/s. Jatindar Ku. Mohapatra,
S. Satpathy & R. N. Das.

For Opp.Parties - M/s. S.R. Pattanaik, Mrs. P. Pattnaik,
D. Pradhan, N.K. Senapati & N.K. Biswal.

Date of hearing : 11.09.2014
Date of Judgment : 24.09.2014

JUDGMENT

BISWANATH RATH, J.

The petitioners are the wife and minor child of the deceased Kshirod Kumar Parida by filing this writ petition have claimed for direction to the opposite parties for paying compensation amount of Rs.8,00,000/-(rupees eight lakhs) along with interest at the rate of 10% per annum from the date of filing of the writ petition till payment is made on account of the death of the deceased due to railway accident in an unmanned level crossing.

2. The fact reveals that the deceased Kshirod Kumar Parida, while was returning to his house from Pankapal after finishing his work as a Masson by his Motor Cycle bearing Registration No.OR-21-B-8549, he was ran over by a goods train coming from the side of the Cuttack and going towards Paradeep at the unmanned level crossing "Banikundo". This fact was published in the local daily newspaper "The Sambada" dated 09.01.2012, faced an agitation in the locality. Besides the above an F.I.R. was also lodged before Police Station, Paradeep G.R. Out-post registered as G.R.O.P. U.D. Case No.2/12 being reported by Station Master, East Coast Railway, Paradeep dated 08.01.2012 as appearing vide Annexure-1 series.

3. It is on the basis of admission of the railway authority vide their F.I.R. dated 08.01.2012 as appearing at Page-9 of the writ petition. The petitioners expected Railway authority to respond to their call for reasonable compensation but, finding no response from the Railway authority in the matter of compensation to the bereaved family the petitioners choose to file the writ petition claiming therein compensation of Rs.8,00,000/-(rupees eight lakhs) along with interest at the rate of 10% per annum from the date of filing of the writ petition till the date of payment. On their appearance, the Railway authority filed a counter affidavit disputing the claim of the petitioners regarding compensation to the bereaved family solely on the ground that as per the latest Railway Board guideline manned level crossing is made basing on TVU (Train Vehicle Unit) and the level crossing less than the required TVU with more visibility from both sides cannot be declared as manned level crossing.

4. It is on this premises, the railway authority claimed that in spite of their sufficient indications at the unmanned level crossing, the deceased did not cared for the instructions and for his negligence, the deceased who was moving in a Motor Cycle bearing Registration No. OR-21-B-8549 was ran over by goods train between RHMA-BDBA near 'Banikundo' at Km 472/29 as clearly reveals from para-8 of the counter affidavit. It is also admitted by the Railway authority that in connection with the said accident F.I.R. is also lodged by G.R.P.F. Out-post Paradeep vide U.D. Case No.02 of 2012. The Railway authority challenged the maintainability of the writ petition as it contained disputed question of facts.

During the course of argument, since petitioners made their claim for compensation, on the basis of their claim that the deceased was a Masson and earning Rs.300/-(rupees three hundred) daily besides looking after his own cultivation they are entitled to get a sum of Rs.8,00,000/-(rupees eight lakhs)

as compensation along with interest at the rate of 10% per annum. Answering the question of maintainability of the writ petition, learned counsel for the petitioner has brought to my notice to a reported decision in A.I.R. 2012 Orissa 38 justifying his claim for compensation by filing a writ petition.

5. On perusal of the aforesaid judgment of this Court, it is found that in the said case taking into consideration that the claim of the petitioners in relation to a person died in a railway accident confined to Rs.4,00,000/-(rupees four lakhs) and considering the provision made at Section 124 of the Railway Act, 1989, which makes provision for 'no fault of liability' of Rs.4,00,000/-(rupees four lakhs) in case of accident involving Railway and since it was matching to the claim of the petitioners therein, this Court allowed the writ petition in the special circumstances and directed the Railway authority to pay Rs.4,00,000/-(rupees four lakhs) as claimed by the petitioner therein. In view of the provision contained in Section 124 of the Railway Act, 1989, the aforesaid decision would have been made applicable to the case of the petitioners if the petitioners claim confined to the amount available under 'no fault liability'. On the other hand, in filing the writ petition since the petitioners is making claim of Rs.8,00,000/-(rupees eight lakhs) as compensation and interest at the rate of 10% for the period of non-payment based on the fact that the deceased, was working as a Masson and was earning of Rs.300/- per day, I do not feel that the matter at hand is squarely covered by the decision referred to by the petitioners and reported in A.I.R. 2012 Orissa 38 for which, I leave the matter open to the petitioners to agitate before the appropriate authority and get proper compensation subject to satisfying their claim in the particular court. But, however, considering the fact that in view of admission of railway authority, particularly counter statement in paragraph-8 that the deceased was ran over by the particular train, taking into consideration of the fact that it is only Railway authority, who had lodged F.I.R. before the concerned Police Station involving the death of the deceased and taking into account the provision contained at Section 124 of the said Act read with the Railway Accident and Untoward Incident (Compensation) Rule, 1990 the victims by way of interim compensation entitled to a sum of Rs.4,00,000/-(rupees four lakhs) towards 'no fault liability' as decided in A.I.R. 2012 Orissa 38. While keeping it open for the petitioners to raise the claim of grant of appropriate compensation, I direct the Railway authority-opposite parties to release a sum of Rs.4,00,000/-(rupees four lakhs) towards interim compensation on the head 'no fault liability' to claimants along with interest at the rate of 10% per

