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

W.P.(C) NO.15701 OF 2013

SUDARSAN BARIK ……..Petitioner

.Vrs.

THE M.D., ODISHA FOREST DEVELOPMENT CORPORATION LTD. ……Opp.Party

TENDER – Highest bidder called upon to deposit deficit E.M.D. – Failure to do so – Forfeiture of amount towards E.M.D./Security deposit as per the terms and conditions of the tender call notice – Held, impugned action is valid. (Para 13)

Case laws Referred to:-

1.(1986) 3 SCC 247 : (Harminder Singh Arora-V- Union of India)
2.(2009) 3 SCC 458 : (B.S.N. Joshi & Sons Ltd.-V- Ajoy Mehta)
3.AIR 1979 SC 1628 : (Ramana Dayaram Shetty-V- International Air Port Authority of India & Ors.)

For Petitioner - M/s. Biren S.Tripathy, M.K.Rath, J. Pati & M. Bhagat.
For Opp.Party - M/s. Santosh Kumar Pattnaik, P.K. Pattnaik & S.P. Das.

Date of Judgment : 18.11.2014

JUDGMENT

AMITAVA ROY, C.J.

The petitioner, who is a participating tenderer in the process initiated by the notice dated 16.10.2012 issued by the Managing Director, Orissa Forest Development Corporation, (for short, hereinafter referred to as "the Corporation") seeks to impugn the decision to forfeit his EMD/security deposit for his failure to offer the entire amount of earnest deposit in terms of the stipulation to that effect.

2. We have heard Mr B.S. Tripathy, learned counsel for the petitioner and Mr S.K. Patnaik, learned Senior Advocate for the opp. parties.

3. Briefly stated, the facts are that the process aforementioned was initiated for collection of cashew nuts with thalamus from the plantation lots of Bhubaneswar (Commercial) Division and other Divisions for three years

i.e. 2013, 2014 and 2015 crop. The petitioner had submitted his sealed tender for lot No.27/13 (Kadambajhara RF) and 32/13 (Sulia RF) on 30.10.2012. According to him, he offered a price of Rs.24,33,000/- for lot No.27/13 and Rs.9,63,000/- for lot No.32/13 and also deposited Rs.3,50,000/- and Rs.1,50,000/- respectively by way of earnest money along with the tender papers. A dispute followed as lot No.27/13 was declared in favour of one Shri Nigamananda Parida at his offer price of Rs.13,51,000/- though the petitioner had offered much higher bid, in connection with which, W.P.(C) No.22424 of 2012 was instituted in this Court. During the pendency of the said writ petition, as averred by the petitioner, the Corporation put lot No.32/13 to auction and settled it for Rs.13,27,000/-in favour of one Shri Golakh Marthi in spite of the orders passed by this Court not to finalize the tender process.

4. Be that as it may, while the matter stood at that, the petitioner received the impugned letter dated 03.06.2013 of the Managing Director of the Corporation intimating him that on his failure to deposit the entire amount of earnest money and royalty/lease rent for 2013 crop though called upon to do so vide office letter No.20602/ PL/24/ 12/ dated 01.12.2012 and letter No.21603/PL/24/12 dated 15.12.2012, the amount of Rs.3,50,000/- deposited by him as EMD stood forfeited in accordance with the provisions of clause Nos.4 and 14 of the terms and conditions of the tender sale. Contending that the impugned decision is illegal and arbitrary the petitioner seeks redress.

5. The opp. party-Corporation in its counter has averred vis-à-vis plantation lot no.32/13, that the petitioner had offered a bid of Rs.24,33,000/- for three years (2013 to 2015) and not Rs.9,63,000/- as claimed by him. According to the Corporation, in terms of his offer i.e. Rs.24,33,000/- his earnest money deposit of Rs.3,50,000/- was short of 15% of the offered amount in terms of Clause No.4(a) of the terms and conditions of the tender. The answering opp. party stated further that as the petitioner's bid was adjudged to be the highest, his offer was accepted subject to his depositing the balance EMD of Rs.14,950/-. However, as the petitioner in spite of the letters dated 01.12.2012 and 15.12.2012 referred to in the impugned order failed to make deposit of the balance amount as well as the royalty/lease rent from 2013 crop, his EMD of Rs.3,50,000/- was forfeited in terms of Clause Nos.4 and 14 and of the terms of the conditions of the tender sale.

6. Mr B.S. Tripathy, learned counsel for the petitioner, has urged that though the EMD accompanying the tender with the highest bid was not as

prescribed, in the facts and circumstances of the case, the impugned forfeiture is unwarranted and is liable to be interfered with.

7. Mr S.K. Patnaik, Sr. Advocate, in reply, has argued that as the relevant records demonstrates that the petitioner's bid for lot No.32/13 was for Rs.24,33,000/- and thus the earnest money deposit of Rs.3,50,000/- was short of the amount prescribed by Clause No.4(a) of the terms and conditions of sale, the opp. party-Corporation was justified in forfeiting the said amount as mandated by Clause (4)(b) of the terms and conditions of sale, as in spite of two notices he (petitioner) did fail to make up the deficit in the earnest money deposit and pay the royalty/lease rent for 2013 crop.

8. Upon hearing the learned counsel for the parties and on consideration of the pleaded facts and the documents on record, we are of the opinion that no interference is called for. There is no manner of doubt that vis-à-vis Cashew lot No.32/13 the petitioner had offered his bid for Rs.24,33,000/- and, accordingly, the EMD of Rs.3,50,000/- being less than 15 % of his quoted offer, the opp. party-Corporation was well within its right in terms of Clause No.4(b) of the terms and conditions of sale to forfeit the same as he failed to make the deposit and also pay the royalty/lease rent for 2013 crop in spite of the notices dated 01.12.2012 and 15.12.12 calling upon him to do so. The relevant provisions of Clause 4(a), 4(b), 12 and 14 of the terms and conditions of sale are quoted herein below:

> "4(a) Intending tender shall be required to submit tender only in the prescribed form to be obtained from the above address as well as from concerned Divisional Managers/Sub-Divisional Offices on payment of Rs.200/- (Rupees two hundred only) (non-refundable) with initials and seal of the issuing officer. Each tender must accompany with Earnest Money Deposit (E.M.D.), 15 % of the tendered amount in shape of Account Payee Bank Draft drawn at any Nationalized Bank/Scheduled Bank payable at Bhubaneswar in favour of "Odisha Forest Development Corporation Limited", Money Receipt in support of purchase of tender form, up to-date VAT clearance certificate in form VAT-612 and VAT Registration Number (TIN) or undertaking to produce VAT Registration Number before execution of the agreement.
>
> 4(b) The tender with highest bid, but not accompanied with prescribed E. M.D. shall be forfeited with deposited E.M.D. on

tenders of the lot in question, which shall be settled as deemed fit by the OFDC Ltd.

xx xx xx xx

12. The successful tenderer shall have to deposit 1/3rd (One-third) of the tendered amount for a crop year towards royalty in one installment as per the following schedule:-

- for 2013 crop year – on or before 10th day of issue of demand letter.

- for 2014 crop year – on or before 30.09.2013.

- for 2015 crop year – on or before 30.09.2014

xx xx xx xx

14. In the event of failure to deposit the royalty as stipulated in clause No.12, the Odisha Forest Development Corporation Limited will be at liberty to forfeit the security deposit and part royalty paid if any without issuing any show cause notice to the tender and without assigning any reason thereof. The forfeiture of Earnest Money Deposit/Security Deposit/ part royalty shall be treated as final and conclusive and the Corporation shall be at liberty to re-lease the lot in any manner as deemed expedient."

9. The above quoted text would demonstrate in clear terms that the impugned action of forfeiture of the earnest money deposit of Rs.3,50,000/- on the petitioner's failure to comply Clause Nos.4(a) and 12 was in valid compliance of Clause Nos.4(b) and 14. In absence of any rejoinder on the part of the petitioner, it also not possible to conclude that the pleaded averments of the opp. party-Corporation that prior to the impugned order the petitioner had been required to make the required deposit as per letter Nos.01.12.2012 and 15.12.2012 is untenable on facts. Thus, the impugned action is not only inconformity with the relevant clauses of the terms and conditions of sale but also in compliance with the principles of natural justice.

10. As it is in a process initiated by the State, its instrumentalities and any public authority contemplating participation of eligible members of the public, the professed norms and stipulations proclaimed to govern the same ought to be strictly adhered to. In other words, such an authority for the sake

of fairness, transparency and objectivity in the process is to be held rigorously to such norms and stipulations lest the exercise undertaken degenerates to be unfair, clandestine, veiled and discriminatory. Inflexibility in the matter of enforcement of such norms to ensure uniformity in approach and consistency in decision is thus an inviolable imperative in every public participatory process.

11. It has been held time out of number by the Hon'ble Apex Court that an essential tender condition must be strictly adhered to as reiterated in ***Harminder Singh Arora v. Union of India, (1986) 3 SCC 247*** and in ***B.S.N. Joshi & Sons Ltd. v. Ajoy Mehta, (2009) 3 SCC 458***.

12. This judicially evolved rule on administrative law has reverberated since the classical enunciation of *Mr Justice Frankfurter* in ***Vitarelli v. Seaton (1959) 359 US 535***, and referred to with approval by the Hon'ble Apex Court in ***Ramana Dayaram Shetty v. International Air Port Authority of India and others, AIR 1979 SC 1628***, wherein it was predicated that an executive authority must be rigorously held to the standards by which it professes its action to be judged and that it must scrupulously observe those standards on the pain of invalidation of an act of any violation thereof.

13. In the facts and circumstances of the case, to reiterate, we are of the unhesitant opinion that the impugned action is in strict adherence to the terms and conditions of the sale and thus no interference in the exercise of power of judicial review, in our comprehension, is warranted. The petition lacks in merit and is dismissed.

Writ petition dismissed.

2015 (I) ILR - CUT- 225

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

RVWPET NO.16 OF 2014

RUKMUNI DAS ……..Petitioner

.Vrs.

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

CIVIL PROCEDURE CODE, 1908 – O- 47, R-1

Review – Judgment passed by a Coordinate Bench of this Court holding that mere failure of tubectomy operation could not be per se be demonstrative of medical negligence entitling the person undergoing the same to compensation – There is neither any admission on the part of the opposite party nor any proof of medical negligence vis-a-vis the petitioner as acknowledged in law – Writ petition adjudicated on merits – No reason to entertain the review petition which is dismissed.

(Paras 8,13)

Case laws Referred to:-

1.(2005) 7 SCC 1 : (State of Punjab-V- Shiv Ram & Ors.)
2.(2009) 3 SCC 1 : (Martin F.D'Souza-V- Mohd. Ishfaq)
3.(1957) 2 All ER 118 : (Bolam-V- Friern Hospital Management Committee)

For Petitioner - Mr. Dhaneswar Mohanty
For Opp.Parties - None

Date of hearing : 28.10.2014
Date of judgment : 28.10.2014

JUDGMENT

AMITAVA ROY, C.J.

Heard Mr. D. Mohanty, learned counsel for the review applicant.

2. By the instant application, a review of the judgment and order dated 18.12.2013 rendered in W.P.(C) No. 3156 of 1997 has been sought for.

3. The review applicant had instituted the aforementioned writ proceeding attributing medical negligence in conducting tubectomy operation on her for the failure whereof she had conceived for the third time and had eventually given birth to a female child on 3.4.1996. She had pleaded that she had undergone the tubectomy surgery on 17.4.1993, whereafter she had duly been issued one Green Card entitling her to the benefits enumerated in the relevant regulations of the Health and Family Welfare Department of the State of Orissa. Alleging that due to deficiency in the surgical procedure involved, she did sustain financial loss and also suffered from mental agony she sought the intervention of this Court by filing the writ petition for an appropriate writ directing the opposite party to pay adequate compensation and for releasing all benefits as contemplated for a Green Card Holder. A direction to take steps for rectification of the operational errors free of costs was also prayed for.

4. This Court by order dated 18.12.2013 dismissed the writ petition in the following terms:

> "This petition seeks direction to award compensation to the petitioner for medical negligence.
>
> The case of the petitioner is that after giving birth to two male children, the petitioner underwent Tubectomy operation on 17.04.1993. Still, petitioner conceived the third child. Accordingly, the petitioner is entitled to compensation to meet the cost of the third child and to compensate for the mental agony on account of the birth of the third child.
>
> We have heard learned counsel for the petitioner.
>
> It is well settled that mere failure of the Tubectomy operation could not be held to be medical negligence entitling the person undergoing such operation to compensation.
>
> Reference is made to the decision of the Supreme Court in the case of State of Punjab Vs. Shiv Ram & ors., (2005) 7 SCC 1 and Martin F. D'Souza Vs. Mohd. Ishfaq, (2009) 3 SCC 1.
>
> Accordingly, this petition is dismissed."

5. According to the review applicant, this adjudication suffers from errors apparent on the face of the records, inasmuch as, this Court had left out of consideration the fact that failure of the tubectomy operation did per se demonstrate medical negligence of the performing surgeon for which the State was vicariously liable to pay compensation. This is more so, as in spite of the notice no counter had been filed by the opposite party. That the medical negligence involved had resulted in infringement of the review applicant's right to life as enshrined under Article 21 of the Constitution of India has also been emphasized.

6. Learned counsel for the petitioner while emphatically reiterating the above has placed reliance on the decisions of the Apex Court in State of Haryana & Ors. Vs. Santra (Smt.), (2000) 5 SCC 182 and that of the Allahabad High Court in Smt. Shakuntala Sharma & Anr. Vs. State of U.P. & Ors., AIR 2000 Allahabad 219.

7. We have carefully analysed the pleaded facts, the documents on records and the arguments advanced.

8. The instant application being one for review, the scope of scrutiny essentially is constricted and limited by the parameters recognized in law. As would be evident from the judgment and order dated 18.12.2013, a coordinate Bench of this Court did hold that mere failure of the tubectomy operation could not per se be demonstrative of medical negligence entitling the person undergoing the same to compensation. This view was sought to be sustained by referring to the decisions of the Hon'ble apex Court in State of Punjab Vs. Shiv Ram & ors., (2005) 7 SCC 1; and Martin F. D'Souza Vs. Mohd. Ishfaq, (2009) 3 SCC 1.

9. Evidently in the facts pleaded in the writ petition and also in the review application, except stating that the review applicant/writ petitioner had undergone tubectomy operation on 17.04.1993 and in spite thereof, she had conceived thereafter, there is no material to establish the medical negligence on the part of the doctor performing the related surgery.

10. The Hon'ble apex Court, dealing with the aspect of medical negligence in Jacob Mathew Vs. State of Punjab & Anr., (2005) 6 SCC 1, had while laying down the guidelines to construe negligence in the context of medical profession had propounded that simply because a patient has not responded favourably to a treatment given by the physician or because a surgery had failed, the doctor cannot be held liable per se by applying the doctrine of *res ipsa loquitor*.

11. In State of Punjab Vs. Shiv Ram (supra), the Hon'ble apex Court, after a dialectical analysis of the facts in the case of State of Haryana Vs. Santra (supra), as relied upon on behalf of the review applicant, held that the cause of action for claiming compensation in cases of failed sterilization operation arises on account of negligence of the surgeon and not on account of childbirth. It was held, in the contextual facts, in State of Haryana Vs. Santra (supra) that the lady involved had offered herself for complete sterilization and not for partial operation and, therefore, both her fallopian tubes should have been operated upon, but it was found as a matter of fact that only the right fallopian tube was operated upon and the left fallopian tube was left untouched and she was issued a certificate that her operation was successful and she was assured that she would not conceive a child in future. It was in those facts and circumstances, that the case of medical

negligence was held to be proved for which the compensation in tort was adjudged to be justified.

12. In Martin F. D'Souza (supra), the Hon'ble apex Court, amongst others, referring to Jacob Mathew (supra) held that a medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another, and he could be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. The enunciation in Martin F. D'Souza (supra) resonated as hereunder:

> "40. Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightaway liable for medical negligence by applying the doctrine of *res ipsa loquitur*. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse."

In the same vein it was held in Bolam Vs. Friern Hospital Management Committee, (1957) 2 All ER 118, as under:

> "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art…. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time… there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent."

The preponderant judicial opinion is thus that medical negligence cannot be presumed as a matter of routine ipso facto, if the patient does not respond to the treatment administered or the surgery undergone, in absence of any proof of failure on the part of the doctor concerned to act in accordance with the standard of reasonable competent medical man at all relevant times.

13. Not only in State of Haryana Vs. Santra (supra) there was an admission that the sterilization operation was not successful and that the lady involved was not subjected to complete sterilization, in Smt. Shakuntala Sharma (supra) as well it was not denied that the operation was unsuccessful. Therefore, these decisions turn on their own facts and are thus distinguishable from those as obtain herein.

To reiterate, in the instant case there is neither any admission on the part of the opposite party nor any proof of medical negligence vis-à-vis the petitioner as acknowledged in law. Further, to reiterate, the instant is a proceeding seeking review of a judicial adjudication made on merits.

14. On an overall consideration of all aspects enumerated hereinabove, we thus see no reason whatsoever to entertain the instant petition and it is thus dismissed.

Review petition dismissed.

2015 (I) ILR - CUT- 230

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

W.P.(C) NO. 9533 OF 2014

PABAN KUMAR SAHU & ORS. ……..Petitioners

.Vrs.

ROURKELA DEVELOPMENT AUTHORITY & ORS. ……..Opp.Parties

P.I.L. – Before entertaining the PIL, Courts should ensure that it is aimed at redressal of genuine public harm and there is no personal gain, private or oblique motive behind it.

In this case it is evident from the writ petition that the petitioners have substantial interest over the land in question so the litigation cannot be termed as PIL which is otherwise an abuse of the process of the Court – The writ petition is dismissed with cost of Rs.1000/-.

(Paras 15, 16)

Case laws Referred to:-

1.AIR 2002 SC 350 : (BALCO Employees Union (Regd.)-V- Union of India & Ors.)
2.(2006) 6 SCC 180 : (Kushum Lata-V- Union of India & Ors.)
3.(2010) 3 SCC 402 : (State of Uttaranchal-V- Balwant Singh Chaufal & Ors.).

For Petitioners - Mr. B. K. Mishra.
For Opp.Parties - Mr. P.K. Muduli, Addl. G.A.
Mr. D.K. Mohapatra,
Mr. J. Pattnaik, Sr. Advocate.

Date of Hearing : 26.11.2014
Date of Judgment : 26.11.2014

JUDGMENT

DR.A.K.RATH, J.

The attractive brand name of Public Interest Litigation has propelled some persons to approach the High Court for their personal gain or private profit with oblique motive. This case is a glaring example how the process of Court has been abused by the petitioners for furtherance for their personal gain and private profit.

2. The short facts of the case of the petitioners are that M/s. ORBIT Motors Pvt. Limited, Rourkela-opposite party no.3 applied for a plot measuring an area of Ac.0.650 dec. in front of its existing shop in the Civil Township, Rourkela Town Unit No.42 for construction of work shop and machineries, for which two lease cases, i.e., Case Nos.14 of 2006 and 15 of 2006 were initiated. Since the land applied for was coming under the Green Belt area, the Assistant Provident Fund Commissioner, whose office exists adjacent to the said plot, raised objections before the competent authority not to allot the same area. The local public also lodged complaint before the Rourkela Development Authority (hereinafter referred to as "the RDA") and Rourkela Land Allotment Committee (hereinafter referred to as "the LAC"), opposite parties 1 and 2. Considering the objections, opposite parties 1 and 2 cancelled the lease application and advised opposite party no.3 to apply for any other plot. Again opposite party no.3 applied for the lease of Ac.0.650 dec. in the same area. The said plot was classified as public zone and semi

public zone. The LAC, opposite party no.2 rejected the application holding that the plots were coming under the public zone and semi public zone. Thereafter, opposite party no.3 laid a consumer dispute before the State Consumer Disputes Redressal Commission, which was registered as C.D. Case No.17 of 2008. Challenging, inter alia, initiation of consumer disputes before the State Consumer Disputes Redressal Commission, the opposite parties 1 and 2 filed writ petition, being W.P.(C) No.2757 of 2009, before this Court. On 18.5.2009 this Court disposed of the writ petition holding inter alia that the matter does not come under the purview of consumer disputes and disposed of the said writ petition. The further case of the petitioners is that though on earlier two occasions, applications of opposite party no.3 was rejected, but for the third time, the same was considered. The classification of the land was changed from public zone and semi public zone to commercial zone by holding the LAC meeting on 13.9.2010. A decision was taken to allot an area of Ac.0.650 dec. of land and adjust the price paid earlier by opposite party no.3 in Lease Case Nos.14 of 2006 and 15 of 2006. Opposite party no.1 published the matter in extra-ordinary issue of Orissa Gazette, vide letter no.3061/RDA. dated 26.6.2010 and in daily newspapers under letter No.4652/R.D.A. dated 5.3.2010 inviting objections and suggestions from the general public. The same modified the Interim Development Plan of Rourkela Civil Township by way of change of land use from public and semi-public zone to commercial zone. Thereafter, petitioner no.1 had filed objection before opposite party no.1 stating that he had interest over the land, as he was the power of attorney holder. Further the compensation was not paid for the land. As per the Orissa Government Land Settlement Act, the displaced families are to be given first priority for allotting the land and in the event the land is allotted, the petitioners and their family members would pay the market price, since they have no suitable house. A prayer was made not to change the land use from public and semi-public zone to commercial zone for the greater public interest. Without hearing objection filed by petitioner no.1, the land was allotted to opposite party no.3. It is further stated that the market value of the land was Rs.60,000/- in the year 1999-2000 and at the time of allotment, the price was Rs.3,34,000/- per dec. The present market value is Rs.5,00,000/- per dec. but opposite parties 1 and 2 allotted the land on 9.12.2013 measuring an area of Ac.0.650 dec. appertaining to khata 111, plot no.12/part A0.245, plot no.29/328/P A0.005 and plot no.12/part, A0.030, plot no.21/part A0.060 and plot no.29/328/part, A0.310 of village RTU No.42 at a price of Rs.39,00,000/-. After the correction of record of rights, patta was issued in favour of opposite party no.3 in the year 2014. With this

factual scenario, a prayer has been made to cancel the lease granted in favour of opposite party no.3 in Lease Case Nos.14 of 2006 and 15 of 2006 and to direct the opposite party nos.1 and 2 to stop construction over the land.

3. Pursuant to issuance of notice, opposite parties 1, 2 and 3 have filed their respective counter affidavits.

4. Case of opposite party no.1 is that in the 12th Authority Meeting dated 1.5.2010 of the RDA, it was resolved to send the proposal of changing the use zone of RTU No.42 from public and semi-public zone to commercial zone for approval. Accordingly, opposite party no.1 issued notification on 26.6.2010 inviting objections and suggestions for change of use zone. Opposite party no.1 sent letter to the Government forwarding the original notification for publishing the same in the extra ordinary issue of Orissa Gazette. In the extra ordinary Gazette No.1055 dated 7.7.2010, the notification was published in Orissa Gazette inviting objections within sixty days. The notification was also published in daily newspapers, New Indian Express on 7.8.2010 and in daily Samaj on 8.8.2010. Since no objection was received within sixty days, the change of use zone was duly recommended to the Government on 18.4.2011 for approval. The recommendation of opposite party no.1 was also forwarded by the Director Town Planning of Orissa, Bhubaneswar on 8.6.2011 to the Government for approval. By letter no.2106/HUD dated 21.1.2012, the Deputy Secretary to Government in H & U.D. Department approved the same.

5. The stand of opposite party no.2 is that the present writ petition filed by the petitioners in the nature of PIL is not in consonance with the Orissa High Court Public Interest Litigation Rules, 2010. The petitioners have not followed Rule-7 and 8 of the Orissa High Court Public Interest Litigation Rules, 2010 for which the writ petition is liable to be dismissed. It is further stated that opposite party no.3 had applied for land in the district of Sundargarh to open a show room and Service-cum-Repairing Centre of four wheelers of Maruti Company. Application filed by opposite party no.3 was numbered as Lease Case No.4 of 2001. After following due procedure of law, an area of Ac.0.250 dec. was allotted in favour of opposite party no.3 on 1.2.2001 for construction of show room subject to premium of @Rs.60 lakhs per acre under OGLS Act. Subsequently, on the basis of another application filed by opposite party no.3, an area of Ac.0.400 dec. was allotted in favour of opposite party no.3 on 3.6.2003. The aforesaid allotments were made by

the committee headed by RDC (ND), Sambalpur, Collector, Sundargarh and ADM, Rourkela. The premium was fixed @ Rs.60 lakhs per acre. Accordingly, opposite party no.3 deposited rupees twenty four lakhs for Ac.0.400 dec, rupees fifteen lakhs for Ac.0.250 dec. of land. On payment of premium, lease deed was executed on 3.6.2003. Thereafter, opposite party no.3 carried out business over the leasehold land. While the matter stood thus, the LAC headed by RDC (ND), Sambalpur found that there were serious irregularities in allotting the land as the said land was earmarked for Green Belt. Accordingly, LAC prima facie was satisfied that allotment was not permissible for commercial purpose. Opportunity of hearing was also given to opposite party no.3 before cancellation of lease. The LAC finally took a decision to cancel the lease granted in favour of opposite party no.3 in Lease Case No.4 of 2001. The LAC took a decision that another plot will be provided to opposite party no.3 in lieu of cancellation of lease. Accordingly, the LAC passed an order of cancellation and communicated the same on 23.4.2005. Soon after cancellation, opposite party no.3 had filed an application in Form No.1 under the OGLS Act for grant of lease on 21.1.2006. On the basis of said application, Lease Case No.14 of 2006 was registered. In the said application, opposite party no.3 had prayed for grant of lease in respect of total area of Ac.0.250 dec.. On the very day also opposite party no.3 had filed another application for grant of lease in respect of total area of Ac.0.400 dec., whereafter Lease Case No.15 of 2006 was registered. Both the applications were placed before the LAC in its meeting dated 13.9.2010. The Committee decided to allot plot no.12-P, 29/328 (Part), 12, 21-P, 29/238 appertaining to khata no.111, village/RTU No.42, total area Ac.0.650 dec. in favour of opposite party no.3 subject to completion of formalities for change of land use. The committee took a decision that the land premium paid by opposite party no.3 will be adjusted but he has to pay the Stamp Duty and registration fee. As per the decision of the Committee, Secretary, RDA issued Gazette Notification on 26.6.2010 inviting objection/suggestion within 60 days from the date of publication of notification. Pursuant to Gazette Notification, no objection/suggestion was filed within 60 days of the notification. Since no objection/suggestion was received, the Secretary, RDA recommended the same to Government for changing of land use from public and semi public zone to commercial zone. Subsequently, the Government of Orissa, H & UD Department approved the proposal of Secretary, RDA and changed the use of land from public and semi public zone to commercial use zone. It is further stated that petitioner no.1 has filed the objection before the Secretary, RDA on 5.10.2010, which is

after expiry of 60 days. So thus the question of giving opportunity of hearing to the petitioner no.1 did not arise. It is further stated that petitioner no.1 filed an objection before the competent authority (opposite party no.1) stating therein that he had interest over the land as he was the power of attorney holder and compensation was not paid for the land to the original owner of land as per law under OGLS Act, the displaced families are to be given first priority for allotting the land and if the land be allotted, then petitioners and their family members would pay the market price and not to change the land use to commercial zone. The petitioner no.1 has some personal interest over the land. The further case of opposite party no.2 is that apart from allotting an area of Ac.0.650 dec. in favour of opposite party no.3, Ac.0.500 was allotted in favour of M/s.Koshal Udyod, Rourkela. Both the allottees deposited premium and executed sale deed. Thereafter, possession was handed over to them. The land cost was calculated at the rate of Rs.60,000/- per acre, which was prevailing then. Consequent upon the objection raised by the Assistant Provident Commissioner, whose office building exists to the adjoining area, the LAC in its meeting held on 17.6.2004 cancelled the allotment being in Green Belt area of the Master Plan of Rourkela and instructed the parties to select alternate sites for allotment in exchange of the earlier allotment. Parties applied again. Since the selected areas, which were found to be in public and semi public zone of the Master Plan, opposite party no.1 was requested to change the status of lease hold land. It is further stated that both the lease deeds were executed after payment of stamp duty and the allotments were considered in exchange of earlier allotment after obtaining approval of the land status from the Government in H & UD Department.

6. Apart from challenging the maintainability of the writ petition, opposite party no.3 has taken the similar stand to that of opposite party no.2.

7. A rejoinder affidavit has also been filed controverting the allegations made in the counter.

8. Heard Mr.B.K.Mishra, learned Advocate for the petitioners, Mr.P.K.Muduli, learned Additional Government Advocate, Mr. D.K.Mohapatra, learned Advocate for opposite party no.1 and Mr. J.Pattnaik, learned Senior Advocate for opposite party no.3.

9. The seminal point that hinges for our consideration is as to whether, the writ petition, which is in the nature of Public Interest Litigation, is maintainable.

10. In paragraph 4.6 of the writ petition, the petitioners have stated that petitioner no.1, power of attorney holder of the original owner, filed an objection before the competent authority (opposite party no.1) stating therein that the petitioner has interest over the land and the compensation has not been paid to the original owner, under O.G.L.S. Act to the displaced families would be given first priority in the event the land is allotted, the petitioners and their family members would pay the market price as they have no suitable house of their own. They have prayed not to change the land use from public and semi public zone to commercial zone for the greater public interest.

11. The apex Court came down heavily against entertaining of PIL for personal gain or private profit or political motive or any oblique consideration. While PIL initially was invoked mostly in cases connected with the relief to the people and the weaker sections of the society and in areas where there was violation of human rights under Article 21, but with passage of time, petitions have been entertained in other spheres. In recent years, there is a feeling that Public Interest Litigation is now tending to become publicity interest litigation or private interest and has a tendency to be counter productive. Mis-use of PIL by the litigants has drawn the attention of the apex Court in number of times. The apex Court consistently held that when there is no material to show that the petition styled as PIL is a camouflage to foster personal disputes. The said petition is to be thrown out.

12. The parameters have been laid down by the apex Court in ***BALCO Employees Union (Regd.) Vrs. Union of India and others,*** AIR 2002 SC 350. In paragraphs 76 to 79 of the said report, it is held as follows:-

> **"76.** Public Interest Litigation, or PIL as it is more commonly known, entered the Indian Judicial process in 1970. It will not be incorrect to say that it is primarily the judges who have innovated this type of litigation as there was a dire need for it. At that stage, it was intended to vindicate public interest where fundamental and other rights of the people who were poor, ignorant or in socially or economically disadvantageous position and were unable to seek legal redress were required to be espoused. PIL was not meant to be adversarial in nature and was to be a cooperative and collaborative effort of the parties and the Court so as to secure justice for the poor and the weaker sections of the community who were not in a position to

protect their own interests. Public Interest Litigation was intended to mean nothing more than what words themselves said viz., 'litigation in the interest of the public.

77. While PIL initially was involved mostly in cases connected with the relief to the people and the weaker sections of the society and in areas where there was violation of human rights under Article 21, but with the passage of time, petitioners have been entertained in other spheres, Prof. S.B.Sathe has summarized the extent of the jurisdiction which has now been exercised in following words:-

"PIL may, therefore, be described as satisfying one or more of the following parameters. These are not exclusive but merely descriptive:

Where the concerns underlying a petition are not individualist but are shared widely by a large number of people (bonded labour, undertrial prisoners, prison inmates).

Where the affected persons belong to the disadvantaged sections of society (Women, Children, bonded labour unorganized labour etc.).

Where judicial law making is necessary to avoid exploitation (inter-country adoption, the education of the children of the prostitutes)

Where judicial intervention is necessary for the protection of the sanctity of democratic institutions (independence of the judiciary, existence of grievance redressal forums).

Where administrative decision related to development are harmful to the resources such as air or water.

78. There is, in recent years, a feeling which is not without any foundation that Public Interest Litigation is now tending to become publicity interest litigation or private interest litigation and has a tendency to be counter productive.

79.PIL is not a pill or a panacea for all wrongs. It was essentially meant to protect basic human rights of the weak and the disadvantaged and was a procedure which was innovated where a public spirited person files a petition in effect on behalf of such persons who on account of poverty, helplessness or economic and social disabilities could not approach the Court for relief. There have been, in recent times, increasingly instances of abuse of PIL.

Therefore, there is a need to re-emphasize the parameters within which PIL can be resorted to by a Petitioner and entertained by the Court. This aspect has come up for consideration before this Court and all we need to do is to recapitulate and re-emphasize the same."

13. In ***Kushum Lata Vrs. Union of India and others,*** (2006) 6 S.C.C. 180, the apex Court sounded a caution in entertaining frivolous PIL and held that the Court must be careful to see that a body of persons or member of public, who approaches the Court is acting *bona fide* and not for personal gain or private motive or political motivation or other oblique considerations. The apex Court further held that when genuine litigants with legitimate grievances are standing in a long serpentine queue for years with the fond hope of getting into the courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity, break the queue muffing their faces by wearing the mask of public interest litigation and get into the courts by filing vexatious and frivolous petitions.

Paragraphs 12 and 13 of the said report are quoted hereunder:-

"12. It is depressing to note that on account of such trumpery proceedings initiated before the courts, innumerable days are wasted, which time otherwise could have been spent for the disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters – government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenu expecting their release from the detention orders, etc. etc. are all standing in a long serpentine queue

> for years with the fond hope of getting into the courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity, break the queue muffing their faces by wearing the mask of public interest litigation and get into the courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the courts and as a result of which the queue standing outside the doors of the courts never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they lose faith in the administration of our judicial system.

13. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, the court must be careful to see that a body of persons or member of public, who approaches the court is acting *bona fide* and not for personal gain or private motive or political motivation or other oblique considerations. The court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

14. In ***State of Uttaranchal Vrs. Balwant Singh Chaufal and others,*** (2010) 3 Supreme Court Cases 402, the apex Court held that the Courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The Court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(emphasis is ours)

15. On the anvil of the decisions cited (supra), we have carefully and meticulously examined the pleadings of the parties and considered the submissions advanced by the counsel for the parties. As would be evident from paragraph 4.6 of the writ petition, the petitioners have substantially interest over the land in question and fruits of the litigation. The same can by no stretch of imagination be termed as PIL. The present writ petition, which is styled as PIL, is a camouflage to foster personal disputes.

16. On taking a holistic view of the matter, we are on ad idem that the present writ petition is an abuse of the process of the Court and the same is dismissed with cost of Rs.1000/-(One Thousand).

Writ petition dismissed.

2015 (I) ILR - CUT-240

PRADIP MOHANTY,J. AND BISWAJIT MOHANTY, J.

W.P. (CRL) No.122 OF 2013

CHITTARANJAN CHOUDHURY ……..Petitioner

.Vrs.

STATE OF ODISHA AND ANR ……... Opp.Parties

ODISHA SPECIAL COURTS ACT, 2006 –S. 5 (1)

Whether a person inorder to attract Section 5 (1) of the Act is required to hold "High public Office" during the entire check period ? – Held, inorder to attract Section 5(1) it is not required that the person must have held "High public Office" throughout the entire check period – It would be sufficient if the person has committed the offence and has also held "High public Office" – Impugned notification U/s 5(1) of the Act is legal and valid. (para-11)

For Petitioners - M/s. H.K.Mund and Kumari A.K.Dei.
For Opp.party - Mr. Srimanta Das. Standing Council (Vigilance)

Date of hearing : 24.12.2014
Date of judgment : 24.12.2014

JUDGMENT

PRADIP MOHANTY,J

The petitioner in this writ petition seeks to quash the notification dated 25.04.2011 of the Home (Special Section) Department, which was published on 02.05.2011 in the Orissa Extraordinary Gazette under Annexure-1.

2. The case of the petitioner, as averred in the writ petition, is that he entered into government service as Junior Engineer on 13.09.1965 in Irrigation Department. He was promoted to the rank of Asst. Engineer in 1976, and then to the rank of Asst. Executive Engineer in 1993. On 06.09.1995, he was posted as Executive Engineer, Minor Irrigation Division-II, Berhampur. While continuing in the said post his house was searched on 19.04.1996 by the Vigilance Department. During search, it is alleged, the petitioner being a public servant was found in possession of assets disproportionate to his known sources of income. As a result, alleging commission of offence under Section 13(2) read with Section 13(1) of the Prevention of Corruption Act, 1988 (for short "the P.C. Act") the Vigilance Department on 06.05.1996 lodged an FIR, which was registered as Berhampur Vigilance P.S. Case No.25 of 1996. On conclusion of the investigation, the Vigilance Department placed charge sheet against the petitioner and the learned Special Judge (Vigilance), Berhampur took cognizance and framed charge under Section 13 (2) read with Section 13 (1)(e) of the P.C. Act. As the matter stood thus, the Government of Odisha in the Home Department in exercise of the powers conferred by sub-section (1) of Section 5 of Special Courts Act, 2006 (for short "the Act") published Annexure-1 declaring that the petitioner should be tried by the Special Court established under Sub-section (1) of Section 3 of the Act. As a consequence, the case of the petitioner stood transferred to the Court of the learned Special Judge, Special Court, Bhubaneswar and renumbered as T.R. Case No.8 of 2012. During pendency of the said T.R. case, the State filed an application under Section 13 (1) of the Act before the Authorized Officer, Special Court, Bhubaneswar for confiscation of the assets of the petitioner, his wife and son. The Authorized Officer registered the said application as Confiscation Case No. 17 of 2012 and issued notice to show cause under Annexure-3 series. Therefore, the petitioner has filed this writ application to quash the declaration/notification under Annexure-1 and its consequential proceedings as unconstitutional.

3. Learned counsel for the petitioner submitted that during the period from 13.09.1965 to 19.04.1996, which had been taken by the prosecution as the check period or period of offence, the petitioner was not holding any "high public office" or any post belonging to Group-A service in the State of Odisha, as defined in Rule 2(e) of the Orissa Special Courts Rules, 2007 (for short "the Rules"). During the aforesaid check period all the civil posts under the Government of Odisha were classified into (a) State Civil Posts, Class-I, (b) State Civil Posts, Class-II and (c) State Civil Posts, Class-III under the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 and such classification was in existence till 2000, when by virtue of amendment to the said Rules such classification was converted to (i) State Civil Services Group-A, (ii) State Civil Services Group-B and (iii) State Civil Services Group-C. So, according to him, since the period of offence ended on 19.04.1996 and at the relevant time the petitioner was not holding any Group-A post under the State Government and as such he was not holding the "high public office", for which the petitioner could not be brought within the ambit of the Act. Furthermore, the classification of posts into Group-A, Group-B, Group-C and Group-D, as made either by resolution no.21317-SC-6-43/95-Gen. dated 22.09.1995 or by resolution no.17655-SC-6-15/99-Gen. dated 07.06.1999 (Annexure-4) of the Government of Odisha in General Administration Department could not be taken into consideration, as no gazette notification was made by the concerned administrative departments amending the relevant Acts and/or Rules nor was the post held by the petitioner identified to be belonging to Group-A category. Secondly, it was contended that in order to attract Section 5(1) of the Act, a person should have committed the offences while holding "high public office". According to the counsel for the petitioner, the petitioner never held "high public office" from 13.09.1965 to 19.04.1996, therefore, the declaration under Section 5(1) was bad in law. Thirdly, he contended that the Act is void for being retrospective in nature vis-à-vis Section 6 of the Act. Therefore, the impugned notification/declaration under Anenxure-1 as well as consequent initiation of confiscation proceeding against the petitioner was bad in law and liable to be set aside.

4. Mr. Das, learned Standing Counsel for the Vigilance Department submitted that Orissa Special Courts Rules, 2007 defined person holding "high public office" under Rule 2(e) which included a public servant falling within the meaning of Clause-c of Section-2 of the P.C. Act or under Section 21 of the Indian Penal Code, 1860 and belonging to Group-A service of the

Central or t he State Government or officers of equivalent rank in anyorganization specified in the explanation below Clause-B of Section-2 of the said Act. The statement of the petitioner, that during the check period he was not holding "high public office" as per the Act, was misconceived for the following reasons. The government resolution no.17655-SC-6-15/99-Gen. dated 07.06.1999 had classified all the posts in the government offices into four groups wherein Group-A was classified as the post in the pay scale, the maximum of which was not less than Rs.13,500/-, as evident from Annexure-B attached to the counter affidavit. Annexure-A to the counter affidavit, which was the communication made from the office of the Superintending Engineer, Southern Irrigation Circle, Berhampur, revealed that as per ORSP Rules, 1996 the scale of pay of Executive Engineer with effect from 01.01.1996 was Rs.9350-325-14550/-. The petitioner admitted that he was promoted to the post of Executive Engineer on 06.09.1995 and the check period was in between 13.09.1965 and 19.04.1996. The petitioner was allowed the benefit of pay scale of Rs.9350-14550/- w.e.f. 01.01.1996. He also relied on the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 to contend that Class-I & Group-A posts are one and the same. Thus, he submitted that during the check period, the petitioner had held Group-A post. So, during the check period the petitioner had held "high public office". Further, he submitted that a plain reading of Section 5(1) of the Act made it clear that it was nowhere the requirement of law that in order to attract the provision of Section 5(1), a high public official should have committed the offence, while holding the "high public office" or a Group-A post. It would be enough if the person had committed the offence and held "high public office". Thirdly, Mr. Das submitted that the issue of retrospective application of the Act did not arise as because the petitioner was facing trial before the learned Special Judge, Vigilance and during pendency of the trial the Act came into force. So, all the cases including the case of the petitioner pending in the Special Judge for commission of selfsame offence got transferred to the Special Courts as per Section 6(2) of the Act. So far as the offence and punishment were concerned, those were still under the same P.C. Act. But the Act had adopted a new procedure to conclude the proceedings expeditiously and to confiscate the property illegally acquired by means of the above offence. As such, the impugned notification/declaration (Annexure-1) issued by the State Government so also the initiation of confiscation proceeding and issuance of show cause notices held good and there was no arbitrariness and illegality in the said notification and the order. Therefore, the writ application was liable to be dismissed.

5. The questions that now fall for consideration, in the face of the above rival submissions urged on behalf of the parties, are that whether during the check period the petitioner held a Group-A post and as such can the petitioner be treated to be holding "high public office"? Secondly, whether in order to attract Section 5(1), a holder of "high public office" is required to hold "high public office" for the entire check period? Lastly, whether the Act is void because of retrospective operation of Section 6 of the Act?

6. In order to understand the nature of controversy, let us have a look at relevant provisions of the Act and Rules.

> "**Sec.2. Definition-** In this Act, unless the context otherwise requires**,-**
>
> xx xx xx
> xx
>
> **(d)**. **"offence"** means an offence of criminal misconduct within the meaning of clause (e) of Sub-section (1) of Section 13 of the Prevention of Corruption Act, 1988;"
>
> **"Sec.5. Declaration of cases to be dealt with under this Act-** (1) If the State Government is of the opinion that there is prima-facie evidence of the commission of an offence alleged to have been committed by a person, who held high public or political office in the State of Orissa, the State Government shall make a declaration to that effect in every case in which it is of the aforesaid opinion.
>
> (2) Such declaration shall not be called in question in any Court."
>
> "**Sec.6. Effect of declaration-**(1)On such declaration being made, notwithstanding anything in the Code or any other law for the time being in force, any prosecution in respect of the offence shall be instituted only in a Special Court.
>
> (2) Where any declaration made under section 5 relates to an offence in respect of which a prosecution has already been instituted and the proceedings in relation thereto are pending in a Court other than Special Court, such proceedings shall, notwithstanding anything contained in any other law for the time being in force, stand transferred to Special Court for trial of the offence in accordance with this Act."

"**Rule-2. Definitions-**(1) In these rules unless the context otherwise requires:

xx xx xx xx

(e).''Person holding high public office'' includes a public servant falling within the meaning of clause-c of Section 2 of the Prevention of Corruption Act, 1988 or under Section 21 of the Indian Penal Code, 1860 and belonging to Group-A service of the Central or State Government or officers of equivalent rank in any organization specified in the explanation below clause-B of Section 2 of the said Act who was serving under or in connection with the affairs of the State Government."

A perusal of Section 2(d) read with Section 5 of the Act makes it clear that as per the said sections, State Government can make a declaration that the case of a high public officer should be dealt under the Act, where it is of the opinion that there is prima facie evidence of alleged commission of an offence by the said officer under section 13(1)(e) of P.C. Act, 1988. As per Rule 2(e) of the Rules, it emanates that a public servant can be said to be holding "high public office" if he falls within the meaning of Clause (c) of Section-2 of the P.C. Act, 1988 or under Section 21 of the Indian Penal Code, 1860 and belongs to Group-A service of the Central or the State Government or officers of equivalent rank in any organization specified in the explanation below Clause (b) of Section-2 of the said Act. Section 6(2) of the Act deals with transfer of pending proceedings, where prosecution has already been instituted, to Special Court under the Act.

7. Admitted case of the petitioner is that he entered into government service as Junior Engineer on 13.09.1965 in Irrigation Department. He was promoted to the rank of Asst. Engineer in 1976, then to the rank of Asst. Executive Engineer in 1993. As per Orissa Service of Engineers" Rules, 1941, the post of Assistant Executive Engineer is a Class-I post. Further, on 06.09.1995, he was promoted as Executive Engineer, Minor Irrigation Division-II, Berhampur. According to the opposite parties, the check period or period of offence is from 13.09.1965 to 19.04.1996. Hence, there is no dispute that the present petitioner was a public servant during the check period and has held a Class-I post w.e.f. 1993.

8. Now, it is to be seen whether during the check period, i.e., from 13.09.1965 to 19.04.1996 the post, which the petitioner has held, is a Group-A post. In this context, it is worthwhile to glance through Rule-8A of the

Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 (for short "OCS (CCA) Rules, 1962").

> "**8-A. Reference to State Civil Services and State Civil Posts –** All references to State Civil Services/State Civil Posts, Class-I, Class-II, Class-III and Class-IV in all Rules, Orders, Schedules, Notifications, Regulations, Instructions in force immediately before the commencement of these rules shall be construed as references to State Civil Services/State Civil Posts, Group-A, Group-B, Group-C and Group-D as the case may be and any reference to "class or classes" therein in this context shall be construed as reference to "Group or Groups" as the case may be."

A reading of Rule-8A of the OCS (CCA) Rules, 1962 makes it clear that all reference to State Civil Services/State Civil Posts, Class-I in all Rules, Order, Schedule, Notification, Regulation & Instruction in force immediately before commencement of these Rules shall be construed as reference to State Civil Service/State Civil Post Group-A. Thus, it is clear that since w.e.f. 1993 the petitioner was holding a Class-I post as indicated earlier, taking help of clarification under Rule-8A of Orissa Civil Services (Classification, Control and Appeal) Rules, 1962, it can safely be said that the petitioner held a Group-A post w.e.f. 1993. Thus, in our view, during the check period, the petitioner has held a Group-A post.

9. Now, coming to the question as to whether in order to attract the provision of Section 5(1) of the Act, is it required that the holder of high public office should have held the said post for the entire check period? Our answer is an emphatic no. It may be noted that the Act was enacted in the following background as stated in the beginning of the Act itself.

