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

W.A. NO. 85 OF 2013

SACHIDANANDA MAHAKUD .....Appellant

.Vrs.

MANAS RANJAN SAMAL & ANR. .....Respondents.

ODISHA GRAMA PANCHAYAT ACT, 1964 - S.31

Election of Sarpanch – Election challenged by filing election petition – Separate application filed on the same day seeking direction to Nazir to accept deposit in respect of such election petition – Maintainability of election petition – No mode or manner prescribed for the deposit – Election petition filed in accordance with the prescription of Section 31 of the Act and Rule 88 of the Odisha Grama Panchayat Election Rules, 1965 – No reason to interfere with the impugned judgment passed by the learned single Judge confirming the order of the Election Tribunal. (Paras 9,10)

For Appellant - Mr. Anupam Rath
For Respondent - Mr. H.C. Sahoo.

Date of hearing : 14.10.2014
Date of judgment : 14.10.2014

JUDGMENT

AMITAVA ROY, C.J.

In assailment is the judgment and order dated 15.3.2013 passed by the learned Single Judge in W.P.(C) No. 2803 of 2013 thereby declining to sustain the appellant/writ petitioner's impugnment of the order dated 06.11.2012 passed by the learned Civil Judge (Jr.Division), Jajpur in Election Misc. Case No. 16 of 2012 rejecting his impeachment of the maintainaibility of respondent No.1's petition as not being presented in accordance with Section 31 of the Orissa Grama Panchayat Act, 1964 (for short, hereinafter referred to as 'the Act') and Rule 88 of the Orissa Grama Panchayats Election Rules, 1965 (for short, hereinafter referred to as 'the Rules').

2. The facts in bare minimum inevitably essential for the present adjudication are that the present appellant along with respondent No.1 herein

had contested the election for the post of Sarpanch of Udayanathpur Grama Panchayat (for short, hereinafter referred to as 'the Grama Panchayat') under Bari block in the district of Jajpur in the year 2012. In the battle of hustings, the appellant/writ petitioner was returned elected. Subsequent thereto, the respondent No.1 filed the Election Petition Case No. 16 of 2012 in the Court of Civil Judge (Jr.Divn.), Jajpur being the Election Tribunal under the Act questioning the appellant's eligibility as a candidate contending that he was disqualified for the post of Sarpanch as he is the father of three children born after the year 1995. According to the appellant/writ petitioner, though the election petition was presented by the respondent No.1 on 6.3.2012, after the publication of the results on 21.02.2012, it was not accompanied by the statutory deposit as security for costs in terms of Section 31 of the Act and thus the petition was clearly not maintainable in law. He has averred that the challan for deposit of amount of Rs.150/- towards security for costs was in fact filed on 6.4.2012 i.e. after a month of filing of the election petition, which was thus apparently barred by time. After receiving the notice of the Election Petition, as the appellant has asserted, he filed an application before the Election Tribunal seeking dismissal of the Election Petition on the ground that the same was not accompanied by the security for costs of Rs. 150/- as enjoined in Section 31 of the Act. The learned Election Tribunal, however, by order dated 6.11.2012 dismissed the said application on the ground that the plea involved mixed questions of law and fact and could not be decided before trial. Having unsuccessfully impugned the same before the learned Single Judge in the aforementioned writ petition, the appellant/writ petitioner is in appeal.

3. The respondent No.1 in his counter in the present appeal, while endorsing the validity of the impugned decision, has asserted that he indeed had filed the Election Petition on 6.3.2012 along with the security for costs by cash with the required challan and also filed a separate petition seeking a direction from the Election Tribunal to the Nazir of the Civil Court to accept the said deposit. Apart from pleading, that the order dated 6.3.2012 passed by the Election Tribunal is a clear testimony of the authenticity of this plea, the respondent No.1 averred further that the appellant/writ petitioner, after entering appearance in the election proceeding, though did file his objection, he did not express any reservation with regard to the deposit of security for costs. According to him, on the basis of the pleadings, learned Election Tribunal framed the issues, where after he led his evidence and it was after the closure of his part of the evidence, that the appellant/writ petitioner filed

the application dated 3.10.2012 contending that the Election Petition had been filed without depositing the security for costs.

The respondent No.1 further maintained that in view of the official formalities involved, the amount deposited by him was processed and was eventually recorded in the challan on 6.4.2012. The answering respondent thus insisted that the deposit of security for costs was in conformity with the mandate of Section 31 of the Act and thus no interference in the appeal was warranted.

4. The learned Single Judge, as the impugned judgment and order would reveal, did notice that the election petition was filed on 6.3.2012 with a challan to deposit the amount towards security for costs and that the entry with regard to the said deposit was made on 6.4.2014. It was thus held that Election Petition could not be construed to be delayed. The decision of the learned Election Tribunal was thus sustained.

5. Mr. Rath has emphatically argued, with reference to Section 31 of the Act and Rule 88 of the Rules and a copy of the receipted challan dated 6.4.2012, that it being patent on the face of the records that the mandatory deposit of security for costs had not been made on 6.3.2012, i.e. the last day of the limitation of filing the election petition, the learned Election Tribunal and the learned Single Judge have grossly erred in repelling the challenge to the maintainability thereof. The learned counsel has argued that no cash deposit, as claimed by the respondent No.1, had also been made and that the application referring to the same had been introduced subsequently to save the election petition. That in the attendant facts and circumstances, the Election Tribunal had no jurisdiction to extend the period of limitation was emphasized as well.

6. Per contra, Mr. Sahoo maintained that it being evident from the order dated 6.3.2012 passed by the learned Election Tribunal and the application of the even date mentioning the deposit of the prescribed amount by way of security for costs, that there has been undeniable compliance of Section 31 of the Act and Rule 88 of the Rules the impugned judgment and order is unassailable in law and on facts and thus the appeal is liable to be dismissed.

7. We have examined the pleaded facts and the documents on records. We have also analysed the contentious assertions.

8. It is not in dispute that the results of the election were declared on 21.02.2012 and that the election petition was otherwise presented in time i.e. on 6.3.2012. The order dated 6.3.2012 passed by the Election Tribunal is quoted hereunder for ready reference:

> "1. 6.3.2012. Advocate Harish Ch. Sahoo and another presented a petition on behalf of the petitioner supported by an affidavit praying to declare the petitioner as elected Sarpanch of Udayanathpur G.P. along with a separate petition praying to direct Nazir to receive the deposited amount. Register. Put up on 14.3.2012 for documents."

It would be apparent there from that the Election Petition was presented on 6.3.2012 and further a separate petition was also filed seeking an order directing the Nazir of the civil court to receive the deposited amount. The records of the Election Petition produced before this Court do contain a petition filed by the respondent No.1 mentioning about the deposit referred to in the order dated 6.3.2012 and also carrying a prayer for directing the Nazir to receive the same. There is no material on record to doubt the veracity of the contents of the petition dated 6.3.2012 mentioning about the deposit as well as of the order of the even date of the learned Election Tribunal. The respondent No.1's pleaded assertion that along with the Election Petition on 6.3.2012, he had made cash deposit of Rs. 150/- as security for costs thus is to be accepted. The photo copy of the challan bears a seal dated 6.3.2012 of the Court of the learned Civil Judge (Jr. Divn.), Jajpur i.e. Election Tribunal. The deposit of Rs.150/-, however, by way of security for costs for the election petition is registered to be on 6.4.2012. Thus the document as well supports the respondent No.1's averments that the election petition was filed on 6.3.2012 along with cash deposit of Rs.150/- and a challan to that effect and that on completion of necessary formalities the said deposit came to be recorded on 6.4.2012.

9. Section 31 of the Act and Rule 88 of the Rules to the extent relevant for the present adjudication are quoted herein below:

> **"31. Presentation of petitions** – (1) The petition shall be presented on one or more of the grounds specified in Section 39 before the Civil Judge (Junior Division) having jurisdiction over the place at which the office of the Grama Sasan is situated together with a deposit of such amount, if any, as may be prescribed in that behalf as security for costs

within fifteen days after the date on which the name of the person elected is published under Section 15.

xxxx xxxx xxxx"

"88. Election petitions – The following amounts shall be deposited as security for costs along with an election petition filed under Chapter-V of the Act:

	Rs. P.
Election petition relating to election of Sarpanch	150.00
Election petition relating to election of Naib-Sarpanch	50.00
Election petition relating to election of a Member	40.00"

Whereas Section 31 of the Act predicates that the election petition has to be presented together with a deposit of such amount as may be prescribed as security for costs within 15 days after the day on which the name of the person elected is published under Section 15, Rule 88 of the Rules prescribes the amount to be deposited i.e. Rs.150/- if the election petition pertains to election to the office of Sarpanch. Noticeably neither Section 31 nor Rule 88 thus obligates the making of the deposit of security for costs in any particular manner. The Act being a special enactment and Rules having been framed thereunder, in absence of any prescription of a mode or manner of deposit of the security for costs, in our comprehension it would be impermissible, having regard to the disastrous consequence that would ensue, to conclude that the deposit by way of cash amount of Rs.150/- made by the respondent No.1 was not in conformity with the requirement of Section 31 of the Act and Rule 88 of the Rules. The insistence for a particular mode or manner of deposit, having regard to the scheme of Section 31 of the Act and Rule 88 of the Rules, would amount to committing violence thereto. To reiterate, there is nothing to doubt the correctness of the contents of the order dated 6.3.2012 and the petition of the even date filed by the respondent No.1 mentioning about the cash deposit with the challan and seeking the order of the learned Election Tribunal directing the Nazir to formalize the same.

Further, it is significant to note, as would be otherwise apparent on the face of the order sheets of the election proceedings, that the appellant/writ petitioner raised the plea of want of statutory deposit of security for costs much after the proceedings had advanced and was at the stage of closure of recording of evidence of the respondent No.1/election petitioner.

10. On a cumulative consideration of the above, we are of the unhesitant opinion that the Election Petition filed by the respondent No.1 had been in accordance with the prescription of Section 31 of the Act and Rule 88 of the Rules. We find no cogent or convincing reason to interfere with the impugned judgment and order. Instead we find ourselves in respectful agreement with the learned Single Judge so far as the dismissal of the writ petition is concerned and thus dismiss this appeal.

11. Learned Election Tribunal would proceed to hear the Election Petition on merits and dispose of the same as expeditiously as possible, but not later than eight weeks from the date of receipt of a certified copy of this order. We make it clear that the issue with regard to maintainability of the Election Petition, so far as it relates to the deposit by way of security for costs, stands concluded by this adjudication at this level.

Appeal dismissed.

2015 (I) ILR - CUT- 433

AMITAVA ROY, CJ.

MISC. CASE NO.33 OF 2013
(ARBP NO.25 OF 2007)

DREDGING & DESILTATION CO. PVT. LTD. ……..Petitioner

.Vrs.

BOARD OF TRUSTEES OF PARADIP PORT TRUST. ……Opp.party

ARBITRATION & CONCILIATION ACT, 1996 - S. 15 (3)

Appointment of substitute arbitrator – Incumbent arbitrator appointed in his official capacity, suspended from his official position – Ineligible to discharge his role – As per terms of arbitration agreement the Arbitral Tribunal was to be comprised of two arbitrators, one to be nominated by the contractor and another by the Board – Independence, impartiality, reliability and efficacy of the arbitrator is important

– Held, it is within the competence of the Board to terminate the mandate of the nominated arbitrator and to appoint the substitute arbitrator. (Paras 22,23)

Case laws Referred to:-

1.(2008) 15 SCC 772 : (Delta Mechcons (India) Ltd.-V- Marubeni Corporation)
2.(2006) 10 SCC 763 : (National Highways Authority of India & Anr.-V- Bumihiway DDB Ltd. (JV) & Ors.)
3.(2010) 2 SCC 385 : (NBCC Ltd.-V- J.G. Engineering Pvt. Ltd.)

For Petitioner - Mr. S.K. Acharya.
For Opp.Party - Mr. S.P. Sarangi.

Date of hearing : 14.11.2014
Date of Judgment : 21.11.2014

JUDGMENT

AMITAVA ROY, C.J.

Heard Mr. S.K.Acharya, learned counsel for the applicant-M/s. Dredging & Desiltation Co. Pvt. Ltd. and Mr. S.P.Sarangi, learned counsel for the opposite party-Board of Trustees of Paradip Port Trust(for short referred to also as PPT/Board).

2. A brief outline of the factual backdrop is essential, more particularly as the instant application has been filed in ARBP No. 25 of 2007 registered under Section 11 of the Arbitration and Conciliation Act, 1996 (for short referred to as 'the Act') since been disposed of on 8.8.2008 by appointing Mr. Justice D.P.Mohapatra, Former Judge of the Hon'ble Supreme Court as the Presiding Arbitrator in terms of the arbitration agreement involved.

3. The petitioner-Company, engaged in dredging and desiltation works was awarded contract at Paradip Port under Tender Call Notice No. MD/SHS/TECH-24/92 dated 16.11.1992 being part of the Agreement No. CE/PPT/No. 11 of 1994-95 dated 11.5.1994. Certain disputes arose with respect to some of the claims of the petitioner in the works under the aforesaid tender/agreement covered by the Arbitration Clause/Agreement between the parties which stood in the following terms as per clause 2.34.4 of the Conditions of Contract.

> "2.34.4. All dispute between the parties other than these covered by clauses where under the decisions of Deputy Conservator is stated to be final shall be referred to two arbitrators (one to be nominated by the contractor and one by Board). In the event of any difference in opinion between the said two arbitrators, the same shall be referred to an umpire to be appointed by the said arbitrators in writing. The decision of the umpire shall be in writing and shall record reasons for the decision and shall be final and binding on all parties to the contract. The provision of the Indian Arbitration Act, 1940 and the rules thereon under and any statutory modification thereof shall be deemed to apply to such reference and deemed to be incorporated in the contract. The award will be a speaking award."

4. As per the Arbitration Agreement as above, all disputes between the parties other than those excepted were to be referred to two arbitrators (one by the contractor and one by the Board) and in the event of difference of opinion between the said two arbitrators, the same was to be referred to an Umpire to be appointed by the said arbitrators in writing.

5. With the advent of the Act, following failed endeavours to appoint a third arbitrator as statutorily mandated, an application was filed under Section 11 of the Act before this Court for such appointment. In Arbitration Petition No. 25 of 2007 so registered, this Court to reiterate, by its order dated 8.8.2008 after hearing the parties, appointed Mr. Justice D.P.Mohapatra, Former Judge of the Hon'ble Supreme Court as Presiding Arbitrator to decide the disputes between the parties and pass the award.

6. The instant application reveals that the Arbitration Tribunal constituted of Hon'ble Mr. Justice D.P.Mohapatra, Presiding Arbitrator, Mr. Amalendu Chakravorty, (Arbitrator of the petitioner) and Mr. Saroj Misro, (Arbitrator of the Paradip Port Trust) entered into the reference. As the proceedings could not be completed within the time fixed by this Court, on an application being made, by order dated 4.3.2011 in Misc. Case No. 22 of 2010, further four months time was granted. According to the petitioner, the arguments on behalf of the both the parties were thereafter concluded and written notes were also submitted. On the culmination of the hearing, learned Arbitral Tribunal fixed for the meeting of the Arbitrators on 15th, 16th, 17th and 18th July, 2012 at Cuttack, but Mr. Saroj Misro, the nominated Arbitrator of the opposite party did not attend the same. The petitioner has averred that the Secretary of the Arbitral Tribunal having enquired of this, Mr. Saroj Misro

informed that he was under suspension from his post as Traffic Manager of Paradip Port Trust and thus, it was not possible for him to participate in the Arbitration proceeding without specific instruction in that regard from the opposite party. The sittings as scheduled were thus deferred awaiting instructions from the opposite party.

7. While the stalemate continued, the opposite party did communicate by its letter dated 17.7.2012 of the Traffic Manager in-charge that it had no objection if the arbitration proceeding was allowed to proceed in the absence of Mr. Saroj Misro or alternatively was kept in abeyance till the revocation of his suspension. Thereafter, Mr. Saroj Misro did inform the Arbitral Tribunal by his letter dated 27.8.2012 that he could act as the Arbitrator as he had been allowed to function as Traffic Manager. Consequently, meetings of the arbitrators were fixed to 12th, 13th and 14th September, 2012. The said meetings were attended by Mr. Saroj Misro whereafter the parties and their advocates were required to appear before the Tribunal on 7.10.2012. However, it did not materialize and it was almost six months thereafter that the petitioner received an order dated 26.4.2013 of the learned Presiding Arbitrator that Mr. Saroj Misro had been placed under suspension and that he was not willing to continue as arbitrator in the case. In the next meeting of the Arbitral Tribunal held on 9.5.2013, a letter dated 8.5.2013 signed by the Deputy Chief Law Officer, Paradip Port Trust was laid before it whereby the opposite party sought to appoint one Mr. Kishore Kumar Sahu, Traffic Manager in-charge as Arbitrator stating the incapability of Mr. Saroj Misro to act as Arbitrator in view of his suspension. Request was thus made to substitute Mr. Kishore Kumar Sahu as the Arbitrator in the proceeding on its behalf. To this, objection was raised by the petitioner contending that appointment of Mr. Kishore Kumar Sahu was not in conformity with the provisions of the Act as the mandate for Mr. Saroj Misro to act as Arbitrator did not terminate in the attendant facts and circumstances and that his suspension from the post of Traffic Manager, Paradip Port Trust did not automatically entail termination of his appointment as arbitrator as he had not been appointed as arbitrator by virtue of his post as Traffic Manager, Paradip Port Trust.

8. Learned Arbitral Tribunal comprised of the Presiding Arbitrator and Mr. Amalendu Chakravorty, Arbitrator passed an order on 9.5.2013 requesting Mr. Saroj Misro to communicate his decision as to whether he intended to continue as the arbitrator or not. The said query however,

remained un-responded thus for all practical purposes protracting the deadlock. The instant application has been filed for a direction to the opposite party to allow or instruct Mr. Saroj Misro to continue to act as arbitrator in the ongoing reference so as to facilitate early finalization thereof and the award.

9. Mr. S.K.Acharya, learned counsel for the petitioner has insistently argued that as the appointment of Mr. Saroj Misro as the arbitrator by the opposite party at the relevant point of time was in his individual capacity and not as Traffic Manager, Paradip Port Trust, his suspension from that post per se did not terminate such mandate and thus, in terms of the Act, he continued to be the arbitrator of the opposite party. Referring to Section 14 of the Act, in particular, learned counsel has urged that none of the eventualities as contemplated therein does exist in the facts of the present case warranting termination of the mandate of the appointment of Mr. Saroj Misro as arbitrator of the opposite party and therefore, his non-participation in the arbitration proceeding and /or the resistance offered by the opposite party to his functioning as such, is in gross contravention of the Act justifying the intervention of this Court. According to him, the statutorily contemplated grounds for termination of the mandate of an arbitrator as enumerated in Section 14(1) of the Act ought to co-exist and it being not so in the case in hand, Mr. Saroj Misro cannot be substituted as endeavoured.

10. Mr. Acharya, has further argued that the underlying objective of arbitration being to ensure inexpensive and expeditious resolution of the differences referred thereto by the parties, the impasse precipitated by the unreasonable and obdurate stand of the opposite party at the final stages of the proceedings is arbitrary and unjustified causing serious prejudice to the petitioner. Learned counsel has urged that in any view of the matter, substitution of Mr. Saroj Misro by Mr. Kishore Kumar Sahu at the penultimate stage of the proceeding would entail enormous delay and thus, direction from this Court is warranted to require the opposite party to permit Mr. Saroj Misro to continue to act as its arbitrator in the interest of early disposal of the arbitration proceedings.

11. Per contra, Mr. S.Sarangi, learned counsel for the opposite party-Board of Trustees has maintained that as Mr. Saroj Misro had been nominated by the opposite party to act as its arbitrator in recognition of his official capacity, his suspension from the said office per se is a valid ground to render him ineligible to continue to act as such. Learned counsel on

instructions has argued that a case is registered by the C.B.I. and is pending against Mr. Saroj Misro and his successive suspensions in the perception of the opposite party does not entitle him to represent it in the arbitration proceeding. Mr. Sarangi, therefore insisted that in the singular facts and circumstances, the mandate of appointment of Mr. Saroj Misro as arbitrator stands terminated in terms of Section 14(1)of the Act and thus, he has been rightly substituted by Mr. Kishore Kumar Sahu in the arbitral proceeding as per Section 15(3). He therefore insisted that the instant petition be rejected.

12. The pleaded facts, the documents available on record and the competing arguments have been duly analysed. Admittedly, at the time of appointment of Sri Saroj Misro as the arbitrator for the Paradip Port Trust, he was functioning as the Traffic Manager, Paradip Port Trust. The text of the letter dated 30.7.2005 issued by the Chief Engineer I/c, Paradip Port Trust appointing him as such, is thus of considerable significance in the face of the present debate and is extracted hereunder:-

> " Where as the said firm has put forth certain claims pertaining to the aforesaid work, and dispute has been arisen between the Paradip Port Trust and the said firm. Sri Saroj Kumar Misro, Traffic Manager, PPT is appointed as Arbitrator by the competent authority to decide the dispute after hearing both the parties as per the terms and conditions of the above mentioned Agreement and pronounce the award."

13. That in appointing Sri Saroj Kumar Misro as the arbitrator of the PPT, his official status as Traffic Manager, Paradip Port Trust and consequential administrative authority had been a consideration for his contemplated role is apparently decipherable. This is more so as the dispute arose out of the works of 'Maintenance and Capital dredging at Paradip Port'. The plea that Sri Saroj Kumar Misro had been appointed in his individual capacity thus does not commend for acceptance.

14. As the documents appended in the instant application would reveal, Sri Saroj Kumar Misro had been placed under suspension from the afore stated post successively on two occasions and at the point of time when the present proceeding was initiated, he had opted not to respond to the query of the Arbitral Tribunal comprising of the Presiding Arbitrator and the Arbitrator of the petitioner as to whether he did intend to continue as the arbitrator in the case or not. To reiterate, it had been mentioned in the course

of argument advanced on behalf of the PPT that CBI had registered a case against Sri Saroj Kumar Misro and that the same was pending.

15. Prior to this, following his suspension, Sri Saroj Kumar Misro had informed the Arbitral Tribunal that he would not attend the proceedings of arbitration as he had been placed under suspension as is apparent from the order dated 17.7.2012 rendered in related proceedings. Letter dated 17.7.2012 of the opposite party also discloses that it had no objection if the arbitration proceeding was allowed to proceed in the absence of Sri Saroj Kumar Misro. Alternatively, it had suggested that the same be kept in abeyance till the revocation of the suspension of Sri Saroj Kumar Misro. Though thereafter on the revocation of the suspension of Sri Saroj Kumar Misro, he expressed his willingness to function as the arbitrator and did participate in the proceedings thereof for some time as would be apparent from the order dated 26.4.2013, he having been placed again under suspension, he declined to continue to act as the arbitrator in the case. It was thereafter by communication dated 8.5.2013 of the Paradip Port Trust that Sri Kishore Kumar Sahu, Traffic Manager I/c. was nominated/appointed on its behalf and act as arbitrator in the proceedings. As a consequence of the suspension of Sri Saroj Kumar Misro, Traffic Manager, Paradip Port Trust, he was construed to be incapable of discharging the role of arbitrator. To reiterate, Sri Saroj Kumar Misro did not respond to the query made by the learned Arbitral Tribunal on 9.5.2013 about his willingness to continue as the Arbitrator. Learned counsel for the PPT/opposite party in course of the arguments also on instruction did not express its (PPT) readiness to continue with him as its arbitrator. However, it is demonstratively clear that the opposite party did comprehend and appoint Sri Saroj Kumar Misro as its arbitrator in the capacity of the Traffic Manager and uncompromisingly did seek to continue with him in that official capacity only. Nomination/appointment of Sri Kishore Kumar Sahu, Traffic Manager In-charge also authenticates the consistent stand of the opposite party.

16. Section 42 of the Act mandates that notwithstanding anything contained elsewhere in the Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under the Part had been made in a Court, that Court alone would have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings would have to be made in that Court and in no other Court.

17. The instant application thus, in the backdrop of earlier proceeding under Section 11 of the Act has been lodged before this Court.

18. Be that as it may, as contemplated in Section 12(3) & (4), the appointment of an arbitrator may be challenged inter alia if circumstances exist that give rise to justifiable doubts as to his independence or impartiality or if he does not possess the qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Section 14 dwells on the eventualities in which the mandate of an arbitrator stand terminated. Sub-section (1) of Section 14 being of considerable significance is quoted hereunder:-

Sec.14(1) The mandate of an arbitrator shall terminate if

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

The statutory provision on scrutiny, thus presents the following salient features as precursors of termination of the mandate of an arbitrator.

(a) the arbitrator becomes de jure unable to perform his functions
(b) the arbitrator becomes de facto unable to perform his functions
(c) the arbitrator for other reasons fails to act without undue delay
(d) the arbitrator withdraws from his office
(e) the parties agree to the termination of the mandate of the arbitrator.

Section 15 envisages the following two circumstances entailing the excision of the mandate of the arbitrator in addition to those set out in Section 13 and 14.

(a) where he withdraws from office for any reason; or
(b) by or pursuant to the agreement of the parties.

19. On an analysis of the overall scheme pertaining to termination of the mandate of an arbitrator outlined by Section 12,13, 14 and 15, it is not possible to lend concurrence to the plea raised on behalf of the petitioner that for such a consequence all the exigencies enumerated in Clause (a) and (b) of Section 14(1) have to essentially co-exist. Such a contention patently defies

the legislative intendment to the contrary chiefly to obviate a deadlock likely to ensue from such insistence. In the attendant facts and circumstances, the PPT having appointed Sri Saroj Kumar Misro, Traffic Manager as its arbitrator in due acknowledgement of his official position, he had for his suspension from that office rendered himself de jure ineligible to discharge the said role. Further, he also has not responded expressing his willingness to continue to be the arbitrator of the PPT signifying his withdrawal from the office of the arbitrator. As it is, his successive suspension and the pendency of a case registered by the CBI are relevant considerations as well for the PPT to baulk at his continuance as its arbitrator, independence and impartiality being non-relaxable attributes of an arbitrator as envisaged by the Statute.

20. Arbitration is a proceeding recognized in law and regulated by the Act and essentially is one to be conducted by mutually nominated arbitrator(s) of the parties for resolution of their disputes and differences. Not only the entire fabric of the legislation underlines consensus based initiatives wherever feasible for the unhindered progress of the proceedings, unqualified confidence about the independence, impartiality, reliability and efficacy of the arbitrator(s) constitute the substratum for their appointment and continuance. Due primacy to this statutorily enjoined imperatives for valid arbitration cannot be emasculated or enfeebled by any interpretation to the contrary. Such a legislatively ordained characteristic of an arbitrator being the sine qua non for valid arbitration, to compel a party to continue with an arbitrator not contemplated in view of the prevailing circumstances would be in derogation of the mandate of the essentiality of an arbitrator of one's choice.

21. The Hon'ble Apex Court in ***Delta Mechcons (India)Ltd vs. Marubeni Corporation, (2008)15 SCC 772*** did reiterate the fundamental notion of process of arbitration to be one of settlement extra cursum curiae where the parties are at liberty to choose their judge and also provide the manner of constituting the Arbitral Tribunal. Thus, the supervening paramountcy of an arbitration agreement had been acknowledged.