annum from the date of accident till the date of payment and the amount as directed above be released in favour of the claimants within a period of eight weeks from the date of receipt of this judgment. It is open to the petitioners to move appropriate Forum for balance compensation, if they are so advised.

5. The writ petition succeeds to the extent directed above. However, there shall be no order as to costs.

Writ petition disposed of.

2015 (I) ILR - CUT- 203

S. K. SAHOO, J

BLAPL NO. 18130 OF 2014

BINOD BIHARI DASH & ORS. ……..Petitioners

.Vrs.

STATE OF ODISHA ……..Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.438

Anticipatory bail – Offence U/s. 13(2) read with section 13(1)(d) of the P.C.Act, 1988 and Sections 409, 465, 467, 471 read with section 120 B of I.P.C. – Allegations of manipulation during valuation of answer sheets of arithmetic/G.K. and Computer Papers for appointment in the post of R.I./A.R.I/Amin – No coding system was adopted – Though petitioner No.(s) 1, 2 and 4 were directed by specific order to evaluate answer papers they should not have allowed the ministerial staff to do the same – No specific allegation against petitioner No. 3 in the F.I.R and materials collected by the vigilance authority do not attribute any specific role played by her – Held, petitioner No. 3 being a lady and keeping in view the proviso to section 437(1) Cr.P.C. her prayer for bail is allowed – However, since custodial interrogation is very much necessary this court is not inclined to grant pre-arrest bail to petitioner No.(s) 1, 2 and 4. (Para 12)

Case laws Referred to:-

1. AIR 1961 SC 1762 : (Major E.G. Barsay -V- State of Bombay reported in)
2. AIR 2008 SC 2991, : Yogesh @ Sachin Jagdish Joshi –v- State of Maharashtra;

3. (1980) 2 SCC 465, : (Shivnarayan Laxminarayan Joshi –v- State of Maharastra,)
4. (2013) (3) SCALE 565, : (Yakub Abdul Razaq Menon –v- State of Maharashtra;)
5. AIR 2005 SC 128, K. : (Hasim –v- State of Tamil Nadu).)
6. AIR 2003 SC 4662 : (Bharat Chaudhary-v- State of Bihar)
7. AIR 2001 SC 1699, : Muraleedharan-v- (State of Kerala)
8. (1997) 7 SCC187, : (State rep. by the CBI -v- Anil Sharma)

For Petitioners- M/s. Himansu Sekhar Mishra, A.K.Mishra, Dr. A.K.Tripathy & K.Badhai
For Opp. Party - Mr. Prasanna Kumar Pani (A.S.C., Vig. Deptt.)

Date of hearing. : 20.11.2014
Date of Judgment: 29.11.2014

JUDGMENT

S.K.SAHOO, J.

"*Corruption is worse than prostitution. The latter might endanger the morals of an individual; the former invariably endangers the morals of entire nation*."

- Karl Kraus

It is said that there are no secrets to success in a competitive examination. It is the result of preparation, hard work and learning from failure. The candidates never know what result would come of their action. They study while others are sleeping, they prepare while others are playing because they know that if they don't go after what they want, they will never have it. Sanctity of an examination greatly depends on the integrity, alertness and sincerity of all examination officials. Any laxity on the part of the officials is likely to result in undesirable consequences and loss of faith of the candidates in the examination system.

This case is an atypical example in which many candidates who prepared hard for the competitive examination burning the midnight oil could not see the light of success because the selection process is allegedly got polluted under the shadow of corruption and sinister influence grabbed the selection committee members for which right persons were not selected for the right job.