> "AN ACT TO PROVIDE FOR THE CONSTITUTION OF SPECIAL COURTS FOR THE SPEEDY TRIAL OF CERTAIN CLASS OF OFFENCES AND FOR CONFISCATION OF THE PROPERTIES INVOLVED.
>
> WHEREAS corruption is perceived to be amongst the persons holding high political and public offices in the State of Orissa;
>
> AND WHEREAS investigations conducted by the agencies of the Government disclose prima-facie evidence, confirming existence of such corruptions;

> AND WHEREAS the Government have reasons to believe that large number of persons, who had held or are holding high political and public offices have accumulated vast property, disproportionate to their known sources of income by resorting to corrupt means;
>
> AND WHEREAS it is constitutional, legal and moral obligation of the State to prosecute persons involved in such corrupt practices;
>
> AND WHEREAS the existing courts of Special Judges cannot reasonably be expected to bring the trials, arising out of those prosecutions, to a speedy termination and it is imperative for the efficient functioning of a parliamentary democracy and the institutions created by or under the Constitution of India that the aforesaid offenders should be tried with utmost dispatch;
>
> AND WHEREAS it is necessary for the said purpose to establish Special Courts to be presided over by the persons who are or have been Sessions Judges and it is also expedient to make some procedural changes whereby avoidable delay in the final determination of the guilt or innocence, of the persons to be tried, is eliminated without interfering with the right to a fair trial."

With such backdrop and having regard to the plain language of Section 5(1) of the Act, it cannot be said that in order to attract the said provision, a holder of high public office should have held the said office for the entire check period. The language of Section 5(1) cannot be read to mean that the alleged offence must have been committed by the holder of "high public office" only while holding the said "high public office". For satisfying the requirement of Section 5(1) of the Act, it would be sufficient if the alleged offence under Section 13(1)(e) of the P.C. Act has been committed by a person and the said person has held "high public office". It is not the requirement of Section 5(1) that throughout the entire period of commission of offence, the person should have held "high public office". If such a restricted interpretation is given, the same would defeat the very purpose and object of the Act, which is to bring people occupying high political and public offices to justice.

10. So far as the submission of the petitioner that the Act is void for being retrospective in nature, we make it clear that we will ignore such submission since there is no prayer in the writ petition to declare the Act void. Section 6 of the Act does not give retrospective operation to the Act. Rather, while

Section 6(1) envisages that once a declaration is made under Section 5, any new prosecution shall have to be instituted in a Special Court constituted under the Act. Section 6(2) enables transfer of old pending proceedings to Special Courts, as has been done in the present case, consequent upon declaration made under Section 5 of the Act.

11. In the above backdrop, this Court comes to a conclusion that during the check period the petitioner has held Group-A post and for the purpose of Section 5 of the Act, it is nowhere requirement of law that for the entire check period, that person should have held high public office. In other words, it is not required that in order to attract the provisions of Section 5(1) the person must have held "high public office" throughout the entire check period. It would be sufficient to attract the provisions of Section 5(1), if the person has committed the offence and has also held "high public office". Thus, the case of the petitioner clearly comes within the ambit of the Act. In such background, the impugned notification under Annexure-1 issued by the State Government in exercise of the powers conferred by Sub-section (1) of Section 5 of the Act is legal and valid.

12. The writ petition being devoid of merit is dismissed without costs.

Writ petition dismissed.

2015 (I) ILR - CUT- 248

VINOD PRASAD, J & DEBABRATA DASH, J.

JCRLA NO. 87 OF 2004

GIRIDHARI DEHURY ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

PENAL CODE, 1860 - S. 304- PART-I

Murder Case – Appellant is the son of the deceased – Incident occurred at the spur of the moment without any premeditation – Appellant had no criminal proclivity nor he had a criminal back ground – No other incident reported against him except the present one – He

was separated from the family and deceased denied him his rightful claim – He was under enormous mental termentation due to poor fiscal condition – On the date of occurrence the deceased must have uttered something which had infuriated the appellant who precipitously acted offensively in haste by giving a single blow by hatchet and this extricates his crime from the ambit of murder and places it within the fold of culpable homicide not amounting to murder punishable U/s.304 Part-I I.P.C. – Held, the appellant is guilty only U/s. 304 Part-I I.P.C. and not U/s. 302 I.P.C. (Para 13)

For Appellant - Mr. Jashobanta Dash, Mr. P.R. Jiban Das.
For Respondent - Mr. Sk. Zafarulla, Addl. Standing Counsel.

Date of hearing : 23.12.2014
Date of judgment: 23.12.2014

JUDGMENT

VINOD PRASAD, J.

This appeal by appellant Giridhari Dehury emanates against the impugned judgment of conviction u/s 302 I.P.C. dated 30.6.2004 and order of sentence for life imprisonment and to pay a fine of Rs.2000/- otherwise serve additional RI for months there for recorded by Additional Sessions Judge, Talchar, in S.T.No.18 of 2003, State versus Diridhari Dehury, relating to P.S. Khamar district Angul.

2. Shorn of unnecessary details, prosecution allegations against the appellant, as are perceptible from the FIR and depositions of fact witnesses and other evidences are that the Gobardhan Dehury, deceased, and his wife Jahaja Dehury, both were resident of village Sanda, police station Khamar district Angul and had three sons and two daughters, the appellant being their eldest son, while informant Sumanta Dehury/PW10, was their second son. Except the appellant rest of the family resided together in one house situated in down town village. Deceased by vocation was a priest as well as a sorcerer as he also used to practise witchcraft. Appellant, who had four issues, residing separately from rest of the family was all the time insisting and beseeching his father(deceased) to partition the ancestral property in which appellant had a legitimate share for which the deceased was not agreeable. Three or four days prior to the murder incident, wife and children of the appellant had left for their parental/maternal grand-father's house as, it

is also alleged, that the appellant was crotchety and quarrelsome and used to fight with them. Additionally it is alleged that on 1.4.2003 deceased returned to his house from the market situated a kilometre away from their house and both the appellant and the deceased started conversing with each other while deceased's wife/PW1 gave him water to wash his hands and feet. While the deceased was bending to wash his feet that all of a sudden at that time 2.15 p.m. appellant inflicted a single hatchet blow on the neck of the deceased due to which deceased died instantaneously and squatted on the ground. The appellant escaped from the spot leaving the hatchet behind at the incident scene. Besides PW1, widow of the deceased this incident was also witnessed by Santilata Samal/PW2, Dukhabandu Behera/PW8 and others and immediately after the murder Saudamini Dehury/PW3, sister of the appellant and daughter of the deceased, came at the incident spot and saw the cadaver of her father and appellant tramping away from the spot.

3. Informant Sumanta Dehury/PW10, was conveyed the murder of his father at the house of his uncle where he was present at that time and therefore he rushed to his house where he scribed, FIR, Ext 3 same day which he had handed over to the I.O., at the spot at 4 p.m. on the basis of which formal FIR was registered at the police station at 6 p.m. same day at a distance of 18 KMs.

4. Murder information having being relayed to Rasananda Behara/PW13,Officer-In-Charge, P.S.Khamar on phone, he immediately sprang up in action and arrived at the incident village , where he commanded Head Constable Athani Behra and Saroj Kumar Amanta to guard the corpse of the deceased and I.O. himself received the written FIR Ext.3 and dispatched it for registration of formal FIR at the police station through Gramrakhi Loknathha and on the basis of Ext.3 that formal FIR was registered at the P.S. same day at 6 p.m. Setting a foot the investigation, O.I.C. interrogated informant and other witnesses, collected blood stained and plain earth vide seizure list Ext.2, conducted inquest over the corpse of the deceased and slated inquest memo Ext.1 and then dispatched the cadaver for autopsy purpose along with command certificate and body chalan Ext.7. Appellant accused was arrested and from his possession a napkin vide Ext.5 was seized. Blood stained Dhoti of the deceased was seized vide Ext.4. Blood sample and nail clippings of the accused appellant were also seized vide Ext.6. Weapon of offence was sent for forensic examination vide Ext.8 and finally wrapping up the investigation, the investigating Officer charge sheeted the accused appellant.

5. Post mortem examination on the dead body was conducted by Dr. Rajendra Nath Tripathi/PW14 on 1.4.2003, who had inked autopsy report Ext.11. On 9.4.2003 doctor had also examined the hatchet and opined that injury sustained by the deceased was possible by it Vide Ext 8/2. Doctor had noted following facts in his post mortem examination report:-

> "An antemortem grievous cut injury of size 2 and ½ inches length one inch breadth and one and half inches depth over lateral surface of neck left side below the ear and mastoid process. The injury extended up to servical vertebrae below sterno-cledomastoid muscle. Left carrotid artery and common Jugular veins cut transversely. The injury was grievious and might have been caused by sharp cutting weapon. Cause of death was due to profuse haemorrhage leading to shock. The injuries inflicted on the body of the deceased were sufficient in ordinary course of nature to cause death."

6. Forwarding of the charge sheet against the accused appellant to the court resulted in initiation of court proceedings by summoning of the accused appellant, whose case, in the usual course, after observing necessary formalities, was committed to Sessions Court for trial, where learned trial Judge charged him with offence u/s 302 I.P.C. on 7.2.2004. Since appellant abjured that charge, pleaded not guilty and claimed to be tried that his trial commenced.

7. Prosecution during course of the trial rested it's case by examining in all fourteen witnesses including wife/widow of the deceased /PW1, Santilata Samal/PW2 and Dukhabandhu Behra/PW8 as the three eye witnesses. Informant/PW10 and Saudamini Dehury/PW3, son and daughter of the deceased, are post incident witnesses who had not witnessed the actual assault albeit the daughter deposed that she had seen appellant retreating from the incident spot. Other two brothers of the deceased Suresh Dehury/PW6 and Kanhu Dehury/PW7 likewise are not witnesses of actual assault and they both are also post incident witnesses. Birabar Sahu/PW4, Khageshwar Sahu/PW5, Iswar Sahu/PW9, Sagar Naik/PW11, and Athani Debata/PW12 are seizure witnesses. PW13 is the I.O. whereas PW14 is the autopsy doctor. Besides these witnesses prosecution also tendered eleven documentary exhibits to lend credence to its story.

8. Appellant's plea is of total denial and of false implication.

9. As noted earlier learned trial Judge believed and relied upon prosecution witnesses and concluded that guilt of the appellant has been established convincingly, therefore convicted and sentenced the appellant as above vide impugned judgment and order, the challenge to which decision has been made in the instant appeal.

10. In above back ground that we have heard Sri Jashobanta Das, learned counsel for the appellant and Sri S.K.Jafarullah, learned Additional Standing Counsel for the respondent State and have critically examined trial court record and evidences.

11. From our vetting of the record what is discernible is that so far as conviction of the appellant is concerned it can not be said that he is not the perpetrator of the crime. His presence at the spot is too well anointed to create any doubt. It is a day light incident which occurred at the house of the deceased and hence presence of PW1 at the spot, who is mother of the appellant and wife of the deceased, cannot be doubted. She is a natural witness and her being the mother, no reason exists for her to tell tale a story or depose terradiddle against the appellant. From her cross examination defence has utterly failed to get elicited any damaging statement eroding her credibility. Otherwise also it will be naive to cogitate that a mother will feign a manipulated and concocted story against her own son as the murderer of her husband and his father. Entire testimony of the widow/PW1, when vetted searchingly, projects that she is a reliable witness with no hostile feeling against the appellant and hence there is scanty reason to discard her version. Categorically she had deposed that it was the appellant who had inflicted a single blow on the neck of the deceased and she could not spot the weapon earlier because one hand of the appellant was towards back. Her graphic description about the incident is convincing and seems to be unblemished. PW1 is well supported by PW2 and PW8 in all significant aspects of the incident and from them also defence has not been able to extract any favouring material to caste a doubt on the authenticity of the prosecution version. Here it will but be apt to mention that entire cross examination of these witnesses circled round insignificant and trivial aspects and no major effort was made to dislodge their testimonies. Attour version of the widow is also credited with res gestie evidence of PW3, her daughter, who in no uncertain terms stated that she had spotted appellant escaping from the incident scene. Still significant is the fact that the name of the appellant surfaced immediately after the incident as the murderer and at least two of

his uncles had deposed as such. Medical evidence of the doctor and recovered weapon of assault further corroborates her depositions and hence it has to be concluded that the mother is a truthful witness. She being the pivotal of the prosecution case and her presence being natural and well cemented that the inescapable conclusion which emerges is that it was the appellant who had assaulted the deceased at the date and time of the incident and but for him nobody else could be the assailant and hence we conclude that appellant is the real culprit.

12. At this juncture we note that no worthwhile submission was canvassed before us challenging the veracity of the FIR version, contents of post mortem examination report, inquest report and site plan and hence we would take that no criticism was available for the defence in respect of these significant documentary evidences. Blood present at the spot with recovery of hatchet fixes incident spot convincingly.

13. Now we advert to the contentious issue regarding the offence proved against the appellant. When facts and evidences are scanned in the light of surrounding circumstances and evidences of witnesses we find sufficient force in appellants contention that the offence against the appellant will not transgress ambit of culpable homicide not amounting to murder and reasons being that the incident occurred at the spur of the moment without any premeditation and a single blow was hurled on the neck. Appellant had separated from rest of the family and as conceded by the mother/PW1 he was demanding his rightful claim which was being denied ostensibly for the reason that the deceased wanted to keep it with rest of the family including his other sons and hence appellant had all the apprehension in his mind that he will be deprived of the usufruct of that property. Appellant had four issues and therefore he must be inquisitive of their welfare and economic wellbeing. Mother who alone was present at the spot had deposed that she could not hear the conversation between the two and hence immediate cause for the appellant to act so bizarrely is not known. We are robbed off the evidence as to what really rankled the appellant that he went extreme to assault his father. Appellant had no criminal proclivity nor he had a criminal back ground. No other incident was reported against him except the present one. He had not abused the deceased nor there was any triadic altercation between them and hence what transpires is that the deceased must have uttered something which had infuriated the appellant who precipitously acted offensively in haste by giving a single blow by hatchet and this

extricates his crime from the ambit of murder and places it within the fold of culpable homicide not amounting to murder punishable u/s 304 part I as the possibility that the appellant wanted to teach a lesson to the deceased for his covetousness cannot be ruled out completely. In this connection we do not approve of the slated view by the learned trial Judge. Reasons which weighed with him as inked in para 26 are wholly insufficient to anoint murder charge on the appellant as they are peripheral, insidious and superficial. Learned trial Judge has recorded that because appellant came at the scene concealing the hatchet and that he used sufficient force on the neck of the deceased when he was bending and therefore his crime will fall within the mischief of murder in fact is an abdication of in-depth analysis of surrounding circumstance and facts which led to the incident. As noted herein above appellant had to foster his family. His wife and children had left him just four days ago possibly because of poor fiscal condition and this has left the appellant all alone in his house. His legitimate share was not being parted away by the father who wanted to give it to his other sons as the statement of the mother in her examination-in- chief is " *But the deceased refused to make partition since other three children were there"*. In her cross examination she has further stated " *Wife of the accused had left his house 3 to 4 days prior to the incident. The accused had four children. The accused was demanding his legitimate share from the properties."* Thus appellant was under enormous mental tormentation and therefore the dialogue between the father and the appellant must have infuriated him. Since in our view the analysis by the learned trial Judge is faulty and unsustainable therefore we take a counter approach to mollify the rigor of the crime from murder to culpable homicide not amounting to murder. Further more from examination of the impugned judgment we have failed to gather convincing material on the above score and hence are of the view that appellant can be held to be guilty only u/s 304 part I and not u/s 302 I.P.C.

14. Turning towards sentence from the record it becomes apparent that appellant had already under gone more than 10 years of R.I. as an under trial as well as during pendency of present appeal. Only in January this year(2014) he was allowed bail but subsequently he was again arrested and put in jail. In our view the period of sentence undergone by the appellant shall meet the ends of justice.

15. In the final outcome, the appeal is allowed in part. Conviction of the appellant u/s 302 I.P.C. and sentence of life imprisonment for that offence

are scored out and instead appellant is convicted u/s 304 part I I.P.C. and for that crime he is sentenced to the period of imprisonment already under gone by him, which is more than 10 years R.I. Fine (Rs. 2000/-) awarded to the appellant and default sentence (6 months additional imprisonment in the event of non payment of fine) remains unaltered. Appellant is permitted to deposit the fine within a month. Appellant since now is incarcerated in jail is directed to be released forthwith, unless he is required in connection with any other case on his furnishing a personal bond of Rs 10,000/- (Rupees thousand) with two solvent sureties of his family members to facilitate him to pay the amount of fine as awarded within the period allowed failing which his personal and surety bonds shall be cancelled and he shall be taken into custody to serve out default sentence.

16. Appeal is allowed in part as above.

17. Let copy of the judgment be certified to the learned trial judge for its information.

Appeal allowed in part.

2015 (I) ILR - CUT- 255

VINOD PRASAD, J & S. K. SAHOO, J.

MATA NOs. 66 & 67 OF 2010

DIPTI MOHANTY @ KANUNGO & ANR. ……...Appellants

.Vrs.

SURYA PRAKASH MOHANTY ……Respondent

A. HINDU MARRIAGE ACT, 1955- S. 9

Petition for restitution of conjugal right – Party seeking relief has to establish that the respondent has withdrawn from the society of himself/herself and such withdrawal was without reasonable excuse – Court should not allow restitution of conjugal rights when the conduct of the respondent was such that it was not possible for the appellant-wife to live with him under the same roof.

In this case the appellant was physically and mentally tortured by the respondent – The respondent had threatened her to kill and had also made character assassination of the appellant but failed to establish the same – The appellant has proved as to what was the reasonable excuses for her to withdraw from the society of the respondent – Held, the impugned decree that the respondent is entitled to a decree of restitution of conjugal rights is set aside.

(Para 11)

B. HINDU ADOPTIONS AND MAINTENANCE ACT, 1956 – S.18.

Maintenance for wife & son – Respondent-husband tortured the wife physically and mentally and made her character assassination – Wife has every right to stay separate and claim maintenance – Merely because section 20 has not been indicated in the cause titled prayer for appellant No.2 (son of the party) cannot be turned down when contents in the application is clear to that effect – Direction issued for payment of Rs.15000/- per month to the appellant No.1 towards the maintenance of the appellants and educational expenses of appellant No.2 from 31.10.2008 i.e the date of filing of the application and the amount if any already paid by the respondent will be adjusted.

(Para 12)

C. HINDU ADOPTIONS AND MAINTENANCE ACT, 1956 – S.18,20

Maintenance to wife and children – Quantum – Maintenance can be fixed by taking into account the position and status of the parties, reasonable wants of the claimant towards food, clothing, shelter and medical attendance and income of the respondent, income if any of the claimant and number of persons the respondent is obliged to maintain.

(Para 12)

Case laws Referred to:-

1.AIR 1984 SC 1562 : (smt. Saroj Rani-V- Sudarshan Kumar Chadha)
2.AIR 2001 SC 1709 : (Chetan Dass –V- Kamala Devi)
3.(2010) 4 SCC 476 : (Rabi Kumar –V- Julmi Devi)
4.AIR 2000 SC 1398 : (Padmja Sharma-V-Ratan Lal Sharma)

For Appellants - M/s. Sidheswar Mohanty, P.K. Mohanty, S. Pattnaik.
For Respondent - M/s. R.K. Mohanty, D.K. Mohanty, S. Mohanty, Sumitra Mohanty, S. Rath, S.N. Biswal, B.K. Nayak-3.

Date of hearing : 02.09.2014
Date of Judgment :12.09. 2014

JUDGMENT

S.K.SAHOO, J.

> "Marriage is that relation between man and woman in which the independence is equal, the dependence mutual and the obligation reciprocal."
>
> -LOUIS K. ANSPACHER

Both the appeals arise out of a common judgment and order dated 27.07.2010 of the learned Judge, Family Court, Cuttack passed in C.P. No. 835 of 2008 and C.P. No.382 of 2008.

The appellants in MATA No.66 of 2010 i.e., Dipti Mohanty @ Kanungo (appellant No.1) and Saktiswaroop Mohanty (appellant No.2) have challenged the judgment and order dated 27.7.2010 of the learned Judge, Family Court, Cuttack passed in C.P. No.835 of 2008 in dismissing the application filed by them under Section 18 of Hindu Adoptions and Maintenance Act, 1956 (hereinafter for short "Maintenance Act") wherein prayer was made for a direction to the respondent to pay Rs.15,000/- per month towards the maintenance of the appellants as well as educational expenses of appellant No.2 with effect from December 2007.

The appellant in MATA No.67 of 2010 i.e., Dipti Mohanty @ Kanungo has challenged the same judgment and order dated 27.7.2010 of the learned Judge, Family Court, Cuttack passed in C.P. No.382 of 2008 in allowing the petition filed by the respondent under section 9 of Hindu Marriage Act, 1955 for decree of restitution of conjugal rights and directing the appellant to return to her matrimonial home with her son Saktiswaroop Mohanty within three months and further directing her to resume conjugal life with the respondent in three months.

Since both MATA No.66 of 2010 and MATA No.67 of 2010 arise out of a common judgment, both the appeals were heard analogously and common judgment is passed.

MATA No.66 of 2010

2. It is the case of the appellants in MATA No. 66 of 2010 that the marriage between the appellant No.1 and the respondent was solemnized on 28.4.1999 as per Hindu customs and rites at Cuttack and at the time of marriage, cash of Rs.3 lakhs, gold ornaments of about 200 gms and other

household articles were given and after the marriage, the appellant no.1 came to stay at her in-law's house at Jatni where she and the respondent lived together as husband and wife and their marriage was consummated. The respondent was serving as an Art Teacher in Jawahar Navodaya Vidyalaya at Zinc Nagar in the district of Sundargarh and after two months of marriage, the respondent took the appellant No.1 to his service place where the couple lived together. During such stay, the appellant No.1 was neglected and tortured by the respondent, for which the father of appellant no.1 brought her back to his house in the month of November 1999. By that time the appellant no.1 was pregnant and she was physically and mentally weak due to non-providing of proper food by the respondent and she was also not getting proper care and moral support from the respondent. Appellant no.2 was born on 20.2.2000 at the parental house of appellant no.1 and the respondent did not pay a single pie towards the medical treatment or the expenses as was incurred during child birth and also during 21st day celebration and all the expenditure were borne by the parents of appellant no.1. In the month of July 2003, the respondent was transferred to Jawahar Navodaya School at Jharsuguda and with much reluctance, the respondent took the appellants to Jharsuguda wherein they stayed inside the school campus. During such stay, the respondent persuaded the appellant no.1 to bring a cash of Rs.5 lakhs from her parents to purchase a vehicle for business purpose and the father of the appellant no.1 was compelled to pay such amount to the respondent so that the appellant no.1 would live peacefully. The respondent persuaded the appellant no.1 to start business to maintain herself and opened a stationary shop and S.T.D. Booth in the said school campus which was managed by the appellant No.1. Even though the appellant No.1 was looking after the business but the respondent was handling the cash and taking away all the profits and most of the time, the appellants were remaining without food and their health condition deteriorated. The respondent also maintained distance from appellant No.1 and in spite of repeated persuasion of the appellant No.1, the respondent did not change his attitude. The respondent compelled the appellant No.1 to bring cash from her father to have a building or land at Cuttack town in his name. As the appellant No.1 did not agree with such demand of the respondent, she was threatened to be killed. Ultimately the appellants were brought from Jharsuguda and they lived in a rented house at Rajendra Nagar, Cuttack and the household articles were also shifted from Jharsuguda to Cuttack. The respondent did not pay any amount to the appellants towards their day to day expenses and house rent. When the appellant No.1 asked the respondent to pay the house rent, he told her to

bring money from her father. The respondent was transferred from Jharsuguda to Nayagarh but he did not take the appellants with him and accordingly the appellants continued to maintain a very miserable and sorrowful life at Cuttack. Due to continuous physical and mental torture of the respondent, finding no other way out, the appellants came back to the parent's house of appellant no.1 with much mental agony but the appellant no.1 was always apprehending danger to her life from the respondent. The appellant No.2 was admitted in a School and the respondent used to threaten the appellant No.1 to take away appellant no.2 forcibly. Due to mental shock on account of the misbehavior of the respondent, the father of appellant no.1 died and since 1st week of December 2007, the respondent finally deserted the appellants without any just reasonable cause. According to the appellants, the respondent was drawing a salary of Rs.28,000/- per month as a Senior Art. Teacher in Jawahar Navodaya Vidyalaya, Nayagarh and he was having a homestead land and building. On the other hand, the appellant no.1 was having no independent source of income to maintain herself and her child and accordingly they prayed for a direction to the respondent for payment of Rs.15,000/- per month towards their maintenance as well as educational expenses of appellant no.2 with effect from December 2007. The application was filed on 31.10.2008.

3. The respondent filed his written statement denying the allegation leveled against him by the appellants and stated that he was maintaining the appellants properly and comfortably and that he has spent all the amount at the time of birth of appellant no.2 and also towards the medical expenses and for celebration of 21st day of appellant no.2. The respondent took the appellant no.1 to his different service places and both of them also visited many historical places and all the expenses were borne by the respondent. The respondent paid a sum of Rs.2 lakhs through Demand Draft to the father of appellant No.1. It is stated that without any just and reasonable cause, the appellant no.1 left the rented house with appellant No.2 and shifted all the household articles to her parental house without the knowledge and consent of the respondent and since 26.3.2008 there is no marital relationship between the appellant no.1 and the respondent. The appellant no.1 being misguided by one Nrupesh Biswal @ Babu was not keeping any relationship with the respondent. The respondent denied the quantum of his salary to be Rs.28,000/- and further stated that he had to maintain his aged parents and unmarried sister and had also to incur expenses for their medical treatment. The respondent claimed to be paying installments regularly towards the loan

amount incurred for the purchase of one Bolero XLI and one TATA load body standing in the name of the appellant No.1.

MATA No.67 of 2010

4. It is the case of the respondent in MATA No.67 of 2010 that after his marriage with the appellant on 28.4.1999, they lived together in the official residence in the campus of Zinc Nagar, Sundargarh and out of their wed-lock a son was born on 20.2.2000. The matrimonial life was very happy and peaceful and in the year 2003 the respondent was transferred from Sundargarh to Jharsuguda and he shifted his family to the official residence at Jharsuguda and their son was admitted in a local school. As both the parties were not happy with the educational system at Jharsuguda, they decided to admit their son in a good school at Cuttack and accordingly a rented house was taken at Rajendra Nagar, Cuttack in the month of December 2007 with the help of one Nrupesh Biswal who was known to the appellant previously. The respondent was staying at Jharsuguda and the appellant and their son were staying at Cuttack and the said Nrupesh was regularly coming to the rented house. The respondent marked abnormal behavior of the appellant and requested the appellant not to entertain Mr. Biswal in the house but she did not oblige. The respondent was transferred to Nayagarh and when he suggested the appellant to accompany him to stay there, the appellant straightway denied to the suggestion of the respondent and continued to stay at Cuttack. It is further indicated in the application that the appellant made a false and frivolous allegation against the respondent and even though he requested his father-in-law and other family members of the in-law family to convince the appellant to shift to the newly transferred place at Nayagarh, they also misbehaved with the respondent for which the application for restitution of conjugal right was filed by respondent with a prayer for a direction to the appellant to return to the company of the respondent.

5. The appellant filed her written statement denying the averments made in the petition filed by the respondent and reiterated about the physical and mental torture given to her by the respondent and she further indicated that the respondent was always demanding money from her parents and accordingly prayed for dismissal of the petition filed by the respondent.

6. The learned Judge, Family Court, Cuttack tried both the cases i.e., C.P. No.835 of 2008 and C.P. No.382 of 2008 analogously.

From the side of the appellants, three witnesses were examined. The appellant no.1 examined herself as P.W.1, one Smt. Kalyani Kanungo, who is the mother of appellant no.1 was examined as P.W.2 and one Laxmi Narayan Hota was examined as P.W.3. From the side of the respondent, the respondent examined himself as O.P.W.1. Numbers of documents were exhibited from both the sides.

Analysis of materials in MATA No.67 of 2010

7. Let us first analyze whether the learned Judge, Family Court was justified in allowing the respondent-husband's petition for restitution of conjugal rights in C.P. No.382 of 2008.

The learned counsel for the appellant submits that the learned Judge, Family Court should not have allowed the restitution of conjugal rights application, particularly when the conduct of the respondent was such that it was not possible on the part of the appellant no.1 to live with him under the same roof.

The learned counsel for the respondent on the other hand supported the impugned judgment and submitted that the learned Family Court has analyzed the oral as well as documentary evidence in proper perspective and considered the submission raised by the respective parties correctly and rightly held that the appellant no.1 has withdrawn from the society of the respondent without any reasonable excuse and the appellant no.1 has failed to discharge the burden of proving the reasonable excuse for withdrawal from the society of the respondent.

Section 9 of the Hindu Marriage Act, 1955 which deals with restitution of conjugal rights reads as follows :-

> "**9. Restitution of conjugal rights**.- When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district Court, for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. "

The section requires that if one of the party i.e. either the husband or the wife withdraws from the society of the other and that too without any

reasonable excuse, then the petition for restitution of conjugal rights filed by the other side would be maintainable and once the Court holds that there was no reasonable excuse for withdrawal of one of the party from the society of the other, it may pass the decree of restitution of conjugal rights accordingly. It is the party withdrawing from the society of the other has to prove that there are reasonable excuses for him/her for such withdrawal and the burden of proof would lie on him/her.

A wife cannot be compelled to stay with her husband or with her in-laws under adverse circumstances, particularly when she has been physically and mentally tortured and has not been properly treated with love and affection by her husband and in-laws' family members. She has to live her life in a dignified manner in the house of her in-laws and any kind of willful conduct on the part of the husband or her in-laws particularly affecting her character would be sufficient for the wife to withdraw from the society of her husband and to stay separately. No doubt, the burden is on the party who has withdrawn from the society of the other to prove the reasonable excuses, but strict proof of such matter should not always be insisted upon, in as much as what would be the proper reasonable excuse for a party to withdraw from the society of the other would depend upon the facts and circumstances of each case and no straight jacket formula can be laid down. It may vary from house to house or to person to person. It all depends upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. In some cases, even a single incident would be sufficient for a party to withdraw from the society of the other. For example, if a wife does not feel safe in the company of her husband and in-laws and her life is in danger and she is physically and mentally tortured in connection with the demand of dowry or the husband brings unfounded allegations against her character or keeps illicit relationship with another lady then the wife would certainly be justified in withdrawing from the company of the husband. These grounds are not exhaustive, but have been given by way of illustration. Of course, the other side can adduce evidence to negative the grounds of reasonable excuse of withdrawal.

The terms 'reasonable excuse' have not been defined under the Hindu Marriage Act, 1955. The aspect of 'reasonable excuse' is a question of fact and each case is to be considered independently with reference to the facts and circumstances of that case. The petitioner in an application under section 9 of the Hindu Marriage Act has to establish the following aspects:-

(a) That the respondent has withdrawn from the society of himself/herself;

(b) That such withdrawal was without reasonable excuse.

The term 'excuse' is something more than a mere whim, fad or brain-wave of the respondent.

The object and purpose of marriage as declared by "Dharmasastra"was not merely to satisfy the mutual carnal desire of a man and woman though it did constitute the basis of normal desire for marriage. The coming together of a man and woman is necessary for the fulfillment of the three-fold ideals of life i.e., Dharma, Artha and Kama. The sum and substance of these three goals are that the husband and the wife should remain loyal to each other throughout their life, they should restrain their desire for material pleasure, wealth and prosperity and they should share happiness and misery in discharging their prescribed duties towards the family and the society. It is said that the marriages are settled in heaven. Our country believes in permanent and lifelong marriage bond between the husband and the wife.

8. In case of **Smt. Saroj Rani –v- Sudarshan Kumar Chadha reported in AIR 1984 SC 1562**, it is held as follows:-

> "14…….It may be mentioned that conjugal rights may be viewed in its proper perspective by keeping in mind the dictionary meaning of the expression "conjugal". Shorter Oxford English Dictionary, 3rd Edn. Vol. I page 371 notes the meaning of 'conjugal' as "of or pertaining to marriage or to husband and wife in their relations to each other". In the Dictionary of English Law, 1959 Edn. at page 453, Earl Jowitt defines 'conjugal rights" thus:
>
> "The right which husband and wife have to each other's society and marital intercourse. The suit for restitution of conjugal rights is a matrimonial suit, cognisable in the Divorce Court, which is brought whenever either the husband or the wife lives separate from the other without any sufficient reason; in which case the court will decree restitution of conjugal rights (Matrimonial Causes Act, 1950, S.15), but will not enforce it by attachment, substituting however for attachment, if the wife be the petitioner, an order for periodically payments by the husband to the wife (S.22).

Conjugal rights cannot be enforced by the act of either party, and a husband cannot seize and detain his wife by force (R.v. Jackson (1891) (1 QB 671)".

15. In India it may be borne in mind that conjugal rights i.e., right of the husband or the wife to the society of the other spouse is not merely creature of the statute. Such a right is inherent in the very institution of marriage itself. See in this connection Mulla's Hindu Law-15th Edn. p.567- Para 443. There are sufficient safeguards in S.9 to prevent it from being a tyranny. The importance of the concept of conjugal rights can be viewed in the light of Law Commission-71st Report on Hindu Marriage Act, 1955-"Irretrievable Breakdown of Marriage as a Ground of Divorce, Para 6.5 where it is stated thus:

"Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common things of the matter and of the spirit and from showering love and affection on one's of spring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage-"Breakdown" – and if it continues for a fairly long period, it would indicate destruction of the essence of marriage-"irretrievable break down".

In case of **Chetan Dass –v- Kamala Devi reported in AIR 2001 Supreme Court 1709**, it is held as follows:-

"Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with this spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be control in the interest of the individuals as well as broader prospective, for regulating matrimonial norms for making of a well knit, healthy and not a disturbed and porous society. Institution of marriage occupies an important place and role to play in the society, in general"

9. Let us now analyze the available materials on record to decide whether there were reasonable excuses on the part of the appellant-wife to withdraw from the society of the respondent-husband.

In case of **Rabi Kumar –v- Julmi Devi reported in (2010) 4 Supreme Court Cases 476**, it is held that in exercise of its power, the First Appellate Court can come to a finding different from the one which has been arrived at by the Trial Court especially in a case where appreciation of evidence by the trial court is not proper.

The appellant who was examined as P.W.1 has stated in her evidence affidavit, inter alia, that the during her stay at Sundargarh, the respondent neglected her by not providing proper food, taking care and giving moral support and most of the time the respondent was returning at late night and on being asked, he was scolding her. She stated that while she was staying at Sundargarh with her two months baby and remaining in the school campus, she and her baby used to suffer cold and fever but without providing treatment, the respondent was regularly sending her to Cuttack by bus and not providing any money for such treatment. She further stated that the respondent demanded Rs.5 lakh from her parents to purchase a vehicle for business purpose which were complied with by her father. She further stated that she was compelled to manage a STD booth with school stationeries inside the school campus even though she had to take care of her small child. She further stated that she was alone doing all household work and the respondent was always threatening to kill her in case she raises her voice. She further stated that the respondent left her and her child in a rented house at Rajendra Nagar, Cuttack on the pretext of son's proper education but did not pay any amount to meet day to day expenditure and also demanded house or land at Cuttack from her parents to be recorded in his name. The respondent was also not paying her house rent, for which finding no other alternative she along with her son came to her parent's house in the month of May 2008. She has stated that the respondent has censured on her character by naming a person Nupesh Biswal who is a stranger to her.

In the cross examination, the appellant has stated that the respondent started assaulting her two months after marriage. She further stated that after she was brought to Cuttack forcibly, neither the respondent came to see her nor sent any money to her for maintenance. The appellant has categorically stated in the cross-examination that it was not possible on her part to go back

to the respondent and to lead a happy conjugal life with him as he made her character assassination. She further stated that she did not go to the house of her father- in-law after the respondent neglected her as her mother-in-law told her over telephone not to come to her house. She has further stated that she was not willing to stay with the respondent even if he takes a house on rent to live with him at a place of her choice as the respondent was threatening to kill her.

The evidence of P.W.1 is corroborated by her mother Smt. Kalyani Kanungo (P.W.2) who also stated that appellant was always complaining before her that the respondent was neglecting her and their son. She also stated about the demand of Rs.5 lakh raised by the respondent and fulfillment of such demand by her husband. She further stated that the respondent scolded the appellant and threatened to kill her and was also demanding a house or land in his name.

Thus the evidence of P.W.1 and P.W.2 make it clear as to how the appellant was physically and mentally tortured and humiliated in the hands of the respondent and how the respondent made her character assassination and how she was threatened to be killed. In such a situation when nothing has been elicited in the cross-examination of the appellant, it can be said that the appellant has proved as to what was the reasonable excuses for her to withdraw from the society of the appellant.

10. Though the respondent stated on affidavit that he availed the loan from State Bank of India, Jharsuguda and Union Bank of India, Jharsuguda and purchased one Bolero XLI bearing registration No. OR-23-A-0012 and another TATA load body in the name of appellant and paying monthly installment to the Bank and the appellant was enjoying the fruits of both vehicle but evidence of P.W.3 indicates that at the instance of the respondent, a sale agreement was executed between him and appellant and since 1.9.2007 the Bolero Vehicle is with him and he is regularly paying the loan installment.

11. The respondent has stated in his evidence affidavit that the appellant introduced one Mr. Nrupesh Biswal as her brother and when the appellant behaved in an abnormal manner, he asked her not to entertain Nrupesh Biswal in the house. The plea taken by the respondent that a decision was taken by both of them to admit their son in a good school at Cuttack as they were not happy with the education system at Jharsuguda appears to be not

correct in as much as the respondent has himself stated that there are number of English Medium School at Jharsuguda. The learned Judge, Family Court, Cuttack has observed that the appellant has failed to establish that it was a design on the part of the respondent to live separately from her on the pretext of admitting their son at Cuttack for her better future. When their son was prosecuting his study in Oriya Medium School at Jharsuguda and there were also a number of English Medium Schools at Jharsuguda, the decision of the respondent to leave appellant at Cuttack to look after the studies of their son and asking the appellant to take all the responsibilities single handedly is certainly an attempt/design of the respondent to part with the appellant no.1.

The learned Judge, Family Court has further held that no medical document has been proved by the appellant that she was assaulted by the respondent at different times. The appellant has not stated that the respondent had assaulted her at different times mercilessly. Thus the question of proving any medical document does not arise. The learned Judge, Family Court further held that the appellant has not examined any neighbor to prove the cruelty on her by the respondent. When P.W.2 has corroborated P.W.1 regarding cruelty aspect, non-examination of the neighbor particularly in a case of this nature is not a vital. The learned Judge, Family Court has taken exception to the conduct of the appellant in not lodging any criminal case against the respondent in spite of his threat. Merely because the appellant did not lodge the F.I.R or filed a complaint case against the respondent anticipating that everything would be set right in due course and by passage of time, no exception can be taken to be conduct of the appellant.

The learned Judge, Family Court is also not right in observing that there is no pleading in C.P. No.835 of 2008 suggesting that the respondent has made the character assassination of the appellant.

In the written statement in C.P. No.835 of 2008, the respondent has stated (in para-24) that the appellant No.1 has deserted him being misguided by Nrupesh Biswal @ Babu.

In the evidence affidavit of the respondent in C.P. No.835 of 2008/C.P. No.382 of 2008, he has stated as follows:-

> "8……The opposite party with their son stayed at Cuttack in a rented house. Nrupesh Biswal, who was the nearby resident helped the opposite party at times and was regularly coming to the rented house.

9. That since opposite party introduced Mr. Nrupesh Biswal as her brother, I had never objected to his regular visit to our house at Cuttack.

10. That, after one month stay at Cuttack, the opposite party started behaving me in an abnormal manner, sometimes she questioned about the frequent visit from Jharsuguda to Cuttack and denied me for conjugal relationship as a result certain doubt developed in my mind and accordingly I requested the opposite party not to entertain Mr. Nrupesh Biswal in my house, but she reacted violently and directly told me that if Babu will not come to her rented house then she will continue her friendship outside without caring any body".

In the petition in C.P. No.382 of 2008, the respondent has stated as follows:-

"8. That as per their decision both the petitioner as well as the opp. party decided to shift to a rented house at Cuttack and accordingly in the month of December 2007 with the help of one Nrupesh Biswal @ Babu who was previously known to the opp. party as well as her parental family members, one rented house at Rajendra Nagar was arranged.

9. That the petitioner with the help and cooperation of Nrupesh Biswal @ Babu shifted all the household articles, furnitures from Jharsuguda to Cuttack.

10. That since the petitioner was serving in the Novodaya Vidyalaya at Jharsuguda and the opp. party with their son was staying at Cuttack in a rented house, Nrupesh Biswal @ Babu who was the nearby resident was helping the Opp. party at times and was regularly coming to their rented house.

11. That since the Opp. party introduced Mr. Nrupesh Biswal as her brother, the petitioner had never objected to his regular visit to their rented house at Cuttack.

12. That after one month stay at Cuttack the Opp. party started behaving the petitioner in a abnormal manner, some time she questioned his frequent visit from Jharsuguda to Cuttack and denied

> the petitioner of his conjugal rights as a result certain doubt developed in his mind and accordingly the petitioner requested the Opp. party not to entertain Mr. Biswal in his house but she reacted violently and directly told the petitioner that even if "Babu" will not enter in her rented house then also she will continue her friendship outside without caring anybody."

In view of such averments made in the written statement in C.P. No.835 of 2008 and in the petition in C.P. No.382 of 2008 as well as in the evidence affidavit, it is very much clear that the respondent has made character assassination of appellant but he has miserably failed to establish any kind of relationship between the appellant and Babu @ Nrupesh Biswal.

Thus not only the appellant was physically and mentally tortured in the hands of the respondent but also the respondent indulged himself in the mudslinging and character assassination of the appellant and as such the appellant has every right to stay separately from the respondent in order to avoid further humiliation and to live her life in a decent and dignified manner. Accordingly, we are of the opinion that the appellant has proved the aspect of "reasonable excuse" on her part for withdrawal from the society of the respondent.

In view of our finding, we hold that the learned Judge, Family Court was not justified in allowing C.P. No.382 of 2008 and observing that the respondent is entitled to a decree of restitution of conjugal rights and also directing the appellant to return to her marital home with her son and to resume conjugal life with the respondent.

Thus in view of our conclusion, MATA No.67 of 2010 filed by the appellant-wife is allowed and the impugned judgment and order dated 27.7.2010 passed in C.P. No.382 of 2008 of the learned Judge, Family Court, Cuttack is set aside.

Analysis of materials in MATA No.66 of 2010

12. The application filed by the appellants under section 18 of Maintenance Act vide C.P. No.835 of 2008 was rejected on the ground that the appellant no.1 has failed to discharge the burden of proving that she had reasonable excuse for withdrawal from the society of the respondent.

The learned counsel for the appellants in MATA No. 66 of 2010 challenged the dismissal of C.P. No. 835 of 2008 on the ground that the

impugned judgment is totally silent about the merits of the maintenance case while allowing the case of restitution filed by the respondent and the simple dismissal order passed without giving any reasonable cause is totally illegal, erroneous and misconceived. It is further contended that when the respondent has made allegation of illicit relationship between the appellant no.1 and another and made her character assassination, but failed to prove the same and when the respondent had subjected her to cruelty and torture, the appellant no.1 has every right to stay separately and claim maintenance. It is further contended that as the appellant no.1 has no means to maintain her as well as appellant no.2 and appellant no.2 is prosecuting his studies in a school, the learned Judge, Family Court should not have rejected the maintenance application and as such the impugned judgment suffers from non-application of mind.

The learned counsel for the respondent supported the dismissal order and contended that the appellants are not entitled to maintenance under the facts and circumstances of the case.

As we have held that there was reasonable excuse on the part of the appellant no.1-wife for withdrawal from the society of the respondent husband, she has every right to stay separately and claim maintenance for herself and for the minor son (appellant no.2) and for the educational expenses of the appellant no.2.

Section 18 of Maintenance Act confers a right on a wife to be maintained by her husband during her life time. According to Mulla, right of wife for maintenance is an incident of the status or estate of matrimony and a Hindu is under a legal obligation to maintain his wife. (see Mulla, Principles of Hindu Law, Volume-I, 18th E. 2001, Pp-454, 455).

No doubt, the appellants have filed an application only under section 18 of Maintenance Act which deals with maintenance of wife whereas section 20 of the said Act deals with maintenance of children and aged parents. Merely because section 20 has not been indicated in the cause title, prayer of appellant no.2 cannot be turned down particularly when the contents of the application as well as the prayer portion clearly mention about such aspect.

In case of **Padmja Sharma –v- Ratan Lal Sharma reported in AIR 2000 SC 1398**, it is held as follows:-

> "10. Maintenance has not been defined in the Act or between the parents whose duty it is to maintain the children. Hindu Marriage Act, 1955, Hindu Minority and Guardianship Act, 1956, Hindu Adoptions and Maintenance Act, 1956 and Hindu Succession Act, 1956 constitute a law in a coded form for the Hindus. Unless there is anything repugnant to the context, definition of a particular word could be lifted from any of the four Acts constituting the law to interpret a certain provision. All these Act are to be read in conjunction with one another and interpreted accordingly. We can, therefore go to Hindu Adoptions and Maintenance Act, 1956 (for short the "Maintenance Act") to understand the meaning of the "maintenance". In clause (b) of section 3 of this Act, "maintenance" includes (i) in all cases, provisions for food, clothing, residence, education and medical attendance and treatment; (ii) in the case of an unmarried daughter also the reasonable expenses of an incident to her marriage and under Clause (c) "minor" means a person who has not completed his or her age of 18 years. Under section 18 of the Maintenance Act, a Hindu wife shall be entitled to be maintained by her husband during her life time. This is of course subject to certain conditions with which we are not concerned. Section 20 provides for maintenance of children and aged parents. Under the section, a Hindu is bound, during his or her life time, to maintain his or her father or mother. Section 20 is, therefore, to be contrasted with section 18."

Law is well settled that while fixing the quantum of maintenance, the following significant points should necessarily be taken into account such as (i) position and status of the parties (ii) reasonable wants of the claimant towards food, clothing, shelter and medical attendance (iii) income of the respondent (iv) income, if any of the claimant (v) number of persons the respondent is obliged to maintain.

The respondent admits in his evidence affidavit dated 4.5.2010 that he is working as an Art Teacher at Jawahar Navodaya Vidyalaya and his monthly salary is Rs.24,000/-. The appellants have filed an information sheet obtained from the Principal, Jawahar Navodaya Vidyalaya, Tarbha in the district of Sonepur obtained under RTI Act indicating therein that the gross salary of the respondent who is serving as an Art Teacher in the said institution is Rs.50,110/- for the month of July 2014 and the net salary is Rs.45,117/-. Though according to the respondent, he is spending Rs.5000/- for his aged parents and invalid sister but nothing has been proved to

establish the same. The evidence on record further indicates that the appellants have no means to maintain themselves. The appellant No.2 is now reading in School. Appellant no.1 has categorically stated that she is maintaining a miserable life and unable to bear the study expenses of appellant no.2. Considering the requirement of the appellants for their maintenance and also the educational expenses of appellant no.2 Shaktiswroop Mohanty vis-à-vis the income of the respondent, we direct the respondent to pay a sum of Rs.15,000/- per month to the appellant no.1 towards the maintenance of both the appellants as well as for the educational expenses of appellant no.2.

Accordingly, MATA No.66 of 2010 is allowed. The impugned Judgment and order dated 27.7.2010 passed in C.P. No.835 of 2008 by the learned Judge, Family Court, Cuttack is hereby set aside.

The respondent is directed to pay monthly maintenance of Rs.15,000/- to the appellant no.1 from 31.10.2008 i.e., the date of filing of the application vide C.P. No.835 of 2008 for the maintenance of the appellants as well as for the educational expenses of appellant no.2. The amount already paid by the respondent to the appellants towards maintenance, if any, will be adjusted accordingly. The arrear amount is to be paid by the respondent to the appellant no.1 within a year from today in six equal installments. The respondent shall go on paying the monthly maintenance regularly in addition to the payment of arrear dues. With the aforesaid observation, both the appeals are allowed.