22. In the comprehension of this Court in the factual setting adumbrated hereinabove, the mandate of Sri Saroj Kumar Misro as the arbitrator of the PPT stands terminated in accordance with the Act and thus in terms of Section 15(3) substituted arbitrator can be appointed according to the arbitration agreement between the parties. To reiterate, in terms of the

arbitration agreement, the Arbitral Tribunal was to be comprised of two arbitrators, one to be nominated by the contractor and another by the Board. As with the enforcement of the Act enjoining as per Section 10 that the number of arbitrators shall not be even, the Presiding Arbitrator was appointed by this Court under Section 11(6) of the Act.

23. Be that as it may, with the termination of the mandate of nominated arbitrator of the Board/Trust, it would be within the competence of PPT to appoint its substituted arbitrator.

24. The above view finds endorsement in the decisions of the Apex Court in ***National Highways Authority of India & anr. Vs. Bumihiway DDB Ltd.(JV) & ors., (2006) 10 SCC 763*** and ***NBCC Ltd. vs. J.G.Engineering Pvt. Ltd., (2010) 2 SCC 385.***

25. True it is that in view of the intervening developments and the substitution of the arbitrator of the Board/Trust, the arbitration proceedings would get extended to some extent. But it is expected that in view of Section 15(3) & (4), efforts would be made by all concerned to minimize the delay.

26. On a cumulative consideration of the above aspects, I am of the view that the prayer made in the instant petition cannot be acceded to. The petition thus fails and is rejected.

Application dismissed.

2015 (I) ILR - CUT- 442

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

W.P.(C) NO.17739 OF 2008

UNION OF INDIA & ORS. ……..Petitioners

.Vrs.

BITALI ROUT & ORS. ……Opp.Parties

SERVICE LAW – Compassionate appointment – Object and entitlement – It is necessary to meet the sudden financial crisis occurring in the family of the deceased employee but an application in

this respect must be preferred without undue delay which must be considered within a reasonable time – How ever it can not be claimed as a matter of right and in the absence of rules or regulation issued by the Government or a public authority.

In this case father of O.P.2 expired on 12.11.1978 and after lapse of 26 years the Opp.Parties approached the learned Tribunal and in the meantime 35 years have elapsed and family of O.Ps.2 & 3 would tide over the financial crisis and the learned Tribunal has brushed aside the same and mechanically allowed the application seeking compassionate appointment – Held, the impugned order passed by the learned Tribunal is quashed. (Paras 9,10,11)

Case laws Referred to:-

1.(1994) 4 SCC 138 : (Umesh Kumar Nagpal-V- State of Haryana)
2.(2008) 15 SCC 560 : (SAIL -V- Madhusudan Das)
3.(2011) 4 SCC 209 : (Bhawani Prasad Sonkar-V- Union of India & Ors.)

For Petitioners - Mr. Anindya Ku. Mishra.
For Opp.Parties - Mr. Nirmal Ranjan Routray.

Date of hearing : 07.01.2015
Date of Judgment : 15.01. 2015

JUDGMENT

DR. A.K. RATH, J.

The petitioners call in question the legality and propriety of the order dated 16.5.2008 passed by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack (hereinafter referred to as "the Tribunal") in Original Application No.875 of 2006, whereby and whereunder the application filed by the opposite parties seeking compassionate appointment has been allowed.

2. The only question which arises for our consideration is as to whether a direction for compassionate appointment can be given to any member of the family after lapse of 28 years of the death of the employee.

3. The husband of the opposite party no.1 and the father of the opposite party no.2 while working as CPC Gangman in the Railways died on 12.11.1978. After opposite party no.2 attained majority, opposite party no.1

made a representation to the petitioners on 5.12.1993 seeking employment on compassionate ground in favour of her son. Since the representation filed by her was not heeded to, they approached the Tribunal in O.A. No.353 of 2004. By order dated 16.6.2004, the learned Tribunal disposed of the said application directing the petitioners, who are respondents therein, to consider the grievance of the applicant and pass necessary order. Thereafter, the matter was considered by the petitioners and by order dated 26.10.2006, the request for providing employment on compassionate ground had been rejected on the ground that there was no representation prior to 2004 and that the application for compassionate appointment had been submitted beyond 20 years of the death of the ex-employee. Thereafter, the opposite parties laid another application being O.A No.875 of 2006 to quash the order of rejection dated 26.10.2006 with further prayer to provide employment to the opposite party no.2. The Tribunal by order dated 16.5.2008, vide Annexure-3, allowed the said application.

4. Pursuant to issuance of notice, a counter affidavit has been filed by the petitioners reiterating the grounds taken in the order of rejection.

5. Heard Mr.A.K.Mishra, learned counsel for the petitioners and Mr.N.R.Routray, learned counsel for the opposite parties 1 and 2.

6. In Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138, the Apex Court held that the whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. Mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family.

7. The appointment on compassionate ground to the dependant of the deceased employee is well known. In SAIL v. Madhusudan Das, (2008) 15 SCC 560, the apex Court held that Articles 14 and 16 of the Constitution of India mandate that all eligible candidates should be considered for appointment in the posts which have fallen vacant. Appointment on compassionate ground offered to a dependant of a deceased employee is an exception to the said rule. It is a concession, not a right.

8. In Bhawani Prasad Sonkar v. Union of India and others, (2011) 4 SCC 209, the apex Court directed that the following factors have to be borne in mind while considering the claim for employment on compassionate grounds.

"(i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the breadwinner while in service. Therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.

(iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated employee viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts."

9. On the anvil of the decisions cited supra, the matter is required to be examined. We find that the father of the opposite party no.2 died on 12.11.1978. After lapse of 26 years, the opposite parties approached the learned Tribunal in OA No.353 of 2004 wherein a direction was issued by the learned Tribunal to the petitioners to consider their case. After considering the case in its proper perspective, the representation of the petitioners was rejected. Thereafter, the opposite parties 2 and 3 approached the Tribunal in OA No.875 of 2006 wherein a direction was issued to consider the case of the opposite party no.2 for compassionate appointment.

10. Appointment on compassionate ground can not be claimed as a matter of right, nor an applicant becomes entitled automatically for

appointment. The same depends on a host of factors enumerated in Bhawani Prasad Sonkar (supra). In the meantime 35 years have elapsed. The family of the opposite parties 2 and 3 would tide over the financial crisis. The learned Tribunal has brushed aside the same and has mechanically allowed the application.

11. In the wake of the aforesaid, the order dated 16.5.2008 passed by the learned Tribunal in Original Application No.875 of 2006 is hereby quashed. The writ petition is accordingly allowed.

Writ petition allowed.

2015 (I) ILR - CUT- 446

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

W.P.(C) NO.11180 OF 2014

JAYANTI DAS ……..Petitioner

.Vrs.

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

P.I.L. – Sewerage/drainage work in Cuttack City – Difficulties faced by people during execution of such work, challenged – L & T Company has taken sufficient steps to avoid any untoward incident – Too early to assess that the work is not done in proper prospective – JICA is funding through Government of India to OISIP to execute the work – Direction issued to provide number of display boards pertaining to diversion of traffic at the work site and proper illumination during night – Further direction issued to provide sufficient number of security personnel to avoid traffic congestion and necessary precautionary steps be taken to avoid water logging during monsoon.

(Para 4)

For Petitioner - Mr. L.N. Patel,
For Opp.Parties - Mr. J.Katikia,
Mr. R.K. Mohapatra, G.A.

Date of hearing : 17.11.2014
Date of Judgment : 17.11.2014

JUDGMENT

DR. A.K. RATH, J.

Alleging several illegalities and irregularities committed by Larsen & Tubro Limited (hereinafter referred to as "the L&T Company") in constructing sewerage works at Cuttack town, the petitioner, who is a public spirited person, has filed this writ petition.

2. Adumbrated, in brief, the case of the petitioner is that the Commissionerate of Police has not kept a vigil on the functioning of L&T Company, which is the authorized contractor of Japan International Cooperation Agency (in short, "the JICA"), resulting in the public inconveniences. The petitioner made an application under the Right to Information Act on 26.4.2014 seeking information from the Deputy Commissioner of Police, Cuttack about the permission granted by the police to JICA and the role and responsibilities of the Commissionerate of Police regarding maintenance of law and order and traffic jam. The reply given by the Assistant Commissioner of Police (Traffic) reveals that the L&T Company, opposite party no.5, flouted the permission granted by the police. It is further stated that neither the L&T Company nor the Commissionerate of Police so also the contractors, who are engaged for construction work of JICA project, have not taken into consideration the problem faced by the people of Cuttack city. In fact in para-7 of the writ petition, the petitioner has given a vivid detail of the illegalities and irregularities committed by the aforesaid agency. With the factual scenario, the petitioner has prayed, inter alia, to stop the project work of JICA in Cuttack city in monsoon season, cover all ditches/holes made by JICA before monsoon every year for public safety, to constitute a committee to look into the affairs of the JICA project and to formulate a contingency fund of L&T Company which shall be 20% of the project cost in the event of any damage or untoward incident caused due to project.

3. Pursuant to issuance of notice, a detailed counter affidavit has been filed by the opposite party no.5. The sum and substance of the case of the opposite party no.5 is that JICA is a funding agency. The said agency is funding through Government of India to the Orissa Integrated Sanitation Improvement Project (hereinafter referred to as "the OISIP") to execute three types of works in Cuttack city, such as, (I) Sewerage works, (II) Drainage works, and (III) Sewage Treatment Plant (in short, "the STP"). The sewerage

works have been undertaken by the L&T Company through Odisha Water Supply & Sewerage Board (hereinafter referred to as "the OWSSB") whereas drainage works have been undertaken by the Tantia & Voltas and STP is carried out by VA Tech and Wabag. All the construction activities with regard to sewerage works are being executed through trained safety security staffs and supervised by efficient trained personnel. The motto of L&T Company is to execute the challenging job of sewerage works in the clumsy Cuttack city with all oddities and no inconvenience to the general public. The L&T Company has sacrosantly adhered to the terms and conditions and taken all precautionary measures as per the permission letter received from the Assistant Commissioner of Police (Traffic). Before granting permission, the traffic officials visited the site, confirmed the precautionary measures to be taken at the time of execution of the work at a particular site. The L&T Company has got necessary traffic diversion road permission and installed the sign boards, which indicate the nature of work and the precautionary measures to be taken. The required numbers of stoppage boards have been submitted during execution and the proper illumination is ensured during night works. The security and safety personnel are available for diversion of traffic and traffic management. Traffic wardens are also available at the site. The L&T Company also obtains road cutting permission before execution of the work at any site. The required numbers of security personnel have been deployed for execution of sewerage work. The work is being carried out on round the clock basis and security personnel also working round the clock in shifts. The Traffic Department has also deployed required number of staff from their end and L&T Company has also deployed sufficient traffic personnel as instructed by the Traffic Police Department. The L&T Company obtains necessary permission to dig the roads and carries out the same in accordance with the terms and conditions. After obtaining permission, public notice had been issued to the Traffic Department in shape of advertisements in different newspapers including "The Samaj" making aware of the general public about the sewerage works undertaken by the L&T Company. The locations where the night work is being carried out, the L&T Company provides proper illumination for smooth traffic movement. The security personnel have been deployed by the L&T Company for smooth traffic management. The public grievance cells have been made functional in coordination with the Cuttack Municipal Corporation for proper coordination between the public and the L&T Company. The general public are regularly being made aware about the short term inconvenience for execution of the

work. Duration of the work has been intimated to the department. The L&T Company personnel with required qualifications and ample experience are deployed at all work sites and monitored by the experienced Senior Managers. The decisions are taken by all such officials and employees of the L&T Company at the site for the respective portion of the work. The materials required for particular stretch of work are mobilized at the site and as and when the work is completed, left out materials are shifted to the next working location. Considering the condition of the work place, three big stockyards on the outskirts have been kept reserved to keep the materials which are brought to the work location only when the same is required. The minimum construction materials are stacked at the work site to reduce the public inconvenience. The usual works are being executed during day shift and as and when required trained personnel are left work in the night shift. Care is taken to close the open trenches before closing of the day. Proper barricading, displaying sign/diversion boards to prevent accident at night are carefully ensured. The L&T Company has been following all the instructions in letter and spirit including the road safety and traffic. The Traffic Department, time and again, is checking the functioning of the L&T Company. Further, the L&T Company has been operating a public grievance cell in coordination with the Cuttack Municipal Corporation since May, 2014. The L&T Company has also organized road safety awareness programme for the public and also set up *Jalachhatra Kendra* during summer season. The L&T Company has kept the required cautioning boards. As per the requirement, the local people are engaged according to the eligibility and qualification with a view to give employment. It is further stated that the work at *Mahammadia Bazar* was started in the month of November, but due to local procession and local interference, the works could not be completed within forty five days for which the L&T Company had to close the construction activities. As the work could not be restarted for a period of five months ahead of pre-closer, the road was restored and the same will be started after monsoon. The L&T Company constructed the road at limited location during monsoon to ensure that there is no water logging. The JICA is also executing storm water drainage work to remove water logging for Cuttack city which is to be made operative. In monsoon, the L&T Company is taking sincere steps to close the existing ditches. Various public awareness programmes have been conducted across the city. It is further stated that steps have been taken by the L&T Company to close the existing ditches to avoid water logging during monsoon.

4. The Cuttack is a millennium city. It has several problems. The conditions of the road and drain in most part of the city are in deplorable condition for which in some parts of the city, the people are living in an unhygienic condition. There is no water sewerage treatment plant. To obviate these difficulties, JICA is funding through Government of India to the OISIP to execute three types of works in Cuttack city. The sewerage work is being undertaken by L&T Company through OWSSB. The agreement dated 30.01.2013 entered into between the OWSSB and L&T Company shows that the work is to be completed within 36 months. It is a big project. At the time of execution of the work, people face immense difficulties. As would be evident from the contents of the counter affidavit, sufficient steps have been taken by the L&T Company to avoid the accident. The L&T Company has also conducted several awareness camps and deployed its personnel at the working site to prevent any untoward incident. Thus it is too early to come to a definite finding that L&T Company is not executing the work in a proper perspective. But then, one fact cannot be lost sight of. At the time of construction, the L&T Company used to dig holes. If an untoward incident happens, then precious life will be lost. To avoid the said untoward incident, we direct that, apart from providing required number of display boards pertaining to diversion of traffic at the working sites, the opposite parties shall also take steps for proper illumination during night and provide sufficient number of security personnel to avoid traffic congestion. We further direct the opposite parties to take sufficient precautionary steps to avoid water logging during monsoon. With the aforesaid direction, the writ petition is disposed of.

Writ petition disposed of.

2015 (I) ILR - CUT- 450

PRADIP MOHANTY, J & BISWAJIT MOHANTY, J.

W.P. (CRL) NO. 134 OF 2012

BIPIN BIHARI PANDA & ANR. .....Petitioners.

.Vrs.

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

ODISHA SPECIAL COURTS ACT, 2006 – S. 13 (1)

Application for confiscation – It is to be filed before the Authorized officer by the public prosecutor being duly authorized by the State Government in that behalf, whether or not the Special Court has taken cognizance of the offence – Section 13 (1) no where requires that the public prosecutor himself should be the applicant – He is only to make an application on behalf of the State Government for confiscation of property to the State Government and state can only be the applicant before the Authorized officer and not the public prosecutor – Held, the application for confiscation having been filed by the public prosecutor before the Authorized officer in accordance with law, the contention raised by the counsel for the petitioners in this regard merits no consideration. (Para 5)

Case laws Referred to:-

1.AIR 1958 BOMBAY 196 : (C.B.I. Bhatnagar-V- The State)
2.AIR 1961 SC 387 : (P.C. Joshi & Anr.-V- The State of U.P.)
3.AIR 1963 SC 1198 : (Gour Chandra Rout & Anr.-V- The Public Prosecutor, Cuttack)
4.AIR 1962 ORISSA 197 : (Gour Chandra Rout & Anr.-V- Public Prosecutor,CTC)
5.ILR 1896 CAL 958 : (Rajendra Nath Haldar & Ors.-V- Nilratan Mitter & Ors.)
6.AIR 1965 SC 1454 : (State of Rajasthan & Ors.-V- Ghasilal)

For Petitioners - M/s. Bijan Ray, Sr. Advocate
S. Mohanty, B. Mohanty,
D. Chhotray, D.R. Das, B. Mohapatra.
For Opp.Parties - Mr. Srimanta Das, Standing Counsel (Vig.)

Date of judgment: 24.12.2014

JUDGMENT

PRADIP MOHANTY, J

In this writ petition (criminal) the proceeding in Confiscation Case No.1 of 2010 pending before the learned Authorized Officer, Special Court, Bhubaneswar is sought to be quashed by the petitioners.

2. The background facts giving rise to initiation of the aforesaid confiscation proceeding against the petitioners are delineated hereunder in a short compass:

On the basis of information gathered from reliable source the vigilance police on 03.09.1997 raided the residential houses of petitioner no.1 situated at Bhubaneswar, Aska and Berhampur so also his office and residential office at Cuttack. In course of search it revealed that during the check period, i.e., from 01.01.1982 to 03.09.1997, while holding the posts of Executive Engineer and Superintending Engineer under the State Government, petitioner no.1 acquired and possessed huge assets disproportionate to his known lawful source of income by indulging in corrupt practices. As such, Bhubaneswar Vigilance P.S. Case No.37 dated 10.09.1997 was registered and after completion of investigation charge-sheet was laid against petitioner no.1 for alleged commission of offence under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988, as a result of which he is facing trial as an accused in T.R. Case No.15/30-2008/2006 pending before the learned Special Judge, Special Court, Bhubaneswar. On scrutiny of records it was further found by the investigating authority that during the aforesaid check period petitioner no.2, who is the wife of petitioner no.1, also acquired some properties, although she did not have any appreciable source of income of her own at the relevant time, and she was also unable to offer any satisfactory explanation for acquisition of such properties. As the things stood thus, the State Government filed an application under Section 13 (1) of the Orissa Special Courts Act, 2006 (for short "the Act") before the learned Authorized Officer, Special Court, Bhubaneswar for confiscation of the disproportionate assets acquired by the petitioners. The said application has been registered as Confiscation Case No.1 of 2010 and the learned Authorized Officer being satisfied has issued notice of confiscation to the petitioners.

3. Mr. Bijan Ray, learned Senior Advocate appearing for the petitioners mainly urged before us that provisions of Section 13 of the Act had not been followed while initiating the aforesaid confiscation proceeding. According to him, Section 13(1) prescribed that the State Government would authorize the Public Prosecutor for making an application to the Authorized Officer for confiscation. That means, the Public Prosecutor himself should make an application to the Authorized Officer for confiscation, if he received an authorization from the State Government in regard to that. But, in the instant case, the application had been made by the holding I.O. and not by the Public Prosecutor. In such view of the matter, the very initiation of the confiscation proceeding was nonest in the eye of law and, as such, the entire proceeding was vitiated. His further stand was that making an application and presenting

an application were two different concepts under law. Legislature has specifically mandated that Public Prosecutor has to make an application as and when authorized by the State Government. In the present case, the Public Prosecutor might have presented the case, but had not made the application, as envisaged under the statute. In support of his contention, he filed his written submissions and relied upon the following decisions, namely, ***C.B.L. Bhatnagar v. The State***, AIR 1958 BOMBAY 196; ***P.C. Joshi and another v. The State of Uttar Pradesh***, AIR 1961 SC 387 and ***Gour Chandra Rout and another v. The Public Prosecutor, Cuttack***, AIR 1963 SC 1198; ***Gour Chandra Rout and another v. Public Prosecutor, Cuttack***, AIR 1962 ORISSA 197; ***Rajendra Nath Haldar and others v. Nilratan Mitter and others***, ILR 1896 CAL 958 and ***State of Rajasthan and others v. Ghasilal***, AIR 1965 SC 1454.

4. Per contra, learned Standing Counsel (Vigilance) Mr. S. Das submitted that in the instant case the application for confiscation had been filed in accordance with the provisions of the Act and the Rules made thereunder. To be specific, the application for confiscation in the instant case had been filed by the Public Prosecutor attached to the Court consequent upon the authorization made by the State Government in terms of Section 13(1) of the Act. The holding investigating officer being acquainted with the facts of the case had sworn the affidavit appended to the application for confiscation. He further submitted that it was nowhere the requirement of law that the Public Prosecutor being authorized by the government should be the applicant himself. According to him, the duty of Public Prosecutor was to institute the case on behalf of the government and to conduct the case before the Authorized Officer. He also submitted that the decisions relied on by Mr. Ray had no application to the present case.

5. At the outset, it may be made clear that no order passed by the Authorized Officer has been challenged here. In order to appreciate the rival submissions of the parties, Section 13(1) of the Act, which is relevant for the purpose of this case, is quoted hereunder.

> 13. (1) Where the State Government, on the basis of prima-facie evidence, have reasons to believe that any person, who held high public or political office has committed the offence, the State Government may, whether or not the Special Court has taken cognizance of the offence, authorize the Public Prosecutor for making an application to the authorized officer for confiscation under this Act

> of the money and other property, which the State Government believe the said person to have procured by means of the offence.

A bare reading of the aforesaid section makes it clear that the application for confiscation has to be filed/made before the Authorized Officer by the Public Prosecutor on being duly authorized by the State Government in that behalf, whether or not the Special Court has taken cognizance of the offence. Further, Section 13(1) nowhere requires that the Public Prosecutor himself should be the applicant. He is only to make an application on behalf of the State Government for confiscation of property to the State Government. In such background, in our view State can only be the applicant before the Authorized Officer and not the Public Prosecutor, as ultimately State is to derive benefit from confiscation by way of recovery of its property. However, in order to satisfy ourselves about the factual backdrop, vide order dated 17.09.2014, the original records in Confiscation Case No.1 of 2010 of the Court of Authorized Officer, Special Court, Bhubaneswar were called for. Accordingly, the original records have been produced before this Court. This Court perused the records to find out as to if the application for confiscation was actually filed by the Public Prosecutor before the Authorized Officer or not. As it appears, one Satyabadi Das, who happens to be the Public Prosecutor has not only signed at each page of the said application but also at the end of the prayer just below the words "By the applicant". At page 12 of the said application the Public Prosecutor Satyabadi Das himself has endorsed a certificate to the effect that he has been duly authorized by the State Government to file the application. Similarly, at the bottom of page 13 below the words "Submitted by the Applicant", the Public Prosecutor Satyabadi Das has also signed. Therefore, it cannot be said that the application for confiscation has not been filed by the Public Prosecutor of the Court. The holding investigating officer Rabindra Kumar Panda being the deponent has signed at each page of the application for confiscation. Merely because his signature appears at page 9 of the application just above the words "By the applicant" (which is not the appropriate place for putting the signature of the applicant), it cannot be construed that the application for confiscation has been filed by the holding investigating officer Rabindra Kumar Panda and not by Public Prosecutor. For all these reasons, this Court holds that the application for confiscation has been filed/made by the Public Prosecutor before the Authorized Officer in accordance with law and thus the contention raised by the learned counsel for the petitioners in this regard merits no consideration.

6. Now, coming to the six decisions cited by learned counsel for the petitioners, namely, ***C.B.L. Bhatnagar v. The State***, AIR 1958 BOMBAY 196; ***P.C. Joshi and another v. The State of Uttar Pradesh***, AIR 1961 SC 387 and ***Gour Chandra Rout and another v. The Public Prosecutor, Cuttack***, AIR 1963 SC 1198; ***Gour Chandra Rout and another v. Public Prosecutor, Cuttack***, AIR 1962 ORISSA 197; ***Rajendra Nath Haldar and others v. Nilratan Mitter and others***, ILR 1896 CAL 958 and ***State of Rajasthan and others v. Ghasilal***, AIR 1965 SC 1454, this Court has perused the same and found that those decisions are factually distinguishable. These decisions nowhere lay down that in a case of present nature, the Public Prosecutor should be the applicant and not the State, who is the real aggrieved party, whose property is alleged to have been swindled.

7. For the foregoing discussions, this Court finds no merit in any of the contentions raised by the learned counsel for the petitioners. As such, the writ petition stands dismissed being bereft of merits.

However, one thing is made clear that observations made in the present judgment would in no way influence the trial/the confiscation proceeding pending before the appropriate fora.

Writ petition dismissed.

2015 (I) ILR - CUT- 455

PRADIP MOHANTY, J & BISWAJIT MOHANTY, J.

W.P.(C) NO. 16601 OF 2014

ODISHA PUBLIC SERVICE COMMISSION .....Petitioner

.Vrs.

PRIYAMBADA DAS & ORS. .....Opp.Parties

SERVICE LAW – Recruitment case – Division Bench matter– Notification to that effect made by the Chairman State Administrative Tribunal Cuttack Bench U/s. 5 (2) and (6) of the Administrative Tribunals Act, 1985 – Held, Single Member Bench had no

jurisdiction to hear and dispose of the original application and by doing so he had exceeded his jurisdiction – Matter is remitted back to the Tribunal for disposal in accordance with law. (Paras 30,31)

SERVICE LAW – Result of the Odisha Civil Services, preliminary examination, challenged – Necessary and proper parties – Persons who are going to be directly affected or against whom relief is sought are necessary parties – Held, selected Candidates in the preliminary examination are necessary parties and the learned Tribunal ought not to have proceeded without insisting their impletion as respondents or even some of them be made parties in a representative capacity – Tribunal should have dismissed the Original Application for non-joinder of necessary parties. (Para 29)

Case laws Referred to:-

1.AIR 2003 SC 578 : (B.L. Sreedhar & Ors.-V-K.M. Munireddy & Ors.)
2.AIR 2014 SC 3083 : (H.C.Kulwant Singh & Ors.-V-H.C.Daya Ram & Ors.)
3.(2008) 4 SCC 619 : (Sadananda Halo-V- Momtaz Ali Sheikh)
4.AIR 2005 SC 4152 : (Sulochana Devi-V- D.M. Sujatha & Ors.)
5.(2013) 12 SCC 489 : (Prashan Ramesh Chakkarwar-V-Union of Public Service Commission & Ors.)
6.(2008) 12 SCC 558 : (Suresh-V- Yeotmal District Central Co-operative Bank)
7.(2002) 4 SCC 638 : (Director of Settlements, A.P. and others v. M.R. Apparao and another
8. AIR 1986 SC 210 : B.Prabhakar Rao and others v. State of Andhra Pradesh and others
9. AIR 2013 SC 2652 : (Rajesh Kumar and others, etc. v. State of Bihar and others, etc.)
10. AIR 1983 SC 769 : (A. Janardhana v. Union of India and others)
11. AIR 2003 SC 1831 : (Post Graduate Institute of Medical Education and Research and another v. A.P. Wasan and others)
12. AIR 1974 SC 1755 : (The General Manager, South Central Railway, Secunderabad and another v. A.V.R. Siddhanti and others)
13. AIR 1966 SC 828 : (Gadde Venkateswara Rao v. Government of Andhra Pradesh and others)
14. AIR 1999 SC 3609 : (Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar and others)

15. AIR 2003 SC 2889 : (Chandra Singh v. State of Rajasthan and another)
16. (2004) 6 SCC 800 : (State of Uttaranchal through Collector, Dehradun and others v. Ajit Singh Bhola and another)

For Petitioner - Mr. Rajat Kumar Rath, Sr. Advocate,
M/s. Pradipta Kumar Mohanty, D.N. Mohapatra, J. Mohanty, P.K. Nayak, S.N. Dash & A. Das.