2. This is an application under section 438 Cr.P.C. filed by the petitioner seeking pre-arrest bail in connection with Sambalpur Vigilance P.S. Case No. 78 of 2014 registered on 30.9.2014 under section 13(2) read with section 13(1)(d) of Prevention of Corruption Act, 1988 and section 409/465/467/471 read with section 120-B of Indian Penal Code which corresponds to Vigilance G.R. Case No.8 of 2014 pending in the court of Special Judge (Vigilance), Bolangir.

The petitioner is the Ex-Head Clerk, Judicial Section and in-charge Head Clerk of Establishment Section, Collectorate, Bolangir and he is now working as Head Clerk, Puintala Block, Bolangir

3. The prosecution case is that there was an allegation that members of Selection Committee have abused their official position and misused the official power and shown undue official favour to their favoured candidates in the appointment of Revenue Inspector, Asst. Revenue Inspector and Amin in the district of Bolangir by manipulating their answer sheets. Enquiry was conducted by one Sri R.N. Patra, D.S.P., Vigilance, Deogarh Unit which was entrusted to him by S.P., Vigilance, Sambalpur. After conducting enquiry, the Enquiry Officer submitted his report on 24.6.2014 and the result of enquiry revealed that during the period of allegation Sri Debaraj Mishra, I.A.S. was serving as District Magistrate & Collector, Bolangir from 3.8.2012 to 18.7.2013 and he was the Chairman of the Recruitment Committee for the appointment of R.I./A.R.I/Amin in Bolangir District in the year 2013. The Collector as well as the petitioner who was Ex-Head Clerk, Judicial Section and in-charge Head Clerk of Establishment Section, Collectorate, Bolangir were directly or indirectly linked with the recruitment/selection of candidates for the post R.I./A.R.I/Amin.

The enquiry report further revealed that the recruitment process in respect of the appointment of R.I/A.R.I/Amin in Bolangir district was initiated in the year 2008 through advertisement inviting applications from eligible candidates for one vacancy each in the post of the A.R.I. and Amin (Special Drive for SC/ST) but due to some reason or the other, the recruitment could not be held. Again in the year 2011, another advertisement was made to fill up 54 posts in the rank of R.I/A.R.I/Amin but by subsequent advertisement the vacancy position was increased by 9 posts. Thus vacancy position for the post of R.I became 15, A.R.I became 21 and Amin became 29. In response to such advertisements, 744 numbers of applications for R.I and 1818 number of applications for A.R.I./Amins were received. 239

applications which were received in 2008 for one post in R.I./Amin each were also included in the list. After rejection of applications, 610 candidates for R.I. and 1484 candidates for A.R.I/Amin were found eligible for the physical test. After joining of Sri Debaraj Mishra, IAS, Collector, Bolangir, physical test of the candidates was held on 11.12.2012 to 15.12.2012 and physical test for the special drive (SC/ST candidates) was conducted on 10.1.2013.

The enquiry report further reveals that a Recruitment Committee was constituted under the chairmanship of Sri Debaraj Mishra, Collector, Bolangir vide order dated 4.2.2013 for the smooth management of recruitment process and Miss Aneeta Panda, Deputy Collector, Binod Bihari Das, Block Development Officers, Raghunath Mundary, Ripunath Suna and Babu Maharana, DWO, Bolangir became the members of such Recruitment Committee. There was some further sanction of 52 posts of R.I and 52 posts of A.R.I communicated by the Government in Revenue and Disaster Management Department, Odisha, Bhubaneswar.

The enquiry report further reveals that Miss Aneeta Panda, Deputy Collector was authorized by the Collector, Bolangir to proceed to Board of Secondary Education, Orissa, Cuttack to bring question papers for the written examination for the recruitment for the post of R.I/A.R.I/Amin in sealed cover and accordingly she proceeded and brought the same and deposited the sealed question papers in District Treasury on 21.5.2013 as per the order of the Collector, Bolangir and handed over the model answer sheets/scoring keys in sealed cover to Collector, Bolangir in presence of D. Prasanth Reddy, I.A.S who was the then P.D., D.R.D.A. Bolangir. Before the written examination, a preparatory meeting was held on 7.6.2013 which was chaired by Collector, Bolangir. The Collector, Bolangir instructed the Centre Superintendents of Rajendra College, Bolangir and Womens' College, Bolangir to deposit the sealed packets of answer sheets at the residential office of the Collector on the same day after the examination process is over. The Block Development Officers namely Binod Bihari Dash, Ripunath Suna and Raghunath Mundary were also directed on 7.6.2013 to conduct computer test examination.