Appeas allowed.

2015 (I) ILR - CUT- 272

VINOD PRASAD, J & PRAMATH PATNAIK, J

MATA NO. 93 OF 2012

SMT. PRATIMA MOHAPATRA @ NEPAK ……..Appellant

.Vrs.

DIBAKAR MOHAPATRA ……Respondent

HINDU MARRIAGE ACT, 1955 – S.25

Permanent alimony – How to fixup – No fixed formula can be adopted but it would depend on status of parties, their social needs and the financial capacity of the husband and other issues.

In this case, the appellant-wife was 51 years old at the time of filing of the case and the life expectancy of a female being minimum 70 years, monthly permanent alimony is enhanced to Rs. 5,000/- per month and compounding the same for 19 years, it comes to Rs. 11,40,000/- which will be paid to the appellant-wife within six months in three equal installments – However on failure of payment the amount shall carry 7% interest per annum. (Para 11)

Case laws Referred to:-

1. AIR 2011 SC 2748 : Vinny Paramvir Parmar -V- Paramvir Parmar
2. AIR 2013 SC 415 : U.Sree -V- U. Srinivas

For Appellant - M/s. R.K.Patnaik, G.Acharya, S.Jena, B.C.Parija & R.R.Rout.

For Respondent - M/s. D.P.Dhal, S.K.Dash & A.Tripathy

Date of hearing : 11.11.2014
Date of judgment : 02.12.2014

JUDGMENT

PRAMATH PATNAIK, J.

This appeal has been filed by the appellant wife under Section 19(1) of the Family Court Act, 1984. The challenge has been made to the impugned judgment and order dated 04.11.2011 passed by the learned Judge, Family Court, Bhubaneswar in Civil Proceeding No.578 of 2011 inter alia to the extent of enhancement of permanent alimony from Rs.3,00,000/- (rupees three lakhs) to Rs.20,00,000/- (rupees twenty lakhs).

2. The facts as depicted in this appeal are that the present appellant filed a petition under Section 13 of the Hindu Marriage Act before the learned Judge, Family Court, Bhubaneswar inter alia praying for passing of a decree of divorce by dissolution of marriage and further prayer for a direction to the respondent to pay Rs.20,00,000/- towards permanent alimony to her along with cost of the suit vide C.P. No.578 of 2011.

3. The appellant and respondent being Hindus got married on 25.02.1988. The appellant after marriage stayed in her in-laws house and led conjugal life. It has been stated that the parents of the respondent constructed a building at Kamapalli, Berhampur. Thereafter the respondent started demanding more valuable articles and the house at Berhampur belonging to the parents of the appellant. Since the demand was not acceded to, the appellant was subjected to torture and mental cruelty and the situations became so unbearable that she had left her in-laws house. Since 13.09.1991, both the appellant and respondent have been staying separately. The appellant is staying with her daughter. During the subsistence of the first marriage, the respondent got married for the second time which shattered the hopes of the appellant for a reunion. Left with no alternative, the appellant filed the aforesaid proceeding seeking a decree of divorce and consequential permanent alimony. Despite service of notice, the respondent chose neither to appear nor to file any objection controverting the allegation/averments made by the appellant. The present respondent had earlier filed a suit in the court of learned Civil Judge (Sr. Division), Berhampur vide O.S. No.26 of 1993 seeking a decree of divorce which was dismissed on contest on 04.12.2002. Against the order of dismissal, the present respondent preferred an appeal before the learned District Judge, Berhampur which was numbered as Mat Appeal No.02 of 2003 subsequently transferred to 2nd Addl. District Judge, Berhampur and renumbered as Mat Appeal No.1 of 2006. Subsequently, the respondent withdrew his appeal on 18.02.2006. During pendency of O.S. No.26 of 1993, the present respondent filed an application under Section 151, C.P.C. with a prayer to pass a decree of divorce without examining the parties. The present appellant who was the respondent in that case had filed counter and learned Civil Judge (Sr. Division), Berhampur after hearing the application, rejected the same. Against that order, the present respondent filed a Civil Revision before the learned District Judge, Berhampur in Civil Revision No.31 of 2000 which was transferred to the court of 1st Addl. District Judge, Berhampur, renumbered as Civil Revision No.5 of 2000 and the same was dismissed vide order dated 23.02.2001. The present respondent preferred writ application vide O.J.C. No.9168 of 2001 challenging the order of dismissal in civil revision. This Court vide order dated 12.05.2008 disposed of the said writ application inter alia directing the trial court to dispose of the same as expeditiously as possible preferably within a period of four months, if there will be no impediment. However, at the time of disposal of the writ application, the fact of dismissal of the O.S. No.26 of 1993 on 04.12.2002 was not brought to the notice of this Court.

4. On perusal of factual matrix, learned Civil Judge (Sr. Division), Berhampur while deciding issue nos.2 and 3 held that the respondent subjected the appellant with the cruelty and desertion. Since the allegation/averments made by the appellant has not been controverted/rebutted by the respondent, learned Judge, Family Court, Bhubaneswar has come to the categorical finding that there are just grounds for dissolution of marriage and the appellant is entitled for divorce. So far as permanent alimony is concerned, learned Judge, Family Court, Bhubaneswar has fixed Rs.3,00,000/- (rupees three lakhs) towards permanent alimony.

5. After perusal of the lower court records, we have bestowed our anxious consideration. Learned counsel for the appellant has assailed the impugned judgment and order dated 04.11.2011 on the following grounds :

(i) That the permanent alimony granted by the learned Judge, Family Court, Bhubaneswar appears to have been made without considering the cost of living in the present society as well as the economic condition of the appellant.

(ii) Learned Judge, Family Court, Bhubaneswar has erred in law in not taking into consideration the maintenance of the unmarried daughter who has attained marriage of the age and the marriage expenses to be incurred by the appellant.

(iii) Learned Judge, Family Court, Bhubaneswar has acted illegally in fixing the permanent alimony to Rs.3,00,000/- (rupees three lakhs). Although no rebuttal evidence has been made by the respondent regarding the income. On the other hand, learned counsel for the respondent husband has strenuously urged and vehemently defended the impugned judgment passed by the learned Judge, Family Court, Bhubaneswar.

6. Section 25 of the Hindu Marriage Act deals with permanent alimony and maintenance, which reads as under :

> "**Permanent alimony and maintenance**-(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the husband shall pay to the appellant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the

husband's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the husband."

7. Hon'ble apex Court in a catena of decisions has dealt with Section 25 of the Hindu Marriage Act pertaining to permanent alimony and maintenance. The guidelines propounded by the Hon'ble apex Court in landmark judgments in the case of ***Vinny Paramvir Parmar v. Paramvir Parmar,*** AIR 2011 SC 2748. Paragraph-12 of the said judgment held as follows :-

"*12. As per Section 25, while considering the claim for permanent alimony and maintenance of either spouse, the husband's own income and other property, and the income and other property of the applicant are all relevant material in addition to the conduct of the parties and other circumstances of the case. It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony*."

8.In the case of ***U. Sree –vrs.- U. Srinivas,*** AIR 2013 SC 415, the Hon'ble Supreme Court has determined the permanent alimony taking into consideration the status of the husband and social strata to which both the parties belonged. Hon'ble apex Court has held that no arithmetical formula can be adopted but the alimony would depend on

status of parties, their social needs, financial capacity of husband and other issues and the court has to ensure that the wife lives not luxuriously but with dignity with comfort. Therefore the quantum is to be fixed considering the status and strata to which the husband and the wife belong.

9. So far as the basis of the claim for permanent alimony of the appellant is concerned, the appellant in the proceeding before the learned Judge, Family Court, Bhubaneswar has submitted that the respondent being a practicing advocate of the Berhampur Bar Association, has been earning Rs.50,000/- per month. He has also got a double storied building getting monthly income of Rs.10,000/-. The respondent has also got agricultural land and from that sources is getting Rs.1,00,000/- per annum and also getting interest from fixed deposits. The said assertion of the appellant has gone un-rebutted and doctrine of non-traverse applies in this case.

10. During course of argument, it has been stated at the Bar by the learned counsel for the appellant that the appellant being a hapless and helpless woman has been taking utmost care of her daughter and in the meantime she has got married for which more than 11 lakhs has been spent. Apart from that the appellant has to maintain herself and she has to bear all her future medical expenses. The conduct of the respondent has put the appellant in a state of destitute.

11. The appellant at the time of filing of the MATA was 51 years and the life expectancy of a female being 70 years minimum, we feel it appropriate to enhance the monthly permanent alimony to Rs.5,000/- (rupees five thousand) per month and taking into consideration compounding the same for 19 years, the whole permanent alimony comes to around about Rs.11,40,000/- (rupees eleven lakh forty thousand) without deduction of any amount which has already been paid to the appellant wife under the direction of different courts in the meantime. The amount of permanent alimony will be paid to the appellant wife within a period of six months in three equal installments. First installment falling on 31st January 2015, second installment on 31st March 2015 and the last installment shall be paid by 31st May 2015. On failure of payment of aforesaid installments in time, the amount shall carry 7% interest per annum and the appellant will be free to take recourse to law for its realization.

With the aforesaid direction, we allow the MATA No.93 of 2012 but there shall be no order as to cost. Appeal allowed.

2015 (I) ILR - CUT- 278

INDRAJIT MAHANTY, J.

CRLMC. NO. 965 OF 2008

M/S. PRAGATI VENTURA PVT. LTD. ……..Petitioner

.Vrs.

M/S. JASMINE ROAD LINES ……Opp.Party

NEGOTIABLE INSTRUMENTS ACT, 1881 - S. 138

Dishonour of cheque – Notice issued to the petitioner on 27.12.2007 – Petitioner received notice on 2.1.2008 – Before expiry of 15 days from the date of receipt of notice by the petitioner, complainant-O.P. filed the complaint case on 14.1.2008 – Magistrate took cognizance on 29.1.2008 – Order challenged – Held, even if a complaint is filed before expiry of the 15 days period since the order of cognizance has been taken after expiry of 15 days period, the order taking cognizance cannot be allowed to be challenged on such ground – The writ petition having no merit is dismissed.

Case law Relied on :-

AIR 2000 SC 2946 : (Narsingh Das Tapadia-V- Goverdhan Das Patani)

For Petitioner - M/s. R.N. Panigrahi, D. Panigrahi, A.Panigrahi & S.K. Mohapatra.

For Opp.Party - Mr. K.A.Guru

Date of Judgment : 19.06.2014

JUDGMENT

I. MAHANTY, J.

The present application under Section 482 Cr.P.C. has been filed by the petitioner-M/s. Pragati Ventura Pvt. Ltd. seeking to challenge an order of cognizance dated 29.01.2008 passed by the learned S.D.J.M.(S), Cuttack in 1.C.C. Case No.64 of 2008.

2. Shorn of unnecessary detail it would suffice to note herein that opposite party-M/s. Jasmine Road Lines received payment of Rs.26,10,000/- towards its dues relating to supply of iron ore fines by way of cheque dated 03.12.2007 drawn on Axis Bank Ltd. The said cheque was duly deposited in the bank for clearance and when the same was dishonoured, a notice under

Section 138 of N.I. Act was issued to the petitioner on 27.12.2007 demanding the cheque amount from the petitioner to be paid within 15 days of the receipt of the notice.

3. The petitioner's claim is that it received notice on 02.01.2008 but without waiting for the expiry of the 15 days period as mandated, the complainant-opposite party filed the aforesaid complaint case on 14.01.2008. It is submitted on behalf of the petitioner that the statutory period of 15 days notice is mandatory and only on the failure of the petitioner to make payment within 15 days thereafter, would give rise to cause of action for filing of the complaint. The present complaint having been filed before the 15 days period lapsed, the order of cognizance ought to be quashed.

4. The aforesaid contention of the petitioner is wholly felicitous. Even though the complainant-opposite party issued notice under Section 138 N.I. Act on 27.12.2007 and the petitioner claims to have received the same on 02.01.2008 and even though the complaint case was filed prior to the expiry of 15 days therefrom and filed on 14.01.2008, from the impugned ordersheet it clearly appears that the order of cognizance was passed by the learned S.D.J.M.(S), Cuttack on 29.01.2008 clearly beyond the 15 days offered to the petitioner. If the petitioner possessed any bona fide, he could have made payment within the period statutorily prescribed and sought for quashing of the proceeding. The petitioner cannot be permitted to take advantage of such situation, since it is well settled by the Hon'ble Supreme Court in the case of ***Narsingh Das Tapadia vs. Goverdhan Das Patani,*** A.I.R. 2000 S.C. 2946 that even in a case where a complaint is filed prior to expiry of 15 days of notice, the same cannot be said to be incompetent since the bar of expiry of 15 days is only for the purpose of taking cognizance and not for filing of the complaint and, therefore, even if a complaint is field before expiry of the 15 days period, if the order of cognizance has been taken after the expiry of 15 days period as in the present case, the order of cognizance cannot be allowed to be challenged on such ground.

5. In view of the above, I find no merit in the present petition and the same stands dismissed. The interim order stands vacated. The Registry is directed to immediately intimate the trial Court to proceed with the matter expeditiously.

Application dismissed.

2015 (I) ILR - CUT- 280

INDRAJIT MAHANTY, J.

CRLMC. NO. 3235 OF 2012

PARTHA SARATHI NAYAK .....Petitioner

.Vrs.

STATE OF ORISSA (VIGILANCE DEPT.) .....Opp.Party

CRIMINAL PROCEDURE CODE, 1973 - Ss. 190, 204

Taking of cognizance and issue of process – Requirement – Court has to apply its judicial mind and test the materials on record – Not necessary to record detailed discussion on the merits of the case so as to find out if the allegations and the charges are true or not.

In this case the order of cognizance indicates that the Magistrate has perused the F.I.R., charge sheet, seizure list and Sanction order and found the existence of a prima facie case – Held, no reason to interfere with the impugned order. (Para 5)

Case law Referred to:-

(2008) 39 OCR 895 : (Saroj Kumar Mahapatra-V- State of Orissa)

For Petitioner - M/s. T. Nanda & S.N. Mishra.
For Opp.Party - Mr. P.K. Pani, Addl. Standing Counsel.

Date of judgment: 15.07.2014

JUDGMENT

I. MAHANTY, J.

The present application under Section 482 Cr.P.C. has come to be filed by the petitioner-Partha Sarathi Nayak, Supply Inspector, Badgaon Block in the district of Sundargarh seeking to challenge an order of cognizance dated 21.12.2007 passed by the learned Special Judge (Vigilance), Balangir in C.T.R. Case No.129 of 2007, inter alia, on the ground that the composite order of cognizance and issuance of process passed by the learned Special Judge (Vigilance), Balangir had been passed in a mechanical manner without prima facie satisfaction regarding the complicity of the petitioner in the alleged commission of the offence and as such the impugned order indicates non-application of judicial mind.

2. Mr. T. Nanda, learned counsel for the petitioner contended that Section 190 Cr.P.C. which stipulates the requirement of taking of cognizance and Section 204 Cr.P.C. deals with the requirement for issue of process and consequently contends that an order of cognizance cannot be equated with the issuance of process and an order of cognizance does not ipso facto require issuance of process which can only be issued by a Magistrate taking cognizance of an offence to form an opinion whether there is sufficient ground for proceeding or not. Accordingly, it is submitted that it would be clear from the order impugned that the court below has formed no opinion regarding his subjective satisfaction about commission of alleged offences by the petitioner and the court below has erroneously equated the order of cognizance with that of issuance of process in a mechanical manner without recording his prima facie satisfaction. In this respect, reliance has placed by the learned counsel for the petitioner on the judgment rendered by this Court in the case of Saroj Kumar Mahapatra V. State of Orissa, (2008) 39 OCR 895 as well as several other judgments referred therein. In the aforementioned case, this Court came to conclude that the order of taking cognizance impugned therein did not disclose the prima facie satisfaction of the trial court regarding availability of materials for taking cognizance against the petitioner, inasmuch as the subjective satisfaction of the trial court with regard to the complicity of the petitioner in the alleged offence has not been disclosed while proceeding to take cognizance of the offence under Section 13(1)(d) read with Section 13(2) of the P.C. Act. Accordingly, the order of cognizance was set aside and the matter was remitted back to the trial court to peruse the materials on record and thereafter to arrive at prima facie satisfaction as to whether materials were available for taking cognizance of the offence against the petitioner.

3. Mr. P.K. Pani, learned Additional Standing Counsel for the Vigilance Department, on the other hand, contended that the fact situation that arose for consideration in the case of Saroj Kumar Mahapatra (supra) and the case at present hand are distinct and, therefore, the earlier judgment of this Court would have no application to the present circumstances of the case. In this respect, it would be relevant to quote the order of cognizance in the case of Saroj Kumar Mahapatra (supra), which is as follows:

> "Case record is received from C.J.M., Berhampur. Register. Cognizance U/s.13(1)(d) r/w Sec.13(2) of P.C. Act is taken against the accused-Prahalad Palo and others. Issue summons to the accd. Persons, fixing 12.9.2002 for appearance of accd."

And, in the present case, the impugned order reads as under:

"Record is received from the C.J.M., Sambalpur and taken to my file. Register.

Charge sheet U/s.13(2) r/w 13(1)(d)/7 of P.C. Act, 1988 is received against the accused Partha Sarathi Nayak.
Perused the FIR, Charge Sheet, statement of the witnesses u/s.161 Cr.P.C., Seizure list, sanction order and other connected papers.

The materials available on record prima facie reveals commission of offences U/s.13(2) R/w 13(1)(d)/7 P.C. Act, 1988. Hence cognizance of those offences is taken.

Issue summons to the accused person fixing 31.1.08 for his appearance."

It is submitted on behalf of the State that in the case at hand, the trial court has applied its judicial mind and in its order taking cognizance and the same would be clearly visible from the words "perused", "reveals commission of offence" and "found that there is prima facie case".

4. In the light of the submissions as recorded hereinabove, it would be relevant at this stage also to take note of the basic allegations against the present petitioner which would appear from the records appended to the application. It appears that Sambalpur Vigilance P.S. Case No.11 of 2007 came to be registered on 19.03.2007 under Section 7 of the P.C. Act, 1988 purportedly on the basis of an alleged demand for bribe made by the petitioner to the complainant pursuant to which a trap was formed by the vigilance with witnesses and it would appears from the records that demand was made seeking the bribe and payment was made with the tainted notes and the petitioner allegedly accepted the money.

5. On perusal of the records of the case here, it is clear from the impugned order that it is not necessary for a Court to record a detailed discussions on the merits of a case so as to find out if the allegations and the charges are true or not, but the Court has to apply its judicial mind and test the materials on records. In the case at hand, I am satisfied that the order of cognizance in the present case which indicates perusal of the F.I.R. as well as charge sheet, seizure list and sanction order itself clearly establishes the existence of a prima facie case and, therefore, I am of the considered view that the judgment of this Court in the case of Saroj Kumar Mahapatra (supra) do not apply the

fact situations that arise for consideration in the present case and are distinct on facts. Consequently, the present CRLMC has no merits and stands dismissed.

Application dismissed.

2015 (I) ILR - CUT- 283

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

W.P.(C) NO.14696 OF 2009

M/S. PATITAPABANA BASTRALAYA ……..Petitioner

.*Vrs.*

THE SALES TAX OFFICER, PURI & ORS. …….Opp.Parties

ODISHA ENTRY TAX ACT, 1999 – S. 9-C (2)

Notice for assessment of tax – Dealer shall be allowed minimum thirty days time for production of relevant books of account and documents – Non compliance of the mandatory provision – Assessment proceeding is liable to be set aside.

In this case the minimum 30 days time as provided U/s. 9-C (2) of the Act has not been granted to the petitioner so the proceeding initiated pursuant to such invalid notice is illegal – Held, the impugned order passed U/s. 9-C and the consequential demand notice is set aside – The matter is remanded to the Assessing Officer to complete the assessment afresh. (Para 27)

Case laws Referred to:-

1.(2012) 54 VST 1 (Orissa) : (Jindal Stainless Ltd.-V- State of Orissa & Ors.)
2.(2009) 25 VST 220 (Ori.) : (Chintamani Industries-V- Commissioner of Sales Tax, Orissa & Ors.)
3.(2002) 4 SCC 316 : (Commissioner of Customs, Mimbai-V- Virgo Steels, Bombay & Anr.)
4.(2011) 6 SCC 321 : (Mahadev Govind Gharge & Ors.-V- Special Land Acquisition Officer, Upper Kirishna Project, Jam Khandi, Karnataka)
5.(1876) 1 Ch.D.426 : (Taylor-V- Taylor)

6.AIR 1936 PC 253 : (Nazir Ahmed-V- King Emperor)
7.AIR 2004 SC 2615 : (Indian Bank's Association-V- Devkala Consultancy Service)
8.(2008) 4 SCC 755 : (Gujarat Urja Vikar Nigam Ltd.-V- Essar Power Ltd.)
9.(1959) 35 ITR 388 (SC) at 392 : (Y. Narayan Chetty-V- Income-tax Officer)
10.(1985) 59 STC 269 (Ori.) : (Sri Krupasindhu Behera-V- State of Orissa)
11.(1980) 46 STC 232 (AP) (FB) : (M. Reddanna-V- Revenue Division Officer)
12.(1977) 39 STC 426 at 442 (Bom) : (S.K. Manekia-V- Commissioner of Sales Tax)
13.(1935) 3 ITR 112 (lar): AIR 1935 Lah 201 : (Jamna Dhalr Potdar-V- CIT)

For Petitioner - Mr. B. Panda, Sr. Advocate,
B.B. Sahu & S.C. Nanda.
For Opp.Parties – Mr. R.P. Kar,
Standing Counsel

Date of Judgment: 24.09.2014

JUDGMENT

B.N. MAHAPATRA, J.

The present writ petition has been filed inter alia challenging validity of the order of assessment dated 06.07.2009 (Annexure-4) passed under Section 9C of the Orissa Entry Tax Act, 1999 (for short, "OET Act") for the period 01.04.2005 to 13.05.2009.

2. Though several prayers as well as grounds have been made/taken in the writ petition, Mr. Panda, learned Senior Advocate for the petitioner confined his argument to one ground to challenge validity of the assessment order. According to Mr. Panda, the notice for assessment of tax dated 19.06.2009 (Annexure-2), which is foundation of the assessment proceeding, having been issued without allowing 30 days time as provided under sub-section (2) of Section 9C of the OET Act, the said notice is invalid and consequentially, the order of assessment and demand notice are bad in law. In support of his contention, he relied upon the judgment of this Court in the case of *Jindal Stainless Ltd. –v- State of Orissa and others*, (2012) 54 VST 1 (Orissa).

It was further contended that the assessing officer being the creature of the statute cannot act contrary to or *de hors* the provisions of the OET Act.

3. Mr. Kar, learned Standing Counsel for opposite party-Revenue submitted that on the date fixed for production of books of account, the petitioner appeared and produced the books of accounts and did not raise any objection to the validity of the notice and therefore, no prejudice is caused to the petitioner for not allowing him a minimum period of 30 days' time as prescribed under Section 9C(2) of the OET Act. Therefore, the notice not providing 30 days' time is not invalid. Further, notice for assessment of tax issued in Form E-30 as a result of audit, does not require to allow 30 days time to the dealer to produce books of account. Hence, liberty has been given to the Assessing Officer to grant time less than 30 days in the notice. It is further submitted that the provision of Section 9C(2) of the OET Act is not mandatory, it is directory in nature.

4. Placing reliance upon the judgment of this Court in the case of *Chintamani Industries vs. Commissioner of Sales Tax, Orissa and others, [2009] 25 VST 220 (Orissa),* Mr. Kar submitted that unless it is established that violation of a directory provision has resulted in loss and/or prejudice to the party, no interference is warranted. Even in the case of violation of a mandatory provision, interference does not follow as a matter of course.

Further, placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Customs, Mumbai vs. Virgo Steels, Bombay and another, (2002) 4 SCC 316,* it was submitted that even though a provision of law is mandatory in its operation if such provision is one which deals with the individual rights of the person concerned and is for his benefit, the said person can always waive such a right and in the present case the petitioner has waived his right of getting 30 days time to produce the books of account for the purpose of assessment.

Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *Mahadev Govind Gharge and others vs. Special Land Acquisition Officer, Upper Kirishna Project, Jam Khandi, Karnataka, (2011) 6 SCC 321*, it was submitted that if the consequence of non-compliance of any statutory provision is not provided, the requirement may be held to be directory.

Concluding his argument, Mr. Kar made a prayer for dismissal of the writ petition.

5. On the rival contentions of the parties, the following questions fall for consideration by this Court:

(i) Whether notice dated 19.06.2009 for assessment of tax issued in Form E-30 for production of books of account and documents without complying with the mandate of sub-section (2) of Section 9C of the OET Act, by not allowing minimum period of 30 days for production of books of account and documents vitiates the assessment proceedings?

(ii) Whether in absence of a valid notice for assessment of tax in terms of sub-section (2) of Section 9C of the OET Act, the Assessing Officer lacks jurisdiction to pass the order of assessment on the basis of audit visit report?

(iii) Whether the Assessing Officer who is the creature of the OET Act can act contrary to or *de hors* the provisions of the said Act?

(iv) Whether the order of assessment dated 06.07.2009 passed under Section 9C of the OET Act for the period 01.04.2005 to 31.05.2009 is sustainable in law?

(v) What order?

6. Question Nos.(i) and (ii) being interlinked, they are dealt with together.

7. To deal with the above questions, it is necessary to extract sub-sections (1) and (2) of Section 9C of the OET Act.

"**9C. Audit Assessment.—**

(1)Whether the tax audit conducted under Section 9B results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions, evasion of tax or contravention of any provisions of this Act affecting the tax liability of the dealer, the assessing authority notwithstanding the fact that the dealer may have been assessed under Section 9 or Section 9A, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person or through his authorized representative on a date and place specified therein and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.

> (2)Where a notice is issued to a dealer under sub-section (1), he shall be allowed time for a period of not less than thirty days for production of relevant books of account and documents."
>
> *(Underlined for emphasis)*

8. As per sub-section (1) of Section 9C of the OET Act, where the tax audit conducted under Section 9B results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions, evasion of tax or contravention of any provisions of this Act affecting the tax liability of the dealer, the assessing authority serves on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.

Sub-section (2) of Section 9C provides that where a notice is issued to a dealer under sub-section (1) he "shall" be allowed time for a period "not less than thirty days" for production of relevant books of account and documents. The use of the expressions "shall" and "not less than thirty days" in sub-section (2) make it amply clear that the Assessing Officer is bound to allow minimum thirty days' time for production of books of account and documents. On a plain reading of sub-section (2) it further reveals that discretion is vested on the Assessing Officer to allow time more than thirty days for production of books of account but he has no discretion to allow less than thirty days' time for production of books of account.

9. Law is well-settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "*Expressio unius est exclusion alteris*", meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. [*See Taylor v. Taylor, (1876) 1 Ch.D.426; Nazir Ahmed v. King Emperor, AIR 1936 PC 253; Ram Phal Kundu v. Kamal Sharma; and Indian Bank's Association v. Devkala Consultancy Service, AIR 2004 SC 2615, Gujarat Urja Vikas Nigam Ltd. –v- Essar Power Ltd., (2008) 4 SCC 755)]*.

10. If the notice issued is invalid for any reason, then the proceeding initiated in pursuance of such notice would be illegal and invalid. Section 9C(2) is a mandatory provision not with regard to any procedural law but with regard to a substantive right. Any infirmity or invalidity in the notice under Section 9C(2) of the Act goes to the root of jurisdiction of the Assessing Authority. Issue of Notice under Section 9C(2) is a condition precedent to the validity of any assessment under Section 9-C of the Act. If the notice issued for assessment is invalid, the assessment would be bad in law. Therefore, the notice for assessment of tax without allowing the minimum period of 30 days for production of the books of account and documents is invalid in law and consequentially, the order of assessment and demand notice passed/issued are not sustainable in law.

11. Our above view is fortified by the following judicial pronouncements:

12. The Hon'ble Supreme Court in the case of ***Y. Narayana Chetty -vs- Income-tax Officer***, (1959) 35 ITR 388 (SC) at 392, held as under:

> "The notice prescribed by section 34 cannot be regarded as a mere procedural requirement, it is only if the said notice is served on the assessee as required that the Income-tax Officer would be justified in taking proceedings against him. If no notice is issued or <u>if the notice issued is shown to be invalid</u>, then the validity of the proceedings taken by the Income-tax Officer without a notice or <u>in pursuance of an invalid notice</u> would be illegal and void. That is the view taken by the Bombay and Calcutta High Courts in Commissioner of Income-tax –v- Ramsukh Motilal (1955) 27 I.T.R. 54) and R.K. Das & Co. –v- Commissioner of Income-tax, ((1956) 30 I.T.R. 439) and we think that that view is right. " (*underlined for emphasis*)

13. This Court in the case of ***Sri Krupasindhu Behera -v- State of Orissa***, (1985) 59 STC 269 (Ori.), has held as under:

> "The proceeding under the Public Demands Recovery Act is a very strict proceeding and the form prescribed under the statute is of substantial significance. Any mistake in the form, particularly in regard to a material particular, would certainly vitiate the proceeding. The same principle is applicable to collection under the Orissa Sales Tax Act."

14. In ***M. Reddanna -vs- Revenue Division Officer***, (1980) 46 STC 232 (AP)(FB), the Andhra Pradesh High Court has held as under:

> "No reasons were recorded for giving 7 days time for payment of the tax as required by the second proviso to section 16(1) of the A.P. General Sales Tax Act, as against the minimum 15 days time which the petitioner was entitled to under the section. Therefore, the notice of demand in breach of the statutory mandate contained in section 16(1) was invalid".

15. In ***S.K. Manekia –v- Commissioner of Sales Tax***, (1977) 39 STC 426 at 442 (Bom), the Bombay High Court has held as under:

> "(1) Under section 15(1) of the Bombay Sales Tax Act, 1953, the reassessing authority would acquire jurisdiction only if a valid notice under that section was issued and duly served upon the assessee.
>
> (2) Not only a defect in the notice under section 15(1) but also wrong service of the notice under section 15(1) would invalidate the notice and would confer no jurisdiction upon the reassessing authority to initiate proceedings in pursuance of such notice and to pass an order of reassessment."

16. In ***Jamna Dhar Potdar -v- CIT***, (1935) 3 ITR 112 (lar): AIR 1935 Lah 201, it has been held as follows:

> "Apparently, this notice is illegal as it could seem that under section 22(2) of the Act, 30 clear days must be given for furnishing of the return from the date of service. It was held in Kajorimal Kalyan Mal, In re, (1930) ITC 451 (All) = AIR 1930 All 209 that under section 22(2) the Income Tax Officer must give the proposed assessee at least thirty days time within which to furnish his return." If this minimum is denied the notice becomes entirely illegal and no subsequent extension of time will cure the defect that initially lay till the notice issued."

17. In the instant case, notice for assessment of tax as a result of audit in Form E-30 dated 19.06.2009 was issued requiring the petitioner to appear in person or through his authorized agent before the Assessing Officer on 06.09.2009 at 11 A.M. to produce or cause to be produced books of account for the period 2005-06 to 2009-10. Thus, notice in Form E-30 itself shows that minimum thirty days time as provided under sub-section (2) of Section

9C of OET Act has not been granted to the petitioner. Thus, it is a case of clear violation/infraction of the mandatory provisions of Section 9C of the OET Act and proceedings initiated by the Assessing Officer in pursuance of such invalid notice would be illegal and void.

18. The contention of Mr. Kar, learned Standing Counsel for opposite party-Revenue is that the petitioner has not objected to the notice issued for production of the books of account and documents allowing less than 30 days time and therefore, the assessment order passed in pursuance of such notice is not invalid. We are afraid how there can be a waiver of the condition precedent, compliance of which alone can confer jurisdiction upon an Assessing Authority for making assessment. The order of assessment having been passed in pursuance of an invalid notice, it could not be validated by participation of the assessee-petitioner in the assessment proceeding. Consent, acquiescence, participation etc. would not confer jurisdiction when the proceeding initiated on the basis of an invalid notice.

19. In ***Commissioner of Income-tax, Bombay City I -v- Ramsukh Motilal***, (1955) 27 I.T.R. 54 (Bom) at 63, it has been held as under:

> "..... it is difficult to understand how there can be a waiver of the condition precedent, compliance with which alone can confer jurisdiction upon an authority or a tribunal. It is well-settled that no consent can confer jurisdiction upon a court if the court has no jurisdiction, and if we take the view that the Income-tax Officer can have jurisdiction only provided he complies with the conditions laid down in section 34 (of the Indian Income-tax Act, 1922), then no consent by the assessee or no waiver on his part can confer jurisdiction upon the Income-tax Officer."

20. Question No. (iii) is whether the Assessing Officer who is the creature of the OET Act can act contrary to or *de hors* the provisions of the said Act.

Admittedly, the Assessing Authority who has issued the notice for assessment of tax as a result of audit in Form E-30 is the creature of the OET Act. Therefore, he cannot in any manner act contrary to or *de hors* the provisions of the OET Act. Since sub-section (2) of Section 9C of the OET Act mandates that the dealer shall be allowed time for a period of not less than thirty days for production of relevant books of account and documents, the assessing officer being the creature of the statute cannot allow time less

than thirty days. On this score, the notice issued under Annexure-2 for assessment of tax as a result of audit is invalid.

21. At this juncture, it would be profitable to refer to the judgment of the Hon'ble Supreme Court in the case of ***Krushna Chandra Sahoo –v- Bank of India***, AIR 2009 Ori 35 : 106 (2008) CLT 713, wherein it has been held as follows:

> "8. A Constitution Bench of the Hon'ble Supreme Court in Sukhdev Singh and others –v- Bhagatram Sardar Singh Raghuvanshi and another, (1975) AIR 1975 SC 1331 held that the statutory authorities cannot deviate from the statutory provisions and any deviation, if so made, is required to be enforced by legal sanction of declaration by the Courts invalidating such actions in violation of the statutory Rules and Regulations. A similar view had been reiterated by the Apex Court in Ambika Quarry Works etc. –v- State of Gujarat and others, (1987) 1 SCR 562; Purushottam –v- Chairman, Maharashtra State Electricity Board and another, (1999) 6 SCC 49 and Sultan Sadik –v- Sanjay Raj Subba and others, AIR 2004 SC 1377.
>
> 9. Therefore, it is evident that when the action of the instrumentalities of the State is not as per the Rules and Regulations and supported by the statute, the Court must exercise its jurisdiction to declare such an act illegal and invalid. It becomes the duty of the Court to ensure compliance of such Rules and Regulations for the reason that they are binding on the authorities. Any order or action done by the authority in violation of the statutory provisions is constitutionally illegal and this cannot claim any sanctity in law. There can be no obligation on the part of the Court to sanctify such illegal act."

22. The various decisions relied upon by Mr.Kar, learned Standing Counsel are of no assistance to the opposite party-Sales Tax Department for the reasons stated hereinabove. Moreover, the facts of those cases are completely different from the facts of the present case.

23. The decision in the case of ***Mahadev Govind Gharge and others*** *(supra)* delivered by the Hon'ble Supreme Court is in connection with an election matter and that too in appeal stage and not in original stage as in the present case.

24. The case in *Chintamani Industries (supra),* relates to cancellation of registration certificate of the applicant, when it had no business during the preceding three consecutive financial years and also in the year 1999-2000. In that case, this Court has placed reliance upon the judgment of the Hon'ble Supreme Court in the case of *Rajendra Singh vs. State of Madhya Pradesh, AIR 1996 SC 2736*, wherein it has been held that while examining complaints of violation of statutory rules and conditions, it must be remembered that violation of each and every provision does not furnish a ground for the court to interfere. The provisions may be directory one or a mandatory one. In the case of directory provision, substantial compliance would be enough. Unless it is established that violation of a directory provision has resulted in loss and/or prejudice to the party, no interference is warranted. Even in the case of violation of a mandatory provision, interference does not follow as a matter of course. Thus, neither the Hon'ble Supreme Court nor this Court has expressed any view that under no circumstances the Court can interfere in case of violation of statutory rules and conditions.

25. The decision of the Hon'ble Supreme Court in the case of *Virgo Steels, Bombay and another (supra)* is under the Customs Act. In that case, the Hon'ble Supreme Court has held that even though a provision of law is mandatory in its operation if such provision is one which deals with the individual rights of the person concerned and is for his benefit, the said person can always waive such a right. In that case, the Company in its letter admitted to pay the duty chargeable on 24,326 MT of billets and 2300 MT of lead ingots along with any other penalty imposed on it and it did not want any show cause notice and personal hearing in the matter. In the present case, the petitioner has not made any such admission/submission.

26. Question No.(iv) is whether the order of assessment dated 06.07.2009 passed under Section 9C of the OET Act for the period 01.04.2005 to 31.05.2009 is sustainable in law.

For the reasons stated above, order of assessment passed in pursuance of notice in Form E-30 issued in violation of requirement of Section 9C(2) of the OET Act is not sustainable in law.

27. Accordingly, we set aside the impugned order dated 06.07.2009 (Annexure-4) passed under Section 9C of the OET Act for the period 01.04.2005 to 13.05.2009 and consequential demand notice. The matter is remanded to the Assessing Officer with a direction to complete the

assessment afresh after affording reasonable opportunity of hearing to the petitioner. For this purpose, the petitioner is directed to appear before the assessing officer on 14.10.2014. On his appearance, the assessing officer shall fix a date giving minimum thirty days time to the petitioner to produce the books of account, documents and complete the assessment proceeding within a period of four weeks thereafter in accordance with law.

28. In the result, the writ petition is allowed to the extent indicated above, but in the circumstances there is no order as to costs.

Writ petition allowed.

2015 (I) ILR - CUT- 293

S.PANDA,J.

W.P (C) No.11814 OF 2007

DILLIP KUMAR PATRO …….. Petitioner

.Vrs.

M. GOPIKRISHNA RAO ……... Opp.Party

SPECIFIC RELIEF ACT,1963 – S.28 (I)

Decree for specific performance – Rescission of Contact – Even after passing of the decree, the Court has power to grant time in favour of the judgment Debtor to pay the amount or to perform the conditions mentioned in the decree, in spite of an application for rescission of the decree having been filed by the Judgment Debtor and rejected.

In this case the learned Court below has rightly exercised its discretion and extended the time which is within its jurisdiction – Impugned order needs no interference. (Paras 8, 9)

For Petitioners : M/s. Reena Nayak

For Opp.party : M/s. S.S. Rao, B.K. Mohanty
N.C.Nayak and I.Sreedevi

Date of Judgment : 24.09.2014

JUDGMENT

S.PANDA, J.

This Writ Petition has been filed by the petitioner challenging the order dated 26.6.2006 passed by the learned Civil Judge (Senior Division), Berhampur in T.S No.128 of 1997 rejecting the application under Section 28 (1) of the Specific Relief Act, 1963 for rescission of the contract dated 21.8.1995 as the opposite party did not comply with the judgment and decree passed by the court below and committed default in depositing the balance consideration within the stipulated time.

2. The facts leading to the present case are that there was an agreement between the petitioner and opposite party on 21.8.1995 wherein the petitioner was agreed to sell the disputed property measuring Ac.0.44 cents for Rs.2,17,844/- to the opposite party and to execute the Sale Deed within a period of seventeen months from the date of agreement. Accordingly, the opposite party paid a sum of Rs.35,001/- to the petitioner towards advance consideration. As the petitioner did not execute the Sale Deed, the opposite party as plaintiff filed T.S No.128 of 1997 before the learned Civil Judge (Senior Division), Berhampur for specific performance of contract. The petitioner who is defendant appeared in the suit and filed his written statement stating that he is ready and willing to perform his contract and the opposite party be directed to deposit the entire balance consideration amount with interest in court.

3. The court below taking into consideration the materials available on record and the evidence adduced by the parties decreed the suit on 07.4.2001 directing the petitioner to execute the Sale Deed in favour of the opposite party within one month of the decree and the opposite party to pay the balance consideration amount of the agreed value within the said period failing which the opposite party would be at liberty to get the Sale Deed executed and registered through courts. The petitioner did not execute the Sale Deed as per the decree, however, he has given a false notice to the opposite party stating that on 28.5.2001 he will execute the Sale Deed. On receiving the notice the opposite party had been to the office of Sub-Registrar along with the balance consideration money. However, the petitioner expressed his inability to execute the Sale Deed for the whole lands on the plea that he had already sold 8800 sqft. out of the schedule property to somebody else. The opposite party in order to show his bona fide deposited the entire balance consideration amount in Bank. Thereafter the petitioner

filed an application before the court below under Order 47, Rule 1 of C.P.C to modify the judgment and decree on the ground that that extent of land as agreed was not as per schedule and the extent to be reduced. The said application was registered as M.J.C No.91 of 2001. The opposite party filed his objection to the said application stating that in order to delay the proceeding the application has been filed. The opposite party also filed Execution Case No.38 of 2001 to get the decree executed. The petitioner filed an application under Section 47 of C.P.C questioning the executability of the decree. Thereafter the petitioner filed an application under Section 28 (1) of the Specific Relief Act, 1963 (hereinafter referred to as 'the Act') to rescind the contract. The court below after hearing the parties came to the conclusion that there are no reasons to hold the decree ineffective merely because the amount was not deposited within the stipulated period. The court is competent under Section 28 of the Act to grant extension of time to deposit the purchased price even if the period fixed by the court has been expired and without any application for extension. Section 148 of C.P.C also empowers the court to extend the time even if the period has already been expired. Accordingly, the court below by the impugned order rejected the application and directed the opposite party to deposit the balance amount within a period of one month from the date of the order and the petitioner is to execute the Sale Deed in view of the judgment and decree passed in the suit.

4. Initially the petitioner challenging the impugned order has filed C.R.P No.32 of 2006, which was disposed of by this Court by judgment dated 31.8.2007 with an observation that revision is not maintainable in view of provision of Section 115 (1) of C.P.C and accordingly the revision was converted to an application under Article 227 of the Constitution of India. Therefore, the matter is heard again.

5. Learned counsel appearing for the petitioner submitted that time is the essence of the contract and as the opposite party has not deposited the balance consideration amount within the stipulated time, the petitioner moved an application under Section 28 (1) of the Act, which should have been allowed by the court below instead of extending the time. Hence the impugned order need be interfered with.

6. Learned counsel appearing for opposite party submitted that the opposite party has given intimation to the Judgment Debtor to execute the Sale Deed on a particular date and pursuant to the said notice the opposite

party was present before the office of Sub-Registrar for execution of Sale Deed on payment of the balance consideration amount. However, the Judgment Debtor did not turn up and failed to execute the Sale Deed, therefore, the Decree Holder compelled to open a Pass Book at Rushikulya Gramya Bank, Berhampur and deposited the balance consideration amount to show his *bona fide*. He further submitted that the Decree Holder is always ready and willing to purchase the suit land and he has not made any default in compliance of the Court's order. He also submitted that the suit for specific performance of contract was decreed as the Judgment Debtor is a defaulting party and the court below rightly rejected his application and allowed the Decree Holder to deposit the money in the Court for execution of the Sale Deed. Hence the impugned order need not be interfered with.

7. Considering the rival submission of the parties and after going through the materials available on record, it appears that the plaintiff had taken steps to comply the judgment and decree, however, the Judgment Debtor in spite of complying his part of performance filed the application to rescind the contract. The Decree Holder in order to show his *bona fide* has deposited the balance consideration amount in Bank to purchase the property. Since the Decree Holder has deposited the balance consideration amount in Bank, the court below inclined to extend the time and passed the impugned order rejecting the application of the petitioner to rescind the contract.

8. The Apex Court in the case of **Sardar Mohar Singh through Power of Attorney Holder, Manjit Singh Vs. Mangilal @ Mangtya** reported in **(1997) 9 SCC 217** held that the Court does not lose its jurisdiction after grant of decree for specific performance nor it becomes *functus officio* in view of the provision of Section 28 (1) of the Act. The very fact that Section 28 of the Act itself gives power to grant order of rescission of the decree would indicate that till the Sale Deed is executed in execution of the decree, the trial court retains its power and jurisdiction to deal with the decree of specific performance. The court has power to enlarge the time in favour of the Judgment Debtor to pay the amount or to perform the conditions mentioned in the decree for specific performance, in spite of an application for rescission of the decree having been filed by the Judgment Debtor and rejected. The court has the discretion to extend time for compliance of the conditional decree as mentioned in the decree for specific performance.

9. In view of the aforesaid settled position of law, the court below has rightly extended the time, which is within its jurisdiction. As there is no error

apparent on the face of the record, this Court is not inclined to interfere with the impugned order dated 26.6.2006 passed by the learned Civil Judge (Senior Division), Berhampur in T.S No.128 of 1997 in exercise of the jurisdiction under Article 227 of the Constitution of India.

Accordingly, this Writ Petition is dismissed. The interim order dated 31.8.2006 passed by this Court in Misc. Case No.45 of 2006 stands vacated.

Writ petition dismissed.

2015 (I) ILR - CUT- 297

S. PANDA, J.

W.P.(C) NO. 12295 OF 2004

Sk. YUSU ……..Petitioner

.*Vrs.*

Md. AWESH ……...Opp.Party

CIVIL PROCEDURE CODE, 1908 – O-21, R-54 & 58

Execution Proceeding – Decree for realization of money – Attachment of property – Petitioner purchased the property by virtue of an agreement prior to the date of attachment – Application to release the Property from attachment rejected – Action challenged in writ petition – Though the disputed property is situated within the revenue district of Cuttack assessed for payment of revenue to the Government, the attachment notice has not been affixed in the office of the Collector of the District as required under Order 21 Rule 54 C.P.C. – Non-compliance of the said procedure vitiates the attachment – Impugned order is set aside. (Paras 6, 7)

Case laws Relied on :-

1. AIR 1973 Calcutta 432, 1990 (1) OLR (S.C) 410, AIR 2008 SC 2069 & also
AIR (35) 1948 Madras 191 : Murugappa Chettiar -V- Thirumallia Nadar & Ors.

For Petitioner- M/s. N.Lenka, A.Parida, Miss. P.R.Behera & P.K.Tripathy

For Opp.Party - M/s. A.K.Mohanty, S.K.Jena, R.K.Behera, R.C.Pradhan & P.Mohanty

Date of Judgment : 25.06.2014

JUDGMENT

S.PANDA, J.

Petitioner in this writ petition has challenged the order dated 15.10.2004 passed by learned Ad hoc Addl. District & Sessions Judge F.T.C. No.IV, Cuttack in F.A.O. No. 93 of 2003 confirming the order dated 29.7.2003 passed by learned Civil Judge (Sr.Divn.), 1st Court, Cuttack in CMA No. 219 of 1999.