For Opp.Parties - M/s. Dr. Ashok Kumar Mohapatra, Sr. Adv, Alok Ku. Mohapatra, Asit Ku. Dash, B. Panda, S.Mohapatra, S.P. Mangaraj, S. Mohanty, T.Dash, S. Samal,S. K. Barik.

Mr. S.P.Mishra, Advocate General.

M/s. Himnansu Sekhar Mishra, A.K. Mishra, A.K.Tripathy, K. Badhi,

M/s. B.B. Mohanty, M.R. Harichandran, Bikash Tripathy, B.Samantray. M/s.J.Patnaik, Sr.Adv. B. Mohanty, S. Patnaik, R.P.Ray, B.S. Rayguru, S.Pholgu.

M/s. S.K. Padhi, Sr. Advocate, S. Das, K. Mohanty,
M/s. Dhuliram Pattanayak, N.S. Panda, N. Biswal, L.Pattanayak.
M/s. Sameer Kumar Das, S.K. Mishra, P.K. Behera.
M/s. B. Routray, Sr. Advocate, S.K. Samal & R.P. Dalei

Date of Judgment: 16 .01.2015

JUDGMENT

BISWAJIT MOHANTY, J.

This writ application has been filed by the petitioner-Odisha Public Service Commission, for short, "the OPSC" with a prayer to quash the order dated 26.8.2014 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.2146(C) of 2014 under Annexure-5.

2. Shorn of unnecessary details, the facts of the case are as follows;

On 17.11.2011, Advertisement No.5 of 2011-12 was issued by the OPSC inviting applications in prescribed Short Form from the candidates for

admission to the Odisha Civil Services Preliminary Examination, 2011 for recruitment to the Posts and Services coming under Odisha Civil Services (Category-I & Category-II) as mentioned therein. In the said advertisement, it was made clear that the Examination should be conducted in accordance with the provisions of the Odisha Civil Services (Combined Competitive Recruitment Examination) Rules, 1991, for short, "1991 Rules". It was made clear that the relevant portion of the said Rules was available in the website of the Commission. At Paragraph-15, advertisement also referred to the Website of the Commission and informed the candidates to visit the Website of the Commission for detailed information about programme of examinations, etc. On 16.12.2011, a corrigendum to the above noted advertisement was issued revising the number of vacancies. On 22.2.2012, vide Notice No.1138/P.S.C., the petitioner informed all concerned that it (OPSC) had decided to implement a uniform Negative Marking System in all competitive examinations having objective type (multiple choice) questions where Answer Sheets were to be evaluated through Computer (O.M.R. System). On 19.1.2014, the Preliminary Examination was conducted. On 18.2.2014, vide Notice No.779/P.S.C., the petitioner published model answers to question papers in the Website of OPSC inviting observations/comments from candidates/general public online by 28.2.2014. On 1.5.2014, the petitioner published correct model answers in respect of the subjects in which observations/comments were received. It also published the procedure for valuation of answer sheets in the Website of the Commission. On the same date, i.e., 1.5.2014 vide Notice No.1838/PSC, the petitioner published the results of Preliminary Examination. The said notice made it clear that 5823 candidates have been provisionally qualified/selected for admission to Odisha Civil Services (Main) Examination and roll numbers of these candidates were available in the Website of the OPSC. It also made clear that the selected candidates were required to furnish the applications online through proforma application form for the Main Examination. Vide Notice No.2052/P.S.C. dated 14.5.2014, it was notified by the petitioner that online applications for applying to sit in the Odisha Civil Services Examination, 2011 would be available till 20.6.2014. The last date for receipt of print-out/hard-copy of online applications along with copy of specified documents/ certificate was on 30.6.2014. It was also made clear that the petitioner had decided to conduct the Odisha Civil Services Main Examination during September, 2014. Vide Notice No.3349/P.S.C. dated 4.7.2014, the petitioner, in consideration of difficulties faced by some

candidates in remote rural areas extended the last date for submission online application form for admission to Odisha Civil Services Examination, 2011. Vide Notice No.3605/P.S.C. dated 10.7.2014, the petitioner notified that it was going to conduct the Odisha Civil Services Examination (Main Examination), 2011 from 6.9.2014 to 30.9.2014 at five zones of the State.

3. It is at this juncture on 30.7.2014, one Priyambada Das (opposite party no.1) filed O.A. No.2146(C) of 2014 before the learned Tribunal with prayer that the learned Tribunal should set aside the grace marks awarded by the OPSC in the Preliminary Examination and accordingly, set aside the results of Preliminary Examination and OPSC be directed to publish the result as per law by conducting fresh and lawful evaluation. The present writ application arises out of the final order dated 26.8.2014 passed by the learned Tribunal in O.A. No.2146(C) of 2014.

4. In O.A. No.2146(C) of 2014, opposite party no.1 took the plea that the evaluation of answer scripts in the Preliminary Examination has been done by following an illegal practice of awarding grace marks in order to favour a few candidates. According to opposite party no.1 while in some optional subjects the grace marks have been given but in optional subjects like, Psychology, Philosophy, Law, Anthropology and Civil Engineering, no grace marks have been awarded. Further, according to opposite party no.1 awarding of grace marks was not provided under law. Thus, evaluation of answer scripts in the Preliminary Examination was opposed to law and therefore, the results of Preliminary Examination was illegal and void. Opposing the said prayer, the petitioner filed its counter on 18.8.2014. In the said counter, the petitioner inter alia took the stand since the candidates, who have qualified in the Preliminary Examination to appear at the Main Examination have not been impleaded as parties, the Original Application be dismissed. The petitioner also submitted that for printing mistakes or wrong questions, a candidate should not be burdened with negative marking as he/she was not at fault. Accordingly, full marks have been awarded to all the candidates for wrong questions or questions having printing mistakes. The petitioner also took a stand that as per the opinion of the Expert Committee, full marks and equal marks were awarded against wrong questions uniformly. This system should not be treated as award of grace marks as alleged by opposite party no.1. The petitioner also took the stand that opposite party no.1 having participated in the selection process cannot challenge the authority of the Commission in formulating the procedure of evaluation as

per the principles evolved by it, which is its inherent prerogative. In its counter, the petitioner also made it clear that opposite party no.1 herself had also obtained full marks for the wrong questions in General studies and also in Public Administration Paper. So, she was in no way prejudiced by this. Thus, according to the petitioner, the Original Application was without any merit and should be dismissed.

5. Opposite party no.1 filed an affidavit on 20.8.2014 before the learned Tribunal stating therein that the petitioner was under legal obligation to conduct examination as per "1991 Rules" and that giving grace marks/extra marks/excess marks was not provided under the Rules and as per opposite party no.1, the petitioner could not have acted in violation of law and it should have acted only in accordance with law. Thus, for acting beyond its jurisdiction Preliminary Examination results were/are vitiated. It is important to note here that despite the plea taken by the petitioner in its counter before the learned Tribunal relating to non-joinder of successful candidates as parties, opposite party no.1 did not implead the successful candidates or some of them before the learned Tribunal. In such background, the order was reserved in O.A. No.2146(C) of 2014 on 20.8.2014 and final order which has been impugned in the present writ application was pronounced on 26.8.2014.

6. The learned Tribunal while pronouncing the final order in O.A. No.2146(C) of 2014, framed the following three issues;

"(i) Whether OPSC is acting as per law and procedures in allotting grace marks to candidates in case of wrong/ambiguous/no option available/Double Answer questions ?

(ii) Whether candidates, having gone through the OCS (Preliminary) Examination, 2011 and surrendered to the terms and conditions of the same, could challenge the selection list of Preliminary Examination after being unsuccessful therein ?

(iii) Whether the case suffers from the defect of non-joinder of parties, since all successful candidates of OCS (Preliminary) Examination, 2011 are affected and have not been made parties ?"

7. On issue no.(i), the learned Tribunal came to hold that OCS Examination was not like a school and college examination, where grace marks were given for faulty questions in order not to jeopardize careers of the students. But in OCS Examination, OPSC is trying to select candidates based on their knowledge, power of analysis, reasoning and competency in the

subjects, he has selected. By awarding grace marks to candidates for such faulty questions, OPSC is rewarding candidates for faults of the question setters/ printers/ proof readers. Hence, grace marks provided is not to judge candidate's competence, but to compensate him for the incompetencies of those, who are part of this process of conduct of the OCS Examination. This, according to the learned Tribunal distorts measurement of relative competencies of all candidates. Here candidates have to be judged based on material that shows their knowledge, their power of analysis & reasoning and analytical ability and not on other's incompetencies. Hence, the evaluation of OPSC by granting grace marks to candidates for faulty question is definitely not as per law as the statute never anticipated such cases will ever arise. According to the learned Tribunal only option available to OPSC was to proceed as per the ratio of judgment of Hon'ble Supreme Court in the case of **Andhra Pradesh Public Service Commission** v. **K. Prasad & another** (*decided on 7.10.2013 in Special Leave to Appeal (Civil) No.25157 of 2013*), i.e., to delete the faulty questions and prorate the marks to the maximum marks to enable comparison among all candidates.

8. With regard to Issue No.(ii) the learned Tribunal held that there was no estoppel against law and since awarding of grace marks for faulty questions had not been declared in advance of the conduct of Preliminary Examination by the OPSC, it could not be held that opposite party no.1 have surrendered to the terms and conditions of the advertisement and she could not question basis of the evaluation of papers.

9. On Issue No.(iii), the learned Tribunal held that since the basis of evaluation, i.e., grace marks for faulty questions has been challenged here as a point of law and that could not prejudice the selected candidates as the list based on faulty evaluation could not be treated as a final list. Moreover only roll numbers of selected candidates have been published and not names. Accordingly, the learned Tribunal quashed Annexure-3 of O.A. No.2146(C) of 2014 and consequential action taken on that basis. In other words the learned Tribunal set aside the results of Preliminary Examination and further directed P.S.C to calculate marks of candidates by eliminating the faulty questions and negative marking and the marks be prorated to full marks and prepare select list of candidates on that basis for appearing at the Main Examination.

10 Challenging the above noted order of the learned Tribunal, the petitioner has filed the instant writ application.

11. Heard Mr. Rajat Kumar Rath, learned Senior Advocate for the petitioner-OPSC, Dr. Ashok Kumar Mohapatra, learned Senior Advocate for opposite party no.1, Mr. S.P. Mishra, learned Advocate General for opposite party no.2, Mr. H.S. Mishra, learned counsel for opposite party nos.4 & 5 (interveners), Mr. B.B. Mohanty, learned counsel for opposite party no.7 (intervener), Mr. J. Pattnaik, learned Senior Advocate for opposite party nos.8 and 9 (interveners), Mr. S.K. Padhi, learned Senior Advocate for opposite party no.10 (intervener), Mr. Dhuliram Pattanayak, learned counsel for opposite party no.11 (intervener) Mr. Sameer Kumar Das, learned counsel for opposite party nos.12 to 22 (interveners) and Mr. B. Routrary, learned Senior Advocate for opposite party nos.23 and 24 (interveners).

Mr. Rajat Kumar Rath, learned Senior Advocate for the petitioner submitted that though the result of Preliminary Examination was passed on 1.5.2014, opposite party no.1 never objected to the same though she had failed in the Examination and filed O.A. No.2146(C) of 2014 after about three months on 30.7.2014 at a belated stage when date for OCS Main Examination has already been announced, in order to create problems for large number of candidates, who were successful in OCS Preliminary Examination. In this context, Mr. Rath submitted that the conduct of opposite party no.1 would show that she had waived her rights. In this context, Mr. Rath relied on a decision of the Hon'ble Supreme Court in the case of **B.L. Sreedhar and others** v. **K.M. Munireddy and others** reported in **AIR 2003 SC 578**. In this background, the learned Tribunal should not have entertained the Original Application filed by opposite party no.1. Secondly, Mr. Rath submitted that though opposite party no.1 has filed O.A. No.2146(C) of 2014 with a prayer to quash Annexure-3 and also to set aside the result of Preliminary Examination issued on the basis of Annexure-3 she never cared to implead the successful candidates of OCS Preliminary Examination as parties. On this ground alone, the learned Tribunal should have thrown out the Original Application instead of deciding the same hurriedly in absence of necessary parties like selected candidates. He submitted that opposite party no.1 filed the Original Application on 30.7.2014 and the same was disposed of on 26.8.2014. In this context, he relied on the decisions of the Hon'ble Supreme Court in the cases of **H.C. Kulwant Singh and others** v. **H.C. Daya Ram and others** reported in **AIR 2014 SC 3083, Sadananda Halo** v. **Momtaz Ali Sheikh** reported in **(2008) 4 SCC 619**, **R. Sulochana Devi** v. **D.M. Sujatha and others** reported in **AIR 2005 SC 4152**, **Prashant Ramesh Chakkarwar** v. **Union Public Service Commission and others**

reported in **(2013) 12 SCC 489** and **Suresh** v. **Yeotmal District Central Co-operative Bank Limited and another** reported in **(2008) 12 SCC 558**. Mr. Rath further submitted that though there was a gap of about three months between publication of results and filing of O.A. No.2146(C) of 2014 by opposite party no.1, she never attempted to get the names of the successful candidates from the petitioner. According to Mr. Rath, the candidates, who were successful in the Preliminary Examination, result of which was published on 1.5.2014, were necessary parties and reiterated that the learned Tribunal has gone wrong in adjudicating the matter in absence of necessary parties. Accordingly, Mr. Rath prayed for interference by this Court in the final order dated 26.8.2014 passed by the learned Tribunal in O.A. No.2146(C) of 2014. Thirdly, Mr. Rath pointed out that pursuant to Notice No.779/P.S.C. dated 18.2.2014 by which P.S.C. published model answers to the questions inviting observations/comments from candidates of general public, opposite party no.1 never objected to that. She also never submitted any objection to publication of correct model answers and procedure for evaluation of answer sheets published in the Website of OPSC on 1.5.2014. Even after result of Preliminary Examination was published on 1.5.2014, she never made any objection. Thus, on this basis also O.A. No.2146(C) of 2014 filed by opposite party no.1 mainly attacking the select list on the ground of giving of grace marks was also not maintainable. Fourthly, Mr. Rath with regard to merits of the case submitted that as per settled principle of law, the petitioner could adopt any reasonable method and according to him the procedure adopted by OPSC in awarding full marks to the candidates in case of wrong questions or faulty questions in an uniform manner was reasonable and the same could not be faulted. In this context, Mr. Rath relied on Prashant Ramesh Chakkarwar's case (*supra*). Lastly, Mr. Rath submitted that since the order passed by the learned Tribunal in O.A. No.2555(C) of 2014 was entirely based on the order passed in O.A. No.2146(C) of 2014 and in case W.P.(C) No.16601 of 2014 was allowed the basis for passing of the final order in O.A. No.2555(C) of 2014 would go and for that reason no separate writ application has been preferred by OPSC against the final order passed in O.A. No.2555(C) of 2014. In this context, Mr. Rath relied on the decision in the case of **Director of Settlements, A.P. and others** v. **M.R. Apparao and another** reported in **(2002) 4 SCC 638**.

12. Dr. Ashok Kumar Mohapatra, learned Senior Advocate for opposite party no.1 submitted that as per Schedule-II of "1991 Rules", the marks obtained in the Preliminary Examination were not counted for ranking and

further candidates selected in the Preliminary Examination have no right to be appointed as they were yet to clear the Main Examination and Personality Tests. Further, according to Dr. Mohapatra as per Note (ii) attached to Schedule-III of "1991 Rules" Preliminary Examination was only a scrutiny test. In such background according to him the candidates selected in Preliminary Examination, who would sit in the Main Examination were not necessary parties to the case. Secondly, Dr. Mohapatra submitted that moreover opposite party no.1 has mainly challenged the illegalities committed by the OPSC in granting grace marks. In such background, there was no need to implead those candidates, who were successful in the Preliminary Examination. In this context, Dr. Mohapatra relied on the decisions of the Hon'ble Supreme Court in the cases of **B. Prabhakar Rao and others** v. **State of Andhra Pradesh and others** reported in **AIR 1986 SC 210** and **Rajesh Kumar and others, etc**. v. **State of Bihar and others**, **etc.** reported in **AIR 2013 SC 2652**,. Thirdly, Dr. Mohapatra submitted that the judgments cited by Mr. Rath were all factually distinguishable. Thus, they have no application to the present case. Lastly, with regard to direction for fresh evaluation on pro rata basis given by the learned Tribunal, Dr. Mohapatra supported the same and relied on the decision of Punjab & Haryana High Court in the case of **Jitender Kumar and another** v. **Haryana Public Service Commission** decided on 30.8.2012 in C.W.P. No.10309 of 2012 and the decision of the Hon'ble Supreme Court rendered in **Andhra Pradesh Public Service Commission** v. **K. Prasad and another** decided on 7.10.2013 in Special Leave to Appeal (Civil) No.25157 of 2013 and **Pankaj Sharma** v. **State of Jammu and Kashmir and others** reported in **(2008) 4 SCC 273**.

It may be noted here that pursuant to this Court's order dated 3.9.2014 some successful candidates of Preliminary Examination intervened in this writ petition. While some of them supported the result of Preliminary Examination published by the PSC and strangely, others (opposite party nos.7,8,9 & 10) supported the impugned order passed by the learned Tribunal without ever challenging the results of Preliminary Examination.

13. Mr. J. Patnaik, learned Senior Advocate for opposite party nos.8 and 9 (interveners), who were successful candidates defended the impugned order without ever challenging the OPSC Preliminary merit list. Mr. Patnaik tried to distinguish the judgments cited by Mr. Rath on facts and contended that the selected candidates were not required to be impleaded before the learned

Tribunal. In this context, Mr. Patnaik relied on the decisions of the Hon'ble Supreme Court in the cases of **A. Janardhana v. Union of India and others** reported in **AIR 1983 SC 769, Post Graduate Institute of Medical Education and Research and another** v**. A.P. Wasan and others** reported in **AIR 2003 SC 1831** and **The General Manager, South Central Railway, Secunderabad and another** v**. A.V.R. Siddhanti and others** reported in **AIR 1974 SC 1755**. With regard to the direction of the learned Tribunal for evaluation of pro rata basis, he relied on the decisions of the Hon'ble Supreme Court in Vikas Pratap Singh's case (*supra*) and in Pankaj Sharma's case (*supra*).

14. Mr. S.K. Padhi, learned Senior Advocate for opposite party no.10, who is one of successful candidates, like Mr. Patnaik supported the impugned final order and submitted that the selected candidates like opposite party no.10 were not required to be impleaded before the learned Tribunal as they could at best be described as proper parties and not necessary parties. In this context, Mr. Padhi relied on the decisions in Govt. of A.P.'s case (*supra*), in the cases of **Joseph Leon** v. **Nidheesh B.** of Karnataka High Court decided on 8.8.2014 in OP (KAT) No.112 of 2014 (z) and **Mr. S.K. Jain** v. **Mr. P.S. Gupta and others** of Delhi High Court decided on 14.3.2002, The General Manager, South Central Railway, Secunerabad's case (*supra*) & Rajesh Kumar's case (supra). In support of the direction of the learned Tribunal for pro rata evaluation, Mr. Padhi relied on the decisions in Kanpur University's (supra), Pankaj Sharma (*supra*), Vikas Pratap Singh's case (supra) and in the case of **Guru Nanak Dev University** v. **Saumil Garg and others** reported in **(2005) 13 SCC 749** the decision of the Hon'ble Supreme Court rendered in Andhra Pradesh Public Service Commission's case (supra) and **RPSC, Ajmer** v**. Santosh Kumar Sharma** of Rajasthan High Court as decided on 25.10.2013. Further, he contended that even assuming that the order of the learned Tribunal was bad in law and therefore, was liable to be quashed, still by quashing the judgment of the learned Tribunal, the illegal decision of OPSC in awarding full marks would be revived. Such a course was not open in view of the decision rendered in the cases of **Gadde Venkateswara Rao** v. **Government of Andhra Pradesh and others** reported in **AIR 1966 SC 828, Maharaja Chintamani Saran Nath Shahdeo** v. **State of Bihar and others** reported in **AIR 1999 SC 3609**, **Chandra Singh** v. **State of Rajasthan and another** reported in **AIR 2003 SC 2889** and **State of Uttaranchal through Collector, Dehradun and others** v. **Ajit Singh Bhola and another** reported in **(2004) 6 SCC 800**. According to Mr. Padhi even as

per parameters laid down by the Hon'ble Supreme Court in the case of **Udit Narayan Singh Malpaharia** v. **Additional Member, Board of Revenue, Bihar and another** reported in **AIR 1963 SC 786** the selected candidates can only be described as proper parties not necessary parties. With regard to the proper evaluation he relied on the decisions reported in the case of **Manish Ujwal and others** v. **Maharish Dayananda Saraswati University and others** reported in **(2005) 13 SCC 744** and Guru Nanak Dev University (supra). Mr. Padhi further submitted that when the quantum of wrong questions differ from paper to paper the direction of the learned Tribunal for pro rata evaluation was rational, reasonable, legal and valid.

15. Mr. B.B. Mohanty, learned counsel for opposite party no.7, who is one of the successful candidates, supported the final order passed by the learned Tribunal like Mr. J. Patnaik & Mr. S.K. Padhi learned Senior Advocates. Mr. Mohanty invited our attention to Clause-1, Clause-8(ii), Note No.4 to Clause-11 and Note No.2 of Clause-14 of the Advertisement and contended that the candidates selected in the Preliminary Examination were provisionally selected and were thus not necessary parties as Preliminary Examination was only a qualifying Examination and their admission at all stages of Examination were purely provisional. Thus, according to Mr. Mohanty no fault could be found in the final order passed by the learned Tribunal. He relied on a decision in the case of **Narmada Bachao Andolan** v. **State of Madhya Pradesh and another** reported in **AIR 2011 SC 1989** and tried to distinguish the judgments cited by Mr. Rath, learned Senior Advocate for the petitioner, by relying on Paragraph-59 of the said judgment as to how the judgments are to be read. He also relied on the decision in the case of **Shankarsan Dash** v. **Union of India** reported in **AIR 1991 SC 1612** and contended that the selected candidates did not have any right to the post and inclusion of candidates in the merit list did not confer any right of appointment on them. In such background, he contended that the selected candidates of Preliminary Examination could not be described as necessary parties and while answering Issue No.iii, the learned Tribunal has rightly held that since it was deciding a point of law and selected candidates can in no way be prejudiced as the list was based on faulty evaluation.

16. Mr. H.S.Mishra, learned counsel appearing for opposite party nos.4 and 5 (interveners) supported the 1st part of the direction of the learned Tribunal and attacked the second part. Mr. D.R. Patnaik, learned counsel for opposite party no.11 made general submission.

17. Mr. Rath, learned Senior Advocate for the petitioner in reply to the submissions made by Dr. Mohapatra, learned Senior Advocate for opposite party no.1, Mr. J. Pattnaik, learned Senior Advocate for opposite party nos.8 and 9, Mr. S.K. Padhi, learned Senior Advocate for opposite party no.10 and Mr. B.B. Mohanty, learned counsel for opposite party no.7 and Mr. H.S. Mishra, learned counsel for opposite party nos.4 and 5 submitted that as per Schedule-II of "1991 Rules", the competitive examination has three stages and each stage consisted of process of selection and elimination. Inviting our attention to Rule 12(1) and Paragraph-2 of Schedule-II of "1991 Rules", Mr. Rath contended that as per the provisions made therein a person clearing the Preliminary Examination acquired a right to appear in the Main Examination. According to him, here what was at stake was not right to be appointed but a right to sit in the Main Examination. Therefore, all the selected candidates, who have been selected in the Preliminary Examination have this right to sit in the Main Examination. Thus they were necessary parties, who should have been heard by the learned Tribunal. In this context, Mr. Rath relied on five decisions of the Hon'ble Supreme Court as indicated earlier. He contended that it has been made clear by the Hon'ble Supreme Court that if a party is likely to suffer from order of the Court, he is a necessary party and such parties should be impleaded in the petition and notice be served on them. According to him it has been made clear by the Hon'ble Supreme Court that the parties who are interested in a proceeding and would be affected thereby are not only proper but are necessary parties. Thus, the persons, who are interested in maintaining the regularity of the proceeding, are necessary parties. He further stated that such decisions make it clear that all the parties in whose favour the impugned order or notification has been passed were/are necessary parties. According to him quashing of the Preliminary Examination result without hearing the selected candidates, who were necessary parties thus vitiated the entire proceeding before the learned Tribunal. Secondly, he contended that opposite party no.1 moved the learned Tribunal as her right to sit in the Main Examination got affected by her failure in the Preliminary Examination. Therefore, before the learned Tribunal she prayed that the result of Preliminary Examination be set aside and results be published afresh by fair and lawful evaluation with the hope that fresh evaluation would get back her right to sit in the Main Examination. If opposite party no.1 has/had no such right, she could not be described as a person aggrieved under Section 19 of the Administrative Tribunals Act, 1985. Thus, Original Application at her behest would not be maintainable. This right to sit in the Main

Examination of selected candidates have been affected by passing of the impugned order without hearing them and this violated the principles of natural justice. Further, according to Mr. Rath as per Section 22(1) of the Administrative Tribunals Act, 1985, it is clear that the learned Tribunal while discharging its functions should be guided by the principles of natural justice. This has been violated as selected candidates were not before the learned Tribunal to have their say. Further, he submitted that though pursuant to the order dated 3.9.2014 passed by this Court some successful candidates have intervened defending the merit list of Preliminary Examination, however, as per settled principles of law the same was not enough. In this context, he relied on the decision in Sadananda Halo's case (*supra*). According to Mr. Rath, the selected candidates of Preliminary Examination who were necessary parties should have got an opportunity at the stage of the learned Tribunal itself. With regard to four successful candidates (opposite party nos.7 to 10) out of 5823 selected candidates, who have intervened here and were being represented by Mr. Pattnaik, Mr. Padhi and Mr. Mohanty, Mr. Rath submitted that their pleas in defending the impugned order should be ignored as they had never challenged the results of the Preliminary Examination. Further 4 out of 5823 successful candidates could not be said to represent the majority of the selected candidates. Further he submitted that violation of principles of natural justice by itself is a prejudice. Therefore, the learned Tribunal has gone wrong in saying that the selected candidates would in no way suffer prejudice. With regard to that he relied on the decisions in the cases of **Union Carbide Corporation etc**. v. **Union of India etc.** reported in **AIR 1992 SC 248, Mysore Urban Development Authority** v. **Veer Kumar Jain and others** reported in **(2010) 5 SCC 791**. Relying on the case of **Jayendra Vishnu Thakur** v. **State of Maharashtra and another** reported in **(2009) 7 SCC 104**, and, **Rajasthan State Road Transport Corporation and another** v. **Bal Mukund Bairwa(2)** reported in **(2009) 4 SCC 299**, Mr. Rath submitted that once principles of natural justice have been violated the order becomes a nullity. He also tried to distinguish the judgments cited by Mr. Pattnaik, Mr. Padhi and Mr. Mohanty saying that those judgments are factually distinguishable. He also submitted that none has challenged the notice dated 22.2.2012 issued by the petitioner relating to coming into force of awarding of negative marks. Lastly, he pointed out that despite liberty granted by this Court opposite party no.1 did not sit in the Main Examination.