On 9.6.2013 written test was conducted at both the centers under the Supervision of Centre Superintendents namely Pravat Kumar Bhoi, Sub-Collector, Titilagah and Mohan Charan Das, Sub-Collector, Patnagarh. After the written tests, the Centre Superintendents handed over the sealed packets

of answer sheets subject wise at the District Emergency Operation Centre (hereinafter for short "EOC") as per the previous order dated 7.6.2013 of the Collector. All such sealed packets of answer sheets were kept inside the Almirah which was in the EOC and after locking the same, the keys of the steel almirah and of the EOC building were handed over to the Collector. Thus according to the enquiry report, Sri Debaraj Mishra, Collector, Bolangir became the sole custodian of the EOC as well as the Almirah, where the question-cum-answer sheets were kept.

As per the instruction of Collector, computer practical tests was conducted on 12.6.2013 and 13.6.2013 at Rajendra College, Bolangir and Womens' College, Bolangir and after conducting the practical tests, the evaluation sheets with the awarded marks were submitted in a closed cover by Sri Rao, who was in charge of Rajendra College, Bolangir and Sri Khirod Mishra, who was in charge of Womens' College, Bolangir directly to the Collector, Bolangir in the evening.

The Enquiry Report further reveals that after the written examination, Miss Anita Panda, Deputy Collector applied for leave from 14.6.2013 to 16.6.2013 on account of Raja Sankranti which was allowed by the Collector, Bolangir. The Block Development Officers Binod Bihari Dash, Ripunath Suna and Raghunath Mundary were directed vide order dated 10.6.2013 of the Collector, Bolangir to act as "officer for valuation" of the answer sheets of the written examination and the date of valuation was fixed from 14.6.2013 to 16.6.2013. Some ministerial staffs were deputed in the said order dated 10.6.2013 to assist in the valuation work. Similarly another set of staffs were deputed by the Collector, Bolangir vide order 13.6.2013 for assisting valuation work.

The enquiry officer found number of irregularities in the entire process of recruitment and some of the main irregularities appear to be as follows:-

(i) No coding system was adopted to the answer sheets though provision was there itself on each paper which facilitated to track the answer sheet of a particular candidate and provided scope to manipulate the answer sheets;

(ii) Though after completion of written examination on 9.6.2013, the Centre Superintendents deposited all the answer sheets in sealed covers but on the date of evaluation, the same were found without

sealed cover and not a single evaluator stated as to how the sealed cover of the answer sheets were open in their presence;

(iii) Though specific orders were passed to the three Block Development Officers to evaluate the answer papers and the ministerial staffs were deployed to assist them but all the arithmetic/G.K. and most of the computer papers were evaluated by the Ministerial staffs, on which manipulation were seen;

(iv) When the Block Development Officers objected as to why coding has not been done, the Collector expressed his displeasure on them and directed them to simply evaluate, as coding is none of their business and the Chairman is responsible for everything.

(v) The petitioner actively participated in the entire process of recruitment even though his name was not been written anywhere in the entire process of recruitment. He also evaluated some answer sheets and issued verbal instructions to the Block Development Officers in presence of the Collector, Bolangir.

(vi) Since the EOC was situated within the residential campus of the Collector and key of the Almirah in which sealed answer sheet packets were kept after completion of written examination on 9.6.2013 was with the Collector till the date of evaluation, the opening of the seal cover of the answer sheets packet prior to evaluation appeared to be within the knowledge of the Collector;

(vii) Miss Aneeta Panda, Deputy Collector had availed leave from 13.6.2013 till 16.6.2013, within which period the evaluation work was over;

(viii) The Block Development Officers not only signed the Committee meeting proceeding but they also did not take any visible steps to protest the irregularities found in the entire process and even they did not raise their voice when they found the answer sheets were in open condition;

(ix) Miss Aneeta Panda, Deputy Collector was ordered to bring and deposit the question-cum-answer sheets and she only deposited the question-cum-answer sheets in the Strong Room but handed over the model answer sheets to the Collector against which there was no order to her.

The Enquiry Officer found after discussing all the materials that unfair means have been adopted by the Selection Committee in the recruitment process to facilitate some favoured ineligible candidates to get the scope for appointment in the post of R.I/A.R.I/Amin and thereby the eligible/genuine candidates have been debarred from getting selected. It was also proved that the sealed answer papers have been handled in the EOC from 10.6.2013 to 13.6.2013 when the key of the Almirah was with the Collector,

Bolangir and it was also proved that all possible steps were taken to adopt unfair means to show undue official favour to some specific candidates to provide them job by abusing the official position. It was also found that the Collector Sri Debaraj Mishra has given all possible scope to the petitioner in committing the offence. The other members of the selection committee and other officials entrusted for examination/evaluation raised their voice at different point of time against the wrong doing of the Collector, Bolangir but they succumbed to the pressure of the Collector and thereby obeyed the illegal order of the Collector.