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

It reveals from the impugned order that opposite party filed T.S. No. 190 of 1994 for specific performance of contract and to direct the defendant No.1 to sell the land to the plaintiff after depositing Rs.1,00,000/- or in the alternative a decree may be passed for realization of Rs.45,000/- from the defendant with 12% interest per annum. The judgment and decree was passed in the suit on 18.2.1998 and on 2.3.1998 respectively. Thereafter, the opposite party filed Execution Case No. 71 of 1998. The decree was for realization of the amount of Rs.45,000/- in the execution proceeding. The property was attached on 28.1.1999. The proclamation was made on 1.2.1999 by adopting the procedure prescribed. While the matter stood thus, the present petitioner filed an application under Order, 21 Rule, 58 of the Code of Civil Procedure registered as C.M.A. No. 219 of 1999 for adjudication of his right title and interest over the property under attachment and for releasing the same from attachment to hold that the judgment debtors have got no manner of right title and interest over the suit land at the time of passing of the order of such attachment. He has specifically pleaded in the said application that he is the bonafide purchaser of suit property for value and has taken possession of the same much prior to the order of attachment by virtue of Registered Sale Deed from the defendant No.1 who has delivered possession and therefore sale has become absolute. The title of the property has already been passed in favour of the petitioner therefore the judgment debtors have no abiding interest of the same at the time of attachment. The property in question does not exclusively belong to the judgment debtor therefore the property should not have been attached for satisfaction of the decree when the judgment debtors have other properties which are sufficient

to satisfy the decree under execution. It is also contended by the petitioner that without complying the mandatory provision under Order, 21 Rule, 54 of the C.P.C. and in connivance with process server and other persons the decree holder managed to prepare the report falsely regarding attachment of the property.

The petitioner also stated that for self and his family inhabitant petitioner was in search of a homestead land and came to know that one Noor Jahan Begum of Daragha Bazar Cuttack for her legal necessity wanted to sale the property under Plot No. 605/2677 under Stitiban Khata No. 371 situated at Kathagadasahi having a pucca building thereof. Accordingly, petitioner entered into an agreement with the said Noor Jahan Begum and the consideration money was fixed at Rs.60,000/-. On 20.6.1996 part consideration of an amount of Rs.40,000/- was paid and rest amount of Rs.20,000/- was paid on 21.7.1996. After full and final consideration amount was made the possession of the said property was delivered in his favour in the year 1996. The petitioner after making substantial expenditure in re-modelleing the house residing thereon with his family. He has also stated that the vendor Noor Jahan Begum after obtaining the ceiling permission from the competent authority on 10.3.1999 executed the Registered Sale Deed in favour of the petitioner.

The opposite party-judgment debtor filed objection to that misc. case stating that the misc. case is not maintainable and he has traversed the averment of the petitioner and pleaded that the decree holder has no knowledge of purchase of the property by consideration money and as the purchase was after the attachment he is not entitled to any relief. He has also denied that the J.Dr. has put the petitioner in possession prior to attachment and proclamation of attachment was made in accordance with law. In support of their respective contention both the parties adduced evidence also. The court below determined four issues for adjudication of the dispute between the parties and came to a finding that attachment was made by beat of drum by one Radhu Nayak and contents of the attachment were read over and explained to the persons present there and a copy of the same was affixed on the Sadar door of the property and also on an electric pole at the centre place of the locality. Another copy of the notice of attachment was affixed on the notice board of the court. Therefore attachment cannot be held to be a nullity. P.W.1 in his evidence stated that Noor Jahan Begum entered into an agreement with him for sale of the property and received part consideration

of Rs.40,000/- on 20.6.1996. The balance consideration amount was received on 21.7.1996 and possession was delivered by giving a receipt dated 21.7.1996. The said receipt was marked as Ext.1 in C.M.A. No. 219 of 1999. He has also produced the sale deed dated 10.3.1999 which was marked as Ext.3. The decree was passed on 5.2.1998 and the notice in Execution Case No. 71 of 1998 was issued to Noor Jahan and her husband the power of attorney holder, who is supposed to know about the delivery of possession of suit property and after the death of judgment bebtor namely Noor Jahan Begum her husband is the best person to know all the facts who has not been examined as a witness, therefore the adverse inference should be drawn against the J.Dr. and the property was in favour of the petitioner after the attachment as such the transaction made in favour of the petitioner is void. On such finding the trial court has dismissed the application. Being aggrieved with the said order, the petitioner has filed F.A.O. No. 93 of 2003. In the FAO the appellate court while reiterating the finding of the court below dismissed the appeal.

3. Learned counsel for the petitioner submitted that the money receipt which was marked as Ext.1 dated 21.7.1996 is a valid document which proves that the agreement was entered into much prior to the date of attachment i.e. 28.1.1999 and by virtue of such agreement since possession was delivered in favour of the petitioner and petitioner is a bonafide purchaser, the property as claimed should have been adjudicated by the trial court. It reveals from the sale deed that the vendor has obtained permission from the competent authority to sale the land. The said permission was applied much prior to the execution of the sale deed and after obtaining the permission, the sale deed has been executed which has not been considered by the court below as such the finding of both the courts below is perverse and are liable to be set aside for non-consideration of the material facts. He further submitted that the land in question being assessed for payment of revenue to the Government, the proclamation of attachment notice must be affixed in the office of the Collector of the district in which the land situates. In the present case the same has not been done and therefore the attachment was not proper and sale deed is valid. The decree holder was only got a decree for realization of money as the judgment debtor has other property those properties should have been attached and the decree holder is entitled to release his money i.e. Rs.45,000/- as per the decree with interest only. Since both the courts below have also not considered the same, the impugned order is liable to be set aside. In support of his contention, he has placed

reliance on the decisions reported in ***AIR 1973 Calcutta 432, 1990(1) OLR (S.C.) 410, AIR 2008 SC 2069 and also AIR (35) 1948 Madras 191, Murugappa Chettiar Vrs. Thirumallia Nadar and others.***

4. Learned counsel for the opposite party submitted that the property was attached on 28.1.1999 and since the sale deed was on 10th March, 1999 after the attachment the property was not validly transferred and both the courts below has rightly held that the sale deed is void the same need not be interfered with. He further submitted that during attachment order the petitioner has started further construction over the vacant land and being the wrong doer the petitioner is not entitled to any relief.

5. Learned counsel for the petitioner submitted that in the present writ petition this Court has stayed the further proceeding in Execution Case No. 71 of 1998 and since there was no prohibitory order the petitioner has raised some construction for his necessity.

6. Considering the rival submission of the parties and after going through the record it appears that the decree was for realisation of money and the decree holder is not going to be affected in case judgment debtor will pay the said money with interest. The proclamation of attachment was not affixed in the office of the Collector of the district where the lands situates, which is necessary and the mode of proclamation is to be made for compliance of the statutory provision. Since the attachment was not done as per the statutory provision it cannot be said that there is valid proclamation or attachment. The petitioner who has purchased the property by virtue of a agreement prior to the date of attachment and the money receipt produced by the petitioner which was marked as Ext.1 is of the year 1996 and the said document was not refuted by the decree holder. Admittedly the original judgment debtor defendant No.1 died and her legal representatives are on record. The said defendant No.1 has alienated the property after receiving the consideration money in the year 1996 and also obtained permission from the competent authority to alienate the property and permission was granted in the year 1999. After receiving the permission sale deed was executed, therefore it cannot be said that after knowing the order of attachment the sale deed was executed.

7. It is not disputed that the disputed property assessed for payment of revenue for the Government and situated within the revenue district of Cuttack. The said attachment notice should have been affixed in the Office of the Collector of the district in compliance with the provision of Order, 21

Rule, 54 of the Code of Civil Procedure. Hence the conclusion reached by both the courts below are error apparent on the face of the record. Non-compliance of the said procedure vitiates the attachment. The petitioner being a bonafide purchaser his interest need be protected and the decree holder can get refund of his money from the J.Dr. Accordingly this Court sets aside the impugned order in exercising the jurisdiction under Article 227 of the Constitution of India and directs the executing court to proceed with the execution case and dispose of the same as expeditiously as possible. The writ petition is allowed. In the facts and circumstances no costs.

Writ petition allowed.

2015 (I) ILR - CUT- 302

B. P. RAY, J.

CRLA NO.238 OF 2004

U. HARIGOPAL ……..Appellant

.Vrs.

REPUBLIC OF INDIA ……..Respondent

PREVENTION OF CORRUPTION ACT – Ss. 7, 13(2), 13(1)(d)

Trap Proceeding – Accused was caught red handed – Mere recovery of tainted money by itself is not enough to establish the charge in the absence of evidence to prove that the appellant has voluntarily accepted money knowing it to be bribe – Defence evidence to rebut the charge – In this case though independent official witnesses available they were kept out and the I.O. was cited as an over hearing witness – The evidence of the complainant as well as I.O. has been rendered unreliable whereas the defence evidence remained un-assailed – Prosecution has failed to establish the guilt of the appellant beyond reasonable doubt – Held, the impugned conviction and sentence against the appellant is set aside.

(Paras 12 to 18)

Case Laws Relied on :-

1. AIR 1979 SC 1408 : Suraj Mal -V- The State of (Delhi Administration)
2. (2002) 10 SCC 371 : Punjabrajo, Appellant -V- State of Maharashtra
3. (2009) 3 SCC 779 : C.M.Girish Babu -V- C.B.I., Cochin, High Court of Kerala
4. (2011) 6 SCC 450 : State of Kerala & Anr. -V- C.P.Rao
5. AIR 1987 SC 2402 : G.V. Nanjundiah -V- State (Delhi Administration)
6. 2003(II) OLR 399 : Niranjan Bharati -V- State of Orissa

For Appellant - M/s. D.P. Das, S.Behera & B.Pati
For Respondent - M/s. S.K. Padhi, Sr. Adv. & G. Mishra

Date of judgment.24.11.2014

JUDGMENT

B.P.RAY, J.

This appeal has been preferred under Section 374 of Criminal Procedure Code and Section 27 of the Prevention of Corruption Act by the appellant challenging the Judgment and order of conviction dated 07.08. 2004 passed the learned Special Judge (C.B.I.),Bhubaneswar sentencing him to undergo rigorous imprisonment for a period of one year and pay a fine Rs.2,000/- (rupees two thousand). In default, to undergo rigorous imprisonment for a perio0d of six months for the offence under Section 7 of Prevention of Corruption Act and rigorous imprisonment for two years and pay a fine of Rs.5,000/- five thousand), in default of such payment, to undergo further rigorous imprisonment for a period of one year for the offence under Section 13 (2) r/w Sec. 13 (1) (d) of the said Act and both the substantive sentences were directed to run concurrently.

2. Prosecution case , in short, is that complainant (P.W..2) Ramesh Chandra Sahu, Secretary, Kedar Gouri Khadi Gramodyog Samiti, Bhubaneswar had applied for a loan to Khadi and village Industries Commission (in short, 'KVIC), Bhubaneswar, for opening of a jewellery shop by their Samiti .The appellant- accused was the Director of the said Commission on his application, the Samit was sanctioned with a loan of Rs.79,956/-on 08.05.98. out of that sanctioned amount, a sum of Rs.36, 450/- was released at the first instance on 31.3.2000. The complainant thereafter applied for second instalment the Commission. It is alleged that the appellant demanded bribe of Rs.1000/- to release the second instalment of the loan amount. Being aggrieved, the complainant lodged a written report against the accused-appellant before the S.P. C.B.I. Bhubaneswar and ultimately it was

registered as an F.I.R. under Section 7 and 13 (2) r/w Sec. 13 (1) (d) of the Prevention of Corruption Act on 17.10.2000. and investigation was taken up by paying a trap. During the trap proceeding, the accused was caught red handed while accepting the bribe, and after completion of the investigation charge sheet was submitted.

3. Plea of the appellant is that of complete denial. The further case of the appellant is that has neither demanded any bribe nor accepted any money.

4. In order to prove its case, prosecution has examined nine witnesses. P.Ws 1 and 7 are said to be the independent witnesses. P.W.2 (informant) is the decoy,P.W.3 is the Development Officer of the 'KVIC', P.W.4 is the sanctioning authority, P.W.5 is the Scientific Officer , P.W. 6 is the Probationary D.S.P. in the Office of the S.P., C.B.I. Bhubaneswar and member of the trap party, P.W..8 is the Trap Laying Officer and P.W.9 is the I.O., who after completion of investigation, submitted charge-sheet.

5. The specific defence plea of the appellant is that the loan sanction file had never come to him and therefore, the demand of bribe and release of loan amount are thoroughly misconceived. Moreover, the appellant was the recommending authority only having no power to release the loan amount. The complainant being goldsmith by caste the appellant had requested him to prepare a silver ring with lucky stone and for that reason he (appellant) had given a sum of Rs. 1000/- to the complainant . On repeated request, as the complainant could not give his ring, the appellant demanded refund of money. On the date of trap, the complaint came to the office and refunded the said money to the accused- appellant. The which was recovered from was recovered from the possession of the appellant was bribe.

6. The appellant has been charged for demanding and accepting the bribe . In case of bribery the essential ingredients are (i) factum of demand, and (ii) factum of acceptance. Demand of bribe is the most important constituent and the entire edifice of the prosecution case rests on it. The next ingredient is the factum of acceptance. Acceptance in the context means acceptance of money/ valuable thing pursuant to the demand. If these two requisites are established by the prosecution through clear, cogent and wholly reliable evidence , the recovery of tainted money would be an incriminating factor. Recovery bereft of positive evidence regarding demand and acceptance would not bring culpability. The Hon'ble apex Court in the case of in the case of ***Suraj Mal .v. The State of (Delhi Administration),*** AIR

1979 SC 1408 consistently has held that ' mere recovery divorced from the circumstances under which it is paid is not sufficient to convict the circumstances under which it is paid is not sufficient to convict the accused which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable".

Keeping the above principles in mind, it may be examined as to whether the prosecution has been able to prove its case

It is alleged that on 16.10.2000 the complainant met the appellant, who had asked him to come next day to his residence. Accordingly, on 17.10.2000.at 8 A.M. in the morning the complaint met the appellant in the residence when the appellant demanded Rs.1,000/- and asked his to pay the same on 18.10.2000 and the balance amount after release of the second installment . FIR is completely silent about any demand on 16.19.2000. The alleged demand of bribe was made only on 17.10. 2000 morning in the residence of the appellant The testimony of the complainant P.W.2 in court different. P.W.2 in his evidence has deposed that the accused demanded Rs. 7000/- There is no mention when and where the appellant raised the said demand and in his further evidence he has stated that on 16.10.2000. he reported to the C.B.I. but the C.B.I. authorities did not believe him and for verification of the truth, they sent one C.B.I. officer, Mr. Tripathy (P.W.80 with him to the Office of the appellant. Both of them went to the Office of the appellant where the complaint introduced him saying that Mr. Tripathy would start brick manufacturing unit, for which he wanted to avail a loan and he would have pay to pay him 10% of the loan amount.

7. From the above evidence, the following facts emerge ;

As per the FIR there was no demand on 16.10.2000 .In such circumstances, there was no reason as to why the complainant would go to the C.B.I. Office and contact them. In the FIR the complaint alleged that he met the accused on 17.10.2000 morning at 8.a.m in his residence .Strangely enough, in his evidence .Strangely enough, in his evidence P.W.2 has not uttered a word that he had met the accused on 17.10.2000 at all. Either in the office or in the residence.

P..W.2 in his evidence has deposed that P.W.8.the C.B.I. Inspector, had accompanied him to the C.B.I Office. In his statement in Court , P.W. 2.did not say that P.W.8. Mr. Tripathy had accompanied the complainant on

any date. P.W.8 who has been projected as overhearing witness did not say that he had accompanied the complainant on 16.10.2000. or had gone to the residence of the appellant. On the other hand, he has deposed that on 17.10.2000 he had gone to the office of appellant with the complainant. This part of his evidence is contrary to the evidence of P.W.2 who did not whisper a word that on 17.10. 2000. P.W.S had accompanied him either to the office or to the residence of the appellant. P.W.S was also silent that the appellant had ever demanded 10% commission of the loan amount as alleged by the complainant.

The prosecution case is that the C.B.I . authority did not be believe the report of the complainant and for verification of the truth, they sent an officer P.W.8 to the appellant. P.W.8 in his evidence has stated that after registration of the case and as per direction of the S.P. C.B.I, he accompanied the complainant. FIR. was lodged on 17.10.2000. Accordingly, the case was registered on the said date. Therefore, any direction stated to have been issued must necessarily have been after 17.10.2000 only. In such circumstance, P.W.2. accompanied the complainant on 16..10. 2000 to verify the truth of the allegation, as alleged and deposed to by the P.W.2., is false. According to the learned councel for the defence, FIR has been lodged on 17.10.2000 after due deliberation with C.B.I. officials as revealed from the evidence of the complainant. Therefore, there cannot be any accidental slip or omission in the narration of the material facts in the F.I.R.

8. On consideration of the above facts and circumstances, the conclusion is irresistible that the allegation of demand of bribe by the appellant either on 16.10.2000 or 17.10. 2000 is not correct. Complainant has categorically deposed that on 17.10. 2000, he met the appellant only once. If this part of evidence of P.W.2 is considered in juxtaposition to his earlier version in the F.I.R, it can safely be concluded that both are contradictory to each other and are irreconcilable. The complainant has met the appellant only once and as per F.I.R, it was in his residence and not in the office. If the complainant had not gone to the office then the evidence of P.W.8 is false that he accompanied the complainant on 17.10.2000. Further evidence of the complainant is that on 16.10.2000, he met the appellant- Harigopal twice. On the first instance, he was alone and on the subsequent occasion, the C.B.I. officer was with him. The above evidence of the complainant completely falsifies the prosecution case. Therefore, the evidence of P.W.s.2 and 8 is mutually exclusive and cannot co-exist.

9. The prosecution case can be adjudged from other perspective also. P.W.3 is the Development Officer of the Commission. In his evidence he has deposed that whenever any application is submitted through the Commission, the State Director forwards and recommends such application after security. The appellant, who was the Director at the relevant time, was not the authority to release the second installment. The Head Office was the competent authority to release such installment. Therefore, the allegation is that the appellant demanded bribe to release the second installment is not correct. P.W.3 in his evidence has further stated that as a Development Officer of the Commission, his duty was to process the loan application and proposal submitted by the individuals or institutions. The paper submitted by Ramesh Chandra Sahu (P.W.2) was incomplete. After examining the papers, he had asked the said Ramesh Chandra Sahu to Submit the Documents relating to payment of interest to the Commission. Till 19.10.2000 he had not placed the file of Rame Chandra Sahu before the appellant. If the file had not gone to the appellant till 18.10.2000, there was no reasons/ justification for the complainant to approach the appellant either on 16. 10.2000 or 17.10.2000. No work was pending with the appellant for which was no scope on his part to raise and demand.

Therefore, in my considered view, the allegation of demand of bribe of Rs. 1,000/- for releasing the second installment is nothing but false. The prosecution was conscious of its shortcomings and it did not bring the file Court's record. Therefore, it can be safely concluded that the complainant, P.W.2 has not complied with the defects, for which second installment was not released in his favor. Therefore, this goes to show that the allegation of demand of bribe for release of the second installment is false and concocted, as it appears P.W.3 has stated in his evidence that appellant is an honest officer.

10. Coming to the next factum of acceptance, the word, "acceptance" connotes receipts or acknowledgment with consenting mind . The consent is the essential ingredient to constitute acceptance. In other words, it is a deliberate act, by which one was willing to receive or acknowledge something for the act to be done. Accidental, unintentional receipt or receipt under misrepresentation or placing of money clandestinely would not amount to acceptance and the same would not constitute the offence under Section 13 (1) (d) or 7 of the Act. P.W.2 has stated that the appellant asked him if he had brought and he replied in affirmative. The appellant then demanded the money twice and extended one diary. He kept the tainted notes inside that diary. The appellant took diary kept it in his table drawer. Admittedly, the

diary was not seized. Seizure of the alleged diary would have been a circumstance in lending corroboration to the prosecution case. The trial court while dealing with the acceptance of tainted money, appears to have laid much stress on the fact that the appellant has accepted the money through his diary. If there was no diary at all, the above conclusion of the trial court is completely baseless. Had there been a diary, the tainted money, which was, in fact, kept inside the diary, would have been an incriminating piece of evidence and the wash of the diary if shown positive indicating change of colour would have made the accusation probable. In absence of the said diary the specific plea of the appellant that he had given Rs.1,000/- as advance to the complainant, who was a jeweler to prepare a silver ring with lucky stone and after repeated request when he did not deliver the same, the appellant demanded refunded of the said money, to which the complaint agreed to refund on 18.10.2000 becomes more probable. Therefore, when the complainant met the appellant and handed over the money, the appellant accepted the same in his hand and kept in his shirt pocket believing the same to be his own money.

11. In order to prove the plea of the defence, the appellant had examined on witness, who has clarified the entire scenario. He has deposed that in the August/ September, 2000 he called the complainant to the appellant for preparing a silver ring with lucky stone. The complainant told that Rs.1200/- would be spent to prepare the ring and accordingly, the accused gave Rs.1,000/- to the complainant so as to prepare the ring within 8-10 days . He has further deposed that as the lucky stone was not available, the complainant could not be able to prepare the ring. Then the appellant asked D.W.1 to request the complainant to return his money. The complainant was approached thrice return his money. There is absolutely no material to disbelieve this evidence.

It is well settled in law that truth is not monopoly of the prosecution. The evidence of the defense witness is to be considered equally with that of the prosecution, Merely because of examination of a person by the defense. is not a ground to discard his evidence, which is trustworthy and there is nothing on record to impeach his testimony.

12. This defence plea of advancing money to the complainant appears to have been at the earliest. When the trap party challenged the appellant to have accepted bribe, the appellant stoutly denied the same and gave the explanation that the complainant returned the money which was taken by him

for preparation of a ring. During the trial, the prosecution witnesses, who are the members of the trap party, have not denied the same.

Therefore, in my considered view, mere recovery of tainted money by itself by is not enough to established the charge in absence of evidence to prove payment of bribe or to show that the appellant has voluntarily accepted money knowing it to be bribe. Appellant has rebutted the charge by rendering the defence evidence. In the present case, the evidence of the complainant as well as part I.O-cum-overhearing witness has been rendered unreliable and the defence evidence of D.W.1 has remained unassailed.

13. learned counsel for the appellant placed on the decision reported in the of PUNJABRAJO, APPELLANT -V- State of Maharashtra (2002) to SCC 371, wherein the Hon'ble apex Court has held as follows:" If the explanation offered by him under Section 313 Cr. P.C. is found to be reasonable, them it cannot be thrown away merely on the ground that he did not offer the said explanation at the time when the amount was seized."

14. In the instant case, the appellant offered explanation immediately after the trap. As it was not recorded correctly in the post-trap memorandum, the appellant signed it with protest. The explanation has not been denied. The witnesses have avoided by saying that they did not remember.

Mere recovery of tainted money divorced from circumstances under it is paid is not sufficient to convict the appellant.

In this regard, learned counsel for the appellant placed reliance on the decisions in the cases of ***Suraj Mal -v- The State of (Delhi Administration***), AIR1979 SC 1408,***C.M.Grish Babu -v- C.B.I, Cohin, High Court of Kerala*** *(2009) 3SCC 779****, and State of Kerala and another -v- C.P.Rao*** *(2011) 6SCC 450*

15. It is the evidence of the P.W..3 that the appellant is a strict officer and he has disposed of the file and never kept it pending with him and there is no allegation that any demand was made at the time of disbursement of the first installment. In this regard, learned counsel for the appellant for the appellant placed reliance on the decision in the case ***G.V. Nanjundiah –v- State (Delhi Administration***) AIR 1987 SC 2402.

16. In the present case even though independent official witnesses were available, they were kept out and the I.O. has been cited as overhearing witness. The I.O. P.W.8 accompanied the decoy. Therefore, in my considered

view, the independent witnesses though were requisitioned by the S.P., were not examined with an apprehension that the actual facts would come to the light. The evidence of the decoy has to satisfy the double test. The evidence must be reliable and if this test is satisfied, it must be sufficiently corroborated. In absence of corroboration, the same cannot be accepted as truth.

17. On the date of trap there was no work of the complainant pending with the appellant and demand of bribe is not free from doubt and not acceptable. In this regard, learned counsel for the appellant placed reliance on Niranjan Bharati -v- State of Orissa 2003 (II) OLR 399.

As has been held by the Hon' ble Supreme Court in the case of ***State through Inspector of police, A.P –v- Narasimhachary,*** (2005) 8 SCC 364, if two views are possible, one in favour of the accused should be taken.

Similarly, it has been held by the Hon' ble Supreme Court in the case of ***C.M. Grish Babu –v- C.B.I, Cochin, High Court of Kerala***, AIR 2009 SC 2002, that the accused is not required to established his defence by proving beyond reasonable doubt as the prosecution and he can establish the same by preponderance of probability.

The appellant in the instant case. has proved his case by the test of preponderance of probability. Thus prosecution has failed to establish the guilt of the appellant beyond reasonable doubt.

18. Keeping in view the decisions referred to above and in the facts and circumstance of the case, convection of the appellant cannot be sustained and the same is liable to be set-aside.

In the result, appeal is allowed.

The order of conviction and sentence passed against the appellant under Sections 7 and 13 (2) r/w Sec. 13 (1) (d) of the Prevention of Corruption Act is set- aside. The bail bond furnished by the appellant, be cancelled.

Appeal allowed.

2015 (I) ILR - CUT- 311

S. C. PARIJA, J.

CRLMC. NO. 3067 & Misc. Case No.2166 OF 2014

MAJUM BIBI ……..Petitioner

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 – S. 210 (3)

Complaint case filed by way of protest in respect of the accused persons not charge-sheeted by police in G.R. Case – Application to club both the cases for trial – Magistrate rejected the application on the ground that accused persons charge-sheeted in the G.R. Case are not the same in the complaint case – Action challenged – Held, when both the G. R. Case as well as complaint filed by way of protest arise out of the same occurrence, the learned Magistrate should have clubbed both the cases and tried them together to avoid any conflict in the findings.

For Petitioner - M/s. M.A. Ali
For Opp.Parties - A.S.C

Date of order : 22.10.2014

ORDER

S.C.PARIJA, J.

Heard learned counsel for the petitioner and learned counsel for the State.

This application has been filed under Section 482 Cr.P.C., challenging the order dated 21.5.2014, passed by the learned S.D.J.M., Bhadrak, in 1.C.C.No.18 of 2012, rejecting the petitioner's application to tag the complaint case with the G.R. Case No.1371 of 2011, arising out of the same occurrence and to try both the cases together.

The brief facts of the case is that the petitioner lodged a written report before the I.I.C., Purunabazar Police Station, Bhadrak, which was registered as Purunabazar P.S. Case No.60, dated 26.8.2011, under Sections 147/148/448 /323/324/379/336/427/506/1 49 I.P.C., against twenty accused persons named therein, corresponding to G.R. Case No.1371 of 2011, pending in the Court of learned S.D.J.M., Bhadrak. The police after investigation submitted

charge-sheet only against five accused persons under Sections 147/148/323/ 336/427/149 I.P.C., cognizance of which was taken by the learned Magistrate.

Being aggrieved by the action of the police in not filing the charge-sheet against the other fifteen accused persons named in the F.I.R., the petitioner filed protest petition by way of complaint, vide 1.C.C.No.18 of 2012, before the learned S.D.J.M., Bhadrak, who after recording the initial statement of the petitioner (complainant) and the evidence of witnesses under Section 202 Cr.P.C., took cognizance of the offences under Sections 452/323/427/379/34 I.P.C and issued process against the accused persons named therein.

Subsequently, the petitioner filed an application before the learned S.D.J.M., Bhadrak, to club the complaint i.e. 1.C.C.No.18 of 2012 with the G.R. Case No.1371 of 2011 and to try the same together, as the same arose out of the same occurrence. By the impugned order dated 21.5.2014, learned S.D.J.M., Bhadrak, has rejected the said application of the petitioner, referring to the provisions of Section 210(3) Cr.P.C. and holding that the G.R. Case No.1371 of 2011 does not relate to any of the accused persons named in the complaint.

Learned counsel for the petitioner submits that as the complaint has been filed by way of protest against the other accused persons, who were not charge-sheeted by the police in G.R. Case No.1371 of 2011, learned Magistrate should have clubbed the complaint case and the G.R. Case, for the purpose of trial, in order to avoid contradictory and conflicting findings.

On a perusal of the impugned order, it is seen that the complaint i.e. 1.C.C.No.18 of 2012 has been filed by way of protest in respect of the accused persons, who were not charge-sheeted by the police in G.R. Case No.1371 of 2011. Learned Magistrate has relied upon the provisions of Section 210(3) Cr.P.C., in holding that the accused persons charge-sheeted in the G.R. case are not the same in the complaint and has accordingly rejected the application of the petitioner for clubbing both the cases together for the purpose of trial.

This approach of the learned Magistrate does not appear to be proper and justified, especially when both the G.R. case as well as the complaint filed by way of protest arise out of the same occurrence. It is only just and proper, for the purpose of convenience to club both cases and try them together, in order to avoid any conflict in the findings.

In view of the above, the impugned order dated 21.5.2014, passed by the learned S.D.J.M., Bhadrak, in G.R. Case No.1371 of 2011, is set aside. Learned Magistrate is directed to club the complaint i.e. 1.C.C.No.18 of 2012 with the G.R. Case No.1371 of 2011 and try the same together, in accordance with law.

Application disposed of.

2015 (I) ILR - CUT-313

B.K. PATEL, J.

W.P.(C) NO. 20269 OF 2014

ASHOK KUMAR PADHY ……..Petitioner

.Vrs.

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

STAMP ACT, 1899 – S. 47- A

Charge for under valued instrument – Petitioner was the buyer on execution of a sale deed which is found to be void abinitio as the vendor has no title – Stamps used for execution of void sale deed stands spoiled – petitioner is entitled under law to be protected against payment of stamp duty and registration fees on a document which is void from the beginning – The sale deed being a void document be treated as cancelled – Demand made by the stamp Collector and the Certificate Officer is arbitrary and without jurisdiction – The impugned proceedings are liable to be dropped. (para-11)

For Petitioner : M/s. Pradipta Kumar Mohanty,
D.N.Mohapatra, J.Mohanty,
P.K.Nayak, S.N.Dash and A.Das.
For Opp. Parties : Additional Government Advocate

Date of Hearing :18.11.2014
Date of Judgment :5.12. 2014

JUDGMENT

B.K. PATEL,J.

In this writ petition, the petitioner has made prayer to quash the proceeding in U.V.M.C. No.417 of 2008 and Certificate Case No.26 of 2014, and consequential notices at Annexures-2, 4 series and 6.

2. Petitioner's case is that on the basis of the claim to be the owner on the strength of Hat Patta alleged to have been granted by the ruler of Kanika Estate, one Rabindra Nath Lenka executed in favour of the petitioner registered sale deed no.5064 dated 24.8.2005 in respect of the land measuring an area of Ac.2.500 pertaining to plot no.321 under Khata No.619 of Mouza Chandrasekharpur recorded in the name of G.A. Department of the State of Orissa. At the time of registration, the petitioner was not aware of the fact that the above said land stands recorded in the name of the Government. In such circumstances, the sale deed executed in favour of the petitioner does not confer title over the land to the petitioner. The petitioner also never claimed title over the land nor possession of the land was delivered to the petitioner. The petitioner being aware that he has not derived any title on the strength of the aforesaid sale deed, never claimed any interest over the same. When the matter stood thus, the petitioner received notice at Annexure-2 from the Stamp Collector, Cuttack in U.V.M.C. No.417 of 2008 for payment of deficit stamp duty and registration fees payable under the Indian Stamp (Orissa Amendment) Act, 1962 purported to have been issued under Rule 25 (1) of the Orissa Stamp Rules, 1952. In response to such notice, the petitioner filed representation at Annexure-3 stating therein that the registered sale deed executed in favour of the petitioner having not conferred any title, the petitioner is not liable to pay any stamp duty. It is specifically averred at paragraphs 6 and 8 of the representation that the petitioner is not at all interested to take advantage and benefit of the registered sale deed in question and that he does not accept and admit the registered sale deed and the property purported to have been conveyed therein. No opportunity of hearing was given to the petitioner on his representation. However, the petitioner received notice at Annexure-4 series in Misc. Case No.26 of 2014 from the Special Certificate Officer-Cum-Sub-Collector, Berhampur with regard to requisition for certificate received from

the Stamp Collector-Cum-Deputy Inspector General of Registration, Cuttack for payment of deficit stamp duty and registration fees. The petitioner filed application denying his liability at Annexure-5 stating, *inter alia*, at paragraph-6 as follows:

> "6. That the R.S.D. in question cannot be construed to be a legal document, since no title has passed to the Certificate Debtor as the property still stands as per the prevailing and the current R.O.R. in the name of the Government, the General Administration Department, in the district of Khurda. Hence, the Certificate Debtor is not liable to make such payment.

The Certificate Officer also without considering the petitioner's application at Annexure-5 has issued summon for payment at Annexure-6 in Certificate Case No.26 of 2014 to deposit the amount with a threat of taking further action against him. The petitioner has never claimed title, interest and possession over the land purported to have been conveyed on the strength of the registered sale deed and he has absolutely no right over such land. It has also been averred that the petitioner is not at all concerned with the registered sale deed and he has absolutely no objection if the sale deed is treated to be cancelled, inoperative, invalid and as a whole void for all purposes.

3. A counter affidavit has been filed on behalf of opposite party nos.1 to 4 by opposite party no.3-Deputy Inspector General of Registration, Odisha. It is averred that the stamp duty and registration fees having been detected to be undervalued, there is no infirmity in initiating proceeding under Section 47-A of the Indian Stamp Act, 1899 (for short, 'the Act') followed by certificate proceeding as provided under Section 48 of the said Act. Upon reference to Section 47-A read with Section 2(14) of the Act, it is averred that the sale deed executed in favour of the petitioner is an 'instrument' of conveyance by way of sale and as such chargeable with duty. Provisions under Registration Act, 1908 and the Act regulate procedure for registration of chargeable instruments. Sale deed executed in favour of the petitioner contains recital regarding payment of consideration amount. By executing the sale deed the vendor of the petitioner purported to transfer the right in favour of the petitioner. In view of non-payment of required stamp duty and registration fees, proceedings were initiated against the petitioner for realization of deficit stamp duty and registration fees in accordance with

statutory provisions. The petitioner ought to have resorted to statutory provisions for redressal of his grievance. It is further averred that validity of document has no concern with the chargeability of stamp duty. Whether the person executing the instrument is authorized to execute is not material and relevant. The only thing which is relevant is that the document should be an instrument chargeable to stamp duty which is realizable on its execution. In the present case, the registering authority, while checking the valuation of the property purported to be sold to the petitioner, upon reference to other sale deeds concerning the similar nature of land, found the sale deed to have been undervalued and submitted report to the Stamp Collector. The Stamp Collector disposed of the matter by order dated 18.12.2013 at Annexure-A after complying with the requirements of Section 47-A of the Act. The petitioner was directed to deposit the deficit stamp duty and registration fees by issuing of notice at Annexure-B to the counter affidavit, copy of which is also at Annexure-2 to the writ petition. As the petitioner did not deposit the dues, the matter was referred to Collector, Ganjam for collection of Government dues by resorting to provisions under the Orissa Public Demands Recovery Act vide requisition at Annexure-C. It is further averred that in view of provision under Section 55 of the Transfer of Property Act providing for rights and liabilities of the seller and buyer, the parties to the sale deed have executed the document after ascertaining the entire facts. Reiterating that the validity of the document has no concern with the chargeability of stamp duty, it is averred that unless the sale deed is declared null and void, the petitioner is liable to pay deficit stamp duty and registration fees. It is also averred that examining the status of land transacted through an instrument is beyond the purview of the Stamp Collector and moreover, the petitioner had never raised any objection before the Stamp Collector in the under valuation proceeding. Under valuation is no way related to the right, title, interest and status of the land. The petitioner ought to have participated in the under valuation proceeding or before appropriate fora against the orders passed by Stamp Collector and Certificate Officer instead of filing the writ petition.

4. Learned counsel for the petitioner submitted that all non-testamentary instruments including a sale deed which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property are compulsorily registerable under Section 17(1)(b) of the Registration Act, 1908 and all instruments

chargeable with duty are required to be duly stamped in view of provision under Section 17 of the Act. However, in the present case, on the basis of false representation made by the vendor with regard to his right, title and interest over the land on the strength of Hat Patta issued by the ruler of Kanika Estate, the sale deed was executed and registered. The vendor failed to establish his title over the land and it was found that the land remained recorded in the name of the State Government. Petitioner's vendor has no title. Upon executing the instrument which purports to transfer title over land by way of sale, no right or liabilities was either created or extinguished. For all intent and purpose, registered sale deed executed in favour of the petitioner is void *ab initio*. The petitioner on receipt of notice dated 18.12.2013 at Annexure-2 of the Stamp Collector in U.V.M.C. No.417 of 2008 directing him to pay deficit stamp duty and registration fees, filed objection at Annexure-3 for giving an opportunity to him of being heard in the matter to contend that the sale deed was nothing but a void document. However, the Stamp Collector issued requisition to the Certificate Officer. Upon receipt of notice from the Certificate Officer, the petitioner filed objection at Annexure-5. However, the petitioner was not given an opportunity of being heard. Instead, notice at Annxure-6 was issued for taking further action. It is earnestly contended that the petitioner has already been put to loss and harassment for the conduct of his vendor. Registered sale deed executed in his favour is a sham document which does not create or extinguish any right. The petitioner has availed no benefit out of it. The vendor never put the petitioner to possession over the land title of which he purported to have transferred to the petitioner. Though the sale deed has been stamped and registration fees have been paid on the same prior to registration, the document having been found to be void from the beginning, stamps used for execution of the sale deed are spoiled stamps. In such circumstances, the petitioner has approached this Court to avoid further harassment and loss. It is categorically contended that having come to know that the registered sale deed is a void document, as petitioner's vendor has no title over the land purported to have been sold therein, the petitioner has never claimed title or possession over the land and also is not capable of advancing any such claim in future. The registered sale deed being a void document, is to be treated to have been cancelled, and demand on the same is without jurisdiction.

5. Reiterating the averments made in the counter affidavit filed on behalf of opposite party nos.1 to 4, learned Advocate General argued that

sale deed executed in favour of the petitioner being an instrument purporting to convey title over the land by the vendor is chargeable to stamp duty in view of provisions under Sections 2(14), 3 and 17 and is subject to provisions under Section 47-A of the Act, to be dealt with when found to have been undervalued. In accordance with Section 47-A of the Act, the deed, after registration, was referred by the Registering Officer to the Collector for realization of deficit stamp duty and registration fees. The petitioner having not paid the stamp duty, proceeding under the Orissa Public Demands Recovery Act has been rightly instituted for realization of the deficit stamp duty and registration fees. It is not disputed by the learned Advocate General that the land purported to be transferred under the sale deed is recorded in the name of the State Government and the petitioner's vendor neither had title over the land, nor has acquired title in the meanwhile. It is also not disputed that petitioner's vendor has no scope to acquire title over the land in future. However, it is argued that even if the sale deed does not create any right in favour of the petitioner, and for all intent and purpose, the sale deed is a void document, validity of document has no concern with chargeability of stamp duty. The petitioner is to bear the expenses for stamp duty and registration fees. In this connection, learned Advocate General sought to derive assistance from an unreported and unauthenticated xerox copy of judgment passed by a Single Judge of the Allahabad High Court in Civil Misc. Writ Petition No.17148 of 2010 (**M/S Aegis BPO Services Limited -vrs.- State of U.P. and others**). In course of argument, learned Advocate General also contended that the impugned orders of undervaluation under the Act as well as for realization of stamp duty and registration fees under the Orissa Public Demands Recovery Act ought to have been assailed by the petitioner by resorting to statutory remedies available under the said Acts.

6. So far as the contentions with regard to availing of alternative statutory remedy is concerned, from the rival averments and contentions made on behalf of the parties, it is evident that this writ petition involves resolution of legal issues only which can be decided on the basis of affidavits filed by the parties. There is no controversy with regard to factual assertions. In **Government of Andhra Pradesh and others –vrs.- P. Laxmi Devi (Smt)**: (2008) 4 SCC 720 while dealing with demand of deficiency of stamp duty Hon'ble Supreme Court opined that even where the demand is arbitrary and exorbitant, it is always open to the party to file a writ petition challenging such demand alleging that demand made is arbitrary and/or

based on extraneous considerations, and in that case it is always open for the High Court to set aside an exorbitant demand made under Section 47-A of Act by declaring the demand arbitrary. It is well settled that arbitrariness violates Article 14 of the Constitution of India. It is also well settled that rule requiring the exhaustion of alternative remedies before the writ is granted is a rule of policy, convenience and discretion rather than a rule of law. In **Whirlpool Corporation -vrs.- Registrar of Trade Mark, Mumbai and others** : AIR 1999 SC 22 it has been held :

> "17. Specific and clear rule was laid down in State of U.P. v. Mohd.Nooh, 1958 SCR 595 : AIR 1958 SC 86, asunder(at P.93 of AIR):
>
> 'But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.'
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> 18. This proposition was considered by a Constitution Bench of this Court in A.V.Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobharaj Wadhwani, AIR 1961 SC 1506 and was affirmed and followed in the following words(para 10):
>
> 'The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to law down in flexible rules which should be applied with rigidity in every case which comes up before the Court.'

19. Another constitution Bench decision in Calcutta Discount Co.Ltd. v.Income-tax Officer, Companies Distt. I, AIR 1961 SC 372 laid down:

'Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment. The High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting without jurisdiction under S.34 I.T.Act.'

20. Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the filed with the result that law as to the jurisdiction of the High Court in pertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

7. In the present case, the crux of contention of the petitioner is that sale deed executed in his favour being a document which is void *ab initio*, the Stamp Collector as well as the Certificate Officer, on consideration of objection filed by the petitioner, ought to have held that the sale deed is not chargeable to stamp duty. The petitioner, thus, has assailed the demand to be arbitrary and without jurisdiction. Moreover, the parties have filed all the pleadings required for adjudication of dispute raised by the petitioner. In such circumstances, in view of above referred settled principles it shall not be in the interest of justice to direct the petitioner to approach this Court after exhausting available statutory remedies.

8. Now coming to the merit of the case it is not disputed that the sale deed executed in favour of the petitioner does not create any right in favour of the petitioner. The petitioner alleges that he has been swindled by the vendor by executing the sale deed in his favour on the false pretext of having title over the land on the basis of a Hat Patta. In **M/S Aegis BPO Services Limited -vrs.- State of U.P. and others** (supra), chargeability to stamp duty

on a lease deed executed in favour of the petitioner was assailed. Referring to undisputed facts in the case it was pointed out that though the lessor had no right at the time of execution of the lease deed, subsequently, the lessor acquired right in the property in question with the due permission of the NOIDA and as such became entitled to let out the property to the writ petitioner. In such factual background, it was held that the lease deed having purported to create title in favour of the petitioner over the property and the lessor having acquired right over the property subsequent to the registration of the lease deed, the lease deed created right in favour of the petitioner and the petitioner was liable to pay stamp duty. Question of validity of lease deed at the time of execution lost its significance upon acquisition of right in the property by the lessor. In the present case the petitioner's vendor who executed sale deed had no right or title at the time of execution of the sale deed, has not acquired right or title over the land in the meanwhile and it is not possible to acquire any right or title in future. Undoubtedly and undisputedly the sale deed is a void document. It is needless to observe that when a document is void *ab initio* , a decree for setting aside the same would not be necessary as the same is non-est in the eye of law, as it would be a nullity. (See **Prem Singh & Ors –vs- Birbal & Ors**.: AIR 2006 S.C.3608 at paragraph 16).

9. It is evident that even the stamps used for execution of void sale deed stands spoiled. For such contingency statutory remedy has been provided. The Act itself provides for allowance for spoiled stamps in certain cases. Section 49 (d)(1) of the Act provides for allowance for stamps used for an instrument executed by any person thereto which has been afterwards found to be absolutely void in law from the beginning. The relevant provision occurring under Chapter-V of the Act reads as follows:

> "**49. Allowance for spoiled stamps** – Subject to such rules as may be made by the State Government as to the evidence to be required or, the enquiry to be made, the Collector may, on application made within the period prescribed in Sec.50, and if he is satisfied as to the facts, make allowance for impressed stamps spoiled in the cases xx xx xx xx xx:
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(d) the stamp used for an instrument executed by any party thereto which-

(1) has been afterwards found to be absolutely void in law from the beginning;

xx xx xx xx xx xx xx xx xx xx xx xx xx x
xx xx xx xx xx xx xx xx xx xx xx xx xx x."

Rules 19 and 20 of the Orissa Stamp Rules, 1952 provide for procedure for allowance by way of refund which read as follows:

"**19. Evidence as to circumstances of claim to refund or renewal** – The Collector may require any person claiming a refund or renewal under Chapter V of the Act or his duly authorised agent to make an oral deposition on oath or affirmation, or to file an affidavit, setting forth the circumstances under which the claim has arisen, and may also, if he thinks fit, call for the evidence of witnesses in support of the statement set forth in any such deposition or affidavit.

20. Payment of allowances in respect of spoiled or misused stamps or on the renewal of debentures – When an application is made for the payment of under Chapter V of the Act, of an allowance in respect to stamp which has been spoiled or misused or for which the applicant 'has had no immediate use or on the renewal of a debenture, and an order is passed by the Collector sanctioning the allowance or calling for further evidence in support of the application, then, if the amount of the allowance of the stamp given in lieu thereof is not taken, or if the further evidence required is not furnished, as the case may be, by the applicant within one year of the date of such order, the application shall be struck off, and the spoiled or misused stamp (if any) sent to the Superintendent of Stamps or offer officer appointed in this behalf by the State Government for destruction."

10. There being statutory mandate for allowance by way of refund for spoiled stamps used on a void document, it would certainly be discriminatory, arbitrary and, consequently, without jurisdiction on the part of the Stamp Collector to insist upon payment of any further duty or fees on an instrument which has already been found to be void *ab initio*. Such action would be violative of Article 14 of the Constitution of India.

11. In the present case, the petitioner was purported to be conferred with the status of buyer on execution of a sale deed which is being found to be void *ab initio* inasmuch as right purported to have been created by execution of the sale deed is never capable of being enforced in law. In such circumstances, the petitioner is entitled under law to be protected against payment of stamp duty and registration fees on a document which is void from the beginning. The sale deed being a void document be treated as cancelled. The Stamp Collector and the Certificate Officer have utterly failed to consider the petitioner's contention that no liability arises for payment of stamp duty on an instrument which has been found to be void *ab initio*. Therefore, proceedings in U.V.M.C. No.417 of 2008 and Certificate Case No.26 of 2014 are liable to be dropped and are, accordingly, dropped. The writ petition is, accordingly, disposed of.

Writ petition disposed of.

2015 (I) ILR - CUT- 323

B.K. NAYAK,J

W.P.(C) No. 8624 OF 2006

KESHAB CHANDRA PANDA ……..Petitioner

.Vrs.

KASTURI MAHATAM & ORS. ……...Opp.Parties

ODISHA SURVEY AND SETTLEMENT ACT, 1958 – S.13 (3)

Presumption of entry in recording-of-rights – If any entry in a record-of-rights is altered in a subsequent record-of-rights, the later entry shall be presumed to be correct until it is proved by evidence to be incorrect.

For Petitioners : M/s.N.C.Pati & S.Mishra
For Opp.party : Mr. A.R.Dash.

Date of hearing : 02.12.2014
Date of judgment: 02.12.2014

JUDGMENT

B.K.NAYAK, J.

Initially order dated 09.02.2006 passed by the Joint Commissioner Settlement and Consolidation, Sambalpur in Settlement R.P. Case No.592 of 2005 (Annexure-5) was challenged in this writ petition. Subsequently by way of amendment order dated 03.08.2012 (Annexure-9) passed by the Member, Board of Revenue Orissa, Cuttack in OSS Case No.726 of 2003 has also been challenged by the petitioner.

2. The dispute relates to Ac.1.57 of land out of Ac.9.36 of Hamid Settlement Plot No.1018 of Khunti No.114 corresponding to M.S. Khata No.687 and Plot Nos.6104, 6105, 6106, 6107, 6112, 6087/8279, 6088/8280 and 6108/8281, measuring total area of Ac.1.570 in village-Golgunda is the subject matter of dispute.