18. Supporting the contentions of Mr. Rath, Mr. B. Routrary, learned Senior Advocate for opposite party nos.23 to 25 (interveners) submitted that since they were successful in the Preliminary Examination, they had a right to sit in the Main Examination as per Rule-12 and Clause-2 of Schedule-II of 1991 Rules. He heavily relied on the decision in Udit Narain Singh Malpaharia's case (*supra*) and contended that his clients were/are necessary parties as they had been directly affected by the impugned order. Further, he relied on the decision in the case of **All India SC & ST Employees' Association and another** v. **A. Arthur Jeen and others** reported in **(2001) 6 SCC 380** and contended that even a person who had got his name included in the provisional merit list/selection list had a substantive right and such a right could not be tampered without hearing him. His clients have a vital interest in defending the select list of Preliminary Examination, from which their right to sit in the Main Examination flowed. In this context, he relied on the decisions in the case of **Prabodh Verma and others** v. **State of Uttar Pradesh and others** reported in **AIR 1985 SC 167**, **Public Service Commission, Uttaranchal** v. **Mamta Bisht and others** reported in **AIR 2010 SC 2613** and **J.S. Yadav** v. **State of Uttar Pradesh and another** reported in **(2011) 6 SCC 570**.

19. Mr. Samir Kumar Das, learned counsel appearing for 11 interveners, who have been arrayed as opposite party nos.12 to 22 submitted that his clients were all selected candidates of Preliminary Examination. He invited our attention to the prayer made in O.A. No.2146(C) of 2014. Thus, the prayer was made to set aside the select list of Preliminary Examination. This being the prayer, the opposite party nos.12 to 22 being the selected candidates were directly interested in the out come of such a case and had there been a notice to them they would have defended their position and the right flowing from Preliminary Examination, i.e., to sit in the Main Examination. If pro rata evaluation be allowed to be followed, his clients might lose their position in the merit list. Therefore, they ought to have been heard and since the final order has been passed behind their back, they have been greatly prejudiced. In such background, like Mr. B. Routrary appearing for opposite party nos.23 to 25, Mr. Das submitted that the writ application filed by the OPSC deserved to be allowed. Secondly, he submitted that the present matter revolves around the subject of recruitment to Odisha Civil Services. As per the Notification issued by the Chairman under Section 5(6) of the Administrative Tribunals Act, 1985 such subject matter has been assigned to a Division Bench. Therefore, the acting Chairman sitting singly

should not have disposed of the matter hurriedly. For this reason, the matter should be remanded to the learned Tribunal for disposal afresh in accordance with law. Thirdly, he submitted that as per the decision reported in the case of **Dr. Mahabal Ram** v. **Indian Council of Agricultural Research and others** [**(1994) 2 SCC 401**], it had been made clear by the Hon'ble Supreme Court that where questions of law were involved, the matter should be assigned to a Division Bench of the learned Tribunal. A perusal of the impugned final order, with regard to Issue No.iii would show that the learned Tribunal at Paragraph-13 has recorded that the basis of valuation has been challenged here as a point of law. In such background, the acting Chairman should have referred the matter to a Division Bench. He further submitted that the decision of the Hon'ble Supreme Court relied by the learned Tribunal, i.e., **Andhra Pradesh Public Service Commission** v. **K. Prasad and another** is factually distinguishable. Therefore, according to him direction for prorated evaluation might not be proper. He further submitted that had his clients been made parties, they would have pointed out all these things so that the matter could have been decided by a learned Division Bench. In any case he submitted that great prejudice had been caused to his clients by their non-impletion and accordingly, the writ application deserves to be allowed.

20. In order to appreciate the contention raised by Mr. Das, learned counsel for opposite party nos.12 to 22 vide order dated 22.12.2014, this Court directed the Deputy Registrar, Orissa Administrative Tribunal, Cuttack Bench, Cuttack and Registrar, Orissa Administrative Tribunal, Principal Bench, Bhubaneswar to produce Office Order, if any, issued before 26.8.2014 by the Chairman under Section 5(6) of the Administrative Tribunals Act. Pursuant to the said order Mrs. Mishra, Registrar, Orissa Administrative Tribunal, Bhubaneswar appeared in person before this Court on 24.12.2014 and filed the relevant Office Orders. As per the documents, it is clear that prior to passing of the impugned order on 26.8.2014 by the learned Tribunal, the last notification was issued by the order of Chairman on 28.9.2013. In fact on 28.9.2013 two office orders have been issued by order of the Chairman. While one of the office order relates to categories of case to be heard by a single Member Bench and the other one relates to the categories of case to be heard by a Division Bench. This later order covering Division Bench matters at Sl. 29 includes recruitment as a Division Bench matter.

21. In reply to Mr. Das's contention based on Dr. Mahabala Ram's case and Notification issued by the Hon'ble Chairman of the learned Tribunal referred to above, Dr. Mohapatra submitted that a Single Bench of the learned Tribunal can decide any illegality. In this context, he relied on the decision in the case of **Indermani Kirtipal** v. **Union of India and others** reported in **AIR 1996 SC 1567**, **2000 (2) KLJ 341** of Karnatak High Court, **2001 (3) ALT 88** of Andhra Pradesh High Court, **2003 (3) LLJ 203** of Madras High Court.

22. Mr. S.P. Mishra, learned Advocate General appearing for opposite party no.2 supported the contention of the petitioner. He further highlighted the problem of large number of vacancies.

23. Upon hearing the parties and on perusing the documents including L.C.R., the following issues arise for consideration in this case.

1. Whether selected candidates of the Preliminary Examination were required to be made parties before the learned Tribunal?
2. Whether in view of office order dated 28.9.2013, a Single Member Bench has/had authority to hear a matter relating to recruitment when vide said office order, the Hon'ble Chairman has clearly categorized, the same as a Division Bench matter ? In other words whether the learned Single Member has exceeded his jurisdiction in entertaining a matter outside his province ?
3. Whether a person, who failed in the preliminary Examination and who never objected to the said results and who never objected to model answers published inviting observations/comments, who never objected to procedure of evaluation, can file an Original Application after three months of the declaration of the result in the background of principles of waiver and acquiescence ?
4. Whether the learned Tribunal has passed a proper order on merits directing evaluation on pro rata basis ?

24. Coming to Issue No.1, let us scan the various averments and prayer made by opposite party no.1 in the Original Application. At Paragraph-3 of the Original Application opposite party no.1 makes it clear that she challenges the illegal selection made in the Preliminary Examination, 2011 by the OPSC by adopting wrong and illegal marking procedure. At Paragraph-6.8 of the Original Application in the middle portion opposite party no.1 clearly averred that the result of preliminary examination of Orissa

Civil Services Examination is illegal and void as the OPSC has acted beyond jurisdiction in giving grace marks in the answer scripts as evident from Annexure-3 by differential treatment which is discriminatory and unconstitutional. Further, in the said Paragraph it is averred that the approach of OPSC in giving grace mark is per se illegal and nonest in the eye of law. If the root goes the super structure falls. So the result of preliminary examination has been vitiated, which is liable to be set aside. At Paragraph-6.9 opposite party no.1 says she has a very good prima facie case to come out successful as per her expectation, if fair evaluation will be made as per law. At Paragraph-7 opposite party no.1 has made following prayer;

> "7. That in view of the facts mentioned above the applicant therefore prays that the Hon'ble Tribunal should set-aside the grace marks adopted in preliminary examination vide Annexure-3 and also set-aside the result of preliminary examination on the basis of Annexure-3 and direct to publish result as per law by fair and lawfully evaluation and any other order as deem fit be passed."

25. Thus one thing is clear that on one ground or another, opposite party no.1 has averred that the result of the Preliminary Examination conducted by the petitioner has been vitiated and accordingly, she prayed for setting aside the result of preliminary examination. As indicated earlier about 5823 candidates succeeded in the preliminary examination. As per Rule 12(1) of 1991 Rules read with Clause-II of Schedule-II of 1991 Rules, it is clear that the candidates qualifying the Preliminary Examination shall only be called by the Commission to appear in the Main Examination. Thus, the candidates, who qualified in the Preliminary Examination got the right to appear in the Main Examination. In such background, it is needless to say that the selected 5823 successful candidates have a right to appear in the main examination as per 1991 Rules, which is a rule made under Proviso to Article 309 of the Constitution of India. Since the select list containing roll nos. of 5823 successful candidates has been set aside by the learned Tribunal, it clearly offends their right to sit in the Main Examination. As per the law laid down by a 4-Judge Bench of the Hon'ble Supreme Court in the decision in Udit Narayan Singh Malpaharia's case (supra), it is clear that persons, who are going to be directly affected or against whom relief is sought are necessary parties and they should be named in the petition. It has also been made clear that the parties in whose favour an order or notification has been issued and when the same order or notification is challenged, the said parties are

necessary parties. To the same effect is the judgment of the Hon'ble Supreme Court in H.C. Kulwant Singh's case (supra). Even as per the decision in the case of Prashant Ramesh Chakkarwar's case, where results of the Civil Services Main Examination was under challenge, the Hon'ble Suprme Court has held that non-impletion of candidates selected in the Civil Service Main Examination was fatal. It may be noted here that even though a candidate selected in the Main Examination has no right to be appointed at that stage, but has a right to appear in the interview. In All India SC & ST Employees' Association's case (supra), the Hon'ble Supreme Court has made it clear that the candidates, whose names are there in the provisional selection even have interest/right in protecting and defending that select list. A reading of decision rendered in Sadananda Halo's case (*supra*) makes it clear that the Hon'ble Supreme Court was not satisfied with the course of action taken by the High Court in inviting the objections from the selected candidates, who were never bothered to be made parties. In this context the decision cited by Dr. Mohapatra in B. Prabhakar Rao's case (*supra*) is factually distinguishable. In that case Ordinance was challenged and no relief was claimed against the individuals. So far as the decision in Rajesh Kumar's case (*supra*) cited by Dr. Mohapatra is concerned, the same is also factually distinguishable. Though the court therein took note of non-impletion of parties, no finding was recorded on its impact on account of the nature of direction given by the Hon'ble Court at Paragraph 19(4) of the judgment.

26. Now coming to the decision cited by Mr. Patnaik, learned Senior Advocate on the point that the selected candidates were not necessary parties, it can be said that those decisions are also factually distinguishable. Mr. Patnaik relied on the decisions in A. Janardhana's case (*supra*), Post Graduate Institute of Medical Education and Research's case (*supra*) and The General Manager, South Central Railway, Secunderabad's case (*supra*). These decisions do not refer to the 4-Judge Bench decision of the Hon'ble Supreme Court in Udit Narayan Singh Malpaharia's case (supra). Further, in A. Janardhana's case (*supra*), no relief has been claimed against individuals unlike the present case. No seniority was also claimed there. Further, some direct recruits had represented their case before the High Court. Unlike the present case, in Post Graduate Institute of Medical Education and Research's case (supra), Policy of Promotion was under challenge and in The General Manager, South Central Railway, Secunderabad's case (supra) constitutional validity of policy decision was under challenge. Further there was no

list/order fixing seniority. It is in such background, it was held that non-joinder of parties, who were likely to be affected not fatal.

27. On this point, Mr. Padhi cited the decision of the Hon'ble Supreme Court in The General Manager, South Central Railway, Secunderabad's case (supra), Gadde Venkateswar Rao's case (*supra*), Rajesh Kumar's case (supra), Joseph Leon's case of Kerala High Court (*supra*), S.K. Jain's case of Delhi High Court (*supra*), which are all factually distinguishable. These above noted decisions do not refer to the 4-Judge Bench decision in Udit Narayan Singh Malpaharia's case (*supra*). We have already distinguished the decisions reported in The General Manager, South Central Railway, Secunderabad's case (supra) and Rajesh Kumar's case (*supra*) above. Now coming to the decision in Gadde Venkateswar Roa's case (*supra*) unlike the present case, in that case validity of rule was under challenge. So impletion was held not to be necessary. In Joseph's case at least paper publication was made. In S.K. Jain's case if not all some were impleaded as parties. So far as the decision in Udit Narayan Singh Malpaharia's case (*supra*) is concerned, Mr. Padhi tried to distinguish the same by advancing a submission that here no right of the selected candidates have been finalized/crystallized, therefore, they were not necessary parties. But as we have discussed earlier here the right to sit in the Main Examination of successful candidates of Preliminary Examination stood finalized by the Preliminary Results. As per the decision in All India SC & ST Employees' Association's case (supra) such selected candidates had every right to defend and protect their position even in provisional select list. So far as his reliance on the decision in Gadde Venkateswara Rao's case (*supra*), Maharaja Chintamani Saran Nath Shahdeo's case (*supra*), Chandra Singh's case (*supra*) and State of Uttaranchal through Collector, Dehradun's case (*supra*) are concerned to buttress his submission that an order should not be quashed to revive an illegal order, it can only be said such arguments lies ill in the mouth of opposite party no.10, who has not challenged the preliminary examination result himself as illegal. Had opposite party no.10 been arrayed as a respondent by opposite party no.1, we doubt whether he would have supported opposite party no.1 there instead of defending his position in the Preliminary Examination merit list, which he is now attacking.

28. So far as the decision in Shankarsan Dash's case (*supra*) as cited by Mr. Mohanty is concerned, in that case the matter related to whether a person has right of appointment on being selected. Here issue is not right of

appointment but a right to sit in the OCS Main Examination. On the principles relating to precedents as laid down in AIR 2011 SC 1989, there exists no dispute as to their applicability.

29. Even otherwise as per Section 22 of the Administrative Tribunals Act, 1985, the learned Tribunal while disposing of a case or adjudicating a matter has to be guided by principles of natural justice. One facet of such principle is that no body should be condemned unheard. Here selected candidates, 5823 in number, have been condemned unheard by setting aside their selection in their absence. For all these reasons, we come to a conclusion that the selected candidates are necessary parties and the learned Tribunal has gone wrong in disposing of the matter without insisting on their presence in tune with the principles of natural justice. As held in Prabodh Verma's case (*supra*), the learned Tribunal ought not to have proceeded without insisting on impletion of the selected candidates as respondents and/or at least some of them being made parties in a representative capacity and had the opposite party no.1 refused to do so, it would have dismissed the Original Application for non-joinder of necessary parties.

30. Coming to the Issue No.2 relating to hearing of a matter by a learned single Member Bench; as has been indicated earlier as per Notification dated 28.9.2013, the Hon'ble Chairman in tune with the requirement of Section 5(6) of the Administrative Tribunals Act, 1985 has made it clear that matter relating to the recruitment is a Division Bench matter. Secondly, in the impugned order itself while discussing Issue No.iii, the learned Single Member Bench has observed that the matter involves a point of law and in such background in tune with the judgment of the Hon'ble Supreme Court in Dr. Mahabalaram's case (*supra*), the matter should not have been disposed of by a learned Single Member Bench and should have gone before a Division Bench. With regard to the decision cited by Dr. Mohapatra, learned counsel for opposite party no.1 in Indermani Kirtipal's case (*supra*) it may be noted here that the said case is factually distinguishable. In the present case successful candidates were not made parties before the learned Tribunal. Mr. Das, learned counsel for opposite party nos.12 to 22 in his submission made it clear that had they been made parties they would have surely raised these issues and would have drawn the attention of the learned Tribunal to the decision in Dr. Mahabal Ram's case (supra). Further, there is no reference to Dr. Mahabala Ram's case, a 3-Judge Bench decision Indermani Kirtipal's case (supra). Thirdly, from the facts of the said judgment, it is not clear as to

whether like in the present case where Hon'ble Chairman has assigned the recruitment matter to a Division Bench, whether in the said case there was any such Notification for taking up promotion matter by a Division Bench. Further as has been submitted by Mr. Das had his clients been made parties, he would have raised that issue before the learned Tribunal. Simply because the petitioners had not raised the issue would not go against his clients as the rights of opposite party nos.12 to 22 to protect and defend the select list from which their right to sit in the Main Examination flowed have been taken away behind their back. Section 5(6) of the Administrative Tribunals Act, 1985 provides that a Single Bench can only take up such matters, which have been assigned to it by the Hon'ble Chairman. Here as indicated earlier, the matter relating to recruitment was never assigned to the single Member Bench by the Hon'ble Chairman. For all these reasons we have no hesitation to hold that the order passed by the learned Single Member Bench is wholly without jurisdiction. The decisions cited by opposite party no.1 reported in 2000 (2) Karnataka Law Journal 341, 2001 (3) ALT 88, (2003) 3 LLJ 203 are factually distinguishable. In (2003) 3 LLJ since there was only one Member, i.e., a Vice Chairman for the entire Tribunal, the High Court observed that the matter can be heard by the said learned Single Member Bench though the matters should have gone before a Division Bench because as per settled principles of law, the Tribunal is the Court of first instance and on the ground of doctrine of necessity. Here, it is nobody's case that on the date of disposal the Odisha Administrative Tribunal was functioning with one Member only. In 2001 (3) ALT 88 parties directly approached the High Court and accordingly High Court directed to approach the Tribunal first. In 2000 (2) KLJ 341, there is no reference to Dr. Mohabala Ram's case. Further, here the point relating to hearing by Division Bench has been raised by successful candidates, who were deliberately not made parties before the Tribunal. Moreover, here clear cut notification to refer the matter to a Division Bench is there. For all these reasons, we hold that the learned Single Member had no jurisdiction to hear and dispose of the Original Application and by doing so, he exceeded his jurisdiction.

31. In view of our findings above, we do not think it proper to discuss the other issues framed by us and those issues are left open. Accordingly, without expressing any opinion on the merits of the case, we set aside the order dated 26.8.2014 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack and remit the matter to the learned Tribunal with a request to dispose of O.A. No.2146(C) of 2014 in accordance with law as expeditiously as

possible preferably within a period of three months keeping in mind the observations made by us above. Further, in order to avoid multiplicity of litigation, we direct that till disposal of O.A. No.2146(C) of 2014, no evaluation should be made of OCS (Main) Examination papers. In order to expedite the matter, we further direct the petitioner-OPSC to supply a sizeable number of names and addresses of successful candidates of Preliminary Examination to opposite party no.1, if a request is made to that effect, whereupon opposite party no.1 would be at liberty to implead them in a representative capacity as respondents before the learned Tribunal. Before saying omega, we expect that the State Government and the petitioner should make all endeavours to conduct Odisha Civil Services Combined Competitive Recruitment Examination regularly every year keeping in mind mandatory provision of "1991 Rules" in the background of submission of the learned Advocate General relating to existence of large number of vacancies.

A copy of the judgment be sent to the Chief Secretary, Government of Odisha for his information and immediate necessary action.

32. The writ application is accordingly allowed with the above noted observations. No costs. LCR be sent back forthwith.

Writ petition allowed.

2015 (I) ILR - CUT- 477

VINOD PRASAD, J & PRAMATH PATNAIK, J.

JCRLA NO.76 OF 2010

KATORAMSING BANARA ……..Appellant

.Vrs.

STATE OF ODISHA ……..Respondent

PENAL CODE, 1860 – S. 302

Conviction of Appellant U/s. 302 I.P.C. with sentence of imprisonment of life – No credible evidence to convict the appellant for the charge of murder but he has already suffered

14 years of incarceration – Court cannot compensate those 14 years which the appellant served in the jail – Held, while setting aside the impugned conviction and sentence this Court observed that hence forth, the trial judges will take into consideration the entire facts and circumstances in all its pros and con and then will come to a conclusion. (Paras 13,14,15)

For Appellant - M/s. Sonita Biswal
For Respondent - M/s.Sk.Zafarulla, A.S.C.

Date of hearing : 11.12.2014
Date of judgment: 11.12. 2014

JUDGMENT

VINOD PRASAD, J.

The appellant Katoramsing Banara, who is an Adibasi belonging to a Scheduled Tribe, has knocked the door of this Court through the instant appeal challenging the impugned judgment of his conviction u/s 302 I.P.C., dated 25.03.2003, recorded by the learned Sessions Judge, Myurbhanj, Baripada in Sessions Trial Case No. 210 of 2001(State Vrs. Matal Murmu and others), and imposed sentence of life imprisonment therefor, while being acquitted for the charge u/s 201 I.P.C. by the same judgment.

2. Stating the prosecution version concisely, as is manifest from the prosecution evidences, both oral and documentary, that Mantising Bandra, resident of Mauja Purnadiha, Champai Singh/PW3, resident of Ranagnuadiha, and the appellant Katoramsing, resident of Mauja Khodabahali, all under the same police station Sarat, district Mayurbhanj, were brothers. Informant Smt. Jambising Bandra/PW1 is the wife of Mantising Bandra and mother of Pradhansing Bandra(deceased), whose erstwhile wife, now his widow, is Jamunasing Bandra/PW2. Sukumar, is the sister of the appellant who is married to one Silei Ho, resident of village Dangadiha. It is alleged that on 1.10 2000, a Sunday, appellant came to the house of the informant and for gaming purposes both left with bow and arrows. From the house of the informant and the deceased both went to the village of the sister namely Dangadiha. Joda Ho, a resident of that village wanted to dispose off one S.B.M.L. gun at a price of `` 500/-(Rupees five hundred). The deceased as well as the appellant agreed to purchase that gun at that price and an advance of ` 50/-(Rupees fifty) taken from one Baju Ho

was paid the seller Joda Ho with understanding that residue of the sale price shall be paid within a week. Joda Ho, however, had handed over the gun to the deceased-Pradhansing Banara. From the Village Dangadiha, the appellant along with the deceased and Silei Ho came to Kukum Handia Depot, where they stayed during the night. Other acquitted accused persons, namely, Matal Murmu and Rodo Ho also arrived there. At the Depot, the accused persons and the deceased along with their companion consumed locally brewed liquor called "*Handia*". It is further alleged that under influence of that intoxication that muscle flexing ensued between the appellant and the deceased amidst which deceased was assaulted fatally. Testimony of Dibar Singh/P.W. 16, who was examined as an eye witness to the scuffle, further reveals that when the scuffle was going on, he had left that place.(There is complete absence of any further evidence regarding any happening after that). Subsequently, as per prosecution version, the appellant alone returned to the native village on 5.10.2000 and that day at about 4 p.m. came to the house of the informant and the deceased and inquired as to whether he had come back or not? Informant mother then inquired about the welfare of her son but without any satisfactory answer. Subsequently, on 7.10.2000, he again came to the house of the deceased and informed the mother that the cadaver of the deceased was lying at Sapanghutu hill. The informant along with her family members went to the spot where the cadaver was lying. Initially an U.D. case was registered and subsequently a formal F.I.R. was registered at the police station regarding the demise of the deceased. Investigation, which followed resulted in submission of charge sheet against the accused persons including the appellant.

3. Case of the appellant was committed to Sessions court for trial and since appellant abjured charge of murder that his prosecution commenced during course of which eighteen prosecution witnesses and one defence witness were examined on behalf of the both sides. P.W.1 is the informant and mother of the deceased, P.W.2 is the widow of the deceased and P.W.3 is the uncle of the deceased. Prosecution evidence further is that it was before Champai Singh that the appellant had made an extra judicial confession. The same is the evidence of P.W.4-Sadansing Kurty. P.W.5-Dibakarsingh Purty, is the scribe of the F.I.R. The other witnesses are the seizure witnesses and the police personnel. The Investigating Officer of the case is Rasananda Rout (P.W.18).

4. During course of the investigation, Lungi M.O.II, Blue colour pant M.O.III, Brown colour pant M.O.IV and Slight Blue colour pant M.O. V were seized.

5. The appellant had denied the allegation and the charge.

6. Learned trial judge concluded that though it is not a case of eye witness account, but from the circumstances, which according to him were last seen, confession of the appellant and recovery at his pointing out, the guilt of the appellant has been established beyond any shadow of doubt and therefore, convicted him for the charge of murder and sentenced him life imprisonment, which judgment has been assailed in the instant appeal.

7. We have heard Ms. Sonita Biswal, learned counsel for the appellant and Sk. Zafarulla, learned Additional Standing Counsel for the respondent-State.

8. Assailing the impugned judgment of conviction, learned counsel for the appellant has harangued that non of the circumstances alleged to have been established by the prosecution prove the guilt of the appellant, learned trial judge committed an error in accepting the prosecution version and convicting the appellant.

Sri Sk. Zafarulla, learned Additional Standing Counsel argues to the contrary and supported the judgment in its entirety.

9. We have considered the rival submissions and have gone through the record and the evidence both oral and documentary.

10. Admittedly, it is a case, which is based on indirect circumstantial evidence as there is no eye witness account. The first circumstance which weighed with the learned trial judge is the last seen evidence. According to the prosecution version, the deceased left the house in the company of the appellant on 1.10.2000 along with the bow and arrows for the purpose of hunting. We are unable to subscribe the opinion of the learned trial judge on this score because the evidence which has been tendered during the trial by the prosecution is that the deceased and the appellant both were very good friends. There was no hostility between them at the time when the appellant left the house in the company of the deceased. There was no motive for the appellant to annihilate the deceased. There was no adverse psyche possessed by the appellant and therefore, going of two friends together is not an evidence of last seen nor is incriminating. A circumstance of last seen to be

incriminating must be preceded by a hostile animus, which in the present case is missing. Learned trial judge instead of a critically examining the facts and circumstances proceeded in a pedantic way, did not critically appreciate the circumstance and recorded the finding that the last seen evidence exists against the appellant. In our view there was no last seen evidence, so far as appellant or any other accused is concerned.

11. Coming to another circumstance of confession, which, according to the prosecution version, was stated by P.W.3-Champai Singh and P.W.4-Sadansingh Kurty. After examining their depositions was emerges is that so far as P.W.3 is concerned, he recollected only the statement of confession. At what time, on what date and at what place the said confession was made is unbeknown to him. Such a statement by P.W.3 does not inspire any confidence and it only indicates that his testimony is an afterthought and a got up statement. The evidence of Sadansingh Kurty (PW.4) made the matter even worse because a close scrutiny of his evidence reveals that his testimony is hearsay of the worse kind. No reliance can be placed on the deposition of the aforesaid two witnesses and the learned trial judge fell in grave error in accepting their versions. Further it is statement of P.W.3 that after return from the hunting, appellant made a confession to him. This date although has not been spelt out, but we take it that it was on 5th October, 2000 that the confession was made. If that was the fact, it was very bizarre on the part of P.Ws. 3 and 4 to the keep the fact of murder of the deceased closed to their chest for another two days, as the fact reveals that factum of demise of the deceased was surfaced only on 7th October, 2000 after the statement made by the present appellant. In view of this very dicey circumstance, we are unable to attach any credit to the deposition of both P.Ws. 3 and 4 and therefore reject their testimonies in its entirety as uncreditworthy.

12. Coming to the 3rd circumstance, i.e., the recovery, the said recovery alone without any attending fact and culpable circumstance does not lead to establishing guilt beyond all reasonable doubt to the hilt. Merely on the recovery of the weapons i.e., the bow, conviction of the appellant could not and should not have been recorded.

13. There is another reason, why we are unable to subscribe to the opinion made by the learned trial judge and that is that according to the prosecution case itself, as was divulged by P.W.16 during the trial, the incident was preceded by a scuffle between the appellant and the deceased. Had that being the fact, a single assault on the deceased during that scuffle

would not bring the charge against the appellant within the ambit of section 302, IPC, and at the worst, what could have been concluded against the appellant is that he is guilty under Section 304, Part-I, IPC. Learned trial judge, without examining the implications and the prosecution charge, in a pedantic way recorded the conviction of the appellant under Section 302, IPC with sentence of life imprisonment and therefore, we are in disagreement with him. In our opinion there was no credible evidence against the appellant to convict him for the charge of murder. Therefore, the appellant is entitled to be acquitted.

14. We hereby record that without there being any credible material the appellant has already suffered 14 years of incarceration. The Court cannot compensate those 14 years which the appellant has already served in the jail, but certainly we would like to observe that henceforth, the trial judges will take into consideration the entire facts and circumstances in all its pros and con and then will come to a conclusion.