4. While the enquiry of D.S.P., Vigilance, Deogarh Unit was under progress, in pursuance to letter No.17165/CID/INV dated 28.5.2014, one R.C. Sethi, DSP, CID, CB, Odisha, Cuttack also enquired into the recruitment conducted by Collector, Bolangir for the post of R.I/A.R.I/Amin and from his independent enquiry, he found the following irregularities:-

(i) No coding system was applied for valuation of examination papers;

(ii) The papers of some applicants who secured 100 marks in arithmetic papers were verified and it was found that marks previously given in the appropriate boxes were tampered with and in their place new marks were written;

(iii) In some arithmetic papers of the candidates who had secured 100 marks out of 100, it was found that there were over writings and cuttings and one candidate was given 93 marks though he had secured two marks in the first instance. Similar manipulations were found in many other papers. Marks previously given in the appropriate boxes were tampered with and in their place new marks were written.

(iii) The candidates were given question-cum-answer booklets during written examinations to choose one answer out of multiple choices and to put a tick (✓) mark against their choice answer but during verification it was found from the question-cum-answer booklets of many selected candidates that tick marks were given in correct answer boxes and tick marks already given in other boxes (wrong answer box) in respect of those questions were tampered and scratched.

The DSP,CID,CB, Odisha, Cuttack after enquiry came to hold that number of persons in the District Office, Bolangir including members of Examination Committee, persons in-charge of evaluation and custody of question-cum-answer sheets entered into a criminal conspiracy to commit manipulation and forgery in the relevant documents to facilitate selection of undeserving candidates for the post of R.I/A.R.I/Amin and by selecting such undeserving persons, qualified and suitable persons to hold such posts were deprived.

Basing on such enquiry, Mr.R.C.Sethi, DSP, CID, CB, Odisha, Cuttack lodged F.I.R. before the Superintendent of Police, CID, CB, Odisha, Cuttack and accordingly on 1.9.2014 CID, CB, Odisha, Cuttack P.S. Case No.18 of 2014 was registered under section 409/465/467/471 read with section 120-B I.P.C. The Inspector-in-charge, CID, CB Police Station, Odisha Cuttack entrusted one Sri R.K. Suar, Addl. SP, CID, CB, Odisha, Cuttack with the investigation of the case.

The said case was transferred for investigation to the Vigilance Police as per the order dated 10.9.2014 of the Director Vigilance-cum-Special Secretary to Government, GA, Vigilance and it was ordered to be investigated by the Sambalpur Division and accordingly Sambalpur Vigilance P.S. Case No.78 of 2014 was registered on 30.9.2014 under section 13(2) read with section 13(1)(d) of Prevention and Corruption Act, 1988 and section 409/465/467/471/120-B I.P.C.

5. During course of argument Mr. Ashis Kumar Mishra, learned counsel appearing for the petitioner submitted that the petitioner being the Head Clerk obliged the order and command of the Recruitment Committee as they were the higher authorities. The learned counsel challenged the findings of the Enquiry Report and submitted that only one sentence has been mentioned against the petitioner in the FIR that he was orally instructed by the Collector

to take charge of the room, wherein the examination papers were kept on an Almirah. He further submitted that key of the Almirah in the EOC was with the Collector and the key of the EOC was also with the Collector and therefore it cannot be said that the petitioner had committed any manipulation in the answer sheets prior to the valuation. He further submitted that it cannot be said that the petitioner has misutilized his official power or he has shown undue favour to anybody. The learned counsel further submitted that no prima facie case is made out against the petitioner and custodial interrogation of the petitioner is not at all necessary and since the petitioner is a Government servant, in the event of his arrest and detention in custody, he may be placed under orders of suspension and accordingly it was submitted that the anticipatory bail application may be favourbly considered.