3. The disputed Plot No.1018 of the Hamid Settlement is said to be a rayati land of one Dukhi Gauntiani Mahatam. On 10.08.1963 Dukhi Gauntiani sold the disputed land measuring Ac.1.57 decimals out of the said plot to one Nirod @ Narendra Kumar Bhattacharya by registered sale deed and delivered possession. After vesting the State of Orissa claimed part of the disputed plot for which Dukhi Gauntiani filed T.S. No.4 of 1966 against the State of Orissa in the court of the learned Sub-Judge, Sambalpur in respect of the land claimed by the State. In the trace map attached to the plaint the subject matter of the suit plot was specified in 'Red" colour as described in Schedule 'B' of the plaint apart from some other undisputed plots. The suit was decreed on 13.05.1967 on contest with the finding that since the disputed plot was the rayati land of Dukhi Gauntiani, it did not vest to the State and accordingly it was found that Dukhi Gauntiani had title in respect of the disputed Hamid Settlement Plot No.1018. The decree has become final.

Mutation Case No.526/1992 was started before the Tahasildar, Sadar for the disputed land purchased by Sri Bhattacharya from Dukhi Gauntiani on receipt of Form No.3 from the office of D.S.R., Sambalpur. The mutation case was allowed on 10.04.1992 and separate R.O.R. was issued in favour of Sri Bhattacharya. The present opposite party nos.1 to 5, who are the successors of Dukhi Gauntiani, challenged the mutation order by filing Mutation Appeal No.5 of 1993. The appeal was allowed by the Sub-Collector and the matter was remanded to the Tahasildar for re-disposal. On remand,

the Tahasildar again by his order dated 30.05.1995 allowed mutation confirming his previous order dated 10.04.1992. Against the order dated 30.05.1995 of the Tahasildar, opposite party nos.1 to 5 filed Mutation Appeal No.27 of 1997 before the Sub-Collector, Sambalpur against Sri Bhattacharya. It is stated by the petitioner that during pendency of the said appeal Sri N.K. Bhattacharya died on 18.11.1997, but the fact of his death was neither brought to the notice of the appellate court (Sub-Collector) nor steps were taken for substitution in his place. By his order dated 03.02.1998, the Sub-Collector again remanded the matter to the Tahasildar for fresh disposal with direction to verify if the disputed land was the subject matter of Title Suit No.4 of 1966. Since N.K. Bhattacharya had already died prior to disposal of the appeal, it is stated that the said appellate order is a nullity being passed against the dead man and hence non-est in the eye of law. After such remand, no notice was issued to the legal representatives of Sri N.K. Bhattacharya, nor anybody contested on his behalf, but by his order dated 20.04.1998 (Annexure-3), the Tahasildar erroneously held that the disputed land was the subject matter of T.S. No.4 of 1966 and hence he disallowed mutation. In the meantime, after the death of the N.K. Bhattacharya, his widow and sons sold the disputed land to the present petitioner by virtue of a registered sale deed dated 01.11.1999 (Annexure-8) and delivered possession to him. After his purchase, the petitioner having come to know about the order under Annexure-3, challenged the same by filing Mutation Appeal No.10 of 2002 before the Sub-Collector, Sambalpur. By his order dated 28.10.2005 (Annexure-4), the Sub-Collector allowed the appeal with the finding that in the title suit filed by Dukhi Gauntiani, the Suit land, i.e., 'B' schedule property was shown in 'Red' colour, whereas the land sold to Sri Bhattacharya by Dukhi Gauntiani was shown in 'Blue' colour, which was not the subject matter of the suit. It was held further that after remand the Tahasildar did not issue any public notice or individual notice and did not make any fresh enquiry though the Amin report and the spot visit report of the Tahasildar show that Sri Bhattacharya was the owner in possession of the disputed land. It was also held that the disputed land was the rayati land of Dukhi and immune from vesting. Accordingly, the mutation appeal was allowed in favour of the petitioner.

4. Challenging the appellate order under Annexure-4, opposite party nos.1 to 5 filed Settlement Revision No.592 of 2005 under Section 15(b) of the Orissa Survey and Settlement Act against the present petitioner, which was heard by the Joint Commissioner, Consolidation and Settlement and

disposed of by the impugned order under Annexure-5 holding that since Burla Town where the disputed land situates, is again under settlement operation vide Government Notification No.62147 dated 21.12.1999 and settlement work is in progress, the revision under Section 15(b) of the Orissa Survey and Settlement Act was not maintainable. The Joint Commissioner, however, further held that it was not competent for the Sub-Collector to pass order in mutation appeal during progress of the settlement operation and, therefore, the appellate order was non-existent in the eye of law and cannot be acted upon. The Joint Commissioner left the parties to agitate the matter in competent forum under relevant provisions of law.

5. It further transpires that a revision under Section 32 of the Orissa Survey and Settlement Act read with paragraph-111 of Orissa Mutation Manual was filed in the year 2003 purportedly by N.K. Bhattacharya before the Board of Revenue, Orissa, Cuttack which was registered as OSS Case No.726 of 2003 against an appellate order of the Sub-Collector, Sambalpur passed in Mutation Appeal No.27 of 1997 remanding the mutation case to Tahasildar. It is stated by the petitioner that the revision under Section 32 of the OSS Act could not have been filed by N.K.Bhattacharya, who was already dead since 18.11.1997. It is stated that some local people including some lawyers, who had greedy eyes on the disputed land had fraudulently managed to file OSS Case No.726 of 2003 in the name of Mr. N.K.Bhattacharya through a fictitious power of attorney holder.

By his order dated 03.08.2012 (Annexure-9) the Member, Board of Revenue set aside the order passed by the Sub-Collector in Mutation Appeal No.27 of 1997 and the orders of the Tahasildar, Sambalpur dated 30.05.1995 and 20.04.1998 in Mutation Case No.526 of 1992 and remanded the matter to the Tahasildar with a direction to examine all relevant records and give opportunity of hearing to all parties and dispose of the case as per law.

6. With respect to the death of N.K.Bhattacharya, the petitioner has filed his death certificate vide Annexure-7 which shows that N.K.Bhattacharya died on 18.11.1997.

7. A counter affidavit is filed by opposite party nos.1 to 5 which indicates that the disputed property is claimed by the opposite parties as successors of Dukhi Gauntiani. However, it is not denied that Dukhi Gauntiani sold the land to N.K. Bhattacharya and that the successors of N.K.Bhattacharya sold the land to the present petitioner. It is also not

specifically denied that N.K.Bhattacharya died on 18.11.1997. The genuineness of the death certificate vide Annexure-7 has not been specifically denied.

8. It appears from the impugned order under Annexure-5 that in Settlement Revision No.592 of 2005 apart from challenging the appellate order passed by the Sub-Collector in Mutation Appeal No.10 of 2002, opposite party nos.1 to 5 had also challenged the major settlement R.O.R. published in respect of the disputed land. It further appears from the certified copy of the plaint in T.S. No.4 of 1966 (Annexure-6) that Dukhi Gauntiani claimed rayati right in respect of the entire Hamid Settlement Plot No.1018 and specifically averred that she had sold Ac.1.57 decimals out of the said plot in favour of Mr.Bhattacharya and, therefore, she claimed for declaration of her right, title and interest in respect of the rest portion of the said plot over which the State raised a claim. The judgment passed in the said suit (Anenxure-1) reveals that Dukhi Gauntiani had rayati right over plot No.1018, though the present disputed land was not the subject matter of the suit.

9. It further transpires that during the continuance of mutation proceedings in the original, appellate and revisional fora fresh settlement under the Orissa Survey and Settlement Act, which was initiated in the year 1999, has been finalized and the disputed land has been recorded in the name of the present petitioner under Khata No.136 in rayati status. The said R.O.R. has been finally published on 31.10.2013.

10. Under Section 13 of the Orissa Survey and Settlement Act entries made in the R.O.R. are presumed to be correct unless and until they are proved to be incorrect. Record-of-rights are prepared by the settlement authorities on the prima facie satisfaction about right, title and interest over the land, but they have no power to decide disputed questions of title. Under the provision of sub section(3) of Section 13 of the Settlement Act if any entry in a record-of-rights is altered in a subsequent record-of-rights, the later entry shall be presumed to be correct until it is proved by evidence to be incorrect. Since the record-of-rights have been finally published in respect of the disputed land as recent as October, 2013, entries made therein must be presumed to be correct. Settlement having been over, question of consideration of any mutation matter originating long before the settlement operation started cannot be gone into. In such circumstances, I am of the view that the orders under Annexures-5 & 9 cannot stand and accordingly I quash

the same. Parties are at liberty to approach the appropriate Civil Court to get disputes relating to title decided, if so advised. It is made clear that this Court has expressed no opinion with regard to right, title and interest of the parties over the disputed land. The writ petition is accordingly disposed of.

Writ petition disposed of.

2015 (I) ILR - CUT- 328

B. K. NAYAK, J.

O.J.C. NO.10798 OF 2001

PURNA CHANDRA TRIPATHY & ORS. ……..Petitioners

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-47, R-1

Review – Consolidation Commissioner reviewed his order by re-appreciating facts afresh – Order challenged – A mistake to be rectified by recall must be an apparent mistake which goes against what had been intended or a clerical or arithmetical mistake – A Court or Tribunal is entitled to decide right or wrong but a wrong decision does not entitle the Court to review the earlier decision and pass a correct decision on merits by re-appreciating the facts afresh.

In this case, not only the Commissioner consolidation has no power of review but also he lacks power to decide the revision afresh on merits on re-appreciation of the entire matter holding that the earlier decision was wrong, which is wholly impermissible – Held, the impugned order is quashed – The first revisional order Dt.19.07.1997 is restored subject to modification that Ac.0.02 decimals of land out of Ac.0.14 decimals in L.R. Plot No.758 shall be recorded in favour of the petitioners. (Paras 9,10,11)

Case laws Referred to:-

1.2009 (Supp-1) OLR 534 : (Balaram Swain & Anr.-V- Rabindra Swain & Ors.)

2.AIR 2001 (SC) 1984 : (Jayalakshmi Coelho-V- Oswald Joseph Cooelho)
3.54 (1982) CLT 515 : (Gopinath Deb-V- Budhia Swain & Ors.)
4.AIR 2000 (SC) 1650 : (Lily Thomas, etc.-V- Union of India & Ors.)
5.(1996) 5 SCC 550 : (Indian Bank-V- Satyam Fibres (India) Pvt. Ltd.)
6.1999 (II) OLR (SC) 151 : (Budhia Swain & Ors.-V- Gopinath Deb & Ors.)
7.AIR 1964 (SC) 907 : (Ittyavira Mathai-V- Varkey).

For Petitioners - Mr. A.K. Tripathy.
For Opp.Parties - Mr. N.K. Sahu.

Date of hearing : 07.11.2014
Date of judgment: 01.12.2014

JUDGMENT

B.K.NAYAK, J.

In this writ petition the petitioners assail the review order dated 28.05.2001 (Annexure-11) passed by the Commissioner, Consolidation, Orissa, Bhubaneswar-opposite party no.2 in Revision Case No.350 of 1996 after recalling the order dated 19.07.1997 (Annexure-8) and thereby substituting a completely new decision.

2. The dispute relates to Ac.0.02 decimal of land out of Ac.0.04 appertaining to Sabik Plot no.258 under Sabik Khata No.18 in village-Tulasipur which forms part of L.R. Plot No.378 having a total area of Ac.0.14 decimal. The entire Sabik Plot No.258 measuring Ac.0.04 decimal vested under the O.E.A. Act in the year 1956. In OEA Lease Case No.1176/1970, Ac.0.02 decimal out of the same was settled in favour of the father of the petitioners, which corresponds to L.R. Plot No.377 and was recorded in the name of the petitioners' father in the consolidation operation. Similarly, the rest Ac.0.02 out of the Sabik Plot No.258 was settled in favour of opposite party nos.3 and 4 (since deceased are substituted) in OEA Lease Case No.378 of 1976. During the consolidation operation, the said land got amalgamated in L.R. Plot No.378 measuring Ac.0.14 decimal and was recorded in the names of opposite party nos.3 and 4.

3. It is stated by the petitioners that opposite party no.4 filed T.S. No.376 of 1979 in the court of Munsif, Puri against the petitioners' father for

declaration of right, title and interest over Sabik Plot No.258. During pendency of the suit, opposite party nos.3 and 4 sold Ac.0.02 decimal out of the said plot in favour of petitioners' father by registered sale deed and thereafter filed a Memo stating that the parties had entered into a compromise and that the plaintiffs would not raise any further claim with respect to the suit property and, therefore, plaintiff was not interested to prosecute the suit further. On such Memo the civil court dismissed the suit as not pressed by order dated 03.11.1981 as at Annexure-5. Since thereafter during the consolidation operation the Ac.0.02 decimal of land out of Sabik Plot No.258 was recorded in the names of opposite party nos.3 and 4 being amalgamated in their L.R. Plot No.378, the petitioners filed Consolidation Revision No.1949 of 1992 under Section 37 of the Consolidation Act before opposite party no.2 for getting Ac.0.02 decimal out of L.R. Plot No.378 recorded in their names. By order dated 19.07.1984 (Annexure-6), the Commissioner, Consolidation remanded the case to the Consolidation Officer for deciding the same on examination of documents of the parties and after giving them opportunity of hearing. The opposite parties did not challenge the said revisional remand order, which became final. The Consolidation Officer rejected the claim of the petitioners on some technical grounds and held that the disputed land was not sold to the petitioners by opposite parties. It is alleged by the petitioners that the Consolidation Officer did not take into consideration the legal effect of dismissal of the suit filed by opposite parties. Appeal preferred against the order of the Consolidation Officer in Appeal No.101 of 1995 was dismissed by the Deputy Director, Consolidation, whereupon the petitioners challenged the said order by filing Consolidation Revision No.350 of 1996 before the Commissioner, Consolidation (opposite party no.2) under Section 36 of the Consolidation Act. Upon hearing, the Commissioner, Consolidation by his judgment dated 19.07.1997 (Annexure-8) allowed the revision and set aside the orders of the courts below holding that the entire Ac.0.04 decimals in Sabik Plot No.258 goes to the defendant in the Civil Suit, i.e., the father of the petitioners. The Commissioner however directed for recording of the entire L.R. Plot No.378, Ac.0.14 in favour of the petitioners, unmindful of the fact that the petitioners had claimed only Ac.0.02 decimal out of the entire area of L.R. Plot No.378. The revisional order under Annexure-8, however, was not challenged by the opposite parties which become final. Having found that the Commissioner had committed mistake by directing recording of the entire Ac.0.14 decimals instead of Ac.0.02 decimal out of the said plot, the opposite parties filed a petition,

registered as Misc. Case No.219 of 1997, under Section 151, C.P.C. to recall the revisional order. By order dated 20.02.1999 finding the mistake committed by him, the Commissioner recalled the revisional order under Annexure-8, but instead of rectifying the mistake, heard the revision again and by the impugned order under Annexure-11 substituted a different decision altogether by dismissing the revision and thereby rejecting the claim of the petitioners.

4. Learned counsel for the petitioners submits that though every court and Tribunal has the inherent jurisdiction to correct any apparent clerical or typographical error in its order, it cannot review the entire decision and re-appreciate the case unless power of review is specifically conferred by the statue. It is submitted that the Commissioner, Consolidation has no power of review and, therefore, he could not have passed the impugned order rejecting the claim of the petitioners, which had been allowed by him by his previous order under Annexure-8.

5. Opposite party nos.3 and 4 have filed a counter affidavit and learned counsel for opposite parties submits that though a Tribunal or quash judicial authority cannot review its own order on merits unless the power of review is specifically conferred on him, the Commissioner has given correct decision as per the impugned order since his earlier order under Section 8 was wrong and, therefore, the impugned order warrants no interference.

6. It is trite law that a Court or Tribunal cannot review its own decision unless the power of review has been specifically conferred on him. It is, however, permissible to rectify any typographical or arithmetical error which power is inherent with every court and Tribunal.

7. This Court in the case of ***Balaram Swain & Anr. v. Rabindra Swain & Ors. : 2009(Supp.-1) OLR 534*** has held that the Commissioner, Consolidation has no power to review his decision.

The apex Court in the decision reported in ***AIR 2001 (SC) 1084: Jayalakshmi Coelho v. Oswald Joseph Coelho*** have held that a power to rectify under Section 152, C.P.C. does not amount to a power to give second thought over the matter. Such power is confined to something initially intended by Court but left out or added against such intention.

A division Bench of this Court in the case of ***Gopinath Deb v. Budhia Swain and others: 54 (1982) C.L.T.515*** has held that the power of review is

not inherent in a Court or Tribunal, it is a creature of the statute. Courts or Tribunals of limited jurisdiction created under special statutes have no inherent power to review.

While dealing with the scope of power of review under Order 47 Rule(1) of the C.P.C., the apex Court in the decision reported in ***AIR 2000 (SC) 1650: Lily Thomas, etc. v. Union of India and others*** have held that "*mistake apparent on face of record*" cannot mean error which has to be fished out and searched.

8. In course of his argument, the learned counsel for the opposite parties with reference to averments in the plaint in the earlier civil suit filed by the opposite parties submits that it is clear that the suit was filed not in respect of the entire Ac.0.04 decimal of Sabik Plot No.258, but it was limited only to Ac.0.02 decimal out of the same and therefore, the decision in the impugned order is the correct decision whereas the decision under review (Annexure-8) was the wrong decision and, therefore, the right decision should not be interfered with. He has also relied upon the decision in ***(1996) 5 SCC 550: Indian Bank v. Satyam Fibres (India) Pvt. Ltd.*** in which it has been held that the National Consumer Commission has inherent power to recall its judgment and order, if found to be obtained by fraud/forgery, as fraud amounts to abuse of process of the Commission. This decision has no application to the facts of the present case since there is no question of fraud or forgery practised by the petitioners, on the Consolidation Commissioner for passing of the first revisional order under Annexure-8.

The other decision relied upon by the learned counsel for the opposite parties is ***1999 (II) OLR (SC) 151: Budhia Swain and others v. Gopinath Deb and others***, wherein the Court relied upon the ratio laid down in the case of ***Indian Bank*** (supra) and held that a Tribunal or a Court may recall an order earlier made by it if:

(i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,

(ii) there exists fraud or collusion in obtaining the judgment,

(iii) there has been a mistake of the Court prejudicing a party, or

(iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.

Elucidating further, the apex Court took note of the decision in ***AIR 1964 (SC) 907 : Ittyavira Mathai v. Varkey***, where it has been held as follows :

> "... ... ...But it is well settled that a Court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it had acted beyond its jurisdiction. As has often been said, Courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities. ... ..."

9. The decisions cited by the learned counsel for the opposite parties have no application inasmuch as there was no question of fraud, forgery or lack of jurisdiction of the Commissioner, Consolidation etc. A mistake to be rectified by recall must be an apparent mistake which goes against what had been intended, or a clerical or arithmetical mistake. A Court or Tribunal is entitled to decide right or wrong, but a wrong decision does not entitle the court to review the earlier decision and pass a correct decision on merits by re-appreciating the facts afresh.

10. In the instant case, not only the Commissioner, Consolidation has no power to review, but also he lacks power to decide the revision afresh on merits on a re-appreciation of the entire matter holding that the earlier decision was wrong, which is wholly impermissible.

11. In the light of the discussions made above, I am of the view that order under Anenxure-11 is wholly unsustainable and accordingly I quash the same. The first revisional order under Annexure-8 is restored subject to modification that Ac.0.02 decimals of land out of Ac.0.14 decimals in L.R. Plot No.758 shall be recorded in favour of the petitioners.The writ petition is accordingly allowed.

Writ petiton allowed.

2015 (I) ILR - CUT- 334

S. K. MISHRA, J.

W.P.(C) NO.1426 OF 2011

BINAYA BHUSAN PATTNAIK ……..Petitioner

.Vrs.

SUJATA PATTNAIK ……..Opp.Party

CIVIL PROCEDURE CODE, 1908 –O-9, R-13

Setting aside exparte decree – Petitioner-husband deliberately given a wrong address in the petition for divorce and obtained the exparte decree – There is element of fraudulent misrepresentation in this case which vitiates every solemn act – Application under Order 9, Rule 13 C.P.C. is maintainable – Impugned orders confirmed.

(Para 5)

Case law Referred to:-

.(1987) DMC 324 : (Dr. Mithilesh Kumar Srivastava-V- Smt.Saroj Ku. Srivastava)

For Petitioner - M/s. B.Sahoo, A. Tripathy, B. Mohanty.
For Opp.Party - M/s. Suvasish Pattnaik, S. Mohanty, D. Moharana, A. Barik.

Date of Judgment : 30.08.2013

JUDGMENT

S.K.MISHRA, J.

In this writ petition, the order dated 11.01.2011 passed by the learned Ad hoc Addl. District Judge, F.T.C. No.II, Bhubaneswar in C.R.P. No. 5/13 of 2007 is called in question. While disposing of the said revision, the learned Addl. District Judge confirmed the order dated 10.05.2007 passed by the learned Civil Judge (Senior Division), Bhubaneswar in I.A. No.335 of 2003, whereby the Civil Judge (Senior Division) has allowed the application under Order IX, Rule 13 of the Code of Civil Procedure, 1908, hereinafter referred as the "Code" for brevity, filed by the present opposite party and set aside the decree dated 14.02.2001 and restored the suit to the original position.

2. The present petitioner filed an application for dissolution of marriage and decree of divorce before the learned Civil Judge (Senior Division),

Bhubaneswar, which was registered as C.S. No.83 of 1998. The said suit was decreed *ex parte* on 07.02.2001. The present opposite party filed an application under Order IX Rule 13 of the Code to set aside the *ex parte* order. In that petition, she averred that she had married the present petitioner on 15.04.1993. Five years after marriage in 1998, the petitioner drove her out of the marital home and avoided to take her back on some pretext or other. In May, 2003, the opposite party came to know that the petitioner is trying to marry for the second time, for which she lodged a complaint on 29.05.2003 before the Mahila Police Station. During enquiry, the petitioner showed an *ex parte* decree of divorce dated 07.02.2001 passed by the learned Civil Judge (Senior Division), Bhubaneswar in C.S. No.83 of 1998, for which police did not lodge the F.I.R. On verification of the record, the present opposite party (wife) came to know that the petitioner had intentionally given a wrong address in the petition for divorce. Taking advantage of such wrong address, the petitioner has managed to obtain a decree fraudulently. After coming to know about such information, the opposite party filed the application under Order IX, Rule 13 of the Code on 23.06.2003 for setting aside the *ex parte* judgment.

3. The petitioner (husband) filed objection in the said interim application contending therein that the address given by the opposite party in the original suit is correct and the opposite party is not residing in Chintamaniswar Canal Colony. It is further contended that the opposite party avoided to take delivery of summons, for which the summons was held sufficient on 10.09.1999 and she was set *ex parte*. Subsequently, the notice was published in "The Pragatibadi" on 25.04.2000 and the same was held sufficient vide order dated 08.05.2000. In spite of such service of notice, the opposite party did not contest and the petitioner married for the second time on 25.11.2001, which was known to the opposite party and her relations. The present petitioner claimed that a petition to set aside the *ex parte* decree has been filed with an intention to harass the petitioner.

4. On such pleadings, the parties led evidence. Learned Civil Judge (Senior Division), Bhubaneswar, after taking into consideration the evidence led by the parties, came to the conclusion that the summons was not duly served on the opposite party (petitioner before him) in the original suit and there is sufficient cause for setting aside the *ex parte* decree passed in favour of the opposite party (wife). The learned Civil Judge (Senior Division) on elaborate discussion has given his finding that the address given in the

petition for divorce is not correct. Therefore, the service of summons on the opposite party cannot be held to be sufficient. Such factual finding has been confirmed by the learned Addl. District Judge in his judgment dated 11.01.2011. Such being the case, the appellate court has also held that the petitioner has failed to prove that service of notice was sufficient on the opposite party (wife) and therefore, the same was set aside. Such orders passed by the learned Civil Judge (Senior Division) and confirmed by the learned Addl. District Judge have been assailed in this writ petition.

5. Learned counsel for the petitioner fairly conceded that he does not want to argue on the question of concurrent findings of fact. He, by drawing attention of the Court to Section 15 of the Hindu Marriage Act, submits that the petition for setting aside the *ex parte* decree is not maintainable in view of the fact that the petitioner has married for the second time after expiry of the period of appeal and has already been blessed with a child. It is apposite to take note of the Section 15 of the Hindu Marriage Act, 1955, hereinafter referred as the "Act" for brevity, which reads as follows:

> "15. **Divorced persons when may marry again.** – When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

Taking into consideration, Section 15 of the Act, Rajasthan High Court in the case of **Surendra Kumar v. Kiran Devi,** AIR 1997 Rajasthan 63 has held that the application by the non-petitioner is not maintainable in view of the fact that the period for appeal has already expired by the time the wife filed an application for setting aside the *ex parte* decree. Learned counsel for the opposite party, on the other hand, relies on the case of **Dr. Mithilesh Kumar Srivastava v. Smt. Saroj Kumar Srivastava,** reported in I (1987) DMC 324. The Allahabad High Court after taking into consideration a number of decisions came to the conclusion that a petition under Order IX, Rule 13 of the Code is maintainable. After having gone through the case, this Court comes to the conclusion that to the facts of the present case, the ratio laid down by the learned Single Judge of the Allahabad High Court in **Dr. Mithilesh Kumar Srivastava v. Smt. Saroj Kumar Srivastava** (supra) is

applicable. In that case, the Allahabad High Court has held that the *ex parte* decree was obtained by practicing fraud. So the applicant, who has obtained the same by misrepresentation, cannot be allowed to deprive the advantage out of it. The fact of the case is similar to the present one. In this case, the petitioner (husband) has deliberately given a wrong address in the petition for divorce and obtained an *ex parte* decree against his wife. There is element of fraudulent misrepresentation in this case. It is well settled that fraud or fraudulent misrepresentation vitiates every solemn act. Therefore, the Court is of the opinion that in such an event, an application under Order IX, Rule 13 of the Code is maintainable and the learned Addl. District Judge has committed no wrong in upholding the orders passed by the learned Civil Judge (Senior Division), Bhubaneswar on an application under Order IX, Rule 13 of the Code.

In such premises, the writ application is dismissed being devoid of merit, but without any cost.

Writ petition dismissed.

2015 (I) ILR - CUT- 337

S. K. MISHRA, J.

CRLA NO. 374 OF 2007

PARITOSH DASH .....Appellant

.Vrs.

STATE OF ORISSA ....Respondent

N.D.P.S. ACT, 1985 – S. 20 (b) (ii) (c)

Seizure of ganja from the verandah of a house and the house is inhabited by several persons – No clear suggestion given by the prosecution that the house in question was not in joint possession of several persons – Prosecution failed to establish the necessary connection showing exclusive and conscious possession of the contraband articles by the accused-appellant – Conviction and sentence are set aside. (Para 8)

For Appellant - M/s. G.N. Mishra, S.C. Sahoo,
M/s. L. Samantray, B. Pradhan,
R.L. Pradhan & G. Das.
For Respondent - Sri Anupam Rath,
Addl. Standing Counsel.

Date of Judgment : 30.08.2013

JUDGMENT

S.K.MISHRA, J.

The accused having been convicted for the offence under Section 20 (b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act) and sentenced to undergo rigorous imprisonment for 20 years and to pay fine of Rs.2,00,000/-, in default to undergo further R.I. for five years has assailed his conviction and sentence in this appeal. The conviction has been recorded by the learned Addl. Sessions Judge-cum-Special Judge, Malkangiri in Criminal Trial No.51 of 2006. Judgment has been pronounced on 03.07.2007.

2. The case of the prosecution is that, on 23.03.2006, the OIC of Malkangiri Police Station received reliable information about the possession of ganja by the accused-Paritosh Dash in village M.V. 83. The said Police Officer after making station diary sent the intimation to his immediate superior in writing. Such information has been sent to the C.I. and Superintendent of Police, Malkangiri though special messenger. The officer was of the opinion that there was danger of accused escaping with the ganja. He along with his staff reached the spot, M.V. 83 at 11.30 A.M. and detected some gunny bags numbering about fourteen on the verandah of the house of the accused. He asked the accused about the contents of those gunny bags and accused replied that ganja was inside the gunny bags and that he procured the same Dyke-III side.

Thereafter, the Investigating Officer (I.O.) detained the accused in his house with the contraband ganja bags and arranged for local witnesses. He disclosed before the local witnesses and the accused for the purpose of his visit. He further asked the accused about his willingness to be searched in the presence of Executive Magistrate. The appellant stated that he is willing to be searched in the presence of an Executive Magistrate. Therefore, a constable was deputed and the service of the Executive Magistrate (P.W.2) was made available on the direction of the Sub-Collector, Malkangiri.

In the presence of the Executive Magistrate, the house of the accused was searched and fourteen numbers of gunny bags were found containing ganja. The witnesses and the Executive Magistrate could know the same to be ganja from the smell. Then, the I.O. deputed a constable to arrange a weighman. On arrival of the weighman, all the fourteen numbers of gunny bags weighed in the presence of witnesses. The total weigh of the ganja came to 250.672 kgs and samples were taken of 24 grams each. The samples were kept in separate packets. Thereafter, the IO seized 14 bags along with sample packets and prepared seizure list. The gunny bags were marked as Exts. A to N and the sample packets were marked as Exts. A-1 to N-1 and A-2 to N-2. He seized all the 28 sample packets and prepared seizure list in the presence of the Executive Magistrate. The accused was also affixed his LTI in the seizure list. The sample packets were signed in the presence of the Executive Magistrate and other witnesses by using brass seal of the Executive Magistrate. He also prepared sample copy of the brass seal of the Executive Magistrate. Then, he arrested the accused and forwarded the material objects to the Court.

At the spot, he prepared a plain paper FIR, which is marked as Ext.27. Then, he proceeded to the police station. On 24.03.2006, at about 2 A.M. he along with his staff reached the police station at Malkangiri and registered a case as Malkangiri P.S. Case No.59, dated 24.03.2006. The IO kept the properties at the P.S. Malkhana and he was also then in-charge of the Malkhana by making entry in P.S. Malkhana Register, vide Mal Number 40/2006 retaining copy of the mal entry vide Ext.28. On 25.03.2006, he forwarded the accused and seized bulk and sample packets to the Court of Special Judge, Koraput at Jeypore. On that date, he received orders from the Court to send sample packets through the SDJM, Malkangiri to R.F.S.L., Berhampur for chemical examination. It was directed that the learned S.D.J.M., Malkangiri shall keep the seized articles in the Malkhana. Accordingly, the same was kept in the Court of learned S.D.J.M., Malkangiri. After completion of investigation, on 20.05.2006, the IO submitted charge-sheet against the appellant under Section 20 (b) (ii) (C) of the NDPS Act. The appellant, therefore was charged for the offence under Section 20(b) (ii) (C) of the NDPS Act.

3. In course of trial, the appellant took the plea of denial and false accusation. However, he admitted that he along with his wife and brother were staying together in the house in question.

4. In order to prove its case, prosecution examined seven witnesses. P.W.6 is the Investigating Officer, who prepared seizure list P.W.2 happens to be the Executive Magistrate. P.W.1 is a local village. P.W.3 is an ASI, who accompanied raiding party. P.W. 4 is a witness to the seizure of command certificate. P.W.5 is the constable, who accompanied the raiding party. P.W.7 is a witness to the seizure of the Patta of the house in question. The defence examined one witness on its behalf, namely, Amal Mazumdar.

5. The learned Special Judge after considering the materials on record came to the conclusion that the prosecution has proved its case beyond all reasonable doubts and, hence, he convicted the appellant for the offence under Section 20 (b) (ii) (C) of the NDPS Act and sentenced him to undergo imprisonment as described above.

6. In course of hearing, the learned counsel for the appellant raised only one contention. It is emphatically argued by the learned counsel for the appellant that the learned Special Judge has not considered the fact that the house from which contraband articles were seized was not the exclusive residence of the appellant and that other persons were also residing. In this connection, he drew attention of the Court to the cross-examination of P.W.6 and the statement of D.W.1. The learned Standing Counsel, on the other hand, has stated that there is presumption in favour of the prosecution under Section 54 of the NDPS Act and, hence, once possession is established from the accused, it shall be presumed under the Act with respect to the contraband articles seized as has been held in this case.

7. It is not disputed that the contraband ganja was seized from the verandah of a house. P.W.6 in the cross-examination has stated that the land in question stands recorded in the name of Ashalata Das, who happens to be mother of the deceased and she is alive. She was not cited as a witness to the prosecution. The witness also admitted that Ashalata Dash had three sons, namely, Santosh Dash, Paritosh Dash (appellant) and Ganesh Dash. He stated that all the brothers were staying separately and there are six houses in that campus. The campus is adjacent to the main road leading to other villages. This aspect was put to the appellant in the statement recorded under Section 313 Cr. P.C.. The Court asked the appellant that Ashalata Dash happens to be his mother and she was staying with him and other brothers. The appellant admitted the same and said that they were staying together. In addition to that, no independent witness has supported the case of the prosecution, who has knowledge about the residence of the accused in the house in question.

8. It is further evident from the statement of D.W.1 that Ashalata Dash happens to be mother of the accused and she is head of the family of the accused. The witness stated that the accused have two other brothers, namely, Santosh and Ganesh. He has further stated all the brothers were staying together along with their mother in one house. He further stated that 12 inmates were staying in that house of Ashalata. He further stated that the land in which the house in question from where recovery took place stands in the name of Ashalata, the mother of the deceased. In the cross-examination, the Special Public Prosecutor has suggested that the brother of the accused-Paritosh Dash, namely, Ganesh is a Police Constable and that he stays in that house. The prosecution has not given a clear suggestion that the house in question was not in the joint possession of several persons. In a case under NDPS Act, where mere possession of contraband article is an offence, it is duty of the prosecution to prove the exclusive and conscious possession of the accused-appellant over the articles seized in course of investigation. In this case, the contraband articles were seized from the verandah of a house. It is also clear from the records that the house is inhabited by several persons. So, the prosecution has failed to establish the necessary connection, which shows the exclusive and conscious possession of the contraband articles by the accused-appellant. Hence, this Court comes to the conclusion that the findings recorded by the learned Addl. Sessions Judge-cum-Special Judge, Malkangiri is not sustainable and is liable to be interfered with.

Accordingly, the Criminal Appeal is allowed. The conviction and sentence of the accused for the offence under Section 20 (b) (ii) (C) of the NDPS Act in C.T. No.51 of 2006 are hereby set aside. The appellant be set at liberty forthwith, if his detention is not required in any other case.

Appeal Allowed.

2015 (I) ILR - CUT- 341

C.R. DASH, J

W.P (C) No.12211 OF 2004

BABAJI DHAL ……..Petitioner

.Vrs.

**ELECTION OFFICER-CUM-B.D.O.
PATTAMUNDAI BLOCK,
KENDRAPARA & ANR.** ……...Opp.Parties

ELECTION CASE – Recounting of votes – When can be ordered – No adequate pleadings of natural facts – No prima facie case of a high degree of probability exists – There was also once recounting of votes – Only narrow margin of votes between the parties is not sufficient for the purpose – Held, impugned order directing recounting of votes is set aside. (Para 26,29)

Case laws Relled on :-

1. AIR 1964 SC 1249 : Ram Sewak Yadav vs. Hussain Kamil Kidwai and Ors.
2 .AIR 2010 SC 24 :Kattinokkula Murali Krishna -v- Veeramalla Koteswara Rao & Ors.
3. AIR 1966 SC 773 : Dr. Jagjit Singh vs. Giani Kartar Singh
4. AIR 1980 SC 206 : R. Narayanan vs. Semmalai
5. AIR 1989 SC 640 : P.K.K. Shamsudeen vs. K.M. Mappillai Mohindeen and Ors.
6. AIR 2004 SC 2036 :Chandrika Prasad Yadav vs. State of Bihar and Ors
7. AIR 2004 SC 541 : M. Chinnasami vs. K.C. Palanisami and Ors.
8. AIR 1970 SC 276 : Jitendra Bahadur Singh vs. Krishna Behari and Ors
9.. AIR 2004 SC 203 : Chandrika Prasad Yadav,
10. AIR 1980 SC 206, : R.Narayanan vs. S. Semmallai,
11. AIR 2010 SC 24 : Kattinokkulla Murali Krishna,
12. (2000) 8 SCC 355 : Vadivelu vs. Sundaram and Ors.
13. 1999 (9) SCC 420, : Mahant Ram Prakash Das vs. Ramesh Chandra.
14. 2010 (1) CLR (SC) : 371, :Udey Chand vs. Surat Singh and others,
15. 1998 (II) OLR 214 : Rabindra Kumar Mallick vs. Panchanan Kanungo and others,

For Petitioners : M/s. Manoj Kumar Mohanty T. Pradhan, M.R. Pradhan
For Opp.party : Addl. Government Advocate
M/s. Amiya Kumar Mohanty (A) R.K. Behera.
Mr. R.C. Pradhan

Date of Judgment : 19.11.2014

JUDGMENT

C.R. DASH, J.

This writ application has been filed by the petitioner impugning the order dated 26.06.2014 passed by the learned Civil Judge (Junior Division), Pattamundai in Election Misc. Case No.7 of 2012 directing production of used, counted and rejected ballots of Balabhadrapur Grama Panchayat under

Pattamundai Panchayat Samiti in the district of Kendrapara for inspection.

2. The present petitioner is the elected Sarpanch and present opposite party No.2 is the defeated candidate. The election for the post of Sarpanch was held on 13.02.2012 and the result was published on 24.02.2012. The petitioner was assigned with the symbol of "Open Book" and opposite party No.2 was assigned with the symbol of "Fish" in the said election. In the election, the petitioner polled 1288 votes, opposite party No.2 polled 1285 votes and 53 votes were rejected. The petitioner was thus declared elected by margin of 3 votes. Subsequently, opposite party No.2 moved the Election Officer for recounting. The prayer was allowed by the Election Officer. In recounting, the petitioner was found to have polled 1292 votes, opposite party No.2 was found to have polled 1291 votes and 43 votes were rejected. After recounting, the petitioner was declared to be elected thus by a margin of one vote.

3. The present opposite party No.2 filed Election Misc. Case No.7 of 2012 on various grounds, inter alia, grounds of multiple voting, non-affixture of prescribed rubber stamp, impersonation by some of the voters and so on in different booths. Altogether polling was held in 11 booths for the Grama Panchayat.

4. In course of the proceeding, present opposite party No.2 filed a petition for production of used, counted and rejected ballots for inspection. The said petition was rejected by the Election Tribunal vide order dated 06.09.2012. Opposite party No.2 moved this Court in W.P.(C) No.17720 of 2012. The writ application was disposed of on 02.07.2013 with the following observation:-

> *"However, the learned court below is directed to immediately proceed with the trial of the Election Misc. Case and dispose of the same within a period of four months from the date of production of certified copy of this order. If any fresh petition is filed by the petitioner at the appropriate stage for recounting, that may be considered on its own merit."*

5. Opposite party No.2 filed another petition for production of used, counted and rejected ballots for inspection and recounting. Such petition was filed after closure of evidence from both the sides.

6. Learned Election Tribunal, on consideration of the materials on record and evidence adduced, took view in favour of recounting and passed the impugned order for production of used, counted and rejected ballots for inspection. The said order is impugned in this writ application.

7. Mr. Manoj Kumar Mohanty, learned counsel for the petitioner submits that the Election Tribunal has erred in ordering recount of votes, when the petitioner (opposite party No.2 here) has not made out a prima facie case for order of recounting. It is further submitted that secrecy of the ballot being sacrosanct, the same could not have been violated by ordering recount until a prima facie case of compulsive nature had been made out by the defeated candidate (opposite party No.2). Learned counsel for the petitioner further submits that the learned Election Tribunal has not properly followed the salutary principles of law pronounced by the Hon'ble Supreme Court in different cases and order of recount of votes has been passed:

(I) When the Election Petition does not contain an adequate statement of all the material facts, on which the allegation of irregularity or illegality in counting are founded ;

(II) When on the basis of the evidence adduced, such allegations are prima facie not established, affording a good ground for believing that there has been a mistake in counting ;

(III) When the Election Tribunal is not prima facie satisfied that making of such an order of recounting is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties ;

Mr. Mohanty, learned counsel for the petitioner relies on a catena of decisions to substantiate his contentions.

8. Mr. Amiya Kumar Mohanty, learned counsel appearing for the opposite party No.2 oppugns the contentions raised by learned counsel for the petitioner and supports the impugned order. He does not dispute the principle of law enunciated by the Hon'ble Supreme Court and this Court so far as recounting of vote by the learned Election Tribunal is concerned. But he submits that the conditions for recount have been well satisfied in his pleadings by the opposite party No.2 and in the evidence adduced on his behalf.

It is further submitted by Mr. Mohanty, learned counsel for opposite party No.2 that, when the finding of the learned court below is not perverse,

no interference by this Court in exercise of writ jurisdiction is called for. He also relies on a number of decisions of the Hon'ble Supreme Court and this Court to substantiate his contention.

9. So far as the decision relied on by learned counsel for the parties are concerned, both of them having relied on a number of decisions so far as conditions precedent for ordering recount of votes in election proceeding is concerned, all the decisions need not be extracted here for the sake of brevity.

10. The Hon'ble Supreme Court, in the case of ***Ram Sewak Yadav vs. Hussain Kamil Kidwai and others,*** **AIR 1964 SC 1249,** has ruled regarding the principles, which should govern the field in ordering recount of votes in an election proceeding. That is a Five Judges Bench decision. The salutary principles enunciated by the Hon'ble Supreme Court in the aforesaid case has been followed consistently till date and the principles have remained the same. It would, therefore, suffice to quote the observation of the Hon'ble Supreme Court in this regard in the recent case of ***Kattinokkula Murali Krishna vs. Veeramalla Koteswara Rao and others***, **AIR 2010 SC 24** in paragraph- 11 of the judgment, which runs as follows:-

> *"Before examining the merits of the issues raised on behalf of the parties, it would be appropriate to bear in mind the salutary principle laid down in the Election Law that since an order for inspection and re-count of the ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course. Undoubtedly, in the entire election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting of votes are made out. The importance of maintenance of secrecy of ballots and the circumstances under which that secrecy can be breached, has been considered by this Court in several cases. It would be trite to state that before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements, viz. (i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be, prima facie, satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively*

necessary, are satisfied. Broadly stated, material facts are primary or basic facts which have to be pleaded by the election petitioner to prove his cause of action and by the defendant to prove his defence. But, as to what could be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down."

11. So far as the aforesaid principles of law is concerned, reference may be made to ***Dr. Jagjit Singh vs. Giani Kartar Singh,*** **AIR 1966 SC 773**, ***R. Narayanan vs. Semmalai,*** **AIR 1980 SC 206**, ***P.K.K. Shamsudeen vs. K.M. Mappillai Mohindeen and others***, **AIR 1989 SC 640**, ***Chandrika Prasad Yadav vs. State of Bihar and others***, **AIR 2004 SC 2036**, ***M. Chinnasami vs. K.C. Palanisami and others***, **AIR 2004 SC 541**, ***Jitendra Bahadur Singh vs. Krishna Behari and others***, **AIR 1970 SC 276**, ***Vadivelu vs. Sundaram and others*** **(2000) 8 SCC 355**, ***Mahant Ram Prakash Das vs. Ramesh Chandra and others***, **1999 (9) SCC 420**, ***Udey Chand vs. Surat Singh and others***, **2010 (1) CLR (SC) 371**, ***Nihar Ranjan Bisoi vs. Election Tribunal-cum-District Judge, Jeypore***, **2006 (1) OLR 796**, ***Jagannath Sethi vs. Adikanda Palata and others***, **2014 (1) OLR 521**, ***Ananda Chandra Ojha vs. Ashok Saha***, **2013 (1) OLR 575**.

12. Mr. Manoj Kumar Mohanty, learned counsel for the petitioner relying on the case of Chandrika Prasad Yadav, ***AIR 2004 SC 2036*** (supra) submits that narrow margin of votes between the returned candidate and election petitioner by itself is not sufficient for issuing direction for recounting. He strenuously submits that opposite party No.2 having not pleaded regarding the material facts in election petition as well as the petition seeking recounting and there being no cogent evidence regarding the irregularity in the voting process, order of recounting is vitiated.

13. Mr. Amiya Kumar Mohanty, learned counsel for opposite party No.2 submits that it is well settled that while maintenance of secrecy of ballot is sacrosanct, maintenance of purity in election is equally important. He relies in the case of Nihar Ranjan Bisoi (supra) to substantiate his contention that, when purity in election had been in question, it was proper for the Election Tribunal to order recounting, especially when the margin of vote is only one vote in the present case.

14. Mr. Amiya Kumar Mohanty, learned counsel for opposite party No.2 with all persuasiveness relies on the case of ***R. Narayanan vs. S. Semmallai***, **AIR 1980 SC 206**, which reads as follows :-

"If the lead is relatively little and/or other legal infirmities or factual flaws hover around, recount is proper, not otherwise. In short, where the difference is microscopic, the stage is set for a recount given some plus point of clear suspicion or legal lacuna, militating against the regularity, accuracy, impartiality or objectivity bearing on the original counting."

The Hon'ble Supreme Court, though has made the above observation, in paragraph- 25 of the judgment in the aforesaid case has observed thus :-

"Although no cast iron rule of universal application can be or has been laid own, yet from a beadroll of the decisions of this Court two broad guidelines are discernible, that the Court would be justified in ordering a recount or permitting inspection of the ballot papers only where (i) all the material facts on which the allegations of irregularity or illegality in counting are founded, are pleaded adequately in the election petition and (ii) the Court/Tribunal trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties."

15. In view of such ruling, the observation of the Hon'ble Supreme Court in the case of R. Narayanan regarding microscopic margin in votes does not lead to any conclusion that, if the lead is relatively little, recount is imperative. A little lead may be an additional ground for ordering recount of votes, if infirmity or factual flaws hover around and there is suspicion or legal lacuna, militating against the regularity, accuracy, impartiality, or objectivity bearing on the original counting. This Court in the case of ***Rabindra Kumar Mallick vs. Panchanan Kanungo and others***, **1998 (II) OLR 214**, has also held that no doubt, the smallness of margin between the victor and the vanquished is a relevant factor, but that by itself is not sufficient. Hon'ble Supreme Court, in the case of ***Kattinokkulla Murali Krishna***, **AIR 2010 SC 24** supra has also ruled that a narrow margin of votes between the returned candidate and the petitioner does not per se give rise to a presumption that there has been an irregularity or illegality in the counting of votes.

16. Mr. Amiya Kumar Mohanty, learned counsel for the opposite party No.2 relies on the case of Nihar Ranjan Bisoi (supra) to bring home the point that maintenance of purity of election is equally important.

17. I do not dispute the contention. If it is the duty of the Election Tribunal to preserve the secrecy of ballot, it is also its duty to see that purity in the election process had been maintained. But to arrive at the satisfaction as to whether there has been some lacuna, irregularity, inaccuracy, partiality or subjectivity bearing on the original counting, the election petitioner is duty bound to provide adequate statement of material facts in the election petition and the Court must be prima facie satisfied about the impurity in the counting process.