15. At the present, we are of the opinion that the impugned judgment of conviction and sentence of life imprisonment are wholly unsustainable and therefore, are hereby set aside.

The net result is that the appeal is allowed and conviction of the appellant as well as sentence through the impugned judgment and order dated 25.03.2003 recorded by the learned Sessions Judge, Mayurbhanj, Baripada in Sessions Trial No. 210 of 2000 is hereby set aside. The appellant is acquitted of the charge. The appellant is in jail. He is directed to be set at liberty forthwith unless he is wanted in connection with any other case or crime.

16. Let copy of the judgment be certified to the learned trial judge for its intimation.

Appeal allowed.

2015 (I) ILR - CUT- 483

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

MATA NO. 43 OF 2011

BIRENDRA SAHOO ……..Appellant

.Vrs.

JYOSHNA RANI SAHOO ……..Respondent

CONSTITUTION OF INDIA, 1950 – ART,14

Right of cross examination – In the absence of such an opportunity it can not be said that the matter has been decided in accordance with law as it is an integral part and parcel of the principles of natural justice.

In the present case though witnesses examined on behalf of the respondent were not cross examined, the learned judge family Court hurriedly closed the evidence and posted the case for judgment – Action challenged – Held, impugned order is setaside – Direction issued to the concerned Court to afford opportunity to the appellant to cross- examine the witnesses, examined by the respondent.

(Para-4)

For Appellant - M/s. Mrs. Sujata Jena, G.B. Jena
For Respondent - M/s. Niranjan Lenka,
M.R.Mohapatra and P.K. Panda

Date of hearing : 16. 09.2014
Date of Judgment : 22.09.2014

JUDGMENT

S.K .SAHOO, J.

This appeal has been filed by the appellant-husband under Section 19 (1) of the Family Courts Act, 1984 read with Section 28 of the Hindu Marriage Act, 1955 challenging the judgment and order dtd. 29.04.2011 of the Judge, Family Court, Bhubaneswar passed in Civil Proceedings No. 239 of 2011 (MAT Case No. 426 of 2009) in allowing the petition filed by the respondent-wife under Section 13 of Hindu Marriage Act, 1955 for a decree of divorce and thereby dissolving the marriage between the appellant and the

respondent and further directing the appellant to pay Rs. 5 lakhs to the respondent within a month i.e., Rs. 1.5 lakhs towards her ornaments and the rest towards permanent alimony. It was observed that the appellant is at liberty to return the jewellery items of the respondent within a month and in that event he is not required to pay its money value of Rs. 1.5 lakhs. It was further observed that in case some of the ornaments are returned and some are withheld, then the estimated value of the withheld ornaments be calculated and payment to be made. The cost was assessed at Rs. 5,000.

2. The respondent-wife filed a petition under Section 13 of Hindu Marriage Act, 1955 stating therein that her marriage was solemnized with the appellant on 15.02.2002 at Bhubaneswar as per Hindu rites and customs. After the marriage, they lived together for a period of about 5-6 years but they had no issues. The appellant subjected her to both physical and mental cruelty in connection with demand of dowry and she lodged an F.I.R. in Balanga P.S. against the appellant, on the basis of which G.R. Case No. 424 of 2009 was instituted and the case was subjudice. It is further stated in the divorce petition that since last two years prior to the filing of the petition for divorce, there had been no relationship between the appellant and the respondent and in between the appellant had married for a second time and he was blessed with a daughter.

The appellant-husband filed his written statement denying the allegation of cruelty in connection with demand of dowry and further stated that the respondent could not adjust herself in the traditional atmosphere of village culture as she was brought up in Bhubaneswar city and a girl namely Saraswati was staying in the house of the appellant as a house-maid and the appellant further denied that he had married anybody for the second time. He further stated that since the respondent could not adjust herself in the house of the appellant, she voluntarily left the house and lodged a false F.I.R. just to put him into harassment and to cover up of her own fault.

According to the learned counsel for the appellant, the matter was taken up on 17.01.2011 and since both the parties were absent, the learned Judge, Family Court directed both the parties to appear in person in Court for conciliation and settlement and the date was fixed to 02.02.2011. On 02.02.2011 both the parties were also absent and the appellant filed a petition seeking time along with a Xerox copy of the outdoor patient ticket and the case was further adjourned to 17.03.2011. On 17.03.2011 the respondent-wife was present but the appellant was absent and the case was adjourned to

07.04.2011 and it was directed that the Execution Case No. 4 of 2010 which arises out of an order under Section 24 of Hindu Marriage Act to be tagged with the proceedings. On 07.04.2011 the appellant was present but the respondent was absent for which the case was adjourned to 19.04.2011 and both the parties were directed to remain present in person. On 19.04.2011 the respondent was present along with her parents but the appellant was absent. According to the learned counsel for the appellant, a time seeking petition was filed on behalf of the appellant along with the outdoor patient ticket on 19.04.2011 stating therein that he was suffering from viral fever and was not in a position to remain present in the Court and accordingly time was sought for. The grievance of the appellant is that the time seeking petition was not taken note of by the learned Judge, Family Court and he proceeded with the matter and on that date i.e., 19.04.2011, the respondent and her father were examined in Court, the appellant's evidence was closed, argument was heard and the case was posted to 25.04.2011 for judgment. Learned counsel for the appellant further submitted that on 25.04.2011 the judgment was not pronounced and on that day the appellant filed an affidavit in the Court indicating therein that the respondent had married to one Babu Sahu of district Ganjam and staying with him without taking divorce from the competent Court of law. The learned Judge, Family Court did not take into consideration the affidavit filed by the appellant and vide judgment and order dtd.29.04.2011 allowed the petition for divorce.

Learned counsel for the appellant contended that non- consideration of the time seeking petition dtd. 19.04.2011 and non-forming such time seeking petition a part of the record, learned Judge, Family Court has committed irregularity and further contended that when an affidavit was filed by the appellant on 25.04.2011, the same should have been reflected in the order-sheet and taken note of. It was further contended that the learned Judge, Family Court has committed illegality in not considering the averments made in the written statement while passing the impugned judgment. It was finally urged that an opportunity of hearing should be afforded to the appellant to contest the case in accordance with law.

Learned counsel for the respondent on the other hand submitted that though the respondent was not present on 17.01.2011,02.02.2011 and 07.04.2011 but she was very much present on 17.03.2011 and 19.04.2011 and the time seeking petition stated to have been filed on 19.04.2011 is not borne out from the record and since the appellant with a motive to delay the

proceedings was not cooperating with the Court, therefore the learned Judge, Family Court was justified in examining the respondent and her father who were present in Court on 19.04.2011 and passing the impugned judgment on the subsequent date.

3. After considering the contentions raised by both the parties and on perusal of the order-sheet annexed to the appeal memo as Annexure-1, it is clear that on some dates the appellant was absent and on some dates the respondent was absent and on some dates both were absent. The order dtd.19.04.2011 does not indicate about filing of any time seeking petition on behalf of the appellant though a copy of such time seeking petition has been annexed to the appeal memo as Annexure–2. In the time seeking petition though it is mentioned in the bottom that the outdoor patient ticket has been attached but the copy of the outdoor ticket is not annexed to the appeal memo. Moreover, the date given in the time seeking petition reflects that the appellant himself has signed the time seeking petition and the date is put as 14.04.2011. Thus, the contention raised by the learned counsel for the appellant that any time seeking petition was filed on 19.04.2011 is neither borne out from the order of the Judge, Family Court, Bhubaneswar nor the time seeking petition itself reflects that it was a time seeking petition dtd.19.04.2011. When the appellant himself has signed the time seeking petition and the date has been put as 14.04.2011, the viral fever plea which has been taken is also prima-facie not acceptable. The copy of the time seeking petition was not served either on the counsel for the respondent or on the respondent who was present in the Court on that date. Similarly, the affidavit which is annexed in the appeal memo vide Annexure–3 indicates that the appellant was present in the Court in person on 25.04.2011 and sworn the affidavit before the Oath Commissioner at 12.45 p.m. There is nothing to show that the copy of this affidavit was served on the counsel for the respondent on that date. It was stated to have been filed in the Court of Judge, Family Court, Bhubaneswar on 25.04.2011. However, even though there are some laches on the part of the appellant but all the same we feel that in the interest of justice and equity, he should be afforded another opportunity of hearing in the Court of Judge, Family Court, Bhubaneswar to contest the case.

The principles of natural justice concern procedural fairness to ensure a fair decision. A person must be allowed an adequate opportunity to present his case. Rules of natural justice is to prevent miscarriage of justice. The case

arises out of a matrimonial dispute where one party seeks for a decree of divorce against the other. On 19.04.2011 the appellant was absent but no order was passed for ex-parte hearing rather two witnesses were examined on behalf of the respondent. The witnesses examined on behalf of the respondent were not cross-examined. The learned Judge, Family Court hurriedly closed the evidence from the side of the respondent on that day and heard the argument obviously from the side of the respondent and posted it for judgment. In case of **Ayaaubkhan Noorkhan Pathan vrs. State of Maharashtra reported in AIR 2013 SC 58**, it is held that the right of cross-examination is an integral part of the principle of natural justice. The learned Judge, Family Court has not even considered the written statement filed by the appellant in its proper perspective and passed the impugned judgment.

4. We, therefore, set aside the impugned judgment and order dtd.29.04.2011 passed by the Judge, Family Court, Bhubaneswar passed in C.P. No. 239 of 2011 (MAT Case No. 426 of 2009) and direct the concerned Court to afford another opportunity to the appellant to contest the case. The appellant will be given an opportunity to cross-examine the witnesses already adduced by the respondent i.e. P.W.1, who is the respondent herself and P.W.2 Bhimsen Sahoo who is the father of the respondent. Liberty will be granted to the respondent to examine any further witness if she so likes but at the same time opportunity of cross-examination is to be provided to the appellant. After the examination from the side of the respondent is over, the appellant shall be provided due opportunity to adduce his evidence and after hearing the arguments from both the sides, the learned Judge, Family Court shall pass judgment afresh.

The entire exercise should be completed within three months from the date of receipt of the judgment copy of this Court. The parties are at liberty to produce the certified copy of this judgment before the Judge, Family Court, Bhubaneswar and the learned Judge shall take note of such certified copy and proceed in accordance with law. The appellant is directed to pay a sum of Rs.10,000/- to the respondent prior to commencement of cross-examination of the witnesses of the respondent.

In the result, MATA No. 43 of 2011 is allowed and the impugned judgment and order dtd.29.04.2011 is set aside.

Appeal allowed.

2015 (I) ILR - CUT- 488

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

W.P.(C) NO. 4896 OF 2014

M/S. JAY BALAJI JYOTI STEELS LTD. .....Petitioner

.Vrs.

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, EAST ZONE BENCH, KOLKATA & ORS. .....Opp. Parties.

CENTRAL EXCISE ACT, 1944 – S.37-C (1)(a)

Dismissal of appeal on the ground of delay – Petitioner-Company took the plea that as the order of the Commissioner (Appeals) sent vide speed post instead of registered post and received by a peon of the Company, not authorized to receive, it could not be brought to the notice of the Company hence the delay caused – Amendment of Indian Post Office Rules 1933 inserting Rule 66-B introducing "Inland, Speed Post Service", to be treated as registered post – Consequent amendment of Section 37-C(1)(a) introducing "Speed Post" with proof of delivery – Held, amendments being clarificatory in nature have retrospective effect – Explanation offered by the Petitioner-Company for the delay of 244 days does not show sufficient cause for condonation of delay. (Paras 9 to 14)

Case Laws Relied on :-

1. 2008 (221) ELT 163 (SC) : Singh Enterprises -V- Commissioner of Central Excise, Jamshedpur
2. 2012 (279) ELT 353 (Bombay) : Amidev Agro Care Pvt. Ltd. -V- Union of India
3. 2012 (27) STR 97 (P&H) : Commissioner of Central Excise, Ludhiana -V- Best Dyeing
4. 1997 (89) ELT 475 (Madras) : Metal Powder Co. Ltd. -V- Commissioner of Central Excise (Appeals), Tiruchirapalli

For Petitioner - M/s. Jagabandhu Sahoo (Sr. Adv.)
A.Mohapatra, D.Panda & G.K.Sahu

For Opp. Parties - Mr. B.A. Prusty (Standing Counsel)

Date of hearing : 12.12.2014
Date of Judgment : 24.12.2014

JUDGMENT

I. MAHANTY, J.

In the present writ application, the petitioner (M/s.Jay Balaji Jyoti Steels Ltd.) has sought to challenge the order dated 24.10.2013 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) in Appeal No.ST/70690/2013-SM dismissing the said appeal on the ground that the Commissioner (Appeals) is vested with the power to condone the delay of 30 days in addition to the statutory limit of 60 days as prescribed under Section 35F of the Central Excise Act, 1944 and the appeal having been filed beyond the 90 days permissible, the same was dismissed on the ground of delay and affirmed by the CESTAT.

2. Shorn of unnecessary details, it is suffice to note that the petitioner-company in the present case while being registered under the Service Tax law as envisaged under Finance Act, 1994 under the category of "transport of goods by road service" by virtue of Rule (2)(1)(d)(b) of the Service Tax Rules, 1994, having not deposited the service tax including education cess and other cess was liable for demand of Rs.7,54,752.00, on the allegation that, there has been willful suppression by the petitioner-company and consequently, contravention of the Act. The show cause demand notice was issued by Opposite Party No.3 dated 10.6.2010 calling upon the petitioner-company to show cause. The petitioner-company filed a show cause and by order dated 12.7.2011 a demand of service tax, interest and penalty was raised. Thereafter, an appeal was moved by the petitioner-company before the Commissioner (Appeals)-Opposite Party No.2 and by order dated 12.7.2011, the Commissioner (Appeals) dismissed the appeal on the ground of delay and the CESTAT in the second appeal confirmed the same.

3. The main contention raised by Mr. Sahoo, learned Senior Advocate on behalf of the petitioner was that the order of the Commissioner (Appeals) dated 12.7.2011 was sent to the petitioner-company, which was handed over to "a Peon" of the company in July 2011 and since the same could not be brought to the knowledge of the "management", there was no effective communication of order as a consequence, there was no real delay in filing of the appeal. It is further alleged that the petitioner-company brought the

misplacement of the impugned order to the notice of the Officer-in-charge, Police Outpost, Kalunga, Rourkela.

It is, therefore, submitted that the Commissioner (Appeals)-Opposite Party No.2 vide his order dated 19.03.2013 dismissed the appeal on the ground that he had no power to condone the delay beyond the prescribed period. It is further submitted that Opposite Party No.2 came to a finding that the appeal having been filed after 244 days beyond the prescribed time limit fails in view of the settled position of law under Section 85(3) of the Finance Act, 1994.

The petitioner-company being aggrieved by the order passed by the Commissioner (Appeals) dated 19.3.2013 filed Second Appeal before the CESTAT and the Tribunal by order dated 24.10.2013 relied upon the judgment of the Hon'ble Supreme Court in the case of *Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur,* 2008 (221) ELT 163 (Supreme Court) and came to hold that "it has no authority nor power to condone the delay beyond 90 days and the Tribunal accordingly dismissed the appeal. Challenging the orders passed by the Tribunal (CESTAT), the present writ application has came to be filed.

4. Mr. Sahoo, learned Senior Counsel appearing for the petitioner attempted to distinguish the facts of the case in the case of *Singh Enterprises* (supra) and stated that Hon'ble Supreme Court recorded a finding that "the causes shown for condonation have no acceptable value" which persuaded the Hon'ble Supreme Court to dismiss the appeal. He asserted that the facts situation that has arisen for consideration in the present case, is distinct from the factual background of the aforesaid case.

Learned Sr. Counsel for the petitioner further asserted that, in fact, there was no delay caused in filing the appeal since the petitioner actually received the order-in-original issued by Opposite Party No.3 on 29.5.2012 i.e. the date of acknowledge of receipt of the order-in-original and the appeal was filed on 14.6.2012 within the statutory period prescribed under Section 30-F of the Central Excise Act, 1944. It is further submitted that the clerk (employee of the petitioner-company) on whom the order passed by the adjudicated authority was served, had no authority to acknowledge receipt of the statutory order on behalf of the petitioner-company, for which, service of the impugned order also not lawful and proper and there has been no valid service of adjudication order on the petitioner-company. He, therefore,

vehemently urged that when law prescribes a particular manner for doing a particular act and act must be done in that manner alone, other methods and modes of performance are impliedly and necessarily forbidden. Relying on the above and various case laws cited he submited that Section 37C of the Central Excise Act, 1944 prescribes the mode of service of notice. The same is quoted hereunder:

"37C. Service of decisions, orders, summons, etc.-

(1) Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served,-

(a) by tendering the decision, order, summons or notice, or sending it by registered post with acknowledgment due, to the person for whom it is intended or his authorized agent, if any;

xxx xxx xxx xxx."

Learned Senior Counsel asserted that the statute has provided for service of orders by "registered post" on the petitioner and sending the order by "speed post" was not in strict compliance of the law and hence, such notice served was in a manner not prescribed by law. Therefore, the same cannot be held to be adequate service on the petitioner. In this respect, reliance is placed on the following three judgments:

(i) Amidev Agro Care Pvt. Ltd. Vs. Union of India, 2012 (279) ELT 353 (Bombay)

(ii) Commissioner of Central Excise, Ludhiana Vs. Best Dyeing 2012 (27) STR 97 (P & H)

(iii) Metal Powder Co. Ltd. Vs. Commissioner of Central Excise (Appeals), Tiruchirapalli, 1997 (89) ELT 475 (Madras)

5. On perusing the judgments referred to by the learned Senior Counsel for the petitioner, it appears that whereas the impugned order has been communicated by "speed post", in the case of *Amidev Agro Care Pvt. Ltd.* (supra), *Commissioner of Central Excise, Ludhiana* (supra) and in the case of *Metal Powder Co. Ltd* (supra), the order was communicated by "Telegram". In all these three cases, the Hon'ble High Court came to hold that sending of an order in a manner not provided under Section 37(C) amounts to no evidence of tendering of the decision to the assessee.

6. At this juncture, it would became most relevant to take note of the fact that in none of the judgments cited hereinabove the Hon'ble High Courts have taken into consideration the definition of "registered post" which has been provided under Section 28 of the Indian Post Office Act, 1898 which is quoted hereunder:

> *"Section 28. Registration of Postal articles.- The sender of a postal article may, subject to the other provisions of this Act, have the article registered at the post office at which it is posted, and require a receipt therefore; and the [Central government] may, by notification in the [Official Gazette], direct that, in addition to any postage chargeable under this Act, such further fee as may be fixed by the notification shall be paid on account of the registration of postal articles."*

It would be relevant also to take note of the fact that an amendment was brought into the Indian Post Office Rules, 1933, by a Gazette Notification issued by the Ministry of Communications (Department of Posts), Government of India dated 24th July, 1986 introducing "Inland, Speed Post Service" by inserting Rules 66-B thereto which is quoted hereunder:

> *"Rule 66-B. INLAND SPEED POST SERVICE.- Inland Postal articles may be booked after obtaining receipts therefor, at the places specified in column(1) of the Schedule below and the post offices specified in the corresponding entries in column (2) of the said Schedule for delivery under the Inland Speed Post Service subject to the following conditions namely:*
>
> *(1) Inland Speed Post Service shall be available in respect of all classes of mails, which can be sent by the registered service:*
>
> *xxx xxx xxx xxx xxx xxx xxx"*

In view of Section 28 of the Indian Post Office Act, 1898 read with Rule 66-B of Indian Post Office Rules, 1933 (as inserted vide Gazette Notification dated 24th July, 1986), any postal article i.e. registered at the post office from which it is posted, and a receipt issued in respect of such article is to be treated as "registered post". Both in the case of "registered post" as well as "speed post", the articles when delivered to the post offices, receipts thereof are required to be issued and consequently, both "speed

post" and "registered post" satisfy the requirement of Section 28 of the Indian Post Office Act, 1898. The only difference between registered post and speed post if at all is the charges payable are normally higher for "speed post" as the name suggests the delivery of such articles at an early date.

7. We are of the considered view that none of the judgments cited by the petitioner as noted hereinabove, the Hon'ble High Courts have taken into consideration Section 28 of the Indian Post Office Act, 1898 nor Rule-66B of the 1933 Rules and consequently, are not of any assistance for deciding the present lis.

8. Mr. Sahoo, learned Sr. Counsel for the petitioner further submitted that Section 37C(1)(a) of the Central Excise Act, 1944 was amended w.e.f. 10.5.2013 and by such an amendment, "speed post" was added thereto to Section 37C and he asserted that such a legislative act, adding an additional mode of service, can only operate prospectively and not retrospectively.

9. We record the aforesaid contention merely to reject the same outright. It is well settled in law that where an amendment which is brought about is "clarificatory in nature", the same would date back to the date on which the original provision was introduced. No doubt, prior to the amendment on 10.5.2013, the word "registered post" found mentioned in Section 35(C) of the Central Excise Act. In view of Section 28 of the Indian Posts Office Act, 1898, we are of the considered view that both "registered post" as well as "speed post" would come within the fold of Section 28 of the Indian Post Office Act, since on delivery of the postal article, receipt thereof are issued by the Postal Department and consequently, the addition of the term "speed post" with amendment on 10.5.2013 is in our considered view, merely clarificatory and hence, retrospective in its operation.

10. It would be relevant also to point out herein that an additional affidavit was filed by the petitioner-company on 21.11.2014 claiming therein that the employee who received speed post packet on behalf of the company, is a Class-IV employee Miss Bengi Oram, who was not authorized by the company to do so and consequently, the company had initiated a disciplinary against her. When such affidavit was filed, this Court directed vide its order dated 5.12.2014 calling upon the General Manager (Accounts) to file a further affidavit before this Court indicating as to whether the said Class-IV employee-Miss Bengi Oram had in the past ever received postal packages on behalf of the company or not. We also called upon Miss Bengi Oram to file

an affidavit whether she had received earlier any postal packages on behalf of the company. After such order was passed, a further affidavit came to be filed on behalf of the petitioner-company through its General Manager, tendering an unconditional apology for filing additional affidavit dated 21.11.2014 without verifying the detail factual position and seeking indulgence of the Court to withdraw the said additional affidavit dated 21.11.2014.

The aforesaid facts are merely being recorded to indicate the manner in which the petitioner-company has sought to try and pass the blame on an employee in order to try and justify their admitted delay in filing of the appeal.

11. It appears that post amendment vide Finance Act, 2013 (17 of 2013) w.e.f. 10.5.2013, the following amendment came to be incorporated in Section 37C(1)(a) of the Central Excise Act, 1944 which is as follows:

> *"SECTION 37C. Service of decisions, orders, summons, etc. – (1) Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served, -*
>
> *(a) by tendering the decision, order, summons or notice, or sending it by registered post with acknowledgment due [or by speed post with proof of delivery or by courier approved by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963)] to the person for whom it is intended or his authorized agent, if any."*
>
> On perusal of the aforesaid amended provision, it is clear that after the words "sending it by registered post with acknowledgment due" the words i.e. "or by speed post with proof of delivery" has been inserted. The aforesaid amendment itself would clearly shows that the amendment sought to be made is not only clarificatory in nature but also purely procedural for the purpose of communication of decisions/orders/summons to the parties.

12. In the Full Bench of the Hon'ble Supreme Court in the case of *Shyam Sunder and others vs. Ram Kumar and another*, 2001(8) SCC 24, affirmed the judgment of apex Court earlier in the case of *R. Rajagopal Reddy (dead) by Lrs. & Ors. Vs. Padmini Chandrasekharan (dead) by Lrs.,* 1995 (2) SCC 630 to the following effect:

> *"Declaratory enactment declares and clarifies the real intention of the legislature in connection with an earlier existing transaction or enactment, it does not create new rights or obligations. If a statute is curative or merely declaratory of the previous law retrospective operation is generally intended....A clarificatory amendment of this nature will have retrospective effect and therefore, if the principal Act was existing law when the Constitution came into force the amending Act also will be part of the existing law. If a new Act is to explain an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act."*

Following the judgment of the Hon'ble Supreme Court as noted hereinabove, we are of the considered view that the insertion of the words "Speed Post" under Section 37C)(1)(a) of the Central Excise Act, 1944 is clearly curative since various High Courts as quoted hereinabove had came to hold that "communication of notices through speed post was in consonance with law". Further this amendment is purely explanatory since Section 28 of Indian Post Office Act, 1988 read with Rule 66-B of the Indian Post Office Rules, 1993 (as amended on 24th July 1986). In our considered view, the insertion of "speed post" within the scope and ambit with the "registered post" as mandatory thereunder. Consequently, the amending statute is held by us as "clarificatory amendment" and would have retrospective effect and, therefore, the argument to the contrary by the learned Sr. Counsel for the petitioner hereby stands rejected.

13. In this respect, before concluding the matter, it would also to be most relevant to note herein that the Hon'ble Supreme Court in the case of *Singh Enterprises* (supra), came to hold that "sufficient cause for explaining the delay is an expression which is found in various statute and it is essentially means as adequate or enough".

14. Considering the facts and circumstances of the present case, we are of the considered view that in the facts and circumstances, the explanation offered by the petitioner for the delay of 244 days and the attempt made to cover up the delay by raising another matter, i.e. "a disciplinary action initiated against a Class-IV employee", we are afraid that the same does not

show sufficient cause and the causes shown for condonation are of no acceptable value.

15. Accordingly, the writ application merits no further consideration and the same stands dismissed but in the circumstances no costs.

Writ petition dismissed.

2015 (I) ILR - CUT- 496

INDRAJIT MAHANTY, J.

W.P.(C) NO. 14629 OF 2004

SEBATI BEHERA ……..Petitioner

.Vrs.

SUBASI NAYAK & ANR. ……..Opp. Parties

CONSTITUTION (SCHEDULED CASTES) ORDER (SECOND AMENDMENT) ACT, 2002 – ENTRY NO. 24

Sub-Caste "Kaibarta" has come to be included as a Scheduled Caste by way of Constitution (Scheduled Castes) Order (Second Amendmant) Act, 2002 which came into force on Dt. 18.12.2002 – Amendment is retrospective in nature – Caste Certificate granted to the petitioner describing her as 'Kaibarta' by the Tahasildar, Parjong Dt. 17.01.2002 basing on which she contested the election on Dt. 21.02.2002 is held to be correct. (Paras 24, 25)

Case Laws Referred to :-

1. 49 (1980) C.L.T 47 : Narayan Behera -V- State of Orissa through Secy., Tribal &Welfare Deppt. & Ors.
2. 2004 A.I.R. S.C.W. 5842 : Zile Singh -V- State of Haryana & Ors.

For Petitioner - M/s. K.K.Swain, P.N.Mohanty, S.C.S.Dash & B.Jena
For Opp. Parties - Mr. B.B. Mishra (For O.P. 1)
Addl. Govt. Advocate (For O.P.2)

Date of judgment: 18.06.2014

JUDGMENT

I. MAHANTY, J.

This matter referred to this Bench in view of a difference expressed by Hon'ble Shri Justice P.K. Tripathy (the then was) and Hon'ble Shri Justice P. Mohanty. Whereas Hon'ble Shri Justice P.K. Tripathy not finding any merit in the writ petition, had directed its dismissal, Hon'ble Shri Justice P. Mohanty, on the other hand, had directed the writ petition be allowed.