6. Mr. Pani, learned counsel for the Vigilance Department on the other hand submitted that the materials available on record indicate that the petitioner was handling/using the almirah and the room on oral instruction of the Collector. The petitioner has evaluated the answer papers even though he was not in the evaluation committee. The petitioner told others in the presence of the Collector during valuation to give marks if tick mark is available on the right box even if it has been overwritten/corrected earlier. Mr. Pani further submitted that in between 10.6.2013 to 15.6.2013 after deposit of the answer sheets and before evaluation, the petitioner and one Makardhwaj Kalsai, Senior Clerk use to come to the residential office of the Collector and the petitioner use to take the key of the EOC from the Collector and work in the EOC building. He further submitted that on the date of valuation, the petitioner opened the almirah and brought out answer papers for valuation and dumped it on the table occupied by the Collector and it was found that no seal was available on the answer sheets packet and the same were tied with rope. He further submits that tabulation sheet was prepared as per the direction of the petitioner and Merit List was also produced by the petitioner before Babu Moharana, DWO, Bolangir who signed it even though he has not seen while the merit list was prepared. The learned counsel for the Vigilance Department submits that the petitioner is absconding.

The learned counsel for the Vigilance Department placed reliance on the decision of Hon'ble Supreme Court in the case of **Chandra Prakash –v- State of Rajasthan, reported 2014 Criminal Law Journal 2884** wherein it is held as follows:-

"70. While dealing with the facet of criminal conspiracy, it has to be kept in mind that in a case of conspiracy, there cannot be any direct evidence. Express agreement between the parties cannot be proved. Circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. Such a conspiracy is never hatched in open and, therefore, evaluation of proved circumstances plays a vital role in establishing the criminal conspiracy."

The learned counsel for the Vigilance Department further placed reliance in case of **Major E.G. Barsay-V State of Bombay reported in AIR 1961 SC 1762** wherein it is held as follows:-

"31 The next criticism is that there can be no legal charge of a conspiracy between accused No. 1 to 3, who are public servants and accused Nos. 4 to 6, who are not public servants, in respect of offences under Prevention of Corruption Act for the reason that they can only be committed by the public servants. But this contention ignores the scope of offence of criminal conspiracy. Section 120-A of Indian Penal Code defines "criminal conspiracy" and under that definition

"When two or more persons agree to do, or cause to be done, an illegal act or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy"

The gist of offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy though the illegal act agree to be done has not been done. So, too, it is not an ingredient of the offence that all the parties should agree to do a single illegal acts. It may comprise the commission of a number of acts. Under section 43 of I.P.C., an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge, the accused are charged with having conspired to do three categories of illegal act and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They are all guilty of the offence of conspiracy to illegal acts, though for individual offence all of them may not be liable".

7. The basic ingredients of the offence of criminal conspiracy as defined under section 120-A I.P.C. are

(i) An agreement between two or more persons;
(ii) The agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means.

The meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is the sine qua non of criminal conspiracy. The offence can be proved largely from the inferences drawn from the acts or illegal omission committed by the conspirators in pursuance of a common design in as much as the conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. The entire agreement is to be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. The essence of criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. Encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment (**Ref:-AIR 2008 SC 2991, Yogesh @ Sachin Jagdish Joshi –v- State of Maharashtra; (1980) 2 SCC 465, Shivnarayan Laxminarayan Joshi –v- State of Maharastra, 2013 (3) SCALE 565, Yakub Abdul Razaq Menon –v- State of Maharashtra; AIR 2005 SC 128, K. Hasim –v- State of Tamil Nadu**).

8. The learned counsel for the Vigilance Department during course of argument placed for perusal the statements of Ramesh Chandra Sethi, Deputy S.P, CID, CB, Odisha, Cuttack Makardhwaj Kalsai, Senior Clerk, Ghanshyam Dang, Senior Clerk, Birabar Kumbhar, Senior Clerk, Pravat Kumar Mishra, Head Clerk, Sudhakar Mohapatra, Senior Clerk, Sankarshan Pradhan, Junior Stenogrpher, Sanjaya Kumar Mishra, Jr. Clerk, Malaya Ananda Kumar Tripathy, Senior Clerk, Miss Sikharani Bhoi, Junior Clerk, Miss Jindiarani Barik, Junior Clerk, Miss Soudamini Sahu, Junior Clerk, Sampurnananda Bez, Senior Clerk . From the statements collected during investigation by Dy. S.P., Vigilance, Bolangir and case diary submitted by the learned counsel for the Vigilance Department, it prima facie appears that the Collector Debaraj Mishra was the sole custodian of answer sheets and within the gap period of depositing the sealed answer pockets on 9.6.2013 at

the EOC and valuation work which started on 15.6.2013, the Collector had handed over the key of EOC to the petitioner and manipulation of answer sheets was detected on the date of valuation and therefore the Collector and the petitioner are the persons who are aware about the manipulation. The case diary further reveals that the answer papers of the candidates relating to arithmetic papers, computer papers and General awareness papers were verified and manipulation were found to a large extent. The statements and materials collected during investigation more or less support the findings of the enquiry report of Mr. R.N.Patra, DSP, Vigilance, Deogarh Unit as well as Mr. R.N.Sethi, DSP, CID, CB, Odisha, Cuttack. The statements of all those witnesses pointed out by the learned counsel for the Vigilance Department and other documents seized during course of investigation cannot be discussed in a detailed manner at this stage as the matter is under investigation.