18. It is not the law that the Court must balance between the secrecy of ballot and the purity of election process. Secrecy of ballot, the Election Tribunal must preserve and purity of election process has to be found out only after conditions for recounting as discussed (supra) are satisfied to show that there has been impurity in the election process. In other words, the principle of "secrecy of ballot" is not absolute. It must yield to the principle of "purity of election" in larger public interest. "Secrecy of ballot" principle presupposes a validly cast vote, the sanctity and sacrosanctness of which must in all events be preserved. When it is talked of ensuring free and fair elections, it is meant elections held on the fundamental foundation of purity and the "secrecy of ballot" as an allied vital principle. Secrecy of ballot therefore has to be preserved until a case to show impurity in election process is made out on the basis of principles discussed supra. Such being the position of law, it is now the stage to find out whether the election petition satisfies the conditions precedent for seeking recount of votes in the proceeding.

19. Paragraphs- 5 to 11 of the election petition speaks about casting of votes by some voters impersonating some other voters. Paragraphs- 5 to 10 speaks of instances of such casting of votes by impersonation. In this regard, Rule- 44 has been enacted in the Grama Panchayat Rules, 1965 to raise objections, which stipulates as follows :-

> *"44. (1) Any contesting candidates or his authorized polling agent may object to the identity of a voter on the only ground that he is not the person he claims to be as per entry in the electoral roll. For every objection a fee of Rs.2 shall be deposited with the Presiding Officer. The Presiding Officer shall decide the objection summarily and his decision shall be final. If the objection is rejected the deposit shall be forfeited. If, on the other hand, the objection is allowed, the deposit shall be refunded to the person who deposited the same.*

(2) In case of forfeiture of deposit under Sub-rule (1), a receipt in Form No.5 prescribed under the Orissa Grama Panchayat Rules, 1968 shall be issued to the person who has made the deposit."

On consideration of this rule, this Court in the case of ***Bhagyadhar Khatei vs. Kubera Pradhan and others***, **2008 (II) OLR 82** has held thus :-

> *"Thus a provision is in built in the Election Rules to raise objection as to identity of a voter on the ground that he is not the person he claims to be as per the electoral roll. Such objection has to be made by the polling agents at the first instance. The modality for raising objection is stipulated in the Rules. The Rules also specify the consequences."*

In the aforesaid case, recount of vote was sought for on the ground that certain fictitious persons had cast votes impersonating some dead voters. There was no evidence to show that Rule- 44 of Orissa Grama Panchayat Rules had been complied with. Taking into consideration such non-compliance, this Court rejected the plea of recounting of votes.

20. So far as the present case is concerned, there is nothing on record to show that Rule- 44 had been resorted to or complied with by the election agents opposite party No.2 at the time of counting by the Presiding Officer or recounting by the Election Officer. In absence of such evidence, the averments made in paragraphs- 5 to 11 of the election petition must be held to be vague plea without any supporting evidence.

21. In paragraph- 13 of the election petition, allegation has been made regarding improper acceptance and improper rejection of votes so far as symbols of the parties are concerned booth-wise. In Booth Nos. 1, 2, 3, 5, 6, 7 and 8 altogether 28 votes are alleged to have been improperly accepted in favour of the present petitioner. So far as Booth No.1 is concerned, serial number of ballot paper and name of the election agent in respect of one such vote has been provided. So far as other booths are concerned, general allegations have been made to the effect that such and such numbers of votes have been improperly accepted in respect of the symbol of the returned candidate and such and such numbers of votes have been improperly rejected in respect of the symbol of the election petitioner. Serial number of ballot paper, agent's name, who raised objection, table number in which the votes were counted etc. which are material facts have not been pleaded.

22. After the election result was declared, recounting was held on the basis of the petition filed by the election petitioner. There is no pleading containing adequate material facts so far as improper acceptance or rejection of votes in the said recounting is concerned except general averment to that effect in paragraph- 13 which reads as follows :-

> *"…… and the prayer of the plaintiff for counting was allowed but the Election Officer has also illegally accepted and counted the rejected votes in favour of "Open Book" and many valid votes polled in the symbol "Fish" have been improperly rejected and in the process the plaintiff got one vote less than the symbol "Open Book" ……"*

The opposite party No.2 in the election petition has not mentioned as to how many invalid votes had been counted in favour of the returned candidate at the recounting. So also, the opposite party No.2 has not alleged the nature of the illegality or irregularity said to have been committed by the Election Officer at the time of recounting. How and in what manner there was improper acceptance of invalid votes and improper rejection of valid votes at the recounting is also not explained by the opposite party No.2. In short, the election petition is bereft of all details so far as the recounting is concerned.

23. It is the settled law that the pleadings as a whole is to be considered and requirement for ordering recounting of vote is adequate pleading in the election petition. In all the cited cases, emphasis has been given to the word "adequate" before the pleading to show that any vague plea is not to be taken into consideration and recounting cannot be ordered for asking. If the entire pleading of the election petition (opposite party No.2) is taken into consideration, it is found that the pleading is deficient so far as adequate pleading of material or basic fact is concerned.

24. Learned court below, in the impugned order, has only given a passing remark about adequate pleading, but he has failed to take into consideration as to what made him to return such a finding and which pleading weighed with him in giving such a finding.

25. Hon'ble Supreme Court, in the case of ***P.K.K. Shamsuddeen, AIR 1989 SC 640*** supra has ruled that the right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be

subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or Court should not order the recount of votes.

26. Hon'ble Supreme Court has thus given emphasis to prima facie case of high degree of probability which must be distinguished from a prima facie case simplicitor. The Court or Tribunal, before ordering the recount of votes has to satisfy itself about the prima facie case of a high degree of probability and the requirement for indulgence by the Court or Tribunal is certainly more than finding a prima facie case simplicitor.

Hon'ble Supreme Court, in the case of ***Chandrika Prasad Yadav***, ***AIR 2004 SC 2036*** supra, in paragraphs- 22 & 23 has held thus :-

> *"22. In M. Chinnasamy v. K.C. Palanisamy and others [2003 (10) Scale 103] this Court upon noticing a large number of decisions held that it is obligatory on the part of the Election Tribunal to arrive at a positive finding as to how a prima facie case has been made out for issuing a direction for recounting holding :*
>
> *"Apart from the clear legal position as laid down in several decisions, as noticed hereinbefore, there cannot be any doubt or dispute that only because a recounting has been directed, it would be held to be sacrosanct to the effect that although in a given case the Court may find such evidence to be at variance with the pleadings, the same must be taken into consideration. It is now well settled principle of law that evidence adduced beyond the pleadings would not be admissible nor any evidence can be permitted to be adduced which is at variance with the pleadings. The Court at a later stage of the trial as also the appellate Court having regard to the rule of pleadings would be entitled to reject the evidence wherefor there does not exist any pleading".*
>
> *23. It was further held that for the said purpose the Tribunal must arrive at a finding that the errors are of such magnitude which would materially affect the result of the election. As regard standard of proof, this Court held :*

"The requirement of laying foundation in the pleadings must also be considered having regard to the fact that the onus to prove the allegations was on the election petitioner. The degree of proof for issuing a direction of recounting of votes must be of a very high standard and is required to be discharged. (See Mahender Pratap v. Krishan Pal and others (2003) 1 SCC 390).

(See also Mukand Ltd. v. Mukand Staff & Officers Association, 2004 (3) JT (SC) 474)."

27. Though the learned court below has given a finding regarding a prima facie case, he has not whispered even a word as to what are the materials, on which it found the prima facie case justifying recount of votes. Learned court below has given a passing finding to the effect that

"…….. so this Court is of the considered opinion that in order to decide the dispute so also to do the complete and equitable justice between the parties making such an order for inspection of ballot papers as claimed by the election petitioner is imperatively necessary as it is the proper stage and this is a fit case……."

28. Hon'ble Supreme Court, in the case of ***Dr. Jagjit Singh AIR 1966 SC 773***, has held that it may be that in some cases, the interest of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes and consider his objections about the improper acceptance or improper rejection of votes tendered by voters at any given election, but in considering the requirement of justice, care must be taken to see that election petitioners do not get a chance to make roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned candidate's election is void.

29. From the aforesaid ruling of the Hon'ble Supreme Court, it is clear that where it appears that prayer has been made to fish out evidence in support of the election petitioner, the Court or Tribunal has to be cautious and circumspect. In the present case, as discussed (supra) there is absence of adequate pleadings of material facts, no prima facie case of a high degree of probability exists, as no evidence beyond pleading can be taken into consideration and there being recounting of votes once, the election petitioner cannot be allowed to fish out evidence for himself from the ballot boxes.

30. In the result, therefore, the impugned order is set aside.

31. Learned Election Tribunal is directed to conclude the election proceeding expeditiously on the basis of the evidence and materials available on record.

32. The writ application is accordingly allowed.

Writ petition allowed.

2015 (I) ILR - CUT-353

RAGHUBIR DASH, J.

F.A.O. NO. 545 OF 2013

MANASMITA PARIDA & ORS. .....Appellants

.Vrs.

RAJEN KUMAR PARIDA .....Respondent

GUARDIANS & WARDS ACT, 1890 – S. 25

Custody of child – Welfare of the minor is important – Father is the custodian of the minor above five years U/s.6 of the Hindu Minority and Guardianship Act unless he has disentitled himself due to gross ill-treatment or cruelty towards the child, habitual drunkenness, immoral character which may tend to corrupt the child – Such personality traits of the mother should be considered when the child will be left in her custody.

In the present case husband has proved that the minor's mother does not possess good character – She had also shown her lack of interest in the minor earlier by leaving him in her matrimonial home for about four years to prosecute her nursing course – She has also expressed her incapacity to maintain the minor out of her own income – Held, the impugned order directing custody of the minor with the father is confirmed but the rider that the minor be delivered after three months of the order is set aside. (Paras 16,19,22)

Case laws Referred to:-

1.AIR 1989 Calcutta 165 : (Raj Kumar Gupta-V- Barbara Gupta)
2.2004 AIR Kar 299 : (Radha @ Parimala-V- N. Rangappa)

For Appellants - M/s. S.K. Mishra, J. Pradhan, D.K. Pradhan, S.K. Rout, L. Pradhan & Miss P.P. Mohanty.
For Respondent - M/s. P.K. Rath, R.N. Parija, A.K. Rout, S.K. Pattanayak, A. Behera, S. Singh & P.K. Sahoo.

Date of hearing : 10.03.2014
Date of judgment : 10.04.2014

JUDGMENT

R. DASH, J.

This appeal is against the order dated 20.07.2013 passed by the learned Civil Judge (Senior Division), Baripada in Guardianship Misc. Case No.97 of 2012 allowing the same and directing the Appellant No.1-mother to deliver the custody of the minor son, namely, Omm @ Rituraj Parida to Respondent-father. Appellant Nos.2 and 3 are parents of Appellant No.1.

2. On a petition filed by the minor's father under Section 25 of the Guardian and Wards Act, 1890 (for short, the Act), the Guardianship Misc. Case was registered. There is no dispute that the minor was born on 06.01.2007 out of the wedlock of the Respondent and Appellant No.1. When the child was about 5-6 months old, the mother joined in the S.C.B. Medical College, Cuttack to undergo nursing course leaving the child in her matrimonial home. In course of time, serious differences arose between the husband and wife leading to some legal proceedings. The wife lodged F.I.R. against her husband and in-laws which was registered as Betonati P.S. Case No.133 of 2011. When the husband and in-laws were arrested by the police, there was no one in the family to take custody of the child. So, it was given to the mother on 23.10.2011. After the husband was bailed out, he filed the application seeking return of the child to his custody. The mother objected to it.

3. The parties adduced evidence in the court of learned Civil Judge. The court after assessing the evidence available on record passed the impugned order directing the mother to deliver the custody of the minor in favour of the

father after three months of the order observing that during the intervening period the father and the paternal grandmother of the child would pay visits to the house of the mother to mix with the child for the purpose of developing acquaintance with the child to which the mother should extend full cooperation.

4. The impugned order is challenged, mainly on the following grounds:

(a) Considering the education, profession, income and place of posting of the mother in juxta- position to that of the father it would be better for the welfare of the child if the mother is allowed to retain the custody of the child.

(b) During the last about two and a half years the child and the mother have developed a strong emotional bonding and the minor is being properly looked after by the mother keeping the child in healthy condition who is admitted in a very good English Medium School, whereas during this period neither the child's father nor his relatives have shown any concern about the welfare of the child.

(c) Learned trial court has failed to record the intelligent preference of the minor as required under the statute.

(d) Since the child is in the custody of the mother, provision of Section-25 of the Act is not maintainable in view of the fact that the mother is also a lawful custodian of the child.

5. Respondent-husband has filed his counter denying all the assertions made by the Appellants to emphasizes their stand that in the facts and circumstances of the case the mother should be preferred to the father. It is further contended that when there is no prima facie case showing that the father is either unfit or disqualified to keep the custody of the minor the impugned order is not liable to be interfered with. That apart, it is not shown by the mother-Appellant that during the period the child was in the custody of the father, before he was handed over to the mother, proper care of the child was not being taken by the father and his relatives. Therefore, it is submitted, the custody of the minor has been rightly restored to the father.

6. Learned Civil Judge has taken the following facts and circumstances into consideration before making a decision to handover the custody of the child to the father:

(a) The contents of Ext.1, admittedly, written by the mother proves existence of mother's physical relationship with one Satyajit Das. That apart, the mother had also expressed her desire to quit her matrimonial home further stating therein that the father was the best person to take care of the minor.

(b) The mother is a career oriented lady who, for her career, did not mind staying away from the child when the latter was just six months old and left the infant in her matrimonial home to pursue her nursing course.

(c) Save and except the mother of the child, there is no other grown-up person living with the mother to take care of the child when the mother remains absent in the house to attend her duty, whereas in the child's paternal home there are several grown up persons to take care of the child during absence of the father.

7. On behalf of the Appellants it is argued that merely on the basis of Ext.1 learned Civil Judge should not have concluded that the Appellant No.1 (minor's mother) was having illicit relationship with one Satyajit Das who is none other than Appellant No.1's Mousa (mother's sister's husband). With regard to the mother's prosecuting nursing course leaving the child in her matrimonial home it is submitted that the arrangement was made with the consent of her husband and in-laws. As regards the non-availability of other grown-up persons to take care of the child during the temporary absence of the mother it is submitted that ever since the child is in the custody of the mother she has been taking proper care of not only the child whose custody is under consideration but also their second son and there are materials to show that the first child, namely, Omm @ Rituraj Parida is doing very well in his study and whenever necessity arises the mother makes arrangement for proper care of the children during her absence.

8. At the outset the question of maintainability of the petition under Section-25 of the Act is to be answered. In support of this contention, learned counsel for the Appellants has cited a decision reported in **AIR 1989 Calcutta 165 (Raj Kumar Gupta v. Barbara Gupta.** In that case, just like in the present case, the husband filed an application under Section 25 of the Act against his wife for return of their minor daughter to his custody. The child was taken away from his lawful custody by the wife. At the time of making an application under Section 25 of the Act, the child was aged about

2 ½ years. Taking the provision of Section-6(a) of the Hindu Minority and Guardianship Act read with Section-25 of the Act, it was observed in the reported case that since under Section-6(a) of the Hindu Minority and Guardianship Act, custody of the child below 5 years was lawful with the mother and not with the father, there could not be a case of removal of the ward from the custody of the father even if the mother took the child with her from her matrimonial home and for that reason the petition under Section-25 of the Act alleging removal of a ward from the custody of its guardian was liable to be rejected. The court proceeded to further observe that by the time the appeal was heard in the High Court, the child had already completed 5 years of age and for that reason the appeal should not be dismissed and it should be disposed of on the basis that the child having completed 5 years of age the mother has no longer any preferential right to its custody under the Hindu Minority and Guardianship Act. In the reported case it was further observed that detention of a minor by mother, who has no right of custody against the wish of the father who has such right amounts to 'removal of the child' from the custody of the father within the minor of Section-25(1) of the Act.

9. In the case at hand, the minor, whose custody is under consideration, was below 5 years of age when the application under Section-25(1) of the Act was filed by the father. The minor was more than 5 years old when the learned lower court passed the order. The change of circumstance that has taken place after the institution of the Guardianship Misc. Case must be taken into account. If under the changed circumstance the relief, otherwise awardable as on the date of the institution of the misc. case would become inappropriate, can be suitably moulded in order to save the parties from a fresh litigation. Therefore, the objection as to the maintainability of the application under Section-25 of the Act becomes insignificant.

Apart from this, in **Radha @ Parimala -Vrs.- N. Rangappa (2004 AIR Kar 299)** relied on by the learned counsel for the Respondent, a petition under Section 25 of the Act, under similar fact situation, is held to be maintainable.

10. Now, let it be examined as to whether the wishes of the minor is essential in the facts and circumstances of this case. There is no dispute that when the child was aged about 4 ½ years old his custody was given to the mother and for last about 2 ½ years he has been staying with his mother. Now, he has completed the age of 7. At this tender age, it cannot be said that

he has attained the age of discretion. For that reason his wishes do not demand serious consideration because, it is quite natural on his part to have an inclination towards her mother for the reason that for last 2 ½ years he has been in the custody of his mother. Chances of influencing his mind by the mother before he is produced before the court for the purpose of taking his wishes cannot be ruled out. In fact, the child was produced before this Court on 10.01.2014 and, though there was interaction with the child, it is not placed on record as to what were his wishes. Presumably, it was considered not useful. Under such circumstances, it is not considered necessary to insist on the personal appearance of the child to know what his desire is.

11. As regards the contention that in the meanwhile the minor has developed a strong emotional bonding with his mother and if at this stage he is separated from her it will have adverse effect on the minor, it may be stated that it does not appeal to the conscience of this Court. The mother herself is mostly responsible for creating such a situation. The minor was in the care and custody of the father and it was only after filing of a criminal case by the mother, not only against the father but also against her in-laws, in which all of them were arrested, the custody was given to the mother. Till then the mother had shown no concern about the minor. Though the child is now with the mother, in the event his custody is shifted to the father the minor would be definitely in the company of his own father and paternal grandmother. It is quite natural that within a very short period he would be able to adjust with them. Further contention made on behalf of the Appellant is that in the custody of the mother the child is getting good education and that during the past 2 ½ years neither the father nor his relatives have shown any concern about the welfare of the child. There is no doubt that the minor is admitted in one English Medium School at Cuttack and he is doing well in his studies. It may also be presumed that the child is being properly brought up in the custody of his mother. But there is no reason to entertain any doubt that he would get at least the same treatment and care in case he is allowed to live with his father. Now, some other stands taken by the parties showing each other's positive/negative aspects may be compared.

12. It is on record that though both the parents of the minor are in service, the father's income is much more than that of the mother. That apart, there is no evidence that the mother has any other of his near relations to take care of the child when she remains out of home to attend her duty, whereas the father is living with his mother who can give company to the minor when

the father stays away from home. Another aspect that needs consideration is that the mother is now taking care of her two minor sons. If the elder son is given to the custody of the father the burden on the mother would lessen and she could give more attention to the younger son. It must be kept in mind that she has filed an application claiming maintenance from her husband for herself so also for the minor in question, taking the stand that her income is not sufficient to maintain both of them. When the father is ready and willing to keep the elder son with him, he should be allowed to do so instead of asking him to pay money for the minor's maintenance, unless it is shown that the welfare of the minor in the custody of his father would be at stake.

13. It is argued that in his show-cause filed in the proceeding under Section 125 of the Cr.P.C., the father has taken the stand that he being presently out of employment has no income to pay maintenance. But on behalf of the Respondent it is argued that on 07.01.2012 the Respondent has got appointment in a renowned pharmaceutical firm, i.e., Magnet Labs Pvt. Ltd. (a Mankind group of company). In this regard, a copy of letter of appointment has been made Annexure-D/1 to his counter to the appeal memo. That apart, it is shown that the father-Respondent has got his own house in Balasore Town wherein there are number of good educational institutions.

14. In the written note of submission filed by the Respondent it is mentioned that Ext.22 to 27 and Ext.36, marked before the learned Civil Judge in the Guardianship Misc. Case, are fixed deposit certificates amounting to rupees twelve lakhs and all are in the name of the minor. The impugned order reflects that fixed deposits in several accounts are there but those are in the name of the Respondent's mother, who is a retired health worker.

15. On behalf of the Appellants it is submitted that the mother being a trained staff nurse, she would be in a better position to take care of the minor's health. But, it is on record that the Respondent's mother is also a retired health worker. That apart, for taking care of a minor the services of a trained nurse is seldom required. In case the child develops any health problem, a good doctor has to be consulted. It is submitted that medical facilities of high standard is available at Cuttack. But, it is not contended that good medical facilities are not available in Balasore. It is submitted by the learned counsel for the Appellant that the mother being a science

graduate is able to give proper guidance in the matter of the minor's studies. But, the father is also claimed to be a science graduate.

16. Under Section-6 of the Hindu Minority and Guardianship Act, the custody of the child, who is above five years must be with the father unless he has disentitled himself. However, the minor's welfare overrides the rights of the father for the custody of the minor. But in that case it must be shown that the father is unfit to keep the custody of the child for reasons like gross ill-treatment or cruelty towards the child, habitual drunkenness, immoral character which may tend to corrupt the child and like things. Similarly, when the child is in the custody of the mother, such personality traits of the mother can also be taken into consideration to find out whether it would be in the interest of the welfare of the child to allow the mother to retain the custody.

17. Under Section-17 of the Act, the character and capacity of the guardian, amongst other things, are to be taken into consideration while deciding what would be for the welfare of the minor.

18. In this regard it may be noted that the wife makes allegations against the husband that he has got a concubine and he is going to marry her but there is no reliable evidence in support of such accusation. The husband, on the other hand, has alleged that the wife is leading an immoral life which she had admitted in writing vide Ext.1. The wife admits to have written Ext.1 in her own handwriting but takes the plea that it has been obtained from her by use of force.

19. In this regard it is stated in the memo of appeal that Ext.1, the letter dated 12.10.2010 though discloses that the wife has admitted to have had physical relationship with one Satyajit Das it relates to her pre-marriage period and not to any instance after her marriage. In the memo of appeal it is contended that there is nothing in Ext.1 suggesting that the wife is still leading an adulterous life. Perusal of the copy of the said letter (Annexure-A/1 series) annexed to the respondent's counter reflects that the wife had maintained physical relationship with one Satyajit Das and she wanted to marry him even though she was having one little son (Omm). It implies that after her marriage the wife had kept physical relationship with Satyajit Das. Thus, the husband has proved that the minor's mother does not possess good character. That apart, she has expressed her incapacity to maintain the minor out of her own income. She had earlier shown her lack of interest in the

minor by leaving him in her matrimonial home for about four years to prosecute her nursing course and there is no evidence to the effect that from the date she left the minor in the custody of her husband till the child was given to her custody she had ever paid visit to her matrimonial home. For all these reasons, even if it is found that in other fields both the father and the mother of the child stand in equal footing to have the custody of the child, the father should be preferred to the mother. Learned lower court has rightly allowed the father's application to take over custody of the minor.

20. While allowing the application the learned lower court has directed that the custody of the minor be delivered to the father after three months of the impugned order and that in the intervening period the father and grandmother of the minor should be allowed to visit the mother's place of residence to give scope to the child to develop acquaintance with them. It is alleged that the father had made attempts to meet the child but the mother did not cooperate.

21. Considering the strained relationship between the husband and wife along with the present age of the minor, the aforestated arrangement made by the learned lower court does not appear to be conducive and useful. The order should have immediate effect.

22. In the result, the appeal stands dismissed and the impugned order directing the minor to be returned to the custody of his father is confirmed but the rider that the minor be delivered after three months of the order is set aside. The Appellant-mother is directed to handover the custody of the minor to the Respondent. Since the Appellant-mother has not disclosed her Cuttack address though she is serving in S.C.B. Medical College & Hospital, Cuttack and the minor is reading in a school at Cuttack, it is directed that the mother with the child on one hand and the father on the other shall appear before the I.I.C., Mangalabag Police Station in between 9.00 A.M. to 9.30 A.M. on 14.04.2014 and the minor be handed over to the father in presence of the police officer who is in-charge of the police station at the relevant time. In case the Appellants do not co-operate in the implementation of this order, then on the approach of the Respondent, necessary police help be rendered to him to get the custody of the minor, Rituraj Parida (Omm), who is said to be a student of St. Xavier's High School, Barabati Stadium, Cuttack.

Appeal dismissed.

2015 (I) ILR - CUT- 362

DR. A. K. RATH, J & DR. B. R. SARANGI, J.

W.P.(C) NO.11458 OF 2014

SUBRAT DAS & ANR. .....Petitioners

.*Vrs.*

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

CIVIL PROCEDURE CODE, 1908 - S.11

Resjudicata – Writ petition to decide as to who are authorized to climb upon the chariots and touch the deities during different occasions including the car festival of Lord Jagannath – Issue involved in the present lis has already been set at rest in the case of Bhabani Prasad Mishra Vrs. State of Odisha and otheres reported in 2014 (II) OLR 95 – Held, writ petition is hit by the principle of resjudicata.

(Para 11)

Case laws Referred to:-

1.2014 (Ii) OLR-95 : (Bhabani Prasad Mishra-V- State of Odisha & Ors.)
2.AIR 1986 SC 391 : (Forward Construction Company & Ors.-V- Prabhat Mandal (Regd.), Andheri & Ors.)
3.AIR 2006 SC 1846 : (State of Karnataka & Anr.-V- All India Manufacturers Organization & Ors.)

For Petitioners - Mr. Ashok Mohanty, Sr. Advocate
For Opp.Parties - Mr. R.K. Mohapatra, G. A.
Mr. D. Panda.

Date of Hearing : 21.11.2014
Date of Judgment: 21.11.2014

JUDGMENT

DR.A.K.RATH, J.

The petitioners, styling as devotees of Lord Jagannath Mahaprabhu, have filed this Public Interest Litigation, raising the issue as to who are authorized to climb atop the Raths (Chariots) and touch the deities during Car Festival.

2. Shorn of unnecessary details, the case of the petitioners is that they are Hindus by religion and devotees of Lord Jagannath Mahaprabhu. A few unfortunate incidents occurred during the Car Festivals of the previous years relating to desirability of devotees to climb aboard the chariots and touch the deities. The matter was referred by the Temple Managing Committee to HH Shankaracharya, Puri for his opinion. On 6.11.2013, HH Shankaracharya submitted his opinion to the Temple Administration that nobody other than the sevaks, who perform rituals or seva puja of the deities over the chariots during Ratha Yatra, the HH Shankaracharya and the Gajapati Maharaja are authorized to climb on to the chariots and the devotees should have darshan from the Badadanda without climbing on the chariots. The Temple Committee accepted the opinion of HH Shankaracharya and wrote to the Government on 11.11.2013 for implementation of the recommendation of HH Shankaracharya. Thereafter, the State Government convened a high level meeting on 11.6.2014 in which decision was taken that no one except the sevaks and others connected with seva puja would be allowed to climb atop the holy chariots on the days of Ratha Yatra, Bahuda and Suna Besha, but on the other days, the existing practice would continue. Thereafter, a Writ Petition, being W.P.(C) (PIL) No.10457 of 2014, was filed before this Court seeking implementation of the decision of the Temple Committee on the recommendation of HH Shankaracharya. The said writ petition was disposed of on 20.6.2014. It is further stated that the decision of the Managing Committee is final in respect of the matter as to who is authorized to board the chariots or touch the deities during the Car Festival, but then the question that remains are; whether HH Shankaracharya is the sole and absolute authority to determine a matter concerning the multitude of devotees, whether record of rights prescribe HH Shankaracharya to opine about a matter which is not a ritual of the Lord or the Temple but is a tradition or practice of darshan by the devotees, whether HH Shankaracharya, Puri can without consultation with other Shankaracharyas determine a matter concerning Hindus all over the country, whether the Managing Committee has taken all aspects including the opinion of devotees into consideration before accepting the opinion of HH Shankaracharya regarding the persons, who are authorized to climb atop the chariots and touch the deities and regarding the arrangements of the temple administration to facilitate darshan of the deities by the devotees. HH Shankarascharya has based his opinion as per the prescriptions in the record of rights of the temple since record of rights are the compendium of the rituals to be performed, the modalities, duties and responsibilities of persons

concerned with the temple and the Lord etc. As per the record of rights, Gajapati Maharaja is to perform Chhhera Panhara on the chariots and authorized to board the chariots for the said purpose. So far as HH Shankaracharya is concerned, the record of rights do not prescribe any ritual to be performed by him on the chariots during the Car Festival. Despite not being a person authorized to board the chariots during the Car Festival, HH Shankaracharya has included himself along with sevaks and the Gajapati Maharaja furnished his opinion and the same was accepted by the Managing Committee.

3. With this factual scenario, the petitioners have prayed, inter alia, for a direction to the opposite parties not to allow any person not authorized in the record of rights to board the chariots during the Car Festival, for a direction to the opposite party no.3 not to board the chariots since he is not authorized to do so as per his duties prescribed in the record of rights. Ancillary prayer has also been made for a direction to the State Government and the Temple Administration to make suitable alternative arrangements for darshan of the deities when they are on the chariots by the devotees.

4. As would be evident from the averments made in the writ petition, more particularly, paragraph 5.6, the petitioners raised various issues, such as, whether HH Shankaracharya is the sole and absolute authority to determine a matter concerning the multitude of devotees, whether record of rights prescribe HH Shankaracharya to opine about a matter which is not a ritual of the Lord or the Temple but is a tradition or practice of darshan by the devotees, whether HH Shankaracharya, Puri can without consultation with other Shankaracharyas determine a matter concerned Hindus all over the country, whether Managing Committee has taken all aspects including the opinion of devotees into consideration before accepting the opinion of HH Shankaracharya on the matter etc., but confine the issue regarding the persons who are authorized to climb atop the chariots and touch the deities and arrangement of the temple administration to facilitate darshan of the deities by the devotees.

5. Heard Mr.Ashok Mohanty, learned Senior Advocate for the petitioners, Mr. R.K.Mohapatra, learned Government Advocate and Mr.D.Panda, learned Advocate for opposite party no.3.

6. Before we proceed further to decide the issue that has cropped up, we find that Rule 8 of the Orissa High Court Public Interest Litigation Rules, 2010 has not been complied with. The said Rule is quoted hereunder:-

> "Before filing a PIL, the petitioner must send a representation to the authorities concerned for taking remedial action, akin to what is postulated in Section 80 CPC. Details of such representation and reply, if any, from the authority concerned along with copies thereof must be filed with the petition. However, in urgent cases where making of representation and waiting for response would cause irreparable injury or damage, petition can be filed straightway by giving prior notice of filing to the authorities concerned and/or their counsel, if any."

Admittedly, the petitioners have not filed any representation before the authorities concerned for taking remedial action. Thus non compliance of the said Rule, which is a mandatory requirement, entails dismissal of the writ petition filed in the form of Public Interest Litigation. Further, on the pleaded facts, we do not find any cause of action for filing of Public Interest Litigation.

7. The issue, who will climb atop the Rathas during Car Festival, is no more res-integra. In ***Bhabani Prasad Mishra Vrs. State of Odisha and others***, 2014 (II) OLR-95, the question that hinges for consideration as to whether it was permissible for the devotees to climb atop the Rathas (chariots) when the deities are installed thereon for having a darshan of the deities or to touch the deities after the chariots reach Shri Gundicha Temple and before the deities are taken therein. The said issue was referred by the Managing Committee for opinion of HH Shankaracharya, Puri on the understanding that HH Shankaracharya, Puri was the final advisor on the issue of rituals of the deities as per the statutorily recognized record of rights. HH Shankaracharya, Puri, vide his opinion dated 6.11.2013 opined that "none other than the Sevaks (who perform rituals or seva-puja over the chariots during Ratha Yatra), the Shankarcharya and the Gajapati Maharaja are authorized to climb on to the chariots and the devotees should have darshan from the Badadanda without climbing on to the chariots". The said opinion was accepted by the Managing Committee. A sub-committee was constituted to suggest the modalities for implementation of the opinion which required co-ordination with various stakeholders and law and order

arrangements. It was also required bringing about consensus with the sevayat community, some of whom had opposed the said opinion. The Managing Committee also referred the matter to the State Government to guide the Sri Jagannath Temple Administration (SJTA) for implementation of the above decision of Jagadguru Sri Shankaracharya. The petitioner represented to the State Government seeking implementation of the decision, but since no response was received, the writ petition had been filed. The Division Bench to which one of us (Dr.A.K.Rath, J) was a party held that the stand of the Managing Committee to go by opinion of the HH Shankaracharya, Puri has to prevail as far as rituals during the Car Festival are concerned.

8. The next question that survives for our consideration is as to whether the present writ petition is hit by the principles of *res judicata*.

9. In ***Forward Construction Company and others, Vrs. Prabhat Mandal (Regd.), Andheri and others***, AIR 1986 Supreme Court 391, the apex Court considered the issue in the factual matrix that a plot of land was reserved under the Development Plan for Bombay and the verified Andheri Town Planning Scheme, for a bus depot of the Bombay Electricity Supply and Transport Undertaking (BEST). Best proposed to build two buildings which would include the bus Depot. The carpet area spared after meeting the needs of the depot was to be given on rent. A writ petition was filed challenging the user of the plot for commercial purposes. The same was dismissed by the High Court. In the said petition, certain provisions of Development Control Rules for change of user of the plot to commercial purpose was not in issue at all. Subsequently another writ petition was filed for the same purpose challenging the validity of the Rules. The apex Court held that provisions of Explanations IV and VI to Section 11 C.P.C. would apply even in the case of Public Interest Litigation. The Court considered the provision of Explanations IV and VI of Section 11 CPC and observed that as Explanation VI deals with public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. Thus, all other persons were bound by the decision in the earlier case. In paragraph-20 of the report, it is held as under:-

> "So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was

conspicuous by its absence in the earlier petition. Explanation IV to Section 11, C.P.C. provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force."

It is further held that:-

"In view of Explanation Vi it cannot be disputed that Section 11 applies to public interest litigation as well but it must be proved that the previous litigation was the public interest litigation, not by way of a private grievance. It has to be a bone fide litigation in respect of a right which is common and is agitated in common with others". (Para-21)

10. The same view was echoed in ***State of Karnataka and another Vrs. All India Manufacturers Organization and others***, AIR 2006 Supreme Court 1846. In paragraph 34 of the report, it is held as follows:-

"As a matter of fact, in a Public Interest Litigation, the petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is bona fide, a judgment in a previous Public Interest Litigation would be a judgment in rem. It binds the public at large and bars any member of the public from coming forward before the Court and raising any connected issue or an issue, which had been raised/should have been raised on an earlier occasion by way of a Public Interest Litigation."

11. On taking a holistic view of the matter, we are of the consensus ad idem that the issue involved in the present writ petition has already been set at rest in *Bhabani Prasad Mishra (Supra),* thus the present writ petition is hit by the principle of res-judicata. The writ petition is dismissed.

Writ petition dismissed.

2015 (I) ILR - CUT- 368

DR. B. R. SARANGI, J

RVWPET No. 150 OF 2004

DEBARCHAN MAHANANDIA ……..Petitioner

.Vrs.

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

CIVIL PROCEDURE CODE , 1908 – O.47,R-1

Any thing pleaded by a party should be pressed before the Court at the time of hearing – If not pressed, presumption would be that they are abandoned by such party – Held, mere change of counsel can not be a ground to review the impugned order passed in the writ petition.

In this case though applicability of ORV Act has been pleaded the same was not pressed by the earlier counsel appearing in that case so the Court had no occasion to deal with such question and presumption is that they were abandoned by the party –Review petition is dismissed. (para -9,12)

Case laws Relled on :-

1. (2000) 2 OLR.543 : Ambika Prasad Bhatta -v-Nehru Paribesh Surakshya Committee.

2. 2010 (II) CLR (SC) 737 : Kalabharati Advertising -v- Hemant Vimainath Narichania & Ors.

3. AIR 1978 SC 326 : Gulab Ajwani and Ors -v- Smt. Saraswati Bai & Ors.
4. AIR 1963 SC 1909 : Shivdeo Singh and Ors. -v- State of Punjab & Ors.
5. AIR 1979 SC 1047 : Aribam Tuleshwar Sharma -v- Aribam Pishak Sharma.
6.AIR 1993 Supp.(4) SCC 595 : S.Nagaraj -v- State of Karanataka
7.AIR2006 sc 2686 : M/s.Jain Studios Ltd.-v- Shin Satelite Public Co. Ltd.
8. AIR 2002 SC 2537 : Subhash -v- State of Mmaharashtra & Anr

For petitioner - M/s. S.K.Purohit, A.K.Nayak. P.K.Swain & A.K.Das

For Opp. Parties - M/S A.K. Mishra.,Addl. Govt. .Advocate

Date of hearing : 14.10.2014
Date of Judgment: 21.10.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who had appeared at the interview conducted by Bamra Trust Fund College for the post of Lecturer in Oriya, has filed this petition for review/ recall of the order dated 6.8.2014 passed in W.P.(C) No. 1724 of 2009.

2. The short facts of the case are that pursuant to the advertisement issued on 3.1.1995 (Annexure-1), the petitioner and opposite party no.5 appeared at the interview for the single post of Lecturer in Oriya in which the opposite party no.5 stood first, but the petitioner was issued with appointment letter No.445 dated 15.9.1995 vide Annexure-3. Pursuant to such appointment letter, the petitioner joined on 20.9.1995. Opposite party no.5 pursuant to the appointment letter No.446 dated 15.9.1995 also joined on 18.9.1995. It is stated that the appointment letter was issued in favour of the petitioner against the 3rd post of Lecturer in Oriya vide letter No.445 dated 15.9.1995, whereas appointment letter No.446 dated 15.9.1995 was also issued in favour of opposite party no.5. There was a gap of two days in submitting the joining report by opposite party no.5 vis-à-vis the petitioner against the 3rd post of Lecturer in Oriya. Since two persons joined against one single post, opposite party no.5 approached the Director, Higher Education

challenging the appointment of the petitioner. On consideration of the grievances made by opposite party no.5 and on perusing the records and materials available, the Director Higher Education approved the appointment of opposite party no.5 against the 3rd post of Lecturer in Oriya vide order dated 14.01.2009 (Annexure-9). Challenging such order passed by the Director, Higher Education, the petitioner filed W.P.(C) No.1724 of 2009, wherein he urged that he being a candidate coming under the reserved category in the selection for the post of Lecturer in Oriya, the provisions of the O.R.V.Act had not been followed, thereby he had been put to harassment by the college authorities and further it was urged that there was non-compliance with the principles of natural justice. After hearing the learned counsel appearing for the parties, this Court found no error in the order passed by the Director, Higher Education and accordingly dismissed the writ petition vide order dated 06.08.2014. Hence, the present review application.

3. Mr.S.K.Purohit, learned counsel for the petitioner, referring to paragraphs 9 and 10 of the writ petition strenuously urged that the question of reservation though pleaded, while disposing of the writ petition, the same has not been taken into consideration. In addition to the same, it is urged that there was non-compliance of the principles of natural justice and therefore, the order impugned suffers from error apparent on the face of the record the same needs to be reviewed/ recalled by this Court. It is further urged that while doing so, this Court should take into consideration the documents, which were filed as Annexures-6, 7, 8 and 9 of the writ application. To substantiate his contention, he has relied upon **Ambika Prasad Bhatta v. Nehru Paribesh Surakshya Committee,** (2002) 2 OLR 543.

4. Mr.A.K.Mishra, learned Additional Govt. Advocate for the State strenuously urged that this Court having passed the impugned order dated 6.8.2014 in consonance with the provisions of law, the said order should neither be recalled nor reviewed as the same does not satisfy the requirements of the provisions contained in Order 47, Rule 1, C.P.C. read with Section 114 of the Code of Civil Procedure.

5. Mr.D.R.Mohapatra, learned counsel for opposite party no.5 states that absolutely a new case has been made out in the review application by the petitioner. According to him, in course of hearing of the writ petition, the applicability of the O.R.V. Act was never urged by the learned counsel for

the petitioner though pleaded. Merely pleading such fact itself is not a ground to consider his case unless the point is urged before the Court. Therefore, there is no question of consideration of the same as there was abandonment of such plea. Applying the same principle and looking into the materials available on record, the impugned order having been passed by this Court after hearing the learned counsel for the parties, the same should not be interfered with by this Court.

6. Now coming to the question of review, the principles laid down in Section 114 read with Order 47, Rule 1, C.P.C. have to be looked into. The apex Court in **Gulab Ajwani and others v. Smt.Saraswati Bai and others,** AIR 1978 SC 326 and **Kalabharati Advertising v. Hemant Vimalnath Narichania and others,** 2010(II) CLR (SC) 737 has clearly laid down that 'review' means a judicial re-examination of the case in certain specified and prescribed circumstances. The power of review is not inherent in a Court or Tribunal. It is a creature of the statute. A Court or Tribunal cannot review its own decision unless it is permitted to do so by statute. The Courts having general jurisdiction have no inherent power under Section 151, CPC to review its own order. The Explanation to Section 141, CPC clearly lays down that the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution. Therefore, the provisions contained in Section 114 read with Order 47, Rule 1, CPC ipso facto may not apply to a proceeding under Article 226 of the Constitution, but its principle will apply. Therefore, the scope of review being very limited in nature, if the principle, which is applicable to mean (1) if the judgment is vitiated by an error apparent on the face of the record in the sense that it is evident on a mere looking at the record without any long-drawn process of reasoning, a review application is maintainable; (2) if there is a serious irregularity in the proceeding, such as violation of the principles of natural justice, a review application can be entertained and (3) if a mistake is committed by an erroneous assumption of a fact which if allowed to stand, cause miscarriage of justice, then also an application for review can be entertained. The scope of review has been elaborately considered by the apex Court in **Shivdeo Singh and others v. State of Punjab and others**, AIR 1963 SC 1909, **Aribam Tuleshwar Sharma v. Aribam Pishak Sharma**, AIR 1979 SC 1047 and **S.Nagaraj v. State of Karnataka**, 1993 Supp.(4) SCC 595.

7. Mr.S.K.Purohit, learned counsel for the petitioner urged that pleadings were made available in paragraphs 9 and 11 of the writ application with regard to the applicability of the O.R.V. Act, but the same was not considered while deciding the matter on merit, thereby there has been gross error apparent on the face of the record while deciding the same vide order dated 6.8.2014.

8. Admittedly, M/s.S.K.Purohit and associates were not the counsel for the petitioner in W.P.(C) No.1724 of 2009. Rather M/s.S.K.Nayak and associates were. In course of hearing of the writ petition, none of the counsel appearing for the petitioner did urge such question before this Court.

9. The principle of law is well settled by catena of decisions that it is not enough for a party to raise objection in the memorandum of appeal or review. Objection should also be pressed at the time of hearing the arguments. If they are not pressed, presumption would be that they are abandoned by a party. Therefore, even though the factum of applicability of O.R.V. Act has been pleaded, in course of hearing the arguments, the same having not been pressed, necessary consequence thereof is that this Court had no occasion to deal with such question as raised in the review application on the plea of error apparent on the face of record. Since the earlier counsel who was appearing in the case had not pressed such plea, presumption is that they were abandoned by the party.

10. In **M/s. Jain Studios Ltd. v. Shin Satellite Public Co. Ltd.,** AIR 2006 SC 2686, the apex Court has held that power of review cannot be confused with appellate power which enables a superior Court to correct all errors committed by a subordinate Court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases. Similar view has also been taken in **Subhash v. State of Maharashtra and another,** AIR 2002 SC 2537.

11. So far as applicability of the principles of natural justice is concerned, this Court on the basis of the materials available on record, considered the same and passed the impugned order recording that the Director, Higher Education after affording opportunity of hearing, passed the order rejecting the claim of the petitioner.

12. In that view of the matter, mere change of counsel cannot be a ground to review the order dated 6.8.2014 passed by this Court in the writ petition. Accordingly, this Court is not inclined to review/ recall the order dated 6.8.2014 passed in W.P.(C) No. 1724 of 2009 and dismisses the Review Petition

13. The RVWPET is dismissed.

Review petition dismissed.

2015 (I) ILR - CUT- 373

DR. B. R. SARANGI, J

W.P.(C) No. 2514 OF 2004

BHUPAL SHANKAR TRIPATHY .....Petitioner

.Vrs.

ORISSA INDUSTRIAL INFRASTRUCTURE DEVELOPMENT CORPORATION, ORISSA & ANR. .....Opp.Parties

DISCIPLINARY PROCEEDING – Dismissal form Service – Appellate authority Confirmed order of the Disciplinary Authority in one line order without assigning any reason – Appellate authority did not apply his mind while in seisin over the matter – Punishment quashed being in violation of 1996 Regulations read with principles of natural justice – petitioner is entitled to reinstatement in service with consequential service benefits. (Para -14,15)

For petitioner - M/s. B.S.Tripathy-1, R.K.Sahoo & J.Mohanty
For Opp. Parties - M/s.J.Pattnaik, B.Mohant, T.K.Pattnaik, RP.Roy, A.Patnaik , B.S. Raiguru

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Date of hearing : 21.07.2014
Date of judgment : 07.08.2014

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner, who was appointed as Light Vehicle Driver (in short L.V. Driver) in IDCO Organization has filed this application praying for the following reliefs :

"(i) Quash the impugned order of punishment of dismissal under Annexure-7 and the order of rejection of appeal of the petitioner under Annexure-9 by concurrently holding them as not only bad, illegal and violative of the provisions of Regulations, 1996 but also violative of the mandatory principles of natural justice and thereby

(i) Direct/order/command that the petitioner is entitled to all consequential service and monetary benefits;

(ii) Pass such other order(s) as deemed fit and proper in the facts and circumstances of the case, in the bonafide interest of justice and fair play".

2. The short facts of the case in hand are that the petitioner, who was appointed as an L.V. driver in IDCO, was posted at Angul Division and thereafter transferred to Jeypore U.C. Project in the year 1989 and continued there up to 1989. Thereafter, he was transferred to Rourkela where he continued from 1989 to 1991. Then he was posted at Badmal, Bolangir wherefrom he was transferred to Bhubaneswar and continued at Mechanical Division, Bhubaneswar up to 1998. From 1999 to 2000 he was posted at Cuttack and from 2000 to 2001 at Bhubaneswar. By order dated 15.10.2001 of the General Manager (P & A), he was transferred and posted at Bolangir Division, Bolangir. Prior to his transfer to Bolangir the petitioner had submitted a representation praying for consideration of his case to retain him at Bhubaneswar on the ground of his acute family problems. While he was in such distress condition, a set of charges was framed against him and communicated to him on 29.05.2000 by opposite party no.2, vide Annexure-1 with the following allegations :

(1) Gross negligence in duty and disobedience of orders of the higher authority.
(2) Misconduct.

(3) Showing willful in sub-ordination to the superior controlling officers.

(4) Proved misbehavior to superior officers, colleagues and staff of the Corporation.

(5) Submission of false vouchers with an intention to misappropriate Corporation funds causing wrongful loss to the Corporation and wrongful gain to him.

The petitioner was called upon to submit his explanation to the aforesaid charges within a fort-night and he submitted a detailed explanation on 12.06.2000 pleading the allegations as untrue. But, without considering his explanation in its proper perspective an inquiry was directed by appointing an Enquiry Officer-Mr. S.K. Mohapatra, G.M. (Civil & MR), who conducted enquiry and submitted his report on 03.01.2003 without following due procedures of law, more particularly, OIIDC Employees' Conduct, Discipline, Appeal and Service Regulations, 1996 (hereinafter referred to as the "1996 Regulations").

On consideration of the enquiry report submitted by the Enquiry Officer, the disciplinary authority awarded major penalty and proposed to terminate him from service and consequentially vide letter dated 28.02.2003 the disciplinary authority furnished a copy of the enquiry report dated 03.01.2003 to the petitioner vide Annexure-3 calling upon him to submit his representation within a period of seven days as against the proposed penalty.