2. The essential facts of this case briefly noted are that the writ petitioner-Sebati Behera and opposite party No.1-Subasi Nayak had both contested for the post of Sarpanch of Kalada Grama Panchayat under Parjang P.S. in the district of Dhenkanal. The said post of Sarpanch was reserved for candidates belonging to Scheduled Castes. Necessary nominations was filed along with necessary caste certificates and the Election Officer had been accepted the nominations after scrutiny. Both the candidates contested the said election and the petitioner ultimately succeeded in the election and was declared elected.

3. It is important to note herein that the petitioner-Sebati Behera had been granted a caste certificate in her favour describing her sub-caste is 'Dewar' (Kaibarta), copy of which is available at Annexure-3.

4. It appears that opposite party No.1-Subasi Nayak, the defeated candidate filed election dispute in the court of Civil Judge (Jr. Division), Kamakhyanagar in Election Misc. Case No.8 of 2002 challenging the election of the petitioner essentially on the ground that "at the time of filing of nomination, the petitioner was not a member of the Scheduled Caste". This contention was sought to be substantiated by placing reliance on the Constitution (Scheduled Castes) Order (Second Amendment) Act, 2002, which came into force on 18.12.2002 and as a consequence of such amendment, the sub-caste 'Kaibarta' was clarified/declared and included as a Scheduled Caste in Entry No.24 of the Act.

5. The learned Civil Judge (Jr. Division), Kamakhyanagar allowed the election dispute filed by opposite party No.1 holding that the inclusion of 'Kaibarta' as a Scheduled Caste was made only on 18.12.2002 and consequently was prospective in nature and the petitioner had been

erroneously declared as Scheduled Caste by the Tahasildar, Parjang in its certificate granted on 17.01.2002 on the basis of which the petitioner had contested the election held on 21.02.2002 for the post of Sarpanch of Kalada Grama Panchayat. The aforesaid view was reiterated and accepted by the Adhoc Additional District Judge, Kamakhyanagar in Appeal and, accordingly, F.A.O. No.5 of 2003/F.A.O. No.2 of 2004 filed by the petitioner also came to be dismissed. Hence, the present writ petition.

6. I have had the privilege of going through the judgments rendered by the Hon'ble Shri Justice P.K. Tripathy as well as Hon'ble Shri Justice P. Mohanty. The essential differences between the two judgments appears to be that whereas Justice Tripathy referred to the judgment of the directives issued by this Court in the case of Narayan Behera v. State of Orissa through Secretary, Tribal & Welfare Department and others, 49 (1980) C.L.T. 47 as well as the judgment of the Hon'ble Supreme Court in the case of Zile Singh v. State of Haryana and others, 2004 A.I.R. S.C.W. 5842 his Lordship came to conclude that it cannot be said that inclusion of three castes in Sl. No.24 is either declaratory or explanatory with retrospective effect and consequently came to conclude that the said amendment was correctly treated as "prospective" by the learned trial judge as well as the lower appellate court, Hon'ble Shri Justice P. Mohanty, on the other hand, placing reliance on the aforesaid two judgments of this Court as well as the Hon'ble Supreme Court in the case of Narayan Behera (supra) and in the case of Zile Singh (supra) respectively and also placed reliance in the case of State of Maharashtra v. Milind Katware, 2000 AIR SCW 4303 as well as various other judgments of the Hon'ble Apex Court concluded that, a bare reading of the aforesaid judgments the mere absence of use of the word 'declaration' in an Act explaining what was the law before may not appear to be a declaratory Act, but if the Court finds an Act as declaratory or explanatory, it has to be construed as retrospective since the legislative power to enact law includes the power to declare what was the previous law, and when such a declaratory Act is passed, invariably it has been held to be retrospective.

7. With greatest respect to the Hon'ble Judges and after perusing the same, I am in respectful agreement with the views expressed by Hon'ble Shri Justice P. Mohanty and, in particular, the judgment of the Hon'ble Supreme Court in the case of Zile Singh (supra) where it has been held that, the presumption against retrospective operation is not applicable to "declaratory statute" and further that where a statute is passed for the purpose of

supplying an obvious omission in a former statute or to 'explain' a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are "explanatory and declaratory" in nature. In the case at hand, this Court in the case of Narayan Behera (supra) had already directed 'Kaibarta' to be issued with caste certificates having held the same to be synonymous with 'Dhibara' and since 'Kaibarta' has come to be included by way of the Constitution (Scheduled Castes) Order (Second Amendment) Act, 2002 dated 18.12.2002, yet ever since the date of the judgment of this Court in the case of Narayan Behera (supra) came delivered on 05.11.1979, till the date of the Constitutional Amendment, the judgment of Narayan Behera was the law on the subject and the Tahasildar, Parjang, having acted in terms of the direction of this Court in the case of Narayan Behera (supra) (though at the time prior to the Constitutional Amendment), the certificate issued by him in favour of the petitioner was valid and could not have been declared void without any challenge thereto and consequently, for the reason noted herein above, this Court record its opinion and agrees with the views render by the Hon'ble Shri Justice P. Mohanty. Accordingly, the writ petition is allowed in terms of the aforesaid judgment.

Writ petition allowed.

2015 (I) ILR - CUT- 499

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

W.P.(C) NO. 25211 OF 2013

MGM MINERALS LTD. & ANR. .....Petitioners

.Vrs.

STATE ENVIRONMENT IMPACT ASSESSMENT AUTHORITY (SEIAA) & ANR. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART.14

Grant of mining project – Petitioner applied for '"Environmental clearance" (E.C) – State Environment Impact Assessment Authority (SEIAA) Odisha (O.P1) granted E.C. for five years only – Action

challenged – Union of India in the Ministry of Environment and Forest (MOEF) grants E.C. in respect of mining Projects to a maximum period of 30 years under the self same notification, 2006 – SEIMAA not acted in compliance of the direction issued by MOEF – Direction issued to SEIAA to extend the E.C. to the petitioner Company for a period of 19 years. (Paras 10, 11)

For Petitioner - Mr. Y.Das (Sr. Adv.)
M/s. Rajjeet Roy & S.K.Singh

For Opp. Parties - Mr. D.Panda (Addl. Govt. Adv.)
Mr. A.K.Bose (Asst. Solicitor General)

Date of hearing : 19.11.2014
Date of Judgment : 24.12.2014

JUDGMENT

I. MAHANTY, J.

In the present writ application the petitioner (MGM Minerals Ltd.) have sought to challenge the order/letter dated 11.12.2009 issued by the State Environment Impact Assessment Authority (hereinafter referred to as 'SEIAA'), Odisha (Opposite Party No.1) whereby, the Environmental Clearance in respect of the petitioner (mining project) have granted for a period of five years only, which it is alleged is not in consonance with the provisions of Environmental Impact Assessment Notification. 2006.

2. Mr.Y.Das, learned Senior Advocate appearing for the petitioners asserted that the SEIAA have granted the petitioner-company "Environmental Clearance" for a period of 5 years for its mining project at village Patabeda vide letter dated 11.12.2009 even though the Union of India in the Ministry of Environment and Forest (Opposite Party No.2) grants Environmental Clearances in respect of the mining projects for the "entire project life subject to a maximum period of 30 years" under the self-same notification of 2006.

3. Shorn of unnecessary details, suffice it is to note herein that the petitioner-company has been granted with a mining lease over an area of 28.397 hectare at village-Patabeda in the district of Sundergarh for a period of 20 years w.e.f. 8th March 2006 for mining of iron ore by the Government of Odisha vide lease-deed dated 8.3.2006. In terms of the Environment

Impact Assessment Authority Notification, 1994 framed by the Union of India under the Environment Protection Act, 1986, the petitioner-company was mandatorily required to obtain "Environmental Clearance" before starting operation of new mines and/or subsequent increase in production. The petitioner-company had applied for "Environmental Clearance" for the mining lease for the purpose of production of iron ore of 0.16 Million Ton Per Annum (MTPA). The Union of India, Ministry of Environment and Forest (O.P.2) vide his letter dated 21.7.2005 granted "Environmental Clearance" in respect of the leased area basing upon the mining plan duly approved by the Indian Bureau of Mines (hereinafter referred to as 'IBM') on 8.11.2002. In terms of such mining plan, the life of the mine was conceptualized for a period of 20 years basing on the projected quantum of production and date available regarding the quantum of iron ore reserve.

4. On the basis of such "Environmental Clearance" obtained from Opposite Party No.2 (Union of India), the petitioner-company commenced its mining operation on its lease hold and thereafter sought to enhance its production capacity of iron ore from 0.16 MTPA to 0.8 MTPA. Prior to giving effect to such enhancement, "Environmental Clearance" once again was required and in the interregnum, the Central Government had issued a Notification dated 14.9.2006 creating a "State Level Environment Impact Assessment Authority" (SEIAA)-Opposite Party No.1 in exercise of its power vested under the Environment Protection Act, 1986 and in terms of such Notification, persons desirous for expansion of their existing mining projects, (below 50 hectare of land area) were required to approach the SEIAA (O.P.1) instead of the Union of India (O.P.2). In other words, all mining projects which were for less than 50 hectares fell under Category 'B' and they could seek approvals from the State-SEIAA and the projects which came under Category 'A' i.e. above 50 hectares of land, would have to approach the Union of India (Ministry of Environment and Forest and the Expert Appraisal Committee) thereof constituted by the Central Government. Since the petitioners' lease area was below 50 hectares of land and since the petitioners sought to enhance its production from 0.16 MTPA to 0.8 MTPA, in view of Notification dated 14.9.2006, it filed an application for Environmental Clearance for seeking enhancement of production through the State (SEIAA).

5. The application filed by the petitioner-company to the SEIAA (Odisha) for grant of "Environmental Clearance" for enhancement of

production from 0.16 MTPA to 0.8 MTPA at Patabeda was granted on 11.12.2009 for a period of 5 years. It appears that the petitioner-company thereafter had sent representation to the SEIAA objecting to limiting the Environmental Clearance for 5 years and in response to the representation of the petitioner-company, the SEIAA vide letter dated 2.3.2010 informed the petitioner-company that its request for extension of validity period of Environmental Clearance was not considered by the authority, on the ground that, the mining scheme submitted by the petitioner-company was valid for a period of 5 years and the petitioner had not furnished any Environmental Management Plan beyond 5 years.

6. The petitioner-company once again sought for a fresh mining approval from the IBM and such approval was obtained from the IBM on 1.4.2011 and in terms of such mining plan, the average rate of production of 5.84,008 MT as planned in the scheme period, the deposit would last for 19 years and consequently, once again the petitioner made a representation to the SEIAA for extension of the period of "Environmental Clearance" to cover the "entire project life". Since in terms of the Environment Impact Assessment Notification, 2006 and Clause-9 thereof, "that prior Environmental Clearance granted for a project or activity shall be valid for a period of ten years in the case of River Valley projects [item 1(c) of the Schedule], project life has been estimated by the Expert Appraisal Committee (EAC) or State Level Expert Appraisal Committee subject to a maximum of 30 years for mining projects and 5 years in the case of all other projects and activities."

Although the petitioner-company submitted the mining plan dated 1.4.2011 signifying life of the mines for at least 19 years to the Opposite Party No.1 and send reminder on 18.3.2013 seeking extension of the "Environmental Clearance", no response thereto was received. Consequently, the present writ application came to be filed.

7. When notices were issued by this Court to the opposite parties, Opposite Party No.2-Union of India (MOEF) filed its affidavit and in Para-5 thereto is quoted hereunder:

> *"That in respect of the issue raised by the petitioner Respondent No.2 submits that the issue or grievances is caused of the decision of the SEIAA i.e. Respondent No.1 as mentioned by the petitioner. The*

answering Respondent No.2 has no comments to offer on the decision of SEIAA, Odisha. Para-9 of the EIA notification 2006 deals with the validity of EC which is annexed at annexure-2 of the petition. The Para reads as follows: The "Validity of Environmental Clearance" is meant the period from which a prior environmental clearance is granted by the regulatory authority, or may be presumed by the applicant to have been granted under sub-paragraph (iv) of paragraph 7 above, to the start of production operations by the project or activity, or completion of all construction operations in case of construction projects (item 8 of the Schedule), to which the application for prior environmental clearance refers. The prior environmental clearance granted for a project or activity shall be valid for a period of ten years in the case of River Valley projects (item 1(c) of the Schedule), project life as estimated by Expert Appraisal Committee or State Level Expert Appraisal Committee subject to a maximum of thirty years for mining projects and five years in the case of all other projects and activities." Since the EC has been granted by SEIAA Odisha and the subject matter is project specific, Respondent 1 may state the position with regard to validity of EC granted."

The SEIAA (Opposite Party No.1) also filed its counter affidavit through its Member Secretary and sought to justify the issue of Environmental Clearance and limiting the same to 5 years in the following manner:

"6.. That, the EC issued for a period of 5 years is in consonance with the provision and spirit of the EIA Notification, 2006 because EC granted for longer period gives rise to the possibility of unscientific mining and excess extraction of minerals over and above the limit prescribed.

That, the validity period of EC for mining projects can have a maximum validity period of 30 years but cannot have a uniform applicability as the decision of the Authority is based on the recommendation of the State Expert Appraisal Committee, which is composed of technical experts who undertake screening and appraisal of the project and after necessary scientific deliberation recommends the period for which the EC is to be granted."

8. Mr.A.K.Bose, learned Asst. Solicitor General representing both the opposite parties placed reliance on Para-6 of the affidavit of SEIAA as quoted hereinabove. The Court asked the Asst. Solicitor General to peruse the terms and conditions under which the SEIAA had granted "Environmental Clearance" to the petitioner-company dated 11.12.2009 and further enquired as to whether the terms and conditions stipulated therein were inadequate for the purpose of seeking effective control over the mining operation of the petitioner-company.

In his usual fairness, the learned Asst. Solicitor General considered that the terms were extremely rigorous in nature and the SEIAA continued to possess pervasive control over the operation of mine even though the "Environmental Clearance" had been granted to it.

9. Mr. Y.Das, learned Sr. Advocate for the petitioners submitted that the Union of India for Category 'A' cases where mining leases were much more than 50 hectares, have consistently granted Environmental Clearances either for the project life or 30 years whichever was lesser. He also asserted that after SEIAAs were constituted in various States of the country, all such SEIAAs have been granting mining projects with Environmental Clearances either for the project life or for 30 years whichever was lesser and it was only in Odisha that the State (SEIAA) have limited grant of "Environmental Clearance" to 5 years. The justification sought to be made by the SEIAA for limiting such clearances to 5 years of mining projects as explained from Para-6 of the counter affidavit, quoted hereinabove, clearly shows an ambivalent response and the Union of India as well as various other State-SEIAAs have been following the Government of India Notification both in letter and spirit. The period of 5 years as mentioned in the Ministry of Environment Notification, 2006 was clearly meant for non-mining projects and vis-à-vis mining projects, the Notification is clear and categorical, indicating that the said "Environmental Clearance" ought to be granted for the project life as estimated by the State Level Expert Appraisal Committee subject to a maximum of 30 years and 5 years in the case of all other projects and activities.

10. In view of the aforesaid facts situation that has arisen, we are of the considered view that the State Level Expert Appraisal Committee has not acted in compliance of the direction issued by the MOEF in its Notification, 2006. Therefore, we are of the view that as far as the mining projects are concerned, the State Level Expert Appraisal Committee ought to have

considered the "project life" of the mines upto maximum 30 years and not limited the same for 5 years only. Limiting the same to 5 years only appears to us to be wholly arbitrary and not in consonance with the direction issued by the MOEF. In the present case, we find that the petitioners had submitted the mining plan duly approved by the IBM on 1.4.2011 to Opposite Party No.1 (SEIAA) and the said mining plan ought to have been acted upon by the SEIAA for the purpose of suitably extending the Environmental Clearance granted to the petitioners to cover the period of 19 years mentioned therein.

11. Accordingly, the writ application is allowed directing the Opposite Party No.1 (SEIAA) to grant extension of "Environmental Clearance" granted to the petitioner-company for a period of 19 years from 1.4.2011 in terms of the approval of mining plan granted by the Indian Bureau of Mines dated 1.4.2011 forthwith.

By interim order dated 10.12.2014, this Court had directed the petitioners that the mining operation shall not be impeded on account of the "Environmental Clearance" till delivery of this judgment and consequently, this Court directs that till the orders in compliance of these directions are issued by Opposite Party No.1 (SEIAA), within a period of four weeks from today, the aforesaid interim order shall remain in operation.

Writ petition allowed.

2015 (I) ILR - CUT- 505

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

W.P.(CRL) NO. 197 OF 2014

K. ALLEY ……..Petitioner

.Vrs.

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

NATIONAL SECURITY ACT, 1980 – S.3(2)

Order of detention – Delay of 46 days in considering the representation of the petitioner by the State Government – No explanation for such inordinate delay – Infringement of the

fundamental right of the detenu provided under Article 22(5) of the Constitution of India – Held, impugned order of detention is liable to be set aside. (Paras 24, 25)

Case Laws Referred to :-

1. AIR 1989 SC 1403 : Aslam Ahmed Zahire Ahmed Shaik -V- Union of India & Ors.
2. AIR 1981 SC 1077 : Smt. Khatoon Begum -V- Union of India & Ors.
3. AIR 1981 SC 111 : Saleh Mohammed -V- Union of India & Ors.
4. AIR 1994 SC 575 : Noor Salman Makani -V- Union of India & Ors.
5. (2010) 47 OCR (SC) : Smt. Pebam Ningol Mikoi Devi -V- State of Manipur & Ors.
6. 2006 (II) OLR 591 : Bijaya Parida -V- State of Orissa & Ors.
7. 2006 (II) OLR 737 : Ananta Parida -V- State of Orissa & Ors.
8. 2007 (Supp.1) OLR 92 : Sankar Gouda -V- Union of India & Ors.
9. 2000 (2) Crimes 424 : Shanina Begum -V- State of Orissa & Ors.

For Petitioner - Ms. Deepali Mohapatra

For Opp. Parties - Mr. B.Bhuyan, Addl. Govt. Adv., (For O.Ps. 1 & 2)
Mr. A.K.Bose (Asst. Solicitor General of India) (For O.P. 3)

Date of Judgment : 19.09.2014

JUDGMENT

B.N. MAHAPATRA,J.

In the present writ petition, petitioner challenges the legality of the order of detention dated 09.01.2014 (Annexure-1) passed by the District Magistrate, Ganjam-opposite party no. 2 in exercise of power under Section 3 (2) of the National Security Act, 1980 (in short 'the Act') on the ground that the said order is illegal and contrary to law.

2. Petitioner's case in a nutshell is that opposite party no. 2 in exercise of power under Section 3 (2) of the Act has passed the order of detention on 09.01.2014 which was served on the petitioner-detenu on 12.01.2014 while he was in jail custody in connection with certain criminal cases. Thereafter, the petitioner was served with the grounds of detention on the same day issued by opposite party no. 2. In the said grounds of detention, reliance has

been placed on 6 (six) criminal cases pending against the petitioner. The State Government in exercise of power under Section 3 (4) of the Act has approved the order of detention vide order dated 18.1.2014 under Annexure-3. On receipt of such grounds of detention, the petitioner has submitted his representation on 19.01.2014 to the jail authorities, separately to the Advisory Board of the State Government as well as the Central Government. Petitioner's representation was referred to the Advisory Board of the State Government and the date of hearing was fixed to 13.2.2014. Subsequently, the matter was adjourned to 19.02.2014 by the Advisory Board and at that stage the petitioner prayed to opposite party No.2 to permit him to appear before the Advisory Board on the date fixed, i.e., on 19.02.2014. In exercise of the power conferred under Section 12(1) read with Section 13 of the Act, the State Government confirmed the detention order for twelve months from the date of the petitioner's detention vide order dated 11.03.2014. The representations of the petitioner were rejected on 18.03.2014. Hence, the present writ petition.

3. Ms. D. Mohapatra, learned counsel for the petitioner-detenu submitted that the documents supplied to the petitioner-detenu along with the grounds of detention are illegal and the same are violative of Article 22 (5) of the Constitution of India. When the order of detention was approved by the State Government, it is incumbent upon the State Government as per Section 3(5) of the Act within seven days to report the fact to the Central Government together with the grounds on which the order has been passed and such other particulars which in the opinion of the State Government have a bearing on the necessity for the detention order. The State Government has not reported the order of detention and the approval thereof to the Central Government as per Section 3 (5) of the Act for which the order of detention is not sustainable and is liable to be quashed. There is no material on record to show that the State Government has conferred the power on the District Magistrate to issue the order of detention. Representation of the petitioner dated 28.01.2014 was mechanically rejected by the State Government vide order dated 18.3.2014 without any proper application of mind. Thus, there was a delay of one month and 18 days. The said rejection order is cryptic and non-speaking one. There has been a delay in dealing with the representation of the petitioner by the State Government which is violative of Article 22 (5) of the Constitution of India. The representation dated 28.1.2014 of the petitioner to the Central Government was also rejected on 21.3.2014 after a delay of about two months which is also violative of Article 22 (5) of the Constitution of India.

4. Ms. Mohapatra further submitted that the Advisory Board to which the case of the petitioner was referred under Section 10 of the Act was of the opinion that there is sufficient cause for detention of the detenu. In view of such opinion of the Advisory Board, the State Government has mechanically confirmed the order of detention of the petitioner under Section 12 (1) of the Act and under Section 13 of the Act directed detention of the petitioner for 12 months vide order dated 11.3.2014. The grounds of detention contained in Annexure-2 relate to ordinary law and order situation but not affecting the public order. The petitioner, who is a social worker and is espousing the cause of poor fishermen, has been arrested in connection with several criminal cases registered in one year, i.e., 2013. The petitioner was elected as a Sarpanch of Arjipalli Gama Panchayat from 2007 to 2012 and due to some political rivalry and in connivance with Gopalpur Port Authority, five cases have been registered against him along with other non-cognizable cases. In all the cases, the petitioner has been released on bail by the learned Sessions Judge as the cases against him are without any basis. The aforesaid order of detention is speculative in nature and does not have any foundation. The grounds on which the order of detention was passed against the petitioner have no nexus with the object sought to be achieved by the authority. In support of her contention, she relied on judgments of this Court in the case of *Pradeep Sahu Vs. Union of India and others*, 2012 (II) OLR 1070; *Bunty @ Ayushman Purohit Vs. State of Orissa and two others*, 2013 (I) OLR 416; and *Kutuli @ Iswar Naik Vs. State of Odisha and others*, 2013 (II) OLR 473.

All the criminal cases have been foisted by the police being influenced by the political persons. So far as non-F.I.Rs. are concerned, the petitioner has not received any notice and has no knowledge regarding station diary entry made against him. Since the criminal cases have been registered and are pending in the court of law, the criminal law is sufficient to punish the detenu and there is no necessity to resort to the National Security Act. The alleged act of the petitioner cannot be said to have disturbed the public order. Since the petitioner was in jail custody, he cannot disrupt the public order or even tempo of life and this aspect has not been appreciated. Thus, the order of detention is purely speculative, result of non-application of mind and the same has been passed without any basis or cogent materials. There is absolutely no complaint of any breach of public order and therefore, the order of detention is illegal. The representations of the petitioner having been rejected by the State Government as well as the Central Government after delay of 48 and 52 days respectively, the same is illegal and arbitrary. It is

incumbent on the part of the State Government as well as the Central Government to dispose of the representation immediately.

5. Mr. Bhuyan, learned Additional Government Advocate for the State submitted that the information regarding detention along with other relevant materials were received in the Home (Special Section) Department on 15.1.2014 and the matter was placed before the Government for consideration and the same was approved on 17.01.2014. The approval order was communicated to the detenu through the detaining authority vide Order No. 135/C dated 18.01.2014. After approval of the order by the State Government, the same was communicated to the Ministry of Home Affairs, Government of India and the Secretary, N.S.A. Advisory Board, Odisha in Home (Special Section) Department Letter No. 140/C dated 18.1.2014 and No. 141/C dated 18.1.2014 respectively. The report and opinion of the NSA Advisory Board dated 26.2.2014 was received in the Home (Special Section) Department on 28.2.2014. The opinion of the Board as well as other relevant materials in connection with the detention were considered by the State Government and the detention of the detenu was confirmed by the State Government, which was communicated to him through the detaining authority in Home (Special Section) Department Order No. 665/C dated 11.3.2014. The Odia representation dated 28.1.2014 and the English representation dated 10.2.2014 were received in Home (Special Section) Department on 1.3.2014 from the District Magistrate, Ganjam. A copy of the English representation dated 10.2.2014 and parawise comments of the Detaining Authority were forwarded to the Government of India, Ministry of Home Affairs in Home (Special Section) Department Letter No. 543/C dated 4.3.2014. The District Magistrate, Ganjam was also requested in Home (Special Section) Department Letter No. 542/C dated 4.3.2014 to submit the English version of the Odia representation dated 28.1.2014 as well as parawise comments in English for onward transmission to the Government of India. After careful consideration of the representation of the detenu as well as comments of the Detaining Authority and all relevant papers, the State Government rejected both the representations of the detenu on 15.3.2014. This was communicated to the detenu through the Detaining Authority in Home Department Letter No. 782/C dated 18.3.2014. The grounds of detention indicate the criminal activities of the detenu which were prejudicial to the maintenance of public order of the locality. The order of detention has been passed to prevent the detenu from acting in any manner which are detrimental to the maintenance of public order. The order passed by the

Detaining Authority, which was confirmed by the Government of Odisha, is preventive and not at all punitive.

6. Mr. Bhuyan further submitted that the petitioner has not submitted any representation to the Sub-Jail Authority on 19.1.2014, but, however, he has submitted his representation dated 28.1.2014 addressed to the Hon'ble Chief Minister and Hon'ble Home Minister, Odisha, Bhubaneswar which was received by opposite party no.2 on 05.02.2014. Parawise comments on the said representation of the petitioner were sent to the Deputy Secretary to Government, Home (Special Section) Department, Odisha, Bhubaneswar vide Letter No. 167/Res dated 11.2.2014 with a copy to the Deputy Secretary-cum-Secretary to NSA Advisory Board, Odisha, Cuttack. All the grounds as mentioned in the grounds of detention are valid. The Marine P.S. Cases registered against the petitioner reveal disruption of public order owing to criminal activities of the petitioner. As the criminal act of the petitioner affected public order and disturbed the even tempo of the general public, the petitioner was arrested on 11.11.2013 in Marine P.S. Case No. 10 dated 10.11.12013 under Sections 147/148/294/341/ 323/325/307/ 149 I.P.C. and forwarded to the court of learned S.D.J.M., Chhatrapur on 11.11.2013. The petitioner might have come out on bail in some other cases, but it does not mean that he is acquitted of the charges levelled against him in P.S. Cases as mentioned in the grounds of detention. As the criminal background of the petitioner is enough to show that the punitive detention under the provisions of Cr.P.C. is not sufficient to prevent him from becoming a threat to public order and tranquility in Marine P.S. area of Ganjam district, the only option left was to invoke the extra ordinary provisions under Section 3 (2) of the N.S. Act so as to prevent the petitioner from coming out of jail and acting in a manner prejudicial to maintenance of public order. The petitioner has violated the law and has become a threat to public order and tranquility in Marine P.S. area. On receiving the report from the Superintendent of Police, Ganjam vide his Letter No. 72/IB dated 5.1.2014, opposite party no. 2 examined the documents in detail submitted before him, discussed the matter with Superintendent of Police, Ganjam and ultimately opposite party no. 2 was subjectively satisfied and convinced that the incidents and occurrences committed by the petitioner as stated in the report of the Superintendent of Police, Ganjam were heinous in nature and were sufficient to prevent the petitioner from becoming a threat to public order and tranquility in Marine P.S. area of Ganjam district and the only option left was to invoke the extra ordinary provisions of National Security Act, 1980.