9. In case of **Siddharam Satilngappa Mhetre –v- State of Maharashtra reported in (2011) 48 Orissa Criminal Reports (SC) 1**, the Hon'ble Supreme Court while dealing with relevant considerations for exercise of power under section 438 Cr.P.C. held that no inflexible guidelines or strait jacket formula can be provided for grant or refusal of anticipatory bail in as much as all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. Grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case and it was held as follows:-

> "122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:
>
> i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
>
> ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
>
> iii. The possibility of the applicant to flee from justice;
>
> iv. The possibility of the accused's likelihood to repeat similar or the other offences.
>
> v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of Sections 34 and 149 of the Indian Penal

viii. Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

123. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

124. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

125. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances

> in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts."

10. The learned counsel for the Vigilance Department Mr. Pani submitted that in a case of this nature, the custodial interrogation is very much necessary in as much as it would be qualitatively more elicitation-oriented. He further submitted that if the petitioner who is now absconding is well protected and insulated by a pre-arrest bail order during the time when he is interrogated then the interrogation would be reduced to a mere ritual. Mr. Pani submitted that from the statements collected by the Dy.S.P., Vigilance, Bolangir Unit as well as from the documents, many more things are required to be questioned to the petitioner and if the petitioner is well ensconced with a favourable order under section 438 of the Code then the success of interrogation would elude. The learned counsel further submitted that even though the counsel for the petitioner submitted that the petitioner is ready and willing to cooperate with the interrogation but he apprehends that such interrogation backed by a favourable order under section 438 Cr.P.C. insulating him from arrest would not yield any fruitful result and there would be less chance of discovery of material facts.

In case of **Bharat Chaudhary-v- State of Bihar reported in AIR 2003 SC 4662**, it is held as follows:-

> "7….The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for *custodial interrogation*, but these are only factors that must be borne in mind by the concerned courts while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of charge sheet cannot by themselves be construed as a prohibition against the grant of anticipatory bail."

In case of **Maruti Nivrutti Navale -v- State of Maharashtra reported in 2012 (8) SCALE 572,** wherein it is held as follows:-

> "12…..It is true that the parties have also approached the Civil Court for various reliefs. At the same time, as pointed out by counsel for the State and the second respondent-Complainant, considering the seriousness relating to corrections/additions/alterations made in various documents, information furnished to the Educational Authorities which, according to them, are incorrect, we are of the

view that in order to bring out all the material information and documents, *custodial interrogation* is required, more particularly, to ascertain in respect of the documents which were alleged to have been forged and fabricated. In the said documents and other materials which are in the possession of the Appellant and the allegation against him that he has made false representation before the Public Authority on the basis of those documents for obtaining necessary permission, as pointed out by the State, in order to secure possession of those documents, *custodial interrogation* is necessary".

In case of **Muraleedharan-v-State of Kerala reported in AIR 2001 SC 1699,** wherein it is held as follows:-

"7…..*Custodial interrogation* of such accused is indispensably necessary for the investigating agency to unearth all the links involved in the criminal conspiracies committed by the persons which ultimately led to the capital tragedy. We express our reprobation at the supercilious manner in which the Sessions Judge decided to think that "no material could be collected by the investigating agency to connect the petitioner with the crime except the confessional statement of the co-accused." Such a wayward thinking emanating from a Sessions Judge deserves judicial condemnation. No court can afford to presume that the investigating agency would fail to trace out more materials to prove the accusation against an accused. We are at a loss to understand what would have prompted the Sessions Judge to conclude, at this early stage, that the investigating agency would not be able to collect any material to connect the appellant with the crime. The order of the Sessions Judge, blessing the appellant with a pre-arrest bail order, would have remained as a bugbear of how the discretion conferred on Sessions Judge under Section 438 of the Cr.P.C. would have been misused. It is heartening that the High Court of Kerala did not allow such an order to remain in force for long."