On receipt of the same, the petitioner submitted his representation on 11.03.2003, vide Annexure-4, indicating specifically that the stage of imposition of major penalty had not reached as he was not supplied copies of the documents forming the basis of charges against him and also a copy of the enquiry report and that a unilateral decision was taken by the disciplinary authority to award the proposed punishment. Vide letter dated 01.05.2003 of the Joint Manager (P & A), the petitioner was supplied copies of certain documents and he was called upon to submit his representation against the proposed penalty vide Annexure-6. On receipt of the same, the petitioner submitted his representation on 17.05.2003 vide Annexure-6 requesting the Disciplinary Authority to direct a de novo enquiry by appointing another independent Enquiry Officer so as to enable him to defend himself properly in the said de novo enquiry as the enquiry conducted by Mr. S.K. Mohapatra

was not fair and he was denied minimum valuable opportunity to cross-examine the departmental witnesses.

Without considering the representation dated 17.05.2003, the Disciplinary Authority passed the impugned order dated 10.09.2003 vide Annexure-7 imposing a major penalty of dismissal of the petitioner from service as L.V. Driver from the Corporation with immediate effect which was communicated to him on 15.09.2003.

Challenging the said order of imposition of major penalty dismissing him from service, the petitioner preferred appeal on 27.10.2003, vide Annexure-8, to the appellate authority justifying the baselessness and impropriety of the impugned order of punishment. He stated that such imposition of penalty was not only motivated but also malafide. But, the appellate authority without considering the same, vide order dated 15.01.2004 rejected the appeal, vide Annexure-9, by a bald unspeaking one lined order without giving him a reasonable opportunity of hearing on merit. Hence this writ application.

3. Mr. B.S. Tripathy-1, learned counsel for the petitioner, submitted that the service conditions of the petitioner were regulated as per the provisions contained in the 1996 Regulations. Regulation 25 states as to Penalties and penalties have been classified in two groups (i) Minor Penalties as per Clause (a) to Clause (f); and (ii) Major Penalties as per Clause (g) to (i). Regulation-26 deals with disciplinary authority whereas Regulation-27 deals with procedure for imposing major penalties. It is stated that while imposing major penalties the provision contained in Sub-Regulation (vii) read with Sub-Clause-(b) (c) of Clause-X of Regulation-27 have not been followed. At the same time, referring to Regulation-28 (i) it is stated that the Disciplinary Authority if it is not itself the Enquiring Officer, shall consider the records of the enquiry and record its findings on each charge. The same having been not done, the major penalties imposed by the Disciplinary Authority is vitiated in as much as the consequential order passed by the appellate authority also cannot be sustained. In addition to that it is also urged that there was violation of principles of natural justice in not giving the opportunity to the petitioner to cross-examine the departmental witnesses and not supplying copy of the enquiry report. Therefore, the order of imposition of penalty is vitiated in law and the petitioner is entitled to re-instatement in service with all consequential service benefits admissible to him. In support of his contention, he has relied upon the judgments of the apex Court in the

cases of ***State Bank of India v. D.C. Agrawal***, AIR 1993 SC 1197, ***State of Uttaranchal v. Kharak Singh***, (2008) 8 SCC 236, ***A.N. Pathan v. State of Maharashtra***, (2013) 4 SCC 465, ***Managing Director, ECIL v. B. Karunakar & Ors***, AIR 1994 SC 1074, ***Md. Yusuf v. State of U.P***., (2010) 10 SCC 539 and ***Shiv Nandan v. State of Bihar***, (2013) 11 SCC 626.

4. Mr. Abhijit Pattnaik, learned counsel for the opposite parties strenuously urged that the petitioner joined the Corporation as a Driver on NMR basis on 06.05.1985 in the scale of pay 255-360 vide letter dated 14.10.1985. During his incumbency at Badmal Division he committed misconduct for which a disciplinary proceeding was initiated against him on 04.09.1992 and penalty was imposed on him stopping his two annual increments with cumulative effect vide Annexure-A which was communicated to him on 19.04.1997, vide Annexure-B. Another disciplinary proceeding was also initiated against the petitioner for alleged gross negligence in duty, disobedience of orders of higher authority, misconduct, showing wilful insubordination to the superior controlling officers, misbehavior to superior officers, colleagues and staff of the Corporation, and submission of false vouchers with an intention to misappropriate Corporation funds causing wrongful loss to the Corporation and wrongful gain to him to which the petitioner submitted his reply on 12.06.2000 denying the allegations. Thereafter, an Enquiry Officer was appointed to enquire into the charges pursuant to which the Enquiry Officer submitted his report on 03.01.2003.

It is urged that the disciplinary proceeding was initiated in consonance with the 1996 Regulations and as such the enquiry was conducted in a fair and impartial manner and the petitioner was given adequate opportunity to defend his case and therefore the impugned order of dismissal cannot be called in question. This Court therefore may not interfere with the said order. Consequential confirmation order made by the appellate authority is also well justified.

It is also stated that while the enquiry proceeding was continuing the petitioner signed on the statements of the witnesses vide Annexure-C series and at that time he could have cross-examined the witnesses. Having not done so, he cannot assail the same on the ground of non-compliance with principles of natural justice.

In order to substantiate his submissiion Mr. A. Pattnaik relied upon the judgment of the apex Court in the case of ***Union of India and Ors v. R.P. Singh*** dated 22.05.2014 (Civil Appeal No.6717 of 2008).

5. From the above contention of the parties, the following questions arise for consideration:-

(i) Whether the proceeding initiated against the petitioner was violative of any of the provision of the 1996 Regulations and there was non-compliance with the principles of natural justice ?

(ii) Whether the order of imposing major penalty and confirmation thereof by the appellate authority can be sustained ?

(iii) Whether the petitioner is entitled to get reinstatement in service with full service benefits?

6. As it appears, the 1996 Regulations are to regulate the service conditions of the employees of the Corporation. Chapter-II vide Regulation-4 states about conduct and discipline; whereas Regulation-5 states about the misconduct enumerated in detail in Sub-clauses (a) to (x) in addition to other provisions mentioned in the said Chapter such as Regulation-6 to 21. Regulation-22 deals with suspension and Regulation-23 states about the subsistence allowance. Regulation 24 stipulates how to treat the period of suspension. Regulation-25 deals with penalties being classified into two categories, namely, Minor Penalties and Major Penalties. Minor penalties have been prescribed in Clauses (a) to (f) and Major penalties are explained in Clauses (g) to (i). Procedure for imposing major penalties has been envisaged under Regulation-27.

7. In view of the provisions contained in Regulation-26 as also the provisions of Regulation-27, learned counsel for the petitioner submitted that the same were grossly violated in the instant case inasmuch as while conducting enquiry against the petitioner. As it appears from Clause-(viii) of Regulation-27, the Enquiry Officer shall in the course of the enquiry, consider such documentary evidence as may be relevant or material in regard to the charges and accordingly the employee entitled to cross-examine the witnesses in support of the charges and to give evidence in person. The "Presenting Officer" shall be entitled to cross-examine the employee and the witnesses examined in his/her defence. The Enquiry Officer may decline to examine any witness, if he considers that his/her evidence is not relevant to the issue; in which case, the reasons shall be recorded in writing.

It is stated that while conducting enquiry, the Enquiry Officer kept certain documents with him and did not supply copies thereof to the

petitioner. Therefore, the petitioner had no opportunity to deny or controvert the same and submitted the enquiry report proposing major penalty of dismissal from service. It is further stated that was violation of Sub-clause (b) and (c) of Clause-(X) of Regulation-27 which states that after conclusion of the enquiry, a report shall be prepared by the Enquiry Officer which shall contain a gist of defence of the employee in respect of each article of charge and an assessment of the evidence in respect of each article of charge. As a copy of the enquiry report was not supplied to the petitioner there was no occasion on his part to raise objection at the initial stage and subsequently, while proposing to impose a major penalty by the disciplinary authority vide Annexure-3 dated 28.02.2003 a copy of the enquiry report was supplied to the petitioner calling upon him for his explanation within a period of seven days. Therefore, the enquiry report having been supplied after conduct of the enquiry and the same having been supplied only at the time of proposing punishment, that itself amounted to violation of natural justice inasmuch as and an empty formality. Even while the Disciplinary Authority, who is not an enquiry officer has not acted in consonance with the provision contained in Regulation-28 of Regulation 1996 inasmuch as in Clause (i) of Regulation-28 the Disciplinary Authority, if not itself the enquiry officer, shall consider the records of enquiry and record its findings on each charge. As it appears, admittedly in the instant case, the enquiry was conducted by an Enquiry Officer, who was not the Disciplinary Authority. Therefore, while considering the enquiry report duty was cast on the Disciplinary Authority to consider the records of enquiry and record its finding of each charge. No such finding having been recorded by the Disciplinary Authority on each charge against the delinquent employee, the enquiry proceeding was conducted in gross violation of the provisions contained in Clause (i) of Regulation-28 of the 1996 Regulations. This having amounted to a perfunctory enquiry on that basis a major penalty like termination of service could not have been imposed on the petitioner.

8. On perusal of the enquiry report, it appears that the Enquiry Officer proceeded with the enquiry proceeding in a manner contrary to the provisions contained in the 1996 Regulations as in gross violation of the principles of natural justice. In addition to that, the enquiry was conducted beyond the scope of the charges framed against the petitioner. On scrutiny of the charges framed against the petitioner and the finding thereon, it is conclusive that the Enquiry Officer travelled beyond the scope of enquiry and where no charge was framed he over zealously offered uncalled for finding.

Besides, the Enquiry Officer appears to have proposed imposition of a major penalty without recording any independent finding on the allegation but on the plea that the activities of the petitioner with regard to misbehavior amounted to gross misconduct which could not be tolerated in the greater interest of the Corporation. Accordingly, he should be awarded major penalty which would strenuously deter other employees of the Corporation from committing similar acts of misconduct. The recommendation were in the better interest of smooth functioning of the Corporation in future. It is further urged that while arriving at such conclusion, copies of the documents on which the Enquiry Officer based, were neither supplied to the petitioner nor was he allowed to cross-examine any witness, thereby grossly violating the principles of natural justice. In addition to the same the Enquiry Officer, where, it is not the Disciplinary Authority, shall forward to the Disciplinary Authority the records of enquiry which shall include (a) the report of the enquiry prepared by it under Sub-Regulation-(x), (b) the written statement of defence, if any, submitted by the employee, (c) the documentary evidence produced in course of the enquiry and (d) the orders, if any, made by the Disciplinary Authority and the Enquiring Authority in regard to the enquiry. There is non-compliance with such provision by the Enquiry Officer while submitting the record to the Disciplinary Authority. Therefore, the enquiry was vitiated on the ground of non-compliance with the principles of natural justice. No materials have been produced by the opposite parties to dislodge the contentions raised on behalf of the petitioner regarding the records of the disciplinary proceeding. Therefore, the conclusion is irresistible that the enquiry was conducted contrary to the 1996 Regulations due to non-affording opportunity of hearing to the petitioner, thereby there was violation of principles of natural justice by the Disciplinary Authority, the appellate authority and the Enquiry Authority.

In ***State Bank of India and others*** (supra), the apex Court held :

"xxx xxx xxx

But non-supply of CVC recommendation which was prepared behind the back of respondent without his participation, and one does not know on what material which was not only sent to the Disciplinary Authority but was examined and relied, was certainly violative of procedural safeguard and contrary to fair and just inquiry.

xxx xxx xxx

May be that the Disciplinary Authority has recorded its own findings and it may be coincidental that reasoning and basis of returning the finding of guilt are same as in the CVC report but it being a material obtained behind back of the respondent without his knowledge or supplying of any copy to him the High Court in our opinion did not commit any error in quashing the order".

> Therefore, observance of procedural fairness in essence of the compliance of principles of natural justice. Non-compliance thereof vitiates the entire proceeding.

9. In ***State of Uttaranchal and Ors*** (supra) the apex Court held that :

> "(a) Disciplinary Authority to supply copy of Enquiry Report and all connected materials relied on by the Enquiry Officer to the delinquent, (b) Enquiry Officer cannot make strong recommendation for imposition of a particular punishment and (c) The appellate Authority to consider the infirmities in the enquiry pleaded by the delinquent." (Para-11)

Mr. B.S. Tripathy-1, learned counsel for the petitioner, submits that in Annexure-3 the Enquiry Officer made strong recommendation for imposition of major penalty which he could not have done. In the present context, the Enquiry Officer had not made any strong recommendation for imposition of major punishment rather he has only suggested to award major penalty by assigning reasons that the same might deter the employees of the Corporation committing such mistake which amounted to misconduct. Therefore, this Court is not in agreement with the contention raised by Mr. Tripathy, learned counsel for the petitioner, that the Enquiry Officer made a stiff recommendation which he ought not to have done in view of judgment in ***State of Uttaranchal and Ors*** (supra).

10. In ***A.N. Pathan*** case (supra) the apex Court held that :

"Cross-examination is an integral part of natural justice and the statements recorded behind the back of a person where he had no opportunity to cross-examine, the same cannot be relied upon".

In the present context, the statements of the witnesses have been recorded which the petitioner has endorsed, but not being allowed to cross-examine them. The said statements have been utilized against the petitioner

in the enquiry report. This clearly shows that there was gross violation of principles of natural justice.

11. In ***Managing Director, ECIL, Hyderabad and Ors***. (supra) the apex Court held :

> "When the Enquiry Officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the Enquiry Officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges leveled against him. That right is a part of the employee's right to defend himself against the charges leveled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice".

Applying the said principle to the present context, it appears that the Disciplinary Authority having not been the Enquiry Officer ought to have acted in consonance with the provisions contained in Regulation-20 (i) and the delinquent officer had a right to receive copy of the enquiry report before the Disciplinary Authority arrived at his conclusion of guilt or innocence of the employee with regard to the charges levelled against him. But, in the present case, the Disciplinary Authority supplied the copy of the enquiry report while proposing imposition of a major penalty i.e. dismissal from service. Therefore, the action taken by Disciplinary Authority being not in consonance with law laid down by the apex Court in ***Managing Director, ECIL, Hyderabad and Ors***. (supra) read with Regulation 20(i) of the 1996 Regulations cannot be allowed to prevail.

As it appears while conducting enquiry the past conduct of the petitioner was taken into consideration in charge No.5 for which no charge had been framed. In the event the Enquiry Officer thought of taking any past conduct into consideration, the petitioner ought to have been offered opportunity to controvert the same. That having not been taken care of, the penalty imposed on the petitioner, that too a major penalty like dismissal from service cannot stand to judicial scrutiny.

12. In ***Md. Yusuf*** case (supra) the apex Court held as follows:

> "If the disciplinary authority wants to consider past conduct of the employee in imposing a punishment, the delinquent is entitled to notice thereof and generally charge-sheet should contain such an article or at least he should be informed of the same at the stage of the show-cause notice, before imposing the punishment (Para-37)".

Applying the said principle to the present context it appears that neither the Enquiry Officer nor the Disciplinary Authority was justified in travelling beyond the scope of charges levelled against the petitioner and imposing the punishment has been done in the case.

13. In ***Union of India and Ors*** (supra) the apex Court held :

> "The courts/tribunals would apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment. It is only if the court/tribunal finds that the furnishing of report could have made a difference to the result in the case then it should set aside the order of punishment. Where after following the said procedure the court/tribunal sets aside the order of punishment, the proper relief that should be granted to direct reinstatement of the employee with liberty to the authority/management to proceed with the enquiry, by placing the employee under suspension and continuing the enquiry from that stage of furnishing with the report. The question whether the employee would be entitled to the back wages and other benefits from the date of dismissal to the date of reinstatement, if ultimately ordered, should invariably left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome".

Considering the ratio decided in ***R.P. Yadav*** case *(*supra), whether the petitioner is entitled to back wages and other consequential relief. Reliance has been placed on ***Shiv Nandan*** case (supra) wherein it is stated that the petitioner being kept out of service illegally, he is entitled to reinstatement in service with full back wages.

14. On perusal of the order passed by the appellate authority, it appears that the same was passed without assigning any reason. It was a bald one lined order confirming the order of Disciplinary Authority which indicates that the appellate authority did not apply his mind while in seisin over the matter.

15. Considering the contentions raised by the learned counsel for the parties and after going through the records and the law laid down by the apex Court, this Court has no hesitation to quash the order of punishment of dismissal, vide Annexure-9, the same being in violation of the 1996 Regulations read with the principles of natural justice. As consequence thereof, the petitioner is entitled to reinstatement in service with consequential service benefits admissible to him in accordance with law granting liberty to the authority to proceed with the enquiry de novo in conformity with the provisions of law by affording opportunity to the petitioner in compliance with the principles of natural justice.

With the above observation and direction, the writ petition is disposed of. No order to cost.

Writ petition disposed of.

2015 (I) ILR - CUT- 384

DR. B. R. SARANGI, J.

W.P.(C) NO. 5951 OF 2012

GOKULA CHANDRA DAS & ORS. ……..Petitioners

.Vrs.

PRAMOD KUMAR PRADHAN & ORS. ……...Opp.Parties

A. CIVIL PROCEDURE CODE, 1908 – O-8, R-6-A
r/w Articles 68 & 123 Limitation Act, 1963

Counter Claim – Limitation – It can be filed at any stage of the suit by the defendant and the only limitation is the cause of action must have arisen before or after filing of the suit but before the defendants had delivered their defence – However starting point of limitation is to be considered depending upon the facts and circumstances of each case, specially relating to knowledge of a party.

In this case the defendants-petitioners had no definite knowledge about the previous suit and only when records were called for, they

came to know about the illegality on 25.11.2011 and that being the date of knowledge, cause of action starts from that date and the learned Court below is not correct in rejecting the Counter claim on the ground of limitation – Held, the impugned order is set aside and the trial Court is directed to consider the Counter claim as a separate suit.

(Paras 10 to 13)

B. CIVIL PROCEDURE CODE, 1908 – O-8, R-6-A

Distinction between "Set off" and "Counter claim" – While set off is a defence, the Counter claim is more than a suit – Counter claim need not be an action of the same nature as the Original action or even analogous there to – The Counter claim is not confined to a money suit only – Even after filing of written statement or before evidence is recorded and issues are settled, the Court is only competent to take cognizance in separate suit to entertain the plea of Counter claim – Separate claim and a separate suit for the separate claim are maintainable and it is set off. (Para 7)

Case laws Referred to:-

1.AIR 1989 Ori 50 : (Magulu Pirai-V- Prafulla Ku. Singh & Ors.)
2.AIR 1987 SC 1395 : (Mahendra Kumar & Anr.-V- State of M.P. & Anr.)
3. AIR 1960 Patna 66 : Sheonandan Prasad Sao v. Ugrah Sao and others.
4. AIR 1996 SC 2358 : Radhika Devi v. Bajrangi Singh and Ors.
5. Vol.91(2001) CLT 144 : Dr. Laxminarayan Mahapatra v. Sohini Bahar Sur & others.
6.2012 (II) OLR 859 :Pramila Das v. Smt.Jugmaprava Mohanty and others.
7.91(2001)CLT 144 :Dr.Laxminarayan Mohapatra v. Sohini Bahar Sur and others.

For Petitioners - M/s. N.C. Pati, M.R. Dash, B. Das.
For Opp.Parties - M/s. S.Nayak, K.B. Kar, A.K. Parida, D.K. Pattnaik, Mr. S.Pattnaik

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Date of hearing : 02.12.2013
Date of Judgment: 11.02.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioners, who are the defendants in the court below, have filed this application seeking to quash the order dated 19.03.2012 passed by

learned Civil Judge(Junior Division), Khurda in T.S. No. 16 of 2000 rejecting the application filed under Order 6 Rule 17 of the Code of Civil Procedure to introduce the counter claim by way of amendment of the written statement.

2. The short fact of the case, in hand, is that the opposite parties, being the plaintiffs, filed a suit for permanent injunction before the learned Civil Judge (Junior Division), Khurda registered as Title Suit No. 16 of 2000 stating that one Narasingha Panigrahi was the owner in possession of Sabik Plot No. 449/1139 corresponding to Hal Plot No. 438 measuring an area of Ac. 0.058 dec. under Khata No. 141 of Mouza Sanapalla and in order to meet his legal necessities, the recorded owner, namely, Narasingha Panigrahi sold the suit land along with other properties to Pravakar Pradhan by registered sale deed dated 21.10.1963 and delivered possession. Therefore, Pravakar Prahdan, who was the father of the plaintiffs, was the rightful owner in possession of the suit land and after his death, the plaintiffs have become the owner in possession. In the R.O.R. of 1961, the suit land was recorded in the names of Batakrushna Dash (father of the present defendants) and Nilamani Devi. Pravakar Pradhan filed Title Suit No. 12 of 1964 in the Court of Munsif, Khurda and during pendency of the said suit, Batakrushna Dash died and his widow and five sons were substituted and ultimately the suit ended in compromise between the parties on 01.08.1966. According to the plaintiffs, Pravakar Pradhan being the true owner is in possession of the suit land and the defendants were not to disturb his possession. In spite of compromise decree, since the defendants disturbed the possession of the plaintiffs, a proceeding under section 144 of Cr.P.C. was initiated and the defendants took a plea disputing the title of the plaintiffs and denying the decree passed in the said suit. Therefore, the present suit bearing Title suit No. 16 of 2000 has been filed by Pravakar Pradhan seeking permanent injunction.

3. The defendant-petitioners' case is that Narasingha Panigrahi was not the owner of the suit land. The plaintiffs have not acquired any title over the suit land by virtue of the so called sale deed executed by Narasingha Panigrahi and the compromise decree, which was passed in T.S. No.12 of 1964, being a fraudulent one, the same cannot bind defendant nos. 3 to 5, who were minors and the provisions under Order 32 Rule 7 C.P.C. have not been complied with as the defendant nos. 1 and 2 have not put their signatures in any compromise petition, thereby the compromise decree is not

binding on the defendants and the same was not for the benefit of the minors. Apart from the same, it is stated that the plaintiffs are not in possession of the suit land and they have filed a petition to adduce certain documents of the decree in the previous suit and some rent receipts, to which the defendants have filed objection. Similarly, the defendants also filed a petition to call for the previous suit records. By order dated 30.04.2009 the trial court allowed the petition filed by the plaintiffs and rejected the application of the defendants. Then the defendants filed W.P.(C) No. 10592 of 2009. This Court by order dated 29.10.2009 disposed of the same with a direction to the defendants to file a better petition. Thereafter, the defendants by giving better particulars, filed a petition and the same was rejected. Again the defendants filed W.P.(C) No.11751 of 2010 and by order dated 15.07.2011 the said writ petition was allowed and the Trial Court was directed to call for the records of the previous suit. Pursuant to the order of this Court, the trial court called for records and the defendants on inspection of the same, found that several illegalities have been committed while obtaining the decree by way of compromise in T.S. No. 12 of 1964. After inspection of records, the defendants filed a petition for amendment of the written statement to introduce counter claim and the same was rejected by the trial Court vide order dated 19.03.2012 under Annexure-5 holding that the counter claim is barred by limitation. Hence this petition.

4. Mr. N.C. Pati, learned counsel for the petitioners submitted that a counter claim shall be treated as a separate suit and shall be deemed to have been instituted on the date on which the counter claim is made invoking the provisions contained in Sec-3 (2)(b)(i) of the Indian Limitation Act. It is further contended that even if the main suit is dismissed for default, the counter claim shall proceed and the same shall be decided on merit and the plaintiff in original suit has got a right to file additional written statement to the counter claim. So whether the counter claim is barred by limitation, be one of the issues and the counter claim can not be thrown out at the threshold without taking any evidence. As per the provisions contained in the Limitation Act lodging of counter claim is the relevancy of the date of the accrual of cause of action and not the date of filing of written statement and the counter claim can be filed at any stage of the suit by the defendant and only limitation is cause of action must have arisen before or after filing of the suit but before the defendant had delivered his defence. Whether the counter claim is barred by limitation and what is actual starting point of limitation is to be considered on the basis of the first of each case and therefore, for any

declaration, limitation is three years as prescribed under Article 58 of Limitation Act when the right to sue first accrues. Mr. Pati, learned counsel for the defendants-petitioners has relied upon the judgments in **Mangulu Pirai v. Prafulla Kumar Singh and others,** AIR 1989 Ori 50, **Mahendra Kumar and another v. State of Madhya Pradesh and another,** AIR 1987 SC 1395, AIR 1977 Cal 189, **T.H.Hancock v. Imperial Bank of Canada,** AIR 1930 P.C. 272, **C.Mohammad Yunus v. Syed Unnissa and others**, AIR 1961 SC 808, **Banidhar Lenka v. Kumar Barik** 1985(I) OLR 133 and **Badhoram Mistri @ Lohari v. Dandapani Sahu,** 43(1977) CLT 584. It is further argued that 'knowledge' means a party must have definite knowledge of the decree in a certain suit and the date of inspection of the records would be the date of knowledge and the limitation would be drawn from that date. Therefore, the defendants came to know about the fraud and illegality committed by the present plaintiffs in detail on 25.11.2011 and therefore, the cause of action arose on 28.04.2000 when the defendants appeared in the suit and on 25.11.2011 when the defendant inspected the case records in T.S. No. 12 of 1964. Therefore, the impugned order rejecting the petition on the ground of limitation cannot be sustainable.

5. Mr. S. Nayak, learned counsel for the plaintiffs-opposite parties have urged that Order 8 Rule 6-A of CPC, which deals with making of counter claim by the defendant, lays down that the counter claim shall be treated as a plaint in a suit and shall be governed by Rules applicable to such suit. Similar is also the position emanating from a reading of the provisions of section 3(2)(b) of the Indian Limitation Act, which stipulates that any claim by way of a set-off of a counter claim shall be treated as separate suit. But with regard to the date on which such a suit shall be deemed to have been instituted, there is a marked difference, which is apparent from clauses (i) and (ii) thereof. In the case of a "set-off", the suit shall be deemed to have been instituted on the same date as the suit in which the set off is pleaded. But in the case of a counter claim, the suit shall be deemed to have been instituted on the date on which the counter claim is made in court. It is admitted by Mr. Nayak that the counter claim is in the nature of an independent suit and shall be deemed to have been instituted on the date on which the petition for amendment is filed in the court seeking to incorporate a counter claim in the written statement. The question of limitation in raising the counter claim assumes great importance inasmuch as per the provision of sub-section (1) of section 3 of the Indian Limitation Act, the position is clear that even if limitation is not set up as a defence, every suit instituted after the

prescribed period shall be dismissed and a duty is cast on the court to examine this aspect before admitting the plaint. Therefore, according to him, the learned court below has not committed any illegality in disallowing the prayer for amendment of the written statement to introduce a counter claim when the relief sought for is barred by time. To substantiate his contentions, he has relied upon the judgments in **Pramila Das v. Smt.Jugmaprava Mohanty and others,** 2012 (II) OLR 859. It is further argued that it is true that while considering a motion for grant of leave to amend the pleading, the court is not required to delve into correctness or falsity of the claim sought to be introduced through amendment on the merit of the claim depending upon analysis and on consideration of the materials to be adduced by the parties during trial, can only be gone into finally while resolving the suit. But the said principle would not apply to a case where the relief sought to be claimed through amendment, on the face of record, is barred by time or barred by any law for the time being in force. In such a case, the Court would refuse the prayer for amendment aimed at introducing a time barred relief and has relied upon the judgment reported in AIR 1996 SC 2358 and **Dr.Laxminarayan Mohapatra v. Sohini Bahar Sur and others**, 91(2001)CLT 144.

6. Before going to the merits of the case and considering the rival contentions of the parties, it is required to understand the meaning of "set-off" as contemplated under Order 8 Rule – 6 of the CPC, which reads as follows:

> "2.**Set-off – What is**? – 'Set off' is defined in Black's law Dictionary, 7th Edn. 1999 inter alia as a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. The dictionary quotes Thomas W. Waterman from a Treatise on the Law of Set Off Recoupment, and Counter Claim as stating:
>
> " Set-off signifies the subtraction or taking away of one demand from another opposite or cross-demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount to be set off was stopped or deduced from the cross-demand."

7. Now coming to the meaning of "counter claim" as contemplated under Order 8 Rule 6A, which has been inserted by Act 104 of 1976. "Counter Claim" means-

> "1. Counter Claim- A defendant in a suit may set up by way of counter-claim against the claim of the plaintiff any right or claim in respect of a cause of action accruing to the defendant against the plaintiff. It is not confined to money claim or to causes or action of the same nature as the original action. Such counter-claim shall have the same effect as a cross-suit. Counter-claim thus shall be treated as plaint and governed by the rules applicable to the plaint. Counter-claim shall be heard together with plaintiff's suit to enable the court to pronounce a judgment- Manick Chand v. Lalchand AIR 1994 Bom 196. A counter Claim should be treated as a plaint and the same is governed by the rules that are applicable to plaints. It can be filed even after written statement subject to fulfillment of all the conditions that are applicable."

Now the distinction between "set-off" as well as "counter claim" is to be considered. While set-off is a defence, the counter claim is more than that of a suit. Counter claim need not be an action of the same nature as the original action or even analogous thereto. The counter claim is not confined to a money suit only. Even after filing of written statement or before evidence is recorded and issues are settled, the court is only competent to take cognizance in separate suit to entertain the plea of counter claim. Separate claim and a separate suit for the separate claim are maintainable and it is set off.

8. In view of the aforesaid facts and circumstances, now it is to be considered in the present context that the defendant-petitioners filed a petition under Order 6 Rule 17 of CPC vide Annexure-3 stating that the plaintiffs have begun hearing of the suit adducing witness and they have not filed all their documents relied on by them. The plaintiffs filed registered sale deed dated 21.10.1963 on 22.11.2011 in course of cross-examination of P.W.-3, Pramod Kumar Pradhan, who is the plaintiff No.1 in the suit. When the advocate for the defendants made inspection of the case record on 25.11.2011, it was revealed that the suit plot is not covered under the sale deed dated 21.10.1963. It is also revealed in such inspection that in the compromise petition filed in T.S. No.12/64, the signatures of the defendants

are forged and the defendants have not put their signatures on it. Therefore, the defendants wanted to amend the written statement by incorporating the materials, which have been discovered due to inspection on 22.11.2011 by making the averments that pursuant to the registered sale deed dated 21.10.1963 all the properties measuring Ac.3.920 dec. purported to have been sold to Pravakar Pradhan are on the basis of current settlement land particulars. The suit property has never been sold to Pravakar Pradhan in the said sale deed. As such the compromise petition as well as the decree is outcome of fraud and the same is void. In addition to the same, a specific averment has been made in the counter claim which is as follows:

> "That the compromise petition filed in O.S. No. 12/64-I was never signed by Parbati Dibyha, mother of present defendants. The defendants No.1 and 2 have also never put their signatures appearing in the said compromise petition are not their signatures. Mandatory provisions under Order 32 Rule 7 of C.P.C. was not complied. The said compromise was not for the benefit of the ten minors. Sisters of the defendants namely Bailasini Devi and Binodini Devi though were parties to the said suit were not signatories to the said compromise petition. The defendants have never appeared in the Court nor has engaged any lawyer on their behalf. The compromise Decree is a nullity. It would defeat provisions of law and opposed to the public policy. Signatures of the alleged parties in the compromise petition has also not been attested. Furthermore, the then plaintiff, Pravakar Pradhan have no title to the suit property during pendency of the said suit. So, the compromise decree is also a nullity. The plaintiff cannot derive any title by virtue of the said compromise decree in as much as it is non-est in the eye of law and the same is required to be set aside as it is void and not binding on these defendants. That the cause of action for the counter claim arose within jurisdiction of this Court on dated 28.04.2000, when these defendants appeared in this suit and came to know about the decree in question in T.S. No. 12/64-I. Therefore, in the said counter claim, the defendants seek for decree declaring the compromise decree passed on the T.S. No. 12.64-I in the Court of the then Munsif, Khurda is null and void and not binding on these defendants."

9. Mr. S. Nayak, learned counsel for the plaintiffs-opposite parties fairly admits that the counter claim filed by the defendants shall be treated as plaint

and he governed by the Rules applicable to the plaint. It is further admitted that in view of the provisions contained in Section 3(2)(b) of the Indian Limitation Act, any claim by way of set off or a counter claim, shall be treated as a separate suit. In a case of set-off, the suit shall be deemed to have been instituted on the same date as the suit in which set off is pleaded. But in the case of counter claim, the suit shall be deemed to have been instituted on the date on which the counter claim is made in court. Therefore, he stoutly submitted that when a counter claim is permitted to be introduced through amendment of written statement, the counter claim in the nature of an independent suit shall be deemed to have been instituted on the date on which the petition for amendment is filed in court seeking to incorporate the counter claim in the written statement. Therefore, the question of limitation raising the counter claim assumes great importance inasmuch as sub-section (1) of Section 3 of the Indian Limitation Act makes the position clear that even if limitation is not set off as a defence, every suit instituted after the prescribed period shall be dismissed. He supported the impugned order passed by the learned court below referring to the judgments in **Pramila Das v. Smt.Jugmaprava Mohanty and others**, in 2012 (II) OLR 859 stating that the learned court below has not committed any illegality in disallowing the prayer for amendment of the written statement to introduce a counter claim when the relief sought for is barred by time.

10. Considering the above contention and perusing the records and in view of the subsequent materials available, the defendants by way of counter claim can approach the court and the said counter claim is to be treated as a separate suit and shall be deemed to have been instituted on the date the said counter is made. In that case the plaintiffs in original suit have also a right to file additional written statement to the counter claim even if the main suit is dismissed for default. The counter claim shall proceed and is to be decided on merit. In essence, the counter claim can be treated as a cross suit before the opposite parties filed additional written statement against the said counter claim, challenging the same as barred by limitation. In that case court has to consider the same by framing issues while deciding the counter claim. But at the threshold the counter claim cannot be rejected as barred by limitation. The limitation with regard to lodging of counter claim is to be considered from the date of accrual of cause of action and not from the date of filing of written statement.

11. The counter claim can be filed at any stage of the suit by the defendant and the only limitation is the cause of action must have arisen before or after filing of the suit but before the defendants had delivered their defence. The said point has been considered by the apex Court in Mahendra Kumar (supra) and by this Court in Mangulu Pirai (supra). The starting point of limitation is to be considered depending upon the facts and circumstances of each case. For any other declaratory suit, the limitation is three years as prescribed under Articles 58 of the Limitation Act when the right to sue first accrues. The right to sue under Article 58 of the Limitation Act which is the residuary article, on suits relating to declarations is not there until an accrual of the right asserted and its infringement or at least a clear and unequivocal threat to infringe that right by the defendants against whom the suit is instituted. Though there is no reference in Article 58 relating to knowledge of a party, there may be cases where the nature of the right imports knowledge of certain facts and in such cases the right to sue cannot be said to arise until a party had the necessary knowledge in view of the judgments reported in C.Mohammad Yunus (supra), T.H.Hancock supra), Kanailal Das & anothers v. Jiban Kanai Das & another AIR 1977 Calcutta 189 and **Sheonandan Prasad Sao v. Ugrah Sao and others,** AIR 1960 Patna 66.

12. Applying the aforesaid principles to the present case and considering the judgments referred to supra, when decree is passed fraudulently behind the back of a party knowledge of such suit is material. What constitutes 'knowledge' is clearly explained in the judgment in Banidhar Lenka (supra) and applying the said principle to the case in hand, question of limitation has to be considered in the counter claim filed by the defendants. In considering Article 123 of the Limitation Act to set aside ex parte decree, this Court in Badhoram Mistra (supra) has held that mere information without knowing full facts as to the suit, service of summons of ex parte decree is not sufficient unless the defendants obtained certified copy of the order or inspect the records. Therefore, knowledge means a party must have definite knowledge of the decree in a certain suit and when the records were inspected would be date of knowledge and limitation would run from that date. In view of such position of law, without examining this fact in proper perspective, the relief sought to be claimed through amendment, if on the face of record is barred by time or barred by any law for the time being in force, in that case, the court has to refuse such prayer for amendment. Therefore, the judgments cited by the learned counsel for the petitioners in 2012(2) OLR 859, **Radhika Devi v. Bajrangi Singh and others,** AIR 1996

SC 2358 and **Dr. Laxminarayan Mahapatra v. Sohini Bahar Sur & others** Vol.91(2001) CLT 144 may not have any application.

13. In the present case, the defendants-petitioners had no definite knowledge about the previous suit record, i.e. T.S.No.12 of 1964. After the direction was given by the learned trial court when the records were called for, the defendants came to know about the fraud and illegalities committed by the present petitioners-opposite parties in detail on 25.11.2011 when inspection was caused to the record. Therefore, the cause of action starts when the defendants inspected the records of T.S.No.12 of 1964 in view of the first appearance in T.S.No.16 of 2000 on 28.4.2000. Therefore the learned court below has committed gross illegalities and irregularities in rejecting the counter claim filed by the defendants-opposite parties in the impugned order dated 19.3.2012. Accordingly, the same is set aside and the trial court is directed to consider the counter claim as a separate suit and proceed with the matter in conformity with the provisions of law.

14. With the aforesaid observation and direction, the writ petition is allowed. No cost.

Writ petition allowed.

2015 (I) ILR - CUT- 394

DR. B. R. SARANGI, J.

W.P.(C) NO. 16352 OF 2006

BISESWAR DANDPAT ……..Petitioner

.Vrs.

SARASWATI DEI & ORS. …….Opp.Parties

EVIDENCE ACT, 1872 – Ss. 36, 74, 83, 87

Printed copy of the original supplied by the competent authority on payment of requisite fees, can be very well presumed to be accurate and admissible in evidence as relevant under sections 36 and 83 of the Evidence Act – The printed copy of the original is the public document within the meaning of section 74 of the Act.

In this case the maps in question are printed copies of the original purchased from the Government Officers on payment of requisite fees – The trial court should not have rejected the prayer of the plaintiff-petitioner to exhibit both the sabik and Hal maps which are vital documents for adjudication of the dispute between the parties – Held, impugned order rejecting the application to exhibit both sabik and Hal maps is set aside. (Paras 8, 9)

Case laws Relied on :-

1. AIR 1942 Bombay 161 : Secretary of State -V- Chimanlal Jamnadas & Ors.
2. AIR 1998 Delhi 386, 388 : New India Assurance Co. Ltd. -V- Krishna Sharma

For Petitioner - M/s. R.Mohanty, A.K.Mohanty, A.P.Bose, P.K.Samantray, S.N.Biswal, S.K.Mohanty, M.R.Dash & Sumitra Mohanty

For Opp.Party - M/s. N.C.Pati, R.Das, M.R.Dash, N.Singh, B.Das & P.R.Barik

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Date of hearing : 10.01.2014
Date of judgment: 11.02.2014

JUDGMENT

DR. B.R. SARANGI, J.

The plaintiff-petitioner has filed this writ application assailing the order dated 29.11.2006 in Annexure-1 passed by the learned Civil Judge (Senior Division), Rairangpur in T.S. Case No.23/1995 rejecting the application to exhibit the village maps.

2. The fact of the case in nut-shell is that the plaintiff-petitioner filed Title Suit No.23/1995 before the learned Civil Judge (Sr. Division), Rairangpur praying for declaration of title over Ac.0.1 decimal of land as found by Civil Court Commissioner and delivering the possession of the same to him by evicting defendant nos.1 to 3 from the said area, his easementary right of way over path and injuncting defendants permanently not to interfere with his possession. The suit was decreed on 24.11.2000. Assailing the same, some of the defendants filed Title Appeal Nos.1 of 2001 and 2 of 2001 before the Additional District Judge, Rairangpur. After hearing

the parties, learned lower appellate court remanded the matter to the learned Civil Judge (Senior Division), Rairangpur with a direction to appoint a Civil Court Commissioner for measurement of the suit land afresh at the cost of the parties and dispose of the suit within six months.

3. After remand the plaintiff-petitioner filed an application before the Board of Revenue to obtain certified copy of the original map of mouza Bisoi and the plaintiff was accordingly directed to deposit the requisite amount to obtain the printed copy available for public sale. In view of the notification issued by the Board of Revenue dated 06.12.2003 indicating enhancement of cost of saleable maps with reference to the Government in Revenue Department letter No.57031/2011 dated 04.02.2013 under clause (1) wherein it is stated that village maps finally published under O.S. & S. Act and O.C.H. & P.F.I. Act, the present rate per sheet Rs.10 has been revised rate per sheet to Rs.25 and such notification has been issued by the Director of Land Records and Survey addressing to the various authorities of the Revenue Department. Accordingly, the plaintiff petitioner deposited the requisite fees for supply of the printed copy of the maps which has been supplied to him in conformity with the provisions of law.

4. On 09.11.2006 the plaintiff-petitioner filed 19 documents along with the said map before the trial court to prove his case. On consideration of the same, learned trial court by order dated 10.11.2006 exhibited other documents excluding the village maps in consequence thereof the plaintiff-petitioner filed a petition under Sections 36 and 83 of the Evidence Act read with Section 151 CPC under Annexure-3 with a prayer to recall the order dated 10.11.2006 and to mark exhibit of both sabik and hal map of mouza Bisoi which has been rejected vide impugned order dated 29.11.2006 on the ground that maps produced by the plaintiff-petitioner do not contain signature with seal and the maps purchased from a competent authority cannot be suo motu exhibited without its formal proof when the defendants dispute the genuineness of the maps.

5. Mrs. S. Mohanty, learned counsel for the plaintiff-petitioner argued with vehemence that the map having been purchased in consonance with the guideline issued by the Board of Revenue issuing a public document the same should have been marked as exhibits as per the provisions contained in Sections 36 and 83 of the Evidence Act. In support of her contention, she has

relied upon the judgment in ***Secretary of State v. Chimanlal Jamnadas and others***, AIR 1942 Bombay 161.

6. Mr. P.R. Barik, learned counsel for the defendant-opposite party no.1 stated that the maps printed by the settlement authority contain the date of publication and signature of the settlement authority as required by the Orissa Survey and Settlement Act, 1962. In the instant case, such certificate is not available in the map. Therefore, the order passed by the learned trial court is justified.

7. Considering the rival contentions of the parties and on perusing the record, it is to be considered whether the map granted by the competent authority can be marked as exhibits for just and proper adjudication of the suit in question. Section 36 of the Indian Evidence Act states as follows:

> "**Relevancy of Statements in maps, charts and plans –** Statements of facts in issue or relevant facts, made in published map or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts".
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> Section 87 of the Indian Evidence Act reads as follows:
>
> "**Presumption as to books, maps and charts-** The Court may presume that any book to which it may refer for information on matters of public or general interest and that any published map or chart, the statements of which are relevant facts, and which, is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published".

In view of the provisions contained in Section 36 read with Section 87 of the Indian Evidence Act it is to be considered whether the map is a public document within the meaning of Section 74 of the Indian Evidence Act.

Referring to Section 36 of the Indian Evidence Act, the map which has been granted by the competent authority in consonance with the notification issued by the Board of Revenue in Annexure-5 can be termed as official map which means 'in zoning and land use, the authorized map for the determination of proper land use in the city or town, showing the zones and areas and their authorized uses'. Map or official maps can be taken into

public document within the meaning of Section 74 of the Evidence Act. Therefore, which of the documents are to be public documents has been mentioned in Section 74 of the Evidence Act. The following documents are public documents (1) documents forming the acts or records of the acts ;

i. of the sovereign authority;
ii. of official bodies and tribunals and;
iii. of public officers, legislative, judicial and executive, of any part of, or of the commonwealth other part of Her Majesty's dominions, or of a foreign country;

(2) public records kept in any state of private documents. [Indian Evidence Act (1 of 1872), S. 74].

What constitute public document has also been considered in See also ***Manorama Srivastava v. Saroj Srivastava***, AIR 1989 all. 17.

A public document is such a document contents of which are of public interest and the statements are made by authorized and competent agents of the public in the course of their official duty. Public are interested in such a document and entitled to see it, so that if there is anything wrong in it they would be entitled to object. In that sense it becomes a statement that would be open to the public to challenge or dispute and therefore, it has a certain amount of authority. See ***New India Assurance Company Ltd. v. Krishna Sharma***, AIR 1998 Delhi 386, 388.

With reference to the question of admissibility of a public document in evidence, the following observations were made by Lord BLACKBURN : There "should be a Public inquiry, a Public Document, and made by a Public Officer. I do not think that, 'Public' there, is to be taken in the sense of meaning of the whole world. I think an entry in the books of a Manor is 'public' in the sense that it concerns all the people interested in the manor and an entry, probably, in a Corporation book concerning a matter or something in which all the corporation is concerned would be 'public' within that sense. But must be a 'Public Document,' and it must be made by a Public Officer. I understand a 'public document.' there, to mean, a document that is made for the purpose of the public making use of it and being able to refer to it. It is meant to be where there is a judicial, or quasi judicial, duty to enquire. It should be made for the purpose of being kept public, so that the persons

concerned in it may have access to it afterwards" (per BLACKBURN J. ***Sturla v. Freccia***, 50 LJ Ch 96 : 5 App Cas 643, 644.).

8. On When the touch stone of the contention raised now it is to be considered whether the learned trial court is justified in rejecting the application on the ground stated earlier with reference to the ground no.1 that the maps purchased by the plaintiff-petitioner which do not contain any certificate with seal and signature cannot be construed to be a public document to be marked as exhibit. The maps in question are prepared by the Revenue Department and the same are sold by the State Government pursuant to letter of Board of Revenue in Annexure-5 and more so the same is published by the Government and offered for sale. The maps in question are printed copy of the original purchased from the Government officers on payment of requisite fees. The said printed copy does not contain any certificate with seal and signature as it is not the certified copy. As per the provisions of Section 36 of the Indian Evidence Act, there are two types of maps, namely, published map or charts offered for public sale and maps and plans made under authority of Government. Therefore, Section 36 of the Evidence Act mandates that the statement of the facts in issue made in published maps generally offered for public sale themselves constitute to be a public document and the element of public document as enshrined in Section 74 of the Evidence Act is well founded. Therefore, under Section 83 of the Evidence Act, the court must presume the said maps to be accurate purporting to be made by the authority of any State Government. So far as rejection of the application on the ground that the maps purchased from competent authority cannot be so motu exhibited without its formal proof when the defendants disputed genuineness of the map is concerned, the contention is that no formal proof is necessary as there is no dispute regarding genuineness of the documents, for the fact is that the document map has been purchased from the various sources of the State Government having competence over the same. The said documents are public document within the meaning of Section 74(1) (i) of the Indian Evidence Act. As the said documents forming the acts of the sovereign authority, the same should have been admitted without any objection as primary evidence under Section 62 of the Evidence Act. When the competent authority has supplied the printed copy of the original on payment of requisite fees by virtue of letter under Annexure-5, it can be very well presumed to be accurate and the said printed maps are admissible in evidence as relevant under Sections 36 and 83 of Evidence Act.

The printed copy of the original is the public document within the meaning of Section 74 of the Indian Evidence Act. In ***Secretary of State*** (supra), the Bombay High Court held that the printed copy of the original is the public document within the meaning of Section 74 of the Indian Evidence Act.