7. Mr. A.K. Bose, learned Asst. Solicitor General for the Union of India submitted that a copy of the representation of the detenu dated 10.02.2014 and parawise comments of the detaining authority forwarded by the Government of Odisha vide its letter no. 543/C dated 04.03.2014 were received by the Central Government in the concerned Section of the Ministry of Home Affairs on 12.3.2014. On receipt of the same, the representation along with para-wise comments was processed for consideration of the Union Home Secretary on 13.3.2014. The file reached the Under Secretary (NSA) on the same day, i.e., 13.3.2014. The Under Secretary (NSA) with his comments forwarded the same to the Joint Secretary (Security) on the very same day, i.e., 13.03.2014. With the comments of Joint Secretary (Security), the file was sent to Union Home Secretary on 14.3.2014. The Union Home Secretary after considering the order of detention and grounds of the representation of the detenu and the comments of the detaining authority rejected the representation on 20.3.2014 (15.3.2014 and 16.3.2014 were holidays being Saturday and Sunday and 17.3.2014 was being the Holi) and sent the file back to the Joint Secretary. The file reached the Section through the aforesaid level of officers on 21.3.2014. Accordingly, a wireless message no. II/15030/01/ 2014-NSA dated 21.3.2014 was sent to the Home Secretary, Government of Odisha, Bhubaneswar, Superintendent, Sub-Jail, Chhatrapur, District Magistrate, Ganjam and the detenu informing that the representation of K. Alleya was considered and rejected by Central Government.

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

(i) Whether delay of 46 days in considering the representation of the petitioner by the State Government warrants interference with the order of detention on the ground that it is in violation of Article 22(5) of the Constitution of India?

(ii) Whether there is any delay on the part of the Central Government in disposing of the representation of the petitioner?

(iii) Whether the grounds on which the detention order is passed against the petitioner satisfies the legal requirement that the detention order is to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order ?

(iv) What order?

9. Question Nos. (i) and (ii) being inter-linked, they are dealt with together.

To deal with the question No.(i) and (ii), i.e., delay and laches on the part of the opposite party-State Government as well as the Central Government in dealing with the representations of the petitioner, the following dates need to be noted.

Sl. No.	**Date**	**Action taken by State Government**
01.	19.01.2014/ 28.01.2014	Petitioner submitted his representation to the State Government
02.	10.02.2014	Petitioner submitted his English representation to the State Government.
03.	15.03.2014	The State Government rejected the representations of the detenu
04.	18.03.2014	The State Government communicated to the petitioner about rejection of his representation through the detaining authority.

Sl. No.	**Date**	**Action taken by Central Government**
01.	12.03.2014	The representation of the petitioner-detenu dated 10.02.2014 and parawise comments of the detaining authority were received by the Central Government.
02.	20.03.2014	The Central Government rejected the representation of the detenu
03.	21.03.2014	The Central Government communicated to the petitioner about rejection of his representation through the detaining authority.

10. There is confusion with regard to the date of submission of representations of the petitioner. In paragraph 7 of the writ petition, it is stated that the petitioner has submitted his representation on 19.01.2014 through Jail Authorities. In paragraph 9 of the writ petition, it is stated that the representation of the petitioner dated 28.01.2014 was mechanically rejected by the State Government. In paragraph 11 of the counter affidavit filed by opposite party No.2-Collector & District Magistrate, Ganjam, it has been stated that "petitioner has not submitted any representation through the

Sub-Jail Authority on 19.01.2014. However, he has submitted representation dated 28.01.2014 addressed to the Hon'ble Chief Minister and Home Minister, Odisha, Bhubaneswar which was received by opposite party No.2 on 05.02.2014 vide Memo No.115 dated 19.01.2014 of Superintendent of Sub-Jail, Chhatrapur."

It is not understood if the petitioner has not submitted its representation on 19.01.2014 and submitted the same on 28.01.2014 how his representation was received by opposite party No.2 on 05.02.2014 vide Memo No.115 dated 19.01.2014 of the Superintendent of Sub-Jail, Chhatrapur as per his own admission. In other words, had the petitioner not sent his representation on 19.01.2014, there was no occasion on the part of the Superintendent of Sub-Jail, Chhatrapur to send such representation vide Memo No.115 dated 19.01.2014 to opposite party No.2. Be that as it may, even if accepting the facts stated in paragraph 4.3 of the counter affidavit of opposite party No.1 that the Odia representation dated 28.01.2014 and the English representation dated 10.02.2014 were received in the Home (Special Section) Department on 01.03.2014 from the District Magistrate, Ganjam, there is a delay of 31 days in sending the Odia representation of the petitioner to the Home (Special Section) Department and there is no explanation for such delay. Similarly, so far English representation dated 10.02.2014 is concerned, there is a delay of 18 days in sending English representation of the petitioner to Home (Special Section) Department and there is also no explanation to such delay.

11. The carelessness of the District Magistrate, Ganjam in dealing with the representation of the petitioner is further evident from the averments made in paragraph 8 of the counter affidavit filed by opposite party No.1. In paragraph 8 of the said counter affidavit, it is stated that "….that Odia representation dated 28.01.2014 and English representation dated 10.02.2014 were received in Home (Special Section) Department on 01.03.2014 from the District Magistrate, Ganjam. Para-wise comments of the detaining authority on the above representation were received in the Home (Special Section) Department on 28.02.2014. As there were only parawise comments on the representation of the petitioner, detaining authority was requested over telephone to send the representations and those were received on 01.03.2014".

As it appears, the District Magistrate, Ganjam is not aware of the importance and necessity of dealing with the representation of a detenu with

utmost urgency. Otherwise, he would not have sent only the parawise comments on the representation of the petitioner without enclosing the representation of the petitioner for which he was requested over telephone to send the representation which was received only on 01.03.2014. From said paragraph 8, it is further revealed that the District Magistrate, Ganjam was requested by the Home (Special Section) Department vide letter No.542C dated 04.03.2014 to submit English version of Odia representation dated 28.01.2014 as well as the parawise comments in English for onward transmission to the Government of India. We fail to understand as to why the District Magistrate, Ganjam after receiving the Odia representation of the petitioner-detenu has not sent the same along with English version of the said representation to Home (Special Section) Department and instead he waited till he was requested for sending the same. Moreover, the petitioner has submitted English representation on 10.02.2014. Ultimately, the representation of the petitioner was rejected on 15.03.2014 and communicated to the detenu on 18.03.2014 through the detaining authority in Home (Special Section) Department vide letter No.782/C dated 18.03.2014. Thus, there is a delay of 46 days in disposing of the representation of the petitioner without any explanation for such delay which is not permissible under law.

12. Further, the English representation dated 10.02.2014 along with parawise comment of the detaining authority were forwarded to the Central Government only on 04.03.2014 and there is no cogent explanation for such inordinate delay.

13. All these go to show that the representation of the petitioner has not been sincerely dealt with by the State Government and there is no explanation for the delay caused in disposing of the same. On the above solitary ground, the writ petition deserves to be allowed.

14. The specific stand of the Union of India is that the English representation of the petitioner dated 10.02.2014 along with para-wise comments of the detaining authority were received by the Central Government in the concerned Section, Ministry of Home Affairs on 12.03.2014. On 13.03.2014, the representation of the petitioner along with parawise comments was processed for consideration by the Union Home Secretary. On the same day, i.e., on 13.03.2014 the file reached the Under Secretary (NSA), who with his comments forwarded the same to the Joint Secretary (Security) on the selfsame day. On the

next day, i.e., 14.03.2014, the file was sent to the Union Home Secretary. After duly considering the order of detention and grounds for the same, the representation of the detenu and comments of the detaining authority, the Central Government rejected the representation on 20.03.2014. In between 14.03.2014 and 20.03.2014, 15.03.2014 and 16.03.2014 were holidays being Saturday and Sunday and 17.03.2014 was a gazetted holiday being Holi. Accordingly, Wireless Message No.II/15030/01/2014-NSA dated 21.03.2014 was sent to the Home Secretary, Government of Odisha, Bhubaneswar; Superintendent of Sub-Jail, Chhatrapur; District Magistrate, Ganjam, Odisha and detenu informing that the representation of the petitioner was considered and rejected by the Central Government. Thus, there appears to be no delay on the part of the Central Government in dealing with representation of the detenu.

15. Law is well-settled that the representation of a detenu under the Act must be attended promptly, as the same infringes the fundamental rights of the detenu guaranteed under Article 22 of the Constitution. At this stage, it is necessary to refer to some of the decisions of the Hon'ble Supreme Court and this Court.

16. In ***Aslam Ahmed Zahire Ahmed Shaik-v- Union of India and others*****,** AIR 1989 SC 1403, the Jail Superintendent to whom the representation was handed over by the detenu for onward transmission, kept it unattended and pending with him for 7 days. The Jail Superintendent gave no explanation as to why the representation was retained though opportunity was afforded to him.

The Hon'ble Supreme Court held that the supine indifference, slackness and callous attitude on the part of the Jail Superintendent who had unreasonably delayed in transmitting the representation as an intermediary, had ultimately caused undue delay in disposal of the detenu's representation by the Government which received the representation 11 days after it was handed over to the Jail Superintendent by the detenu. This avoidable and unexplained delay has resulted in rendering the continued detention of the detenu as illegal and constitutionally impermissible.

17. The Hon'ble Supreme Court in *Smt. Khatoon Begum-v- Union of India and others*, AIR 1981 SC 1077, it is held that a person preventively detained under the provisions of the National Security Act is entitled to be released if there is delay in the consideration of the representation made by him to the detaining authority. It cannot be urged in respect of detention

under the Security Act that a certain amount of delay was inevitable having due regard to the procedure prescribed by the Act and, therefore, delay in consideration of the representation should not be allowed to prejudice the detention.

18. Article 22(5) enjoins a duty on the authority making the order of detention to afford the detenu "the earliest opportunity of making a representation against the order". The right and obligation to make and to consider the representation at the earliest opportunity is a constitutional imperative, which cannot be curtailed or abridged. If the Parliament or the State legislature making the law providing for preventive detention devises a circumlocutory procedure for considering the representation or if the inter departmental consultative procedures are such that delay becomes inevitable, the law and the procedures will contravene the constitutional mandate. It is essential that any law providing for preventive detention and any authority obliged to make orders for preventive detention should adopt procedures calculated towards expeditious consideration of representation made by detenu.

19. In, ***Saleh Mohammed-v- Union of India and others, AIR 1981 SC 111***, it is held as follows:-

> "Times out of number, this Court has emphasized that where the liberty of an individual is curtailed under a law of preventive detention, the representation, if any, made by him must be attended to, dealt with and considered with watchful care and reasonable promptitude lest the safeguards provided in Article 22(5) of the Constitution and the statute concerned should be stultified and rendered meaningless. Here in the instant case we find that the functionaries of the State in attending to the representation of the detenu have been guilty of gross negligence and chill indifference. For more than three weeks, the representation of the detenu remained lying unattended in the office of the Superintendent of Jail, or the Inspector-General of Prisons. This inordinate, unreasonable and unwarranted delay of about 22 days amounted to a violation of Article 22 (5), which guarantees to the detenu a right to have his representation considered with reasonable expedition. It was on this short ground that we had, as per our order dated August 20, 1980, allowed this writ petition, quashed the order of Saleh Mohammed's detention and directed his release forthwith."

20. In ***Noor Salman Makani-v-Union of India & Ors., AIR 1994 SC 575***, while examining the similar issue the Hon'ble Supreme Court observed that day to day delay in disposal of representation is required to be explained by the Authority to whom the representation is made. While dealing with the issue the holidays have been excluded, but inordinate delay in consideration and disposal of the representation may be fatal.

21. In the case of ***Smt. Pebam Ningol Mikoi Devi vs. State of Manipur and Ors****., (2010) 47 OCR (SC) – 684*, the Hon'ble Supreme Court quashed the order of preventive detention made against the detenu as seven days' delay occurred in forwarding of the representation which remained unexplained and none of the documents relied upon by the detaining Authority in passing the detention order was found to be pertinent. (See also *Md. Raju @ Md. Azim vs. State of Odisha and others, (2012) 51 OCR 1027*)

22. This Court in ***Bijaya Parida -v- State of Orissa and others***, ***2006 (II) OLR 591***, for 15 days' delay in the matter of disposal in detenu's representation, quashed the order of detention. Again in the case of ***Ananta Parida -v- State of Orissa and others, 2006 (II) O.L.R. 737***, for the same delay of 15 days in disposing of the detenu's representation, this Court also quashed the order of detention. Similarly, in the case of ***Sankar Gouda-v-Union of India and others***, ***2007(Supp.-1) OLR-92***, this Court quashed the order of detention for delay of thirty-five days on the part of the State Government in disposing of the representation of the detenu.

23. This Court in ***Shanina Begum-v-State of Orissa and others 2000(2) Crimes 424***, held that laches on the part of the State Government in forwarding the representation to the Central Government for a period of eighteen days vitiated the detention order.

24. If the case of the petitioner is examined in the light of the above legal propositions, we have no hesitation to hold that there was inordinate/ unreasonable and unwarranted delay on the part of the State Government in dealing with the representation of the detenu, which has infringed the fundamental rights of the detenu guaranteed under Article 22 of the Constitution.

25. Since there was delay and laches on the part of the State Government in disposing of the representation of the petitioner dated 28.01.2014

/29.01.2014 in view of above legal position, the order of detention is not sustainable and liable to be set aside.

26. Since the order of detention is quashed on the ground of inordinate delay in disposal of the representation of the petitioner there is no need to deal with question No.(iii) which would only amount to academic in nature.

27. Before we part with the case, we express our displeasure for the casual manner in which the administrative functionaries have acted to deal with the matter. The Hon'ble Supreme Court and this Court in innumerable cases have highlighted the constitutional mandate to deal with the representation of a detenu with utmost urgency. But in the present case, the contrary is the fact-situation. Such instance sends out a wrong message about the intention of the administrative authorities concerned.

28. In view of the above, we allow the writ petition, quash the impugned order of detention dated 09.01.2014 passed by the District Magistrate, Ganjam, Chatrapur under Annexure-1 and direct that the petitioner-detenu be set at liberty forthwith, if his detention is no longer required in connection with any other case.

Writ petition allowed.

2015 (I) ILR - CUT- 518

S. PANDA, J.

W.P.(C) NO.592 OF 2012

BANITA CHOUDHURY …….. Petitioner

.Vrs.

SUBRATA PATI ……OPP. Party.

CIVIL PROCEDURE CODE, 1908 – O-23,R-3

Compromise decree – Application by stranger to recall the decree – Order 23 Rule 3A is not applicable to a stranger to the compromise decree – Learned Court below should not have entertained the application recalling the compromise decree entered into 15 years back, that too after the death of the defendant – Held, the impugned order is setaside. **(**para-9,10.11)

For Petitioner - M/s P.K.Sahoo. A.C.Mohapatra, A.K.Panda & A.A.Lenka

For Opp. Parties- M/s. S.P.Misra B.Mohanty, S.K.Mohanty, A.K.Dash, S.K.Sahoo, J.K.Mohapatra. & S.K.Samantray.

Date of Judgment : 28.01.2015

JUDGMENT

S. PANDA, J.

Petitioner in this application has challenged the order dated 16.12.2011 passed by learned Civil Judge (Sr.Divn.) 1st Court, Cuttack in Interim Application No. 324 of 2007 recalling the judgment and decree passed on 17.8.1992 and 27.8.1992 respectively in T.S. No. 320 of 1992.

2. The facts leading to the present case as narrated in the application are as follows:-

The present petitioner filed T.S. No. 320 of 1992. The said suit was decreed on compromise on 17.8.1992. The plaintiff in the said suit pleaded that the suit property was purchased by her father on 1.1.1969 for a consideration of Rs.50/- from one Sashirekha and was in possession of the same. As there is no record of such transfer of land and the purchaser was in possession of the property from the date of purchase after him his daughter was in possession. The daughter has filed the suit claiming of her right over the property impleading the owner of the property Sashirekha as defendant. A decree was passed in the suit on compromise. The defendant has accepted the averment made in the plaint. After the suit was disposed of the decree was drawn up.

3. While the matter stood thus the present petitioner filed C.S. No. 243 of 2007 against one Madhusmita for permanent injunction as she has disturbed the possession of the petitioner over the suit property. In the said suit the petitioner has pleaded that the factum of earlier suit which was ended on compromise in support of her claim. After receiving notice by the defendant in the said suit the present opposite party came to know about the earlier T.S. No. 320 of 1992. She is the vendor of aforesaid Madhusmita who was the defendant.

4. The opposite party thereafter enquired into the matter and filed Interim Application No. 324 of 2007 to set aside the compromise decree taking a plea that she is the adopted daughter of Sashirekha who has purchased the property on 19.2.1964. After purchase she remained in peaceful possession of the same. Sashirekha and her husband Nilamani lost two daughters at an early stage for which they decided to adopt her as she is the daughter of Nilamani's sister. After their death the opposite party performed the funeral ceremony. Sashirekha died on 31.7.2004. After death of Sashirekha the opposite party being the successor has alienated the property in favour of Madhusmita Gochhi by registered sale deed dated 5.2.2007. The purchaser is in possession of the property. On the above pleadings she has seeking the relief to set aside the compromise decree dated 17.8.1992 and also the decree passed in T.S. No. 320 of 1992. She has disputed that Sashirekha has not appeared and filed Vakalatnama in the said suit which was fraudulently obtained and the compromise decree is not binding on her.

5. The present petitioner contested the said proceeding traversing the allegation made by the opposite party and contended that the opposite party has averred that she was adopted when she was only five days old. However when she was aged about 7 to 8 years in the year 1960 the giving and taking ceremony was observed and also she has not able to state why the deed of acknowledgement was executed by the adoptive parents 47 years after the adoption. The application to recall/set aside the compromise decree was filed at a belated stage i.e. 15 years after the decree was passed as such the application is liable to be rejected.

The court below on the above pleadings formulated four points to determine the issues whether the petition to recall/set aside the judgment and decree is maintainable, whether the judgment and decree obtained by fraud, whether the petitioner is not the natural born or adopted daughter of Sashirekha and Nilamani and has got no locus standi to file the case and whether the claim is barred by limitation or not? The opposite party examined five witnesses including herself, her natural father and mother and filed the documents which were marked as Exts. 1 to 8. The present petitioner has examined herself as witness. However she has not filed any documentary evidence. The court below on analyzing the materials available on record came to a conclusion that the compromise was effected in a clandestine manner and the order sheet shows that the parties are absent and their

respective counsel had also not signed on the record. The aforesaid finding based on the acknowledgement deed of adoption executed in the year 1999 though the signatures of Sashirekha and Nilamani were disputed in the said deed. Further without answering the points formulated the court below came to a finding that the O.P.W claimed that she has purchased the suit land which was completely different from the plaint averment therefore the Interim Application is maintainable at the instance of the adoptive daughter. Whether the adoption is valid or not is of little consequence. With the above finding the trial court has allowed the Interim Application and set aside the compromise decree.

6. Learned counsel appearing for the petitioner submitted that when the opposite party has taken a plea of adoption without proving the said adoption as valid one and in absence of any materials whatsoever regarding valid adoption of the opposite party, the court below should not have set aside the compromise decree passed 15 years back. He further submitted that the party to the compromise died in the year 2004, an application was filed in 2007 to set aside the compromise decree by a person who is not a party to the compromise the court below should have rejected the application as the adoption of the said person was under dispute. In support of his contention he has cited the decisions reported in ***2012(1) CLR (SC) 431, Holir V. Keshav and another, AIR 1991 Allahabad 75***, ***Smt. Suraj Kumari V. District Judge, Mirzapur and others***.

7. Learned counsel appearing for the opposite party submitted that the opposite party being the adopted daughter she has mutated the property in her name and alienated the same in the year 2007. He further submitted that since the adoptive mother has not disclosed that she has any knowledge about filing of the suit against her in respect of the suit property and same was compromised rightly after her death opposite party No.1 has filed the application to set aside the compromise. The court below taking into consideration the facts and circumstances of the case has allowed the application. In support of his contention he has cited the decision reported in ***AIR 1993 SC 1139***, ***Banwari Lal V. Smt. Chando Devi (through L.R.) and another***.

8. The facts discussed in the above paragraphs clearly reveals that the applicant filed the application to recall the compromise entered into in the suit is stranger to the said compromise. She has no personal knowledge regarding the compromise and its terms and conditions. The application to

recall the compromise was filed 15 years after the compromise was entered into that too after the death of the defendant, the recorded tenant.

9. The recall petition was filed under the provision of under Order, 23 of the Code of Civil Procedure. The said prescribed procedure was confined the parties to the suit not to the legal heirs. In the case of ***Smt. Suraj Kumari (supra)*** the Court has held that Order, 23 Rule, 3-A of the C.P.C. is not applicable to a stranger to the compromise decree. A suit by stranger to set aside the compromise decree, which affects his rights is not barred by the aforesaid provision. The provision makes it clear that the party to the suit is debarred from filing the suit for setting aside the compromise decree on the ground of being unlawful. A remedy available to such a party only by moving the appropriate application before the court concerned which has passed the compromise decree to appreciate the contention whether the compromise is lawful or the decree was obtained fraudulently, only remedy available is to file a suit revoking the said compromise.

10. The Apex Court in the case of ***Holir (supra)*** while considering the provision under Order, 23 Rule, 3-A of the C.P.C. distinguished the case of ***Banwari Lal V. Chando Devi (supra)*** held that under Section 9 of the C.P.C. the Civil Court has inherent jurisdiction to try all type of civil disputes unless its jurisdiction is barred expressly or by necessary implication, by any statutory provision and conferred on any other tribunal or authority. Nothing in Order, 23 Rule, 3-A to bar the institution of a suit before the Civil Court even in regard to decree or order passed in suits and/or proceedings under the different statutes before a court, tribunal or authority of limited and restricted jurisdiction.

11. In view of the above settled position the court below should not have entertained an application recalling the compromise decree entered into 15 years back that too after the death of the defendant. Accordingly this Court sets aside the impugned order dated 16.12.2011 passed by learned Civil Judge (Sr.Divn.) 1st Court, Cuttack in Interim Application No. 324 of 2007 arising out of T.S. No. 320 of 1992 in exercising the jurisdiction under Article 227 of the Constitution of India. However in the facts and circumstances without costs. Since the parties have already filed a suit for declaration/eviction, it is open to the parties to contest the said suit which shall be disposed of on its own merit. Accordingly the writ petition is disposed of

Writ petition disposed of.

2015 (I) ILR - CUT- 523

S.PANDA, J.

W.P.(C) NO. 29692 OF 2011

AMIYA KUMAR BISWASRAY .....Petitioner

.Vrs.

DILLIP KUMAR BISWASRAY & ORS. .....Opp. Parties

STAMP ACT, 1899 – S.33

Deed of partition not duly stamped – Impounding of the deed – Document in question was reduced to writing at a subsequent stage reflecting the allotment of share to the parties – Document need not be impounded – Trial Court shall consider the same in accordance with law in the suit itself – No error in the impugned order calling for interference of this Court. (Para 7)

For Appellant - M/s. P.K.Mishra & S.K. Dash
For Respondent - M/s. N.C.Pati , M.R.Dash, B.Dash & S.K.Dasmohapatra

Date of Judgment : 28.01.2015

JUDGMENT

S.PANDA, J.

Petitioner in this application has challenged the order dated 6.9.2011 passed by learned Civil Judge (Sr.Divn.), Paralakhemundi in C.S. No. 41 of 2009 rejecting an application to impound Ext.9 (deed of partition) filed by the plaintiff as required stamp duty has not been paid.

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

The opposite party No.1 as plaintiff filed the suit for partition. The present petitioner is the defendant No.3, brother of the plaintiff. In the plaint it was specifically pleaded that there was an oral family arrangement-cum-partition among the plaintiff and the defendants in respect of all the properties including the suit schedule properties of the deceased father Narendranath Biswasray. The four brothers, the widow mother and sisters have given their consent to the said arrangement. Subsequently the same was reduced to writing on 25th March, 2000 for the sake of convenience and to

avoid further complications and litigations. Accordingly the parties are in peaceful possession of the property. However cause of action arose when defendant No.3 threatened and made some overtact previous year for which plaintiff apprehended danger filed the suit in the year 2009 for declaration as per the said family arrangement and for permanent injunction in respect of the property allotted to him which was described in the suit schedule. The defendant No.3 filed his separate written statement. He has also pleaded that plaintiff and defendant Nos. 1 and 2 conspired together due to illness of the mother along with the help of the elder son-in-law of the family to deprive him an equal share. Accordingly with secret plan and conspiracy they drafted a document and representing that to fulfill wishes of the ailing mother for family peace postponed the actual partition in metes and bounds. The defendant No.3 signed on the said document as required to be produced and shown to the ailing mother. The document was taken away before he could read the contents of the same. A copy of the same has not been given to him till date. Thus, the alleged family settlement deed dated 25.3.2000 is out and out a product of fraud and misrepresentation and also can never be termed as a deed of partition as the plaintiff calls it in course of his plaint. He has also alleged that the deed of partition-cum-family settlement not acceptable for want of registration.

3. After pleadings are completed the parties have adduced their evidence. Plaintiff has filed his evidence on affidavit and he has produced the said deed which was marked as Ext.9 without any objection. The plaintiff has also pleaded at paragraph four of the plaint regarding an oral family arrangement-cum-partition among the parties in respect of all the properties. The suit property was allotted to the plaintiff and defendants were allotted with other properties towards their share in the said arrangement. Plaintiff as P.W.1 at paragraph-11 of his evidence deposed that oral family arrangement was made in April, 1998 and same was reduced to writing on 25th March, 2000. The scribe of the said document was examined as P.W.2. The defendant No.3 has cross-examined the said witness on 31st March, 2011. Thereafter the application was filed on 16th August, 2011 under Sections 33 and 38 of the Indian Stamp Act on behalf of the defendant No.3 to impound the document and to call upon for assessment of the stamp duty payable thereof with penalty and for recovery of the same. Plaintiff filed his objection and contended that the nature and true purpose of a document has to be determined with reference to the terms of the document which express the intention of the parties. The title or caption or the nomenclature of the

instrument/document is not determinative of the nature and character of the instrument/document. Ext.9 is a family arrangement in corroboration in the pleading of the plaint regarding an oral family arrangement-cum-partition which was made in April, 1998 and it was reduced to writing on 25.3.2000. The court below after hearing the parties passed the impugned order held that Ext.9 needs no compulsory registration as after death of the father, plaintiff and his brothers have made arrangement to possess the properties as per their convenience. The interest over the property was already existed to the parties before creation of the document as parties inherited the same after the death of the father. Hence question of impounding does not arise.