In case of **State rep. by the CBI -v- Anil Sharma reported in (1997) 7 Supreme Court Cases 187**, wherein it is held as follow:-

"6. We find force in the submission of the CBI that *custodial interrogation* is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with favourable order under Section 438 of Code. In a case like this, effective

> interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the *custodial interrogation* is fraught with the danger of the person being subjected to third degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

What is "custodial interrogation"? "Custody" means formal arrest or the deprivation of freedom to an extent associated with formal arrest. "Interrogation" means explicit questioning or actions that are reasonably likely to elicit an incriminating response. Questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his or her freedom in any significant way is called "custodial interrogation". The Court has to strike a balance between individual's right to personal freedom and the investigational rights of the police. On one hand, the Court has to prevent harassment, humilition and unjustified detention of an accused, on the other hand it is to see that a free, fair and full investigation is not hampered in any manner. When an application for anticipatory bail of an accused is objected to by the State on the ground of necessity of custodial interrogation, the Court can scan the materials available on record and ask the State to satisfy as to in what way the custodial interrogation would benefit the prosecution. The satisfaction of the Court would depend upon several facts viz., the nature of offence, the stage at which the investigation is pending, the materials which could not be traced out by the Investigating Agency due to absence of custodial interrogation and the benefit which the prosecution would get on account of custodial interrogation of the accused. It cannot be stated that in a particular type of cases or for a particular type of accused, the custodial interrogation is mandatory. It would all depend upon the facts and circumstances of each case. No strait jacket formula could be laid down. When the accused makes out a case for anticipatory bail, it is not to be defeated by mere asking for custodial interrogation by the prosecution without satisfying the necessity for the same. Sometimes the custodial

interrogation of suspects would give clue regarding criminal conspiracy and identity of the conspirators and it may lead to confession of guilt and recovery of the incriminating materials. Sometimes at the crucial stage of investigation, the custodial interrogation would be a boon to the Investigating Officer. The person in custody likely to be interrogated has a right to remain silent. On some questions, he may answer and on some questions, he may remain silent or refuse to answer. Nobody can be compelled to answer to a particular question. No third-degree method is to be adopted for elicitating any answer. It is illegal to employ coercive measures to compel a person to answer.

11. Now let us discuss the exact role played by the petitioner in the entire episode. The materials so far collected by the Vigilance Authorities reveal that the name of the petitioner was not written anywhere in the entire process of recruitment but he actively participated in the entire process and even issued verbal instructions to the OAS Officers in presence of the Collector. He has also evaluated same answer sheets. The petitioner was handling and using the almirah and EOC on the instruction of the Collector. The petitioner told others in presence of the Collector during valuation to give marks to the candidates if the tick mark is available on the right box, even if it has been overwritten or corrected earlier. In between 10.6.2013 to 15.06.2013 after the deposit of the answer sheets and before valuation, the petitioner was coming to the residential office of the Collector and use to take the key of the EOC from the Collector and work in the EOC building. On the date of valuation, the petitioner opened the almirah and brought out answer papers for valuation and dumped it on the table occupied by the Collector and it was found that no seal was available on the answer sheets packets and the same were tied with ropes. The tabulation sheet was prepared as per the directions of the petitioner and he produced the tabulation sheet and proceeding before the officers for their signature. The petitioner is absconding for which he could not be interrogated by the Vigilance Authorities. The materials on record further reveal that the petitioner is directly or indirectly linked with the recruitment/selection of the candidates and the conduct of the petitioner is very suspicious and he has been given all possible scope to adopt unfair means which facilitated the ineligible candidates who were favoured to get the scope for the appointment. The contention of the learned counsel for the Vigilance Department that the role of petitioner prima facie makes out a case of conspiracy with other accused persons to facilitate favoured ineligible candidates getting scope for appointment in the post of R.I/A.R.I/Amin has

substantial force. The role of the petitioner after the answer sheets were kept in the EOC and during the entire process of valuation and thereafter speaks a volume of misconduct and raises "the pointing finger of accusations" against him. The charges in this case are very serious and it relates to the unfair means adopted in the recruitment process for which eligible/genuine candidates were debarred from getting selected and ineligible candidates were favored with orders of appointment for the posts of R.I/A.R.I/Amin. The statements and materials placed by the learned counsel for the Vigilance Department prima facie establish the link of the petitioner in the crime. Without entering into a detail examination of the evidence at this stage but on a brief examination of the materials, I find prima facie case is available against the petitioner.

Considering the nature and gravity of accusations with utmost care and caution and the need for custodial interrogation, I am not inclined to exercise the discretionary power under section 438 of the Code by granting pre-arrest bail to petitioner. Accordingly, the prayer for anticipatory bail of the petitioner stands rejected.

Application disposed of.