9. In view of the aforesaid fact and law, the trial court should not have rejected the prayer of the plaintiff-petitioner to exhibit both the Sabik and Hal maps and other documents without appreciating the facts that the same are imperative for effective adjudication of issue involved in the case. Hence the appellate court remanded the case to the trial court with an observation that the report of the Civil Court Commissioner is vitiated due to non supply of Sabik and Hal map and directed for appointment of a Civil Court Commissioner for measurement of the suit land afresh at the cost of the parties. Thus, the Sabik and Hal maps are most vital documents to be exhibited for adjudication of the dispute between the parties. Therefore, this Court sets aside the impugned order dated 29.06.2011 passed by the learned Civil Judge (Senior Division), Rairangpur in T.S. No.23 of 1995 under Annexure-1 rejecting the application to mark the maps as exhibits and directs the trial court to exhibit both the Sabik and Hal maps of mouza Bisoi submitted by the plaintiff-petitioner for proper adjudication of the dispute in question. Accordingly, the writ petition is allowed. No order to cost.

Writ petition allowed.

2015 (I) ILR - CUT- 400

D. DASH, J.

GOVT. APPEAL NO. 02 OF 1998

STATE OF ORISSA ……..Appellant

.Vrs.

GOPINATH NAYAK ……Respondent

PENAL CODE, 1860 – S. 376 (2) (f)

Rape – Victim aged about one and half years – It is established from evidence beyond reasonable doubt that the respondent was the author of the Crime – Imposition of less sentence than it is prescribed – Minimum sentence prescribed is R.I. for ten years, extending to life and also fine – Court may on adequate and special reasons to be mentioned in the judgment, impose less sentence than prescribed.

In the present case imposition of less sentence i.e. seven years cannot be said to be adequate and special – Held, order of sentence passed by the trial Court is set aside – The respondent is sentenced to undergo R.I. for eleven years instead of seven years with the same sentence of fine imposed by the trial Court. (Para 15,16)

Case laws Referred to:-

1.1996 (2) SCC 175 (Ravji -V- State of Rajasthan)
2.2005 (1) Crimes 254 (SC) : (State of Madhya Pradesh-V- Munna Choubey & Anr.)
3.2013 (4) Supreme 25 : (Shyam Narain-V- The State of NCT of Delhi)

For Appellant - Mr. A.K. Mishra,
Standing Counsel
For Respondent - Mr. G.S.Das,
Mr. Bhabani Shankar Dasparida,
Amicus curie

Date of hearing : 11.11.2014
Date of judgment: 19.11.2014

JUDGMENT

D. DASH, J.

The State in this appeal under Section 377 of the Code of Criminal Procedure has called in question the inadequacy of the sentence imposed against the respondent by the learned C.J.M-cum-Assistant Sessions Judge, Jeypore, after recording conviction for commission of offence under Section 376(2)(f) IPC against the respondent.

2. Prosecution case is that on 08.10.1995 evening around 6.00 pm, which was the Kumar Purnima day, the informant (P.W.1) with Raghunath, Babi, Samal and Surendra were playing cards on the verandah of the house of Raghunath. The victim girl aged about one and half year was then with

her father (P.W.1) where they were playing cards. The respondent a co-villager came there and took the victim from P.W.1 saying that he would take her to give chocolate. So P.W.1 left the victim in the custody of the respondent. When after about one hour, they did not return, P.W.1 went in search of the respondent. Around 9.00 P.M. when the P.W.1 was absent in his house, the respondent came with victim and left her in the custody of her mother, P.W.5 when she was talking with her neighbour, namely, Saraswati in front of their house. At that time victim was crying. So, P.W.5 asked the respondent as regards the reason for the same. But the respondent instead of replying, suddenly ran away. P.W.5 then noticed blood oozing out of the vagina of the victim and also saw the said area to have been in flamed with the wearing apparels sustained with blood. The victim was immediately taken to the hospital. On arrival, the father of the victim, P.W.1, lodged the FIR at the police station.

3. The S.I. of Police of Sunabeda Police Station, in the absence of the OIC registered the case and took up the investigation. The informant was examined at the hospital and also the requisition was given for examination of the victim. The blood stained cloth of the victim was seized under seizure list, Ext.2. The blood stained shirt and chadi of the accused were seized under seizure list Ext.3. All these were sent for chemical examination. The I.O. after examination of the other witnesses closed the investigation and finally submitted the charge sheet. That is how the respondent faced the trial being charged for commission of offence under Section 376 (2) (f) IPC.

4. The trial court on evaluation of the evidence of ten prosecution witnesses as well as on going through the report of the doctors and also the chemical examiner's report found the respondent to have committed rape upon the victim girl aged about one year or little more. Accordingly, he has been convicted there under.

However upon hearing the respondent and the learned State defence counsel and viewing the mitigating factor such as the respondent being the sole earning member of his family having small children and in the absence of record of previous conviction taking into account his age without any record of prior conviction passed an order directing the respondent to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.2,000/- with default stipulation for undergoing rigorous imprisonment for two months. It may be stated here that the trial court as required by the

said statutory provision has not indicated that such reasons are adequate and special for exercising such discretion of awarding sentence lesser than the minimum.

5. The State has preferred this appeal questioning the sentence to be inappropriate and not in conformity with the legal provision. This Court is thus called upon to examine that aspect in the touch stone of proven facts and circumstances and other relevant factors.

6. Learned Standing Counsel submits that in this case there surfaces no adequate and special reasons. According to him those indicated such as respondent having small children with poor financial status, his age and having no prior conviction to his credit are not adequate and special reasons which should lead the court to award sentence less than the prescribed minimum. It is submitted that those facts concerning the respondent are not enough to adopt the course departing from the normal and those are in the direction of seeking mercy by drawing sympathy which have very little role in the matter and cannot have a march over the factors as nature and gravity of offence, its manner of commission, affect on the society and its order. So he urges that it is a fit case for appropriate enhancement of sentence and in the facts and circumstances it is a case for imposition of life imprisonment.

7. Learned counsel appearing on behalf of the respondent urges that in this case evidence is not at all satisfactory to arrive at the conclusive finding beyond reasonable doubt that it is the respondent who has committed the offence of rape upon the girl child of one and half year of old. He further urges that there is absolutely no direct evidence and simply from the fact that the respondent had taken the girl child and had then left after some hours when injuries have been found, he cannot be attributed to be the author. Thus he submits that it is a case of acquittal. Next he submits that in this case after lapse of nineteen years enhancement of sentence would amount to travesty of justice. He further submits that the trial court has rightly so sentenced finding adequate and special reasons. He also urges that the present condition of the respondent that he has somehow settled after release from jail would get seriously disturbed to the great suffering of respondent and his family members.

8. In view of the above submission of the learned counsel for the respondent seeking of acquittal on the basis of the evidence on record, this Court feel it proper to re-appreciate the evidence in order to judge the

sustainability of the finding recorded by the trial court against the respondent. The evidence of P.W.1 has been believed that the girl child was left in the custody of the respondent. Next the evidence of P.W.5 (mother) has been relied upon that when respondent left the child, he though was asked as to why she was crying, did not reply and immediately left. Where after she found blood coming out of the child's vagina with injuries thereon. The doctor (P.W.10) having stated that she noticed lacerated injury on vagina, tearing of hymen occasioned from forcible penetration of a firm and elongated object of greater diameter then the inlet of vagina and it is likely by a penis, the trial court in the absence of any sort of explanation by the respondent has definitely found the respondent to have raped the girl child as those evidence unerringly point the complicity of respondent and none else.

The evidence of P.W.1 is that it was around 6.00 PM when girl child was taken by the respondent to his custody, when he was playing cards. The evidence of P.W.3 is also on the same score, it is the respondent who took the girl child around 6.00 PM. Similarly, P.W.2 has stated in the same vein. The evidence of mother, P.W.5 is that it was around 9.00 P.M. this respondent handed over the girl child to her in presence of P.W.6 which is corroborated by P.W.6 and also the fact that the respondent ran away instead of answering the query as regards the girl child crying continuously which stands again as a strong circumstance adverse to the claim of innocence of the respondent. During the interim period, since the time took the girl child from P.W.1 and left with P.W.5, it is the again evidence of P.W.4, the betel shop owner that respondent having gone with the girl child had purchased the chocolate and again left with the girl child. Interestingly, the respondent has not given any explanation if the girl child remained with someone else during this period and rather the evidence is clear that he has avoided to receive any question in that light lest he may be compelled to answer the girl child, continuously crying while being carried by the respondent. It is normal conduct that he must have enquired as to the reason of this bleeding injury on the vagina which certainly cannot go unnoticed. So this circumstance heavily weighs on the mind of the court as to be adversely pointing at the respondent as regards his complicity. The doctor's evidence lends full corroboration as regards the penetration and the injury being result of the same. Moreover, on the shirt and chadi of the respondent when human blood of B Group has been found by the chemical examiner, the same has also been found on the frock of the girl child. All these evidence establish beyond

reasonable doubt that it is the respondent who has committed rape upon one and half year girl child, when she was in his custody and during that period.

Therefore, the submission of the learned counsel for the respondent that the finding of the trial court is not founded upon proper appreciation of the evidence, merits no acceptance. The trial court thus is found to have rightly convicted the respondent.

9. For commission of offence under Section 376(2) (f) IPC, the minimum sentence prescribed is rigorous imprisonment for a term of ten years extending to life, and also fine. Under the proviso the power remains with the court that by assigning adequate and special reasons in writing in the judgment it can impose sentence of imprisonment of either description for a term of less than ten years.

In view of above statutory provision, the trial court instead of awarding minimum sentence prescribed has awarded the sentence of imprisonment for lesser period than the minimum i.e. seven years of rigorous imprisonment instead of ten years of rigorous imprisonment. It has not stated about the satisfaction that the reasons are adequate and special. So now in this appeal, it is required to be seen as to whether there appears the reasons which are enough in the proven facts and circumstances of the case to drive the court to even impose lesser punishment than the prescribed minimum.

10. The principle is well settled that when the legislature have prescribed minimum sentence ordinarily in case of conviction , the court is called upon to award that sentence at the minimum and showing of leniency is normally impermissible. It has to be borne in mind that prescription of such minimum sentence extending to even higher has been so mandated by the legislature looking into the nature and gravity of the offence, its affect on the society and the societal cry in combinating commission of such crimes besides viewing the rise of such kind of offence stalling the State in the march of progress of inclusive growth as well as from the victim's point of view. In order to exercise the power, under the proviso, the court is thus called upon to give adequate and special reason and to put up the same in writing expressing satisfaction that such discretion has been exercised properly. The word 'adequate' and 'special' reasons clearly indicate that the reasons must not be normal or ordinary which are taken into consideration in the matter of imposition of sentence in other offences but must be above those. In other words, to show that such reason are not only adequate but special in the case

compelling the court to have a departure from the normal rule of sentence and to proceed to award lesser sentence than the minimum prescribed.

11. In case of commission of such kind of offence, the criminal test has little to weigh in mind and it's the crime test which mostly control the field. The word 'adequate' finds mention first and then the word 'special'. So, both have to be found out. In my humble view, when it is said 'adequate' it refers for viewing the nature and gravity of the offence, the manner of its commission, the affect of the same on the society as large and the social order as well as the suffering of the victim. The other word 'special' refers to the particular case which is for viewing the status of the convict and other conditions in relation to the convict. The legislature having purposely couched the proviso, by wording so, first indicating the word adequate and then special, it appears to have intended that only when adequate reasons are found the court is called upon to search for special reasons and upon finding both to be existing the justification would stand for awarding punishment less than the minimum prescribed.

12. The above view of mine derives further strength from the view expressed by the Hon'ble Apex Court in case of "***Ravji Vrs. State of Rajasthan***", 1996 (2) SCC 175 that in such type of cases, it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal." If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

13. The Hon'ble Apex Court in case of "***State of Madhya Pradesh Vrs. Munna Choubey and Anr***.", 2005(1) Crimes 254 (SC) have said the following prophetic words.

> "Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social

> impact of the crime, e.g., where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system."

14. In a recent decision of the Hon'ble Supreme Court the Apex Court in case of ***Shyam Narain Vrs. The State of NCT of Delhi***, 2013 (4) Supreme 25 have held that primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and against for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see that impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

xxx xxx xxx xxx

As is seen, various concepts, namely, gravity of the offence, manner of its execution, impact on the society, repercussions on the victim and proportionality of punishment have been emphasized upon. In the case at hand, we are concerned with the justification of life imprisonment in a case of rape committed on an eight year old girl, helpless and vulnerable and, in a way, hapless. The victim was both physically and psychologically vulnerable. It is worthy to note that any kind of sexual assault has always been viewed with seriousness and sensitivity by this Court.

15. Keeping in mind the above authoritative pronouncement, the reasons as are culled out from the order of the trial court in imposing the sentence less than the prescribed cannot be said to be adequate and special and that too also taking into account all the relevant factors. Thus the cumulative requirement of law is not fulfilled in the present case.

16. We are with a case where the girl child who is the victim is totally incapatiated to communicate and that too it is only her mother and then her father being familiar with her from the time of birth and bringing her up can get to know something from her by signs, gestures, laugh and cry as well as facial expressions which are the modes that she can express through. The simplicity of parents is well seen from the fact that they have gone to describe the incident before others. The father without thinking anything for a moment, had given the custody of the child to the respondent on his desire reposing utmost faith and confidence and accepting respondent's position as a guardian. The nature and character of the parents hailing from rural pocket of the State and they being law abiding citizens are well seen that when most of the parents in such kind of incidents would remain highly aggressive without hesitating to take law into their own hands, they have chosen to follow the rule of law. Nothing also surfaces to show that P.Ws. 1 and 4 were having so found financial status.

The type of abuse, depravity as well as the and gravity of offence in the instant case shock the conscience of the society and this may stand as an example reaffirming of the justifications for the legislature to enact the special legislation (POCSO) containing stringent provisions and taking care of all other relevant factors. The severity of mental harm or injury suffered by the girl child in view of the commission of offence is well visualized just from the incident which has the definiteness of exerting mental trauma to all concerned and also the effect of causing physical disability. There has been total betrayal of faith by the respondent, who instead of being the guardian has turned to be the greatest foe. The age of the victim simplicity of her parents and their living condition have been taken advantage of. In view of all these, thinking comes to mind as to how God be so cruel to its just created creature, who is incapacitated to commit any mistake or fault in any matter, whatsoever.

Considering all these above in the touch stone of the legal position as indicated, this Court without least hesitation set aside the order of sentence

passed by the trial court.. The respondent is thus sentenced to undergo rigorous imprisonment for a period of eleven years instead of seven years and the sentence of fine is to remain as imposed by the trial court. The respondent be taken to custody forthwith to serve the reminder of sentence and the trial court is directed to take steps as per law in that regard.

16. The appeal is allowed to the extent as indicated above.

Appeal allowed.

2015 (I) ILR - CUT- 409

D. DASH, J.

R.F.A. NO.155 OF 2009

BABAJI NAYAK & ANR. ……..Appellants

.Vrs.

GOVT. OF ORISSA ..……..Respondent

LIMITATION ACT, 1963 – ART. 65

Adverse possession – Test – Possession must be peaceful, open, continuous and it must be proved to be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner.

In this case plaintiffs have not pleaded from which year, even approximately from which time they began to possess the suit land – Even the person in possession is not aware as to who is the owner of the suit land, so question of denial of title of the true owner does not arise – So far as the entry of forcible possession in the ROR, it can not lead to a presumption as regards continuity of possession fulfilling other legal requirements for perfection of title by way of adverse possession – Held, plaintiffs have failed to discharge the burden of proof resting on them to establish their claim of perfection of title over the suit land by way of adverse possession. (Para 10)

Case laws Referred to:-

1.1993 (4) SCC 375 : (Parinni (dead) by LRs and Ors.-V- Sukhi & Ors.)
2.AIR 1935 P.C. 530 : (Ejaz Ali Qidwai-V- The Special Manager, Court of Wards, Berhampur Estate)
3.AIR 1995 SC 73 : (Thakur Kishan Singh-V- Arvind Kumar)
4.2006 (8) JT 382 : (T. Anjanappa-V- Somalingappa)
5.AIR 2007 SC 204 : (Govindammal-V- R.Perumal Chettiar)
6.AIR 1984 Orissa 77 : (Radhamani Dibya & Ors.-V- Brajamohan Biswal & Ors.)
7.1986 (II) OLR 391 : (Dandapani Naik-V- State of Orissa)
8.1996 (I) OLR 393 : (Jagabandhu Sahu & Ors.-V- Commission, Land Records &Settlement)
9.2000(I) OLR 550 : (Baikunthanath Barik & Ors.-V- Nilamani Barik & Ors.)
10.2007 (II) OLR 557 : (Special Secretary,G.A. Department -V- Shri Bansidhar).

For Appellants - M/s. B.S. Tripathy, M.K. Rath, H. Pati, M. Bhagat.
For Respondent - Mrs. Rati Mohanty, Addl. Standing Counsel.

Date of hearing : 21.11.2014
Date of judgment: 28.11.2014

JUDGMENT

D. DASH, J.

The unsuccessful plaintiffs are the appellants before this Court. They challenge the judgment and decree passed by the 2nd Additional Civil Judge (Sr. Division), Bhubaneswar, Khurda in C.S. No.370 of 2005 dismissing their suit for declaration of right, title, interest and confirmation of possession with permanent injunction filed against the respondent.

2. For the sake of convenience, to avoid confusion and for clarity, the parties hereinafter have been referred to as they have been arrayed in the court below.

3. Plaintiffs' case

One Parima Nayak had two sons, namely, Chintamani and Sridhar. Plaintiff no.1 is the son of Chintamani whereas the other plaintiff is the daughter of Sridhar. Chintamani and Sridhar are dead.

The suit land under Hal Khata No.619, Plot No.672 measuring an area Ac.0.480 dec. in Mouza-Chandrasekharpur under New Capital in the district of Khurda (erstwhile district of Puri) corresponding to Sabak Khata No.303, Plot No.590 measuring an area of Ac.0.43 dec. originally was lying barren. Parima Nayak during his lifetime started possessing the said land and planted mango and other valuable trees over there. It is stated that he enjoyed the said property without any hindrance from any side. On his death, sons of Chintamani and Sridhar stepped into the shoes of Parima and as such continued to remain in possession. It is stated that they continued to possess the said land by looking after the trees standing over there and further planting some more fruits bearing trees. In course of time, those trees received some set back. So they cultivated Mandia, Maka, Kolatha and also other rabi crops and different kinds of vegetables over the suit land. It is said that they had no other land and were depending upon the suit land and the cultivation made thereon when nobody posed any problem for the same. They used the suit land as their own. It is further stated that Parima was a landless poor illiterate rustic villager belonging to scheduled caste community. In order to maintain himself as well as his family members, he cultivated that barren land and after him his sons continued to do so making further development and then their heirs.

Such possession and enjoyment is said to be within the knowledge of the State, i.e., the defendant and the general public, more particularly, the villagers. It is further stated that during settlement operation, in the record prepared in the year 1931 under the O.T. Act, the suit lands stood recorded in the name of one Madhusudan Deb (Zamindar). But there remained note of possession in favour of two sons of Parima, namely, Chintamani and Sridhar. This record of right is said to have been published on 07.02.1931 being made effective from 07.03.1931. The note of possession continued to remain and no step was taken for its deletion at any point of time. So, it is claimed that at least from that time onwards the possession of Chintamani and Sridhar cannot be denied and stood recognized as adverse and in denial of the title of the true owner in assertion of right of ownership unto themselves. When the position stood thus, in the current settlement operation, the land has been wrongly recorded in the name of the defendant without the knowledge of Chintamani and Sridhar, the old illiterate rustic villagers. This record of right was published in the year 1988. Chintamani and Sridhar died in course of time. The plaintiffs being their legal heirs stepping into their shoes continued to possess the suit land and maintained it

as before. In February, 2002 the plaintiffs having got the certified copy of the record of right came to know about such wrong recording though they were under an impression that the record of right must have been standing in the name of their father. So, they approached the Tahasildar and the settlement authorities who having assured to do the needful at last asked the plaintiffs to approach the civil court.Therefore, serving notice upon the defendant-State under section 80, C.P.C., the suit has been filed. To sum up, the case of the plaintiffs is that by virtue of their long, continuous and uninterrupted possession of the suit land since the time of their grandfather, Parima for much more than the statutory period as its owner denying the title of the true owner with necessary hostile animus claiming title unto themselves, they have perfected their title over the suit land by adverse possession.

4. The State-defendant contested the suit. While traversing the plaint averments, it has been stated that the land stands under the classification of 'Unnata Jojana Jogya' in the name of the defendant under Rakhit Khata No.472 as per the settlement record of 1973-74 and that corresponds to the land under Sabik Khata No.303 in the name of the Zamindar Madhusudan Dev under classification as 'Puruna Padia'. It is stated that after vesting of the intermediary interest, the property vested with the defendant free from all encumbrances and the same thus got recorded in the name of the defendant in successive settlements. The possession of Parima and then on his death by his two sons Chintamani and Sridhar and thereafter that of these plaintiffs have been seriously refuted that it is out and out false in order to grab the valuable land belonging to the State. It is also stated that the facts pleaded as regards plantation of trees taking care of those and then going for cultivation over the said land are all false, imaginary. Thus, it is stated that the question of perfection by title by adverse possession in respect of the suit land does not arise in the facts and circumstances of the case and it is out and out a false story sought to be projected to achieve the sole objective of grabbing the public property.

5. On such rival pleadings, the trial court has framed necessary issues. The principal one is the issue relating to the right, title, interest and possession over the suit land as claimed to have been perfected by the plaintiffs by way of adverse possession fulfilling all the requirements of law. Although three issues have been framed but for all practical purpose those intermingle with the above issue. So, the trial court appears to have rightly

taken up those three issues together for decision. The answer in the ultimatum has been rendered against the plaintiffs that they have not perfected right, title and interest over the suit land by way of adverse possession and they were/are also not in possession of the suit land.

6. Learned counsel for the appellants submitted that overwhelming evidence being there on record as regards the factum of possession of the suit land right from the time of Parima and followed up till now by the plaintiffs, the trial court has erred in law by not taking those into consideration in their proper prospective and rather in a half hearted manner has examined the evidence and the outcome is completely the erroneous answer leading to an unmerited dismissal of the claim of the plaintiffs. He further contended that their being note of possession in the name of the predecessors-in-interest of the plaintiffs, the same ought to have been given its due waightage with the presumption of correctness being attached to it and in that event the burden was on the defendant to dislodge the said presumption which in the case has not been done. So, the continuity of possession by the successors-in-interest is also to be presumed in view of the oral evidence of the plaintiffs that they are now in possession. It is submitted that the trial court failed to consider those aspects and thus the finding is unsustainable and it ought to have been given favouring the plaintiffs claim and entitlement to the reliefs as prayed for. Therefore, he urged that the plaintiff's suit is to be decreed.

7. Learned counsel for the State supported the finding of the trial court. According to her, the plaintiff's have utterly failed to establish mandatory legal requirements as regards the establishment of the claim over the suit land by way of perfection of title by adverse possession. She further submitted that the physical possession in the case resting with the plaintiffs has not been proved by adducing clear, cogent and acceptable evidence and then it has not been shown to be open, continuous, peaceful, without any interruption and to the knowledge of the true owner that too by denying the title of the said owner with hostile animus. Thus, she contended that the trial court did commit no error in rendering the answer to the issues against the plaintiff resulting in the dismissal of the suit.

8. Keeping the rival submission in mind, this Court is now called upon to judge the defensibility of the finding of the trial court upon examination of the evidence on record in the touchstone of the respective pleading of the

parties. Before taking up that exercise it is felt appropriate to take note of the position of law.

The position of law is too settled that a person who sets up a case of perfection of right, title and interest over a piece of immovable property by adverse possession and thereby seeks to deprive the true owner asserting whatever right, title and interest he had, since been extinguished, the burden squarely rests on him to establish not only to prove the factum of physical possession for upward of the statutory period but also the fact that such possession for such length of time over the prescribed statutory period at the minimum has all along right from the inception been in fulfillment of the legal requirements, i.e., Nec-vi, Nec-clam, Nec-precario, i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner.

So, in a claim of acquisition of title by adverse possession the party, who pleads the same in staking the claim over the subject matter of a suit or proceeding either as a plaintiff or defendant, he is under compulsive legal obligation to establish those above mentioned aspects by clear, cogent and acceptable evidence, since in such cases, the original rightful owner is being deprived of his property not only by virtue of his inaction and remaining in slumber but also in the hands of a wrong doer whose action beginning with wrong in this way is being declared as to have become right and thus is legalized.

9. In "***Parsinni (dead) by LRs and others v. Sukhi and others***"; 1993(4) SCC 375, the Apex Court held that :

> "…….. The burden undoubtedly lies on them to plead and prove that they remained in possession in their own right adverse to the respondents. The party claiming adverse possession must prove that his possession must be 'nec vi, nec clam, nec precario' i.e., peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner."
>
> xx xx xx
>
> "The concept of adverse possession contemplates a hostile possession, i.e., possession which is expressly or impliedly in denial

> of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights, but denies them." For deciding whether the alleged act of a person contributed adverse possession, the animus of the person doing those acts is the most crucial factor.

The judgment of the Privy Council in the case of '***Ejaz Ali Qidwai v. The Special Manager, Court of Wards, Berhampur Estate***, AIR 1935 PC 530, having been referred to by the Apex Court land the following passage has been quoted :

> "The Principle of law is firmly established that a person who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed." Thus, for deciding whether the alleged acts of a person constitute adverse possession, the animus of the person doing those acts is the most crucial factor.

In the case of ***Thakur Kishan Singh v. Arvind Kumar***, reported in AIR 1995 SC 73, the Apex Court, in para 5, held as follows:

> "…….5. As regards adverse possession, it was not disputed even by the trial court that the appellant entered into possession over the land in dispute under a licence from the respondent for purposes of brick kiln. The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for however length of time does not result in converting the permissive possession into adverse possession."

In an other decision in case of ***T.Anjanappa v. Somalingappa***, 2006 (8) JT 382, it has been held that mere possession, how-so-ever long, does not necessarily mean that it is adverse to the true owner and in order to constitute adverse possession, the possession must be proved to be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. It was further held that classical requirement is that such

possession is in denial of true owners' title and must be peaceful, open and continuous.

Also in ***Govindammal v. R.Perumal Chettiar***; AIR 2007 SC 204, it is held that there must be a hostile, open possession, denial and repudiation of rights of competitor and this denial and repudiation must have been brought home to the knowledge of the competitors.

10. The plaintiffs have not pleaded in the plaint from which year or even approximately from which time Parima began to possess the suit land and also when he died and so also when his two sons, namely, Chintamani and Sridhar began to possess, at least to show as to for how many years Parima remained in possession and then for what length of time his two sons possessed and since when for what length of time these plaintiffs are in possession. It is simply stated that the land belonged to the State-defendant and was lying barren and Parima began to possess it by planting some fruit bearing and other trees which were taken care of. Neither it has been pleaded nor it has been stated in evidence as to where Parima was then residing and so also where Chintamani and Sridhar were residing with their family at least to show that they had some reason or scope to possess having a purpose behind it. Simply, it has been evasively pleaded that the possession continued. Now, let us have a glance at the evidence of P.W.1 who is one of the plaintiffs.

10(a) P.W.1, the plaintiff no.1 has proved two records of right. He has stated that though the land was recorded in the name of defendant a note of possession remained in the name of his father and uncle. Here, it is for the first time introduced in the evidence that since 1931 they have been possessing the suit land. He further states to have taken no steps for correction of record of right. When he has stated that he has been staying at distance of about 200 to 300 feet away from the suit land he has not stated as to if the suit land adjoins the land over which his house is situated. Most importantly, he has stated that he had/has no knowledge if the suit land belonged to one Madhusudan Dev and if the same vested with the State who became the right owner. Next, he admits that he is not a landless person when their averment in the plaint is completely otherwise. Therefore, accepting for a moment that the plaintiffs since the time of their ancestor remained in possession of the suit land, it is not found to be in denial of the title of the true owner and to the knowledge of the true owner. If the person

in possession is not aware as to who is the owner, then where arises the question of denial of the title of the true owner and also that the possession was with and in exercising all those rights of the true owner. The plaintiff having deposed to have not known whether the State is the owner of the property, their possession for any length of time descending down from the hands of their ancestors puts them nowhere in so far as their claim is concerned and it has to be thus deemed to be that of mere trespassers or squatters. Even the entry of forcible possession in the record-of-right although carry evidentiary value but said entry cannot lead to a presumption as regards continuity of possession fulfilling all other legal requirements for perfection of title by way of adverse possession.

10(b). With the above when the evidence of P.W.2 is seen, it again reveals a picture as if Parima Nayak, the grandfather of the plaintiffs had acquired the land. In Para-3 of his deposition he has stated that "though before 1931 deceased-Parima Nayak acquired the land, after his death Chintamani and Sridhar became the full owner of the suit land from 1931". This completely gives an axe blow to the trunk of the case of the plaintiffs cutting it across. If Parima Nayak had acquired the land, no such mode of acquisition is pleaded or proved, so as to say that the property has devolved upon these plaintiffs. This acquisition of land has time and again been repeated by the P.W.2 during his examination on oath. He has further avoided to say as to from which year the fathers of the plaintiffs possessed the suit land. The evidence of P.W.3 is that the plaintiffs are in possession of the suit land since the time of their father by growing Rabi crop. His evidence is that for more than 100 years the possession has remained in the hands of the ancestors of the plaintiffs and it was known to the defendant that the plaintiffs are the owners.

The decisions cited by the learned counsel for the appellants in case of '***Radhamani Dibya and others vrs. Brajamohan Biswal and others***; AIR 1984 Orissa 77; ***Dandapani Naik vrs. State of Orissa***; 1986(II) OLR 391; ***Jagabandhu Sahu and others vrs. Commissioner, Land Records and Settlement***; 1996 (I) OLR 393; ***Baikunthanath Barik and others vrs. Nilamani Barik and others***; 2000(I) OLR 550 and ***Special Secretary, G.A.Department vrs. Shri Bansidhar***; 2007(II) OLR 557 are all distinguishable in the facts and circumstances as also the evidence on record as discussed so as to come to the aid of the case of the plaintiffs

In view of above discussion of evidence and pleadings as well as the reasons, the plaintiffs are found to have failed to discharge the burden of proof resting on them to establish their claim of perfection of title over the suit land by way of adverse possession.

Therefore, even on independent examination of the evidence in the touch stone of the pleadings and the settled law for answering those issues, this Court's answer remains the same as it has been rendered by the trial court. Thus the same is hereby affirmed.

11. In the result, the appeal stands dismissed and in the circumstances without cost.

Appeal dismissed.

2015 (I) ILR - CUT- 418

BISWANATH RATH, J.

W.P.(C) NO.15297 OF 2013

DR. DEEPAK KUMAR BEHERA ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties

SERVICE – Contractual appointment of the petitioner as Ayush Homeopathic Doctor – Mysterious death of a patient – Petitioner said he has no involvement in the issue – Joint enquiry reports Dt.05.02.2013 and 12.03.2013 – No material against the petitioner in the first report and second report suggested police enquiry – No opportunity given to the petitioner to show cause on the Second report – Findings in both the reports, not conclusive – Decision to terminate the services of the petitioner attaching stigma – Non compliance of the principles of natural justice – Impugned order for disengagement of the petitioner is set aside and he ought to be treated as continuing in service till the period involved in the last contract but without any back wages. (Paras 5,6)

For Petitioner - M/s.Agasti Kanungo.
For Opp.Parties - Mr. Sangram Ku. Das, A.S.C.
M/s. Bibhu Prasad Tripathy.

Date of hearing :12.08.2014
Date of Judgment: 09.09.2014

JUDGMENT

BISWANATH RATH, J.

By filing the writ petition the petitioner has sought for quashing of order under Annexure-6, an order passed by the Chief District Medical Officer, Mayurbhanj for disengaging the petitioner from contractual service w.e.f 30.04.2013 on the ground of unprofessional behavior. Petitioner has assailed the impugned order vide Annexure -6 on the grounds as enumerated in para-2 which is reproduced as herein below :-

"(i) No, enquiry has been made to find out the truth of the allegations of misconduct, on the other hand, whatever fact finding enquiry has been made behind the back, the Enquiry reports do not give any positive findings to prove the guilt nor the same is supplied to the petitioner to explain.

(ii) The fact finding report also in fact, does not give any positive findings to prove the guilt of the petitioner. The law is settled that suspicion cannot take place of proof.

(iii) There is complete violation of the "Audi Alteram Partem" Rule."

2. Facts involved in the writ petition is that the petitioner after being qualified as a Ayush Homeopathic Doctor, obtained licenses from Orissa State Board of Homeopathic Medicine, Bhubaneswar vide license No.C/3021. He joined as a contractual Ayush Homeopathic Doctor at Bhanjakia New P.H.C. on 02.10.2008. He was allowed to continue even after the expiry of the contractual period.

The further case of the petitioner is that in an unfortunate incident on 22.01.2013 he attended one lady patient on call of her husband. The petitioner found the patient in critical condition. He advised the husband of the patient to take the patient to Karanjia Hospital. It is the specific case of the petitioner that he has neither prescribed any medicine nor has given any

treatment to the patient. Being an Ayush Homeopathic Medical Officer he has never treated any patient for MTP or under PNDT Act. The petitioner further submitted that neither the patient was ever attended the petitioner hospital either as a OPD patient or the petitioner has never treated her at any point of time earlier. The patient died in a mysterious circumstance on 23.01.2013 at Karanjia Hospital and the family members of the patient brought the body back to home and cremated without any post-mortem. Surprisingly the death of the patient became a news item in local newspaper giving rise to local doubts to blackmail the petitioner in the garb of settling the issue. For petitioner's not surrendering to the blackmailing of the local goons there was a lot of 'Hullah Gullah' concerning the matter leading to joint enquiry under the direction of the Higher Authority. Based on constitution of a Joint Enquiry Board, the petitioner was called upon vide letter No.737 dtd.04.02.2013 for filing his show cause. Petitioner submitted the show cause detailing therein his non-involvement in the issue further pointing out that being a Ayush Homeopathic Doctor he is not qualified to undertake the MTP or abortion and thereby claimed that allegation against him are not only incorrect but also foisted falsely to malign the image of the petitioner at the instance of some mischievous elements.

Subsequently, the petitioner also submitted a memorandum to the Collector and District Magistrate, Mayurbhanj pleading his non-involvement in the matter by his letter dtd.16.02.2013 clearly stating therein that as because the patient was in a bad condition when he attended the patient at her residence on the request of the husband, he requested the husband to take her to nearby CHC or SDH at Karanjia**.** The inquiry was not only conducted behind back of him but also completed in absence of any opportunity of hearing to the petitioner and further in absence of giving a chance of showing cause against the so called enquiry report prepared behind the back of the petitioner and by order dtd.13.04.2013 as appearing at Annexure-6 the services of the petitioner was terminated attaching a stigma thereon.

Petitioner applied for the copy of the said enquiry report under the provisions of R.T.I. Act. On receipt of the joint enquiry report dtd.12.04.2013 the petitioner found that there is no material to find the petitioner guilt rather there is clear indication in the joint enquiry report requiring further investigation by the police agency to unravel the mystery. The purported action of disengaging the petitioner has been taken horridly.

3. Per contra, on notice the opposite party No.4 (Chief District Medical officer, Mayurbhanj) on his appearance, filed a counter affidavit admitting the fact of engagement of the petitioner as Ayush Homeopathic Doctor at Bhanjakia PHC on contractual basis under NRHM programme initially for eleven (11) months and renewed from time to time until he was disengaged by the impugned action. It is further contended by the opposite party No.4 based on the hue and cry through the local paper the C.D.M.O. vide his letter dtd.25.01.2013 instructed the A.D.M.O (Public Health) and the A.D.M.O.(Family Welfare) to conduct the joint enquiry in the matter and for submitting a report. Consequent upon, which a report was submitted by the above two officers on 05.02.2013 and their opinion and suggestion in this said report read as follows :

> "There is no clear cut evidence to prove that Dr. Behera a (AYUSH) M.O. is involved in the death of Sebati Naik, W/o-Bidesi Naik.
>
> But the circumstantial evidence and opinion of the local people suggested the petitioners involvement in such type of illegal practice time and again. So he may be for transferred / shifted from Bhanjakia P.H.C. and in his place another Doctor may be posted at an early date."

In support of the above submission, the opposite party No.4 also filed the joint enquiry report dtd.05.02.2013 as appearing at Annexure-B/4 to the counter affidavit. It is further submitted that in furtherance to the above Joint Enquiry not being satisfied with the reply submitted by the petitioner against the observations in the Joint Enquiry Report, the opposite party No.3 on consideration of the entire aspect, directed the Sub-Collector, Karanjia to enquire into the matter and submit a report for follow up action.

The Opposite party No.4 after receipt of the report under Annexure-B/4 submitted the same to the opposite party No.3. After verifying the report as well as the show cause not being satisfied with the same opposite party No.3 directed the Sub-Collector, Karanjia to enquire into the matter and submit report to that effect. Pursuance to the said direction, the Sub-Collector, Karanjia enquired into the matter and submitted his report on 12.04.2013. As per instruction of the Collector and District Magistrate, Mayurbhanj, Opposite Party No.3, the matter has been enquired into by the Sub-Collector, Karanjia and A.D.M.O (FW), Mayurbhanj on 12.04.2013 and they submitted their enquiry report in which they mentioned that "Dr. Behera,

the Medical Officer-In-charge, AYUSH is not free from blemish so far as indulging in illegal abortion in number of cases is concerned as given to understand from Public, as well as the Local Sarpanch. It is further submitted in the report that the Local Sarpanch Sri Dukhabandhu Naik has furnished a statement that the public have many times alleged against the Dr. Behera's performing abortion illegally for which there was a hue and cry including demonstration by public against him causing death of Smt. Sebati Naik by undertaking illegal unauthorized abortion having no experience over it. One medicine store owner namely Kanan Kumar Mohanta has also submitted statement that Dr. Behera has instructed them to keep medicines in their shop essential for use in abortion and he was also prescribing to the patients for purchasing the same. Although the Medical Staff feigned silence over this issue. It transpired from the reaction of the people present that undisputedly Dr. Deepak Kumar Behera, Medical Officer, AYUSH was performing abortions on many occasions (un reported) and his role in treatment of Smt. Sabita Naik resulting in severe bleeding and ultimately succumbing to death cannot be ruled out. It is as a result of such a report the opposite party No.3 directed for disengagement of the petitioner. It is based on this direction of the Collector, Mayurbhanj, the opposite party No.4 issued the impugned order of termination vide, Annexure-6.

4. From the argument of the parties it appears that following hue and cry in the locality as well as in the local newspaper relating to death of Sebati Naik, W/o-Bidesi Naik**,** an enquiry was directed to be conducted by a Joint Enquiry Board of Assistant District Medical Officer (Family Welfare), Mayurbhanj and Assistant District Medical Officer (P.H), Mayurbhanj. Based on the direction for conducting a joint inquiry a report was thus submitted on 05.02.2013 recording following opinion / suggestion.

> "**Opinion & Suggestion:**
>
> There is no clear-cut evidence to prove that Dr. Behera (AYUSH) MO is involved in the death of Sebati Naik, W/o- Bidesi Naik.
>
> But circumstantial evidences and opinion of local people suggest that Dr. Behera AYUSH M.O is involved in this type of illegal practices time and again. So he may be transferred / shifted from Bhanjakia PHC (N) and another doctor may be posted at an early date."

Following the submission of the above report, the matter did not rest rather landed in a subsequent direction of the Higher Authority. A joint

enquiry was also conducted by A.D.M.O. (F.W), D.H.H, Baripada and the Sub-Collector, Panchapir, Karanjia. A report was submitted by the said Joint Committee on 12.04.2013 after recording the evidence of the several person of the locality with the following observations :

> "Although the Medical staff feigned silence over this issue. It transpired from the reaction of the people present that undisputedly Dr. Deepak Kumar Behera Medical Officer AYUSH was performing abortions on many occasion (un reportedly) and his role in treatment of Smt. Sebati Naik resulting in severe bleeding and ultimately succumbing to death cannot be ruled out.
>
> In our considered opinion the matter needs to be investigated in Toto by police to unravel the mystery behind it as the statement differs from person to person, non-conduct of post-mortem and non-intimation to her father regarding the death of his daughter and finally keeping the police in darkness."

5. Bare reading of the reports dtd.05.02.2013 and 12.04.2013, it is made clear that in first report it was submitted that there is no clear cut evidence to prove that Dr. Behera the petitioner is involved in the death of Sebati Nayak but from the second report dtd.12.04.2013 it appears based on the statement of several persons, the Joint Enquiry Committee submitted a report against the petitioner. The said observation since was not conclusive, it was recommended by the said Committee for an investigation by the police to unravel the mystery with a specific finding that statement of different person recorded therein was differing from the other coupled with the fact of no conduct of post-mortem and no indication of the alleged mysterious death to the father of the deceased and finally for keeping the police in darkness. Therefore, it can be safely concluded that though the report dtd.12.04.2013 indicted the petitioner but the same remain inconclusive in view of the observations made in the later report. Neither any opportunity to the show cause was provided to the petitioner nor the petitioner was even provided with a copy of the report dtd.12.04.2013. The Collector before considering the case of the petitioner taking into account the enquiry report dtd.05.02.2013 as well as 12.04.2013 ought to have provided an opportunity of showing cause to the petitioner supplying him a copy of the said report. The service of the petitioner was taken away by the opposite party No.4 vide Annexure-6. It appears that the direction of the Collector was taken behind the back of the petitioner and in absence of any opportunity to the petitioner

before taking away the services of the petitioner. The report dtd.05.02.2013 & 12.04.2013 if read together, the same are not conclusive. There is no material found against the petitioner in the first report, whereas the second report clearly s uggested for police enquiry. Therefore, any decision terminating the services of the petitioner in absence of further probe by the police agency to unravel the truth behind the mysterious death further in absence of any opportunity to the petitioner to have his show cause on second report dtd.12.04.2013 cannot get the support of Law. Further since the order terminating the petitioner was passed attaching a stigma against the petitioner compliance of principle of natural justice is a must.

6. Under the above facts & circumstances and the findings arrived at by me, I hold the observation of the Collector to disengage the petitioner as well as the consequential impugned order for disengagement of the petitioner vide Annexure 6 as bad in law and consequently I set-aside the impugned order under Annexure-6. As a result, the petitioner ought to be treated as continuing in service till the period involved in the last contract in favour of the petitioner survived but without any back wages for his not discharging any duty. Further since the reports referred to hereinabove suggested for further probe into the allegations against the petitioner, it is open to the competent authorities to further probe into the matter and the future engagement of the petitioner shall be dependent on the findings in such enquiry, if any, taking place.

7. The writ petition succeeds to the extent directed hereinabove. However, there shall be no order on cost.

Writ petition disposed of.

2015 (I) ILR - CUT- 425

BISWANATH RATH, J.

W.P.(C) NO.13221 OF 2014

MANOJ KUMAR SAHU .....Petitioner

.Vrs.

THE CHAIRPERSON, STATE COMMISSION FOR WOMEN & ORS. .....Opp.Parties

ODISHA (STATE) COMMISSION OF WOMEN ACT, 1993 – S. 10 (1) (a) (i) (d) (ii)

State Women Commission has the power U/s. 10 (1) (a) (i) (d) (ii) to provide financial assistance considering the condition of the Woman dose not empower the Commission to issue direction in non-consideration of materials available on record and direct for payment of compensation going beyond the materials. (Para 4)

For Petitioner - M/s. D. Panda & A.K. Parida.
For Opp.Parties - M/s. B. Mohanty-3, Mr. M. Ku. Mohanty-2,.

Date of hearing : 04.12.2014
Date of Judgment : 11.12.2014

JUDGMENT

BISWANATH RATH, J.

This is a writ petition filed by the husband/petitioner being aggrieved by order dated 06.06.2014 passed by the Orissa State Commission for Women on an application filed at the instance of wife/opposite party no.6 thereby directing the petitioner to pay a sum of Rs.6,00,000/-(rupees six lakhs) in suitable installments to the opposite no.6.

2. Mr. Panda, learned counsel appearing for the petitioner submits that the order of the Orissa State Women Commission is bad, arbitrary as well as beyond the claims made in the applications filed before it. Mr. Panda also submits that in view of order dated 14.02.2014 passed by the Orissa State Commission directing for closure of the case in view of investigation of the allegation of the opposite party no.6 taking note of her complaint in Annexure-1 by the Mangalabag P.S. registering an F.I.R . vide P.S. Case

No.229 of 22.10.2013 there was no need for continuing in the case further even in the garb of further application vide Annexure-3.

3. Mr. Biswajit Mohanty-3, learned counsel appearing for the opposite party nos.3 to 6 submits that it is a fact that opposite party no.6 has already undergone several rounds of treatments and in the meanwhile there has been lot of expenditures and since this a case of negligence by the husband claims that there is no illegality in the order impugned. By filing a counter it also pleaded that the State Women Commission has made a lot of exercise before it has come to the direction for payment of Rs.6,00,000/-(rupees six lakhs) to the victim wife and it is only based on such materials the State Women Commission has arrived at a rightful conclusion, which need no interference.

4. Heard the parties, order-sheet of the State Women Commission discloses the closure of the case by order dated 14.02.2014. I have perused the complaint at Annexure-3 filed by the opposite party no.3 on behalf of opposite party no.6. No doubt the complaint indicates some allegation of negligence and some information regarding expenditure maximum to the tune of Rs.20,000/-(rupees twenty thousand) on account of Treatment of the opposite party no.6 in different hospitals. From the perusal of the document vide Annexure-2, it clearly appears that the complaint of the opposite party no.3 on the self-same issue has already been registered as F.I.R. No.229 dated 22.10.2013 vide Mangalabag Police Station and now pending vide G.R. Case No.1700 of 2013. Further taking note of the above development the State Women Commission after making necessary investigation by its order dated 14.02.2014 has already directed for closure of the case. Now coming to the impugned order vide order dated 05.06.2014 as appearing at page-24 of the writ petition it appears the proceeding was allowed to continue in view of further complaint of both the opposite party nos.3 and 6 jointly to the State Women Commission made on 11.04.2014 vide Annexure-3. Even assuming that there was any occasion for continuing with the proceeding by virtue of complaint to the Commission on 11.04.2014, reading of complaint vide Annexure-3 no where indicated any demand for any exact compensation on any head. It is merely an application by the opposite party nos.3 and 6 requesting the Women Commission for its intervention in the matter and for direction for compensation on the head of her fooding, maintenance and medical expenses. Under the circumstances, it is amply clear that there was absolutely no information/particular regarding any expenditure and I find the impugned direction of the Women commission vide Annexure-4 as beyond

materials available on record as well as based on no material at all. I also do not find any such reference on documents in the counter affidavit filed by the opposite party nos.3 to 6. The State Women Commission is a creature of State Commission of Women Act, 1993. State Women Commission has the power under Section 10(1)(a)(i)(d)(ii) to provide financial assistance considering the condition of the woman does not empower the Commission to issue direction in non-consideration of materials available on record and direct for payment of compensation going beyond the materials available on record. I also do not find any single material in establishing the claim for compensation except a mentioning in the initial complain that there is already medical expenditure to the extent of Rs.20,000/-(rupees twenty thousand).

5. Under the circumstances, while setting aside the order dated 05.06.2014 passed by the State Women Commission as appearing at Annexure-4, considering the facts as appearing from Annexure-1 indicating some expenditures due to treatment of the opposite party no.6, I direct the petitioner to pay a sum of Rs.20,000/- (rupees twenty thousand) only to the opposite party no.6 within a period of one week from the date of this order. I make it clear that this order is passed keeping in view the materials available on record and will not preclude the opposite party no.6 to make appropriate application before the Competent Authority which has to be dealt in accordance with law.

6. The writ petition succeeds to the extent directed above. However, there shall be no order as to costs.

Writ petition allowed.