4. Leaned counsel for the petitioner submits that as per Section 33 of the Stamp Act a statutory obligation casts on all the authorities to impound a document. The court being an authority to receive a document in evidence is bound to give effect thereto. A document tendered in evidence should be duly stamped or should comply with requirements of Section 35 of the Stamp Act, if not stamped properly such a document cannot be received in evidence even for collateral purpose unless it is duly stamped or duty and penalty are paid under Section 35 of the Stamp Act. In support of his contention he has relied on the decisions reported in ***A.I.R. 2009 S.C. 1489, Avinash Kumar Chauhan V. Vijay Krishna Mishra, AIR, 2008 S.C. 1640, Government of Andhra Pradesh & Others Vrs. Smt. P.Laxmi Devi.*** He further submitted that Ext.9 is a document incorporating the details of the properties which were partitioned. The said document need be compulsorily registerable as provided under Section 17 of the Registration Act. Since the said document was unregistered document and it was tendered to the court as evidence in compliance of Sections 33 and 35 of the Stamp Act the document liable to be impounded and document is compulsorily required to be registered. In support of his contention he has relied on the decision reported in ***79 (1995) C.L.T. 666, Purnabashi Mishra Vrs. Raj Kumari Mishra and another*** wherein this Court held that partition in a Mitakshra sense may either be only a severance of the joint status without properties being partitioned by metes and bounds or partition may also mean in the ordinary sense, a partition amongst the co-sharers by way of division of properties in question by metes and bounds. In the case of partition of a former nature the document is not compulsorily required to be registered, but in a latter case of partition, because the document evidences allotment of specific properties or parcels of properties to individual coparceners and this is necessarily because of an agreement all the coparceners, such a partition may be effected orally but if

the parties reduce the transaction to a formal document and this document is intended to be the evidence of partition by metes and bounds it has the effect of declaring exclusive title of the coparcener in respect of that property which falls to his share and in such a case the document has to be compulsorily registered.

5. Learned counsel appearing for the opposite party No.1 submits that the plaintiff has filed the suit for declaration of his exclusive right, title, interest and possession over the suit property and for permanent injunction alleging inter alia that there was orally family arrangement-cum-partition among the plaintiff and the defendants for which the suit property was allotted to the plaintiff. Subsequently the said arrangement-cum-partition was reduced to writing to avoid future complicacy. The said fact defendant No.3 in his written statement alleged that the family settlement deed is outcome of fraud and mis-representation. After examination of some witnesses he has filed the application to impound family settlement deed. D.W.1 who is a party to Ext.9 has also stated Ext.9 is a deed of family settlement therefore, the conclusion of the court below that the document in question is a family settlement/arrangement not required to be registered under Section 17(1) of the Indian Registration Act is correct. In support of his contention he has cited the decision reported in ***A.I.R. 1966 S.C. 1836***, wherein the Apex Court at paragraphs nine quoted the passage Halasbury's Laws of England, 3rd Edition Volume-17 and held that:-

"(i) A family arrangement is an agreement between the members of the family for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

(ii) The agreement may be implied from a long course of dealing but it is more usual to embody or to effectuate the agreement in a deed.

(iii) The family arrangements are governed by principles which are not applicable to strangers. The Court when deciding the right of the parties under family arrangement should take broadest view of the matter for the interest of the family. The Courts in England as well as in India have made every attempt to sustain a family arrangement other than to avoid it.

(iv) In para-11 of the decision it is held that family arrangements are governed by a special equity and will be enforced if honestly made.

(v) Considering a number of decisions the Hon'ble Apex Court held in Para-16 of the judgment that the Courts are strongly lean in favour of a family arrangement that brings harmony in the family."

In view of the above and since in the present case the plaintiff as well as the defendant Nos. 1 and 2 supported regarding family settlement and parties are in possession of their respective shares having made considerable improvements and defendant No.3 has constructed his new residential building over the property allotted to him, now with some ulterior motive resile from the same. Family settlement made earlier which was reduced to writing at a subsequent stage need not be required to be registered. In support of his contention he has cited the decisions reported in ***A.I.R. 1976 S.C. 807, Kale & Others V. Deputy Director of Consolidation and Others, 2008 (II) O.L.R.(S.C.) 446, Faqir Chand Gulati V. Uppal Agencies Private Limited & another, A.I.R. 2014 Delhi 173, Vikram Singh and another V. Ajit Inder Singh, A.I.R. 2006 S.C. 2488, Hari Sankar Singhania & Others V. Gaur Hari Singhania & Others.***

6. In the case of ***Kale & Others(supra)*** the Apex Court discussed in general the effect and value of family arrangements entered into between the parties with a view to resolve disputes once for all. By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made.

xx xxx xxx xxx

The family arrangement may be even oral in which case no registration is necessary. The registration would be necessary only if the terms of the family arrangement are reduced into writing. A distinction should be made between a document containing the terms and recitals of a family arrangement made under the documents and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish

any rights in immovable properties if therefore not compulsorily registrable. Even if the family arrangement was not registered it could be used for a collateral purpose namely for the purpose of showing the nature and character of possession of the parties in pursuance of the family settlement. It would operate as an estoppel by preventing the parties after having taken advantage under the arrangement to resile from the same or try to revoke it.

The aforesaid decision of law reiterated by the said Court in the case of ***Hari Shankar (supra)*** and considering the case of ***Kale and others*** further held that the case of ***KK Modi V. KN Modi & others (AIR 1998 SCW 1166)*** where the court examined that "……. a family settlement which settles disputes within the family should not be lightly interfered with especially when the settlement has been ready acted upon by some members of the family. In the present case from 1989 to 1995 the memorandum of understanding has been substantially acted upon and hence the parties must be held to the settlement which is in the interest of the family and which avoid disputes between the members of the family. Such settlements have to be viewed a little differently from ordinary contracts and their internal mechanism for working out the settlement should not be lightly disturbed." Considering the above it was held that technical considerations should give way to peace and harmony in enforcement of family arrangements or settlements.

In the case of ***Vikram Singh (supra)*** the Court has considered the deed of family settlement which was reduced into writing because it has already been acted upon by parties. Parties acknowledged antecedent title. The deed does not require registration to be admissible in evidence.

In the case of ***Faqir Chand (supra)*** it was held that title or caption or the nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name may usually give some indication of the nature of the document. The nature and true purpose of a document has to be determined with reference to the terms of the document which express the intention of the parties.

7. Considering the above position and after going through the materials available on record it appears that the document was already marked as exhibit therefore the contention that it need be compulsorily registrable is not accepted as the parties have already acted upon it. The defendant No.3 in his written statement at paragraph three stated that the house property and most

of the immovable covered by the alleged family settlement deed are all acquired by Narendranath with the aid of the joint coparcenery fund. At paragraph five he has stated that during the year 2000 mother was suffering from various ailments she need longtime treatment. In such circumstances to fulfill wishes of the ailing mother for family peace the plaintiff and defendant Nos. 1 and 2 along with the elder brother-in-law postponed the actual partition in metes and bounds and drafted the document on which defendant No.3 is to sign as the same is required to be produced and to be shown to the mother who was very sick etc. The defendant No.3 has already constructed his residential building over the property allotted to him. The document in question was reduced to writing at a subsequent stage reflecting the allotment of share to the parties. As such the document need not be impounded. Trial court shall consider the same in accordance with law in the suit itself.

As there is no error apparent on the face of the record this Court is not inclined to interfere with the impugned order in exercising the jurisdiction under Article 227 of the Constitution of India. Hence the writ petition stands dismissed.

Writ petition dismissed.

2015 (I) ILR - CUT- 529

S. C. PARIJA, J.

CRLMC. NO.1367 & MISC. CASE NO. 913 OF 2013

RAJENDRA KUMAR SAHOO ……..Petitioner

.Vrs.

RAMAKANTA SAHOO ……..Opp.Party

NEGOTIABLE INSTRUMENT ACT, 1881 – S. 138

Proceeding U/s. 138 N.I. Act – Accused resides beyond the territorial jurisdiction of the concerned Magistrate – Whether it is mandatory for the Magistrate to conduct enquiry as envisaged U/s. 202 (1) Cr. P.C. before issuing process to the accused ? – Held, Court has option of accepting affidavits of complainant and other witnesses, instead of examining them in the Court for their examination-in-chief – No infirmity in the impugned order warranting interference by this Court.

Case laws Referred to:-

1.2013 (II) OLR -318 : (L.P. Electronics (Orissa) Pvt. Ltd. & Ors.-V- Tirupati Electro Marketing Pvt. Ltd.)
2.AIR 2014 SC 630 : (A.C. Narayanan-V- State of Maharastra)
3.(2014) 5 SCC 590 : (Indian Bank Association & Ors.-V- Union of India & Ors.)

For Petitioner - M/s. Sangram Nayak
For Opp.Party - M/s. U.C.Mishra

Date of Order 27.8.14

ORDER

S. C. PARIJA, J.

Learned counsel for the petitioner files written note of submission and learned counsel for the opposite party files copy of the complaint in Court today, which are kept on record.

Heard learned counsel for the petitioner and learned counsel appearing for the opposite party.

This is an application filed under Section 482 Cr.P.C., praying for quashing of the order of cognizance dated 24.7.2012, passed by the learned J.M.F.C., Pipli, in 1.C.C.No.37 of 2012, taking cognizance of offence under Section 138 of the Negotiable Instruments Act ('N.I.Act.' for short) and directing issuance of process against the accused-petitioner.

The sole contention raised by learned counsel for the accused-petitioner is that as the petitioner resides at Bhubaneswar, which is beyond the territorial jurisdiction of the learned J.M.F.C., Pipli, enquiry under Section 202 Cr.P.C. was mandatory and the same having not been complied, the impugned order of cognizance is liable to be quashed. It is submitted that as the provisions of Section 202 (1) Cr.P.C. are mandatory and admittedly, as no enquiry has been conducted by the learned Magistrate prior to taking of cognizance and issuance of process, the same is liable to be quashed. In this regard, learned counsel for the petitioner has relied upon a decision of this Court in ***L.P. Electronics (Orissa) Pvt. Ltd. & others v. Tirupati Electro Marketing Pvt. Ltd.,*** 2013 (II) OLR-318, in support of his contention that non-compliance of the mandatory provisions of Section 202 (1) Cr.P.C. vitiates the order of cognizance and issuance of process.

The impugned order of cognizance dated 24.7.2012, passed by the learned J.M.F.C., Pipli, in 1.C.C.No.37 of 2012, reads as under:

> *"The case record is put up for consideration on the point of cognizance. Perused the complaint petition, initial statement of the complainant furnished in the shape of an affidavit, the impugned cheque, Memorandum of the Bank and other relevant documents such as copy of legal notice, postal A/D etc. On careful scrutiny of all these documents and the sworn affidavit of the complainant clearly shows that prima facie material suggesting commission of an offence U/s.138 of the N.I.Act well exist in the case record. In such circumstances cognizance of the offence U/s.138 of the N.I.Act is taken as the materials available on record prima facie suggest the involvement of the accused Rajendra Kumar Sahoo in commission of such offence. The complainant is directed to file requisites within seven days for issuance of summons to the accused. Put up on the date fixed for appearance of the accused."*

The question which falls for consideration in this case is whether in a proceeding under Section 138 N.I.Act, where the accused resides beyond the territorial jurisdiction of the concerned Magistrate, it is mandatory for the Magistrate to conduct an enquiry, as envisaged under Section 202 (1) Cr.P.C., before issuing process to the accused.

The object of the provisions of Section 202 Cr.P.C. is to enable the learned Magistrate to form an opinion as to whether process should be issued or not. At that stage, what the Magistrate has to see is whether there is evidence in support of the allegations made in the complaint and a prima facie case has been made out on the materials placed before him. The scope of enquiry under Section 202(1) Cr.P.C., as amended with effect from 20.3.2006 is extremely limited to the ascertainment of truth of false-hood of the allegations made in the complaint, only to ensure that innocent persons living in or off places are not harassed by unscrupulous persons. The enquiry envisaged under Section 202 (1) Cr.P.C. is only for finding out whether or not there are sufficient grounds for proceeding against the accused. Therefore, if on the existing materials, it is not possible for the Magistrate to take cognizance of the offence, he can direct an enquiry under Section 202 Cr.P.C. However, if the materials existing are sufficient, there is no impediment for the Magistrate to take cognizance of the offence and issue process against the accused, without holding any such enquiry.

In the present case, the complainant has filed the complaint along with the relevant documents, including the original cheque, document with regard to the return of the same as dishonoured by the drawee bank, notice issued by the complainant to the accused, documents showing receipt of the same by the accused and the initial statement in form of affidavit in support of the allegations made in the complaint. Learned Magistrate has duly considered the said materials on record in taking cognizance of the offence under Section 138 N.I.Act and directing issuance of process to the accused-petitioner.

In ***A.C.Narayanan v. State of Maharastra,*** AIR 2014 SC 630, the Hon'ble Supreme Court while dealing with the question whether the proceeding contemplated under Section 200 Cr.P.C. can be dispensed with in the light of Section 145 of the N.I.Act, which was introduced by way of amendment in the year 2000, has observed as under:

> *"22. From a conjoint reading of Sections 138, 142 and 145 of the N.I. Act as well as Section 200 of the Code, it is clear that it is open to the Magistrate to issue process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 of the Code, it is thereafter open to the Magistrate, if he thinks fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. However, it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the Court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the N.I. Act. For the purpose of issuing process under Section 200 of the Code, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I. Act. It is only if and where the Magistrate, after considering the complaint under Section 138 of the N.I. Act, documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness(s) is required, the Magistrate may call upon the complainant to remain present before the Court and*

examine the complainant and/or his witness upon oath for taking a decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

26. While holding that there is no serious conflict between the decisions in MMTC (AIR 2002 SC 182:2001 AIR SCW 4793) (supra) and Janki Vashdeo Bhojwani (AIR 2005 SC 439 : 2004 AIR SCW 7064)(supra), we clarify the position and answer the questions in the following manner:

xxx xxx xxx

(iv) In the light of section 145 of N.I.Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I.Act and the magistrate is neither mandatory obliged to call upon the complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the N.I.Act."

A Division Bench of this Court in a reference made to it by the learned Single Judge in CRLMC Nos.42 and 1 of 2009, on the question whether it is necessary to record the statement of the complainant before issuance of process in a proceeding under Section 138 N.I.Act, has answered the reference in the negative, relying upon the decision of the apex Court in A.C.Narayanan (supra).

In a recent decision of the apex Court in ***Indian Bank Association and others v. Union of India and others,*** (2014) 5 SCC 590, the Hon'ble Court while dealing with the objectives of the amended provisions of Sections 143 to 147 of the N.I.Act has come to observe as under:

"We have indicated that under Section 145 of the Act, the complainant can give his evidence by way of an affidavit and such affidavit shall be read in evidence in any inquiry, trial or other proceedings in the court, which makes it clear that a complainant is not required to examine himself twice i.e. one after filing the complaint and one after summoning of the accused. The affidavit and the documents filed by the complainant along with complaint for taking cognizance of the offence are good enough to be read in evidence at both the stages i.e. pre-summoning stage and the post-summoning stage. In other words, there is no necessity to recall and re-examine the complainant after summoning of accused, unless the

Magistrate passes a specific order as to why the complainant is to be recalled. Such an order is to be passed on an application made by the accused or under Section 145(2) of the Act suo motu by the court. In summary trial, after the accused is summoned, his plea is to be recorded under Section 263(g) CrPC and his examination, if any, can be done by a Magistrate and a finding can be given by the court under Section 263(h) CrPC and the same procedure can be followed by a Magistrate for offence of dishonour of cheque since offence under Section 138 of the Act is a document based offence. We make it clear that if provisos (a), (b) & (c) to Section 138 of the Act are shown to have been complied with, technically the commission of the offence stands completed and it is for the accused to show that no offence could have been committed by him for specific reasons and defences."

Considering the decisions of various High Courts of the country, which have laid down certain procedure for speedy disposal of the cases under Section 138 N.I.Act, the Hon'ble Court found that many of the directions given by the various High Courts are worthy of emulation by the criminal courts all over the country dealing with cases under Section 138 N.I.Act and has accordingly given the following directions:

*"**23.1.** The Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.*

***23.2**. The MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. The court, in appropriate cases, may take the assistance of the police or the nearby court to serve notice to the accused. For notice of appearance, a short date be fixed. If the summons is received back unserved, immediate follow-up action be taken*

***23.3.** The court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing*

of the case and, if such an application is made, the court may pass appropriate orders at the earliest.

23.4. *The court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 CrPC to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for recalling a witness for cross-examination.*

23.5. *The court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The court has option of accepting affidavits of the witnesses, instead of examining them in court. The witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court.*

24. *We, therefore, direct all the criminal courts in the country dealing with Section 138 cases to follow the abovementioned procedures for speedy and expeditious disposal of cases falling under Section 138 of the Negotiable Instruments Act. The writ petition is, accordingly, disposed of, as above."*

In view of the settled position of law as discussed above, the decision of this Court in L.P. Electronics (supra) is no more good law.

For the reasons as aforestated, I do not find any infirmity in the impugned order of the learned Magistrate taking cognizance of the offence under Section 138 N.I.Act and directing issuance of process to the accused-petitioner, so as to warrant any interference.

CRLMC and Misc. Case being devoid of merits, the same are accordingly dismissed. Interim order dated 22.8.2013 stands vacated.

Application dismissed.

2015 (I) ILR - CUT- 536

B. K. NAYAK, J.

W.P.(C) NO.13319 OF 2013

ATMARAM SANSKRIT MAHAVIDYALAYA ……..Petitioner

.Vrs.

SHRI JAGANNATH SANSKRIT VISHWAVIDYALAYA & ORS. ……..Opp.Parties.

EXAMINATION – Mass malpractice – Examination committee cancelled the result and imposed punishment – Action challenged – Sub-Section 6 of Section 214 of the Odisha Universities First Statutes, 1990 is clear that only the Syndicate shall decide imposition of penalties on the recommendation of the Examination Committee – Held, the impugned notification so far it relates to punishment of cancellation of the results of 4th paper Vyakarana Upasastri (New & Old) Examination, 2013 of the students of the petitioner's Institution and the punishment of debarring the Centre Superintendent and Invigilator from examination related works is quashed – Direction issued that the syndicate of the Opp. Party-University shall consider the recommendation of the examination committe and take an independent decision. (Paras 14,15,16)

Case laws Referred to:-

1.AIR 1989 SC 1582 : (The Marthwada University-V- Seshrao Balwant Rao Chavan)

2.2013 (Supp.I) OLR 1045 : (Sri Biswaranjan Sethi & Ors.-V- Sri Jagannath Sanskrit Biswavidyalaya & Anr.).

For Petitioner - Mr. B.S.Tripathy-1
For Opp.Parties - M/s. S.Nayak & S.M. Jena.

Date of hearing : 21.10.2014
Date of judgment: 31.10.2014

JUDGMENT

B.K.NAYAK, J.

This writ petition has been filed by Atmaram Sanskrit Mahavidyalaya, Jatadhari Ashram through his Secretary praying to declare notification no.1242 dated 28.05.2013 (Annexure-3) cancelling the results of

4th paper, Vyakarana Upasastri (New & Old) Examination,2013 in respect of the students of the petitioner's institution and the punishment imposed debarring the Centre Superintendent and the concerned Invigilator from the conduct of Examination related works for next one year from the valuation and other examination related works for next three years on the ground of reported mass malpractice in the said paper as bad and illegal in law and to quash the same, and with further prayer to direct the opposite party-University and its authorities to forthwith evaluate the answer papers of the said cancelled examination.

2. The petitioner's institution established since 1993, is affiliated to Shri Jagannath Sanskrit Vishavidyalaya-opposite party no.1. It has been presenting it students in the annual examination of Sastri and Upasastri since 1995 at it own premises, which is an examination centre. During the examination 2013 on 04.03.2013 in respect of 4th paper- Vyakarana Upasastri (New & Old) the one-member squad (opposite party no.3), who is a Professor of opposite party-University, visited the examination centre and allegedly detected irregularity and mass malpractice during conduct of the examination and accordingly he submitted a report to the University indicating about such mass malpractice, on the basis of which the impugned notification dated 28.05.2013 under Annexure-3 has been issued by the University canceling the examination in respect of 4th paper- Vyakarana of the centre conducted at the petitioner's centre.

3. During the course of his argument, learned counsel for the petitioner does not challenge the report of the one-man squad with regard to alleged mass malpractice at the examination concerned. He only raises legal contention to the effect that under the Orissa Universities First Statutes,1990, it is the syndicate of the University, who is only authorized to decide and pass order regarding penalties to be imposed on the recommendations of the examination committee for use of unauthorized or incriminating material during examination at a centre and the impugned notification under Annexure-3 imposing the punishments is not the outcome of any decision taken by the syndicate of opposite party-University and, therefore, it has no legal basis. It is also submitted that there is no recommendation of the examination committee for cancellation of such examination on the report of the squad, but it is only the decision of the Vice Chancellor of the University, who has no authority to take such decision under the statue.

4. A counter affidavit has been filed by opposite party nos.1 and 2 wherein it is stated inter alia in paragraphs-11 and 12 thereof that the flying squad detected mass malpractice and suggested for cancellation of the examination of the said paper and from the report of the flying squad the examination committee considred that there was mass malpractice and the Invigilator along with the Centre Superintendent were involved in such mal practice. It is also stated that the impugned notification is the outcome of the examination committee report which was ratified by the syndicate and, therefore, it cannot be said that the syndicate has not taken decision for cancellation of the examination concerned.

5. In reply the learned counsel for the petitioner submits that the syndicate being the sole authority under the Orissa Universities First Statututes,1990 and there being no provision in the statutes prescribing for delegation of powers of syndicate to any other authority and for ratification of any decision of any other authority by the syndicate, the impugned notification which is not the outcome of the decision of the syndicate of the University, is unsustainable.

6. In order to resolve the issue raised it is necessary to look to certain relevant provisions of the Orissa Universities First Statutes,1990 (in short 'the Statutes'. Section 209 of the First Statutes which provides for the Constitution of the Examination Committee and its powers is extracted herein below :

> "**209. Examination Committee**-(1) There shall be an Examination Committee which shall perform the following functions namely:

(i) to recommend to the Syndicate, names of suitable persons for appointment as examiners;
(ii) to consider the reports of the Center Superintendents of Examination Centers and Supervisors of Valuations Centers and Observers Deputed to Examination Centers and make recommendations thereon to the Syndicate;
(iii) to consider the reports of Boards of Conducting Examiners on the work of Chief, Additional, Special and Assistant Examiners;
(iv) to consider all cases of unfair practices in examinations and make suitable recommendations to the Syndicate;
(v) to perform such other functions related to examinations as may be assigned to them by the Syndicate and the Vice-Chancellor.

(2) The following shall be the composition of the Examination Committee, namely;

(a) the Vice-Chancellor;

(b) two members of the Syndicate from among those specified in Clauses (c), (d), (e), (f), (g) and (h) of Sub-section (1) of Section 10 of the Act to be nominated by the Vice-Chancellor for a term of not more than one year or for a particular examination on examination basis;

(c) the Controller of Examinations shall be the Secretary of the Committee.

Any two of the three members shall form the quorum of the Committee.

(3) The vice-Chancellor shall, when present, preside at all meetings of the Committee and in his absence of the two Syndicate members as agreed between them shall preside at such meeting.

(4) Ordinarily the Committee shall meet at least twice a year. The first meeting shall be convened in the first week of January each year at which the Committee will consider the list of Question Paper Setters, Examiners etc., prepared by the Boards of Studies and vetted by the Controller of Examinations.

(5) After due scrutiny of the list, the Committee may recommend the list to the Syndicate with or without modifications provided, however, that there shall be a choice of three names to be considered for the appointment of every Question paper setters and Examiner in respect of all the papers of the examinations."

7. Section 210 of the Statutes provides for the powers of the syndicate with regard to ratification and approval of list of examiners vetted by the examination committee and to frame from time to time such rules and issue such directions and instructions for the guidance of all Question Paper Setters, Examiners appointed under the provisions of these Statutes.

8. Section 214 of the Statutes which provides for the manner of dealing with all instances of unfair means adopted in examination and the procedure and powers of the authorities to deal with the same and the nature of penalties to be imposed runs as under:

214. Unfair means in examination-(1) All instances of unfair means in examinations whether reported by the Centre Superintendents/ Invigilators/Supervisors/ Observers/Examiners or otherwise shall be placed before the appropriate Board of Conducting Examiners by the Controller of Examinations as soon as practicable but preferably before the results of the relevant examination are passed for publication. The Board of Conducting Examiners shall consider the reports and other materials, if any, and make a report of the scope and extent of the unfair means resorted to and specifically whether use has been made of unauthorized of incriminating material referred to in the reports or produced before the Board.

(2) *Conduct of examination Act*- In case the Board is satisfied that there is *prima facie* evidence of resort to unfair means in the examination, the Controller of Examinations shall forthwith issue notices to the candidates concerned precisely specifying the nature of the charge and calling upon the candidate to furnish his written reply to the charges within a period of twenty-one clear days. The notice shall also inform the candidate that he shall have the right to a personal hearing on a specified date which shall be after the last date for receipt of the written reply from the candidate.

(3) The written reply of the candidate along with the report of the Board of Conducting Examiners and other reports and material pertaining to the matter shall be placed before the Examination Committee.

(4) The Committee shall give a personal hearing to the candidate as indicated in the notice issued to the candidate by the Controller of Examinations and shall also consider the report of Board of Conducting Examiners, and other reports and material relevant to the case, if any.

Provided however, that in case no reply has been received from the candidate within the stipulated time and/or in the event the candidate failing to appear before the Committee at the appointed time, the Committee shall be competent to consider the other reports and other relevant material placed before them by the Controller of Examinations.

(5) If the Committee comes to the conclusion that there has been resort to unfair means, the Committee may recommend to the Syndicate that

any of the following penalties may be imposed on the candidate commensurating with the gravity of the unfair means resorted by him namely:

(i) for writing the roll number or leaving any identification mark anywhere in the answer script except in the place provided for the purpose-cancellation of the result of the examination;

(ii) for possession (but not used) of unauthorized or incriminating material cancellation of the result of that examination;

(iii) for misbehaviour with the Centre Superintendent/Invigilators/ Supervisors/ others connected with the conduct of the examination-Cancellation of the result of that examination;

(iv) for use of unauthorized or incriminating material-Cancellation of the result of that examination and debarring the candidate from appearing at the next examination;

(v) for use of unauthorized or incriminating material combined with misbehaviour with the Centre Superintendent/Invigilators/ Observers/Supervisors or others connected with the conduct of the examination-Cancellation of the result of that examination and debarring the candidate from appearing at the next two examinations.

(6) The Syndicate may consider the recommendations of the Examination Committee and decide on the penalties to be imposed. All such orders imposing penalties shall be published in the University Notice Board and the Gazette."

9. It transpires from the materials and the records produced by the University that the examination committee consisting of the Vice-Chancellor, Chairman, P.G. Council and Member of the Syndicate, one Prof. of Dharmasastra and Member of the Syndicate and the Controller of Examinations in their meeting dated 21.05.2013 took decision inter alia recommending cancellation of results of the examination concerned of the petitioner-institution and for debarring the concerned Centre Superintendent and the Invigilators from conducting examination related works for next one year. It is quite apparent that on the basis of such recommendation, the impugned notification (Annexure-3) was published on 28.05.2013, by which time, the Syndicate had not even approved or ratified the recommendation of the examination committee. It was only in the meeting of the Syndicate on

18.06.2013 vide Agenda Item No.6, the Syndicate ratified post facto the action taken by the Vice Chancellor with regard to the cancellation of the result of the examination.

10. Now the question arises as to whether the recommendation about the penalty of cancellation of examination made by the examination committee could have been ratified by the Syndicate of the University after publication of the impugned notification, which is evidently based on the recommendation of the examination committee?

Resorting to malpractice or mass malpractice at the examination comes within the ambit of adoption of unfair means and can be visited upon with penalties. Section 214 of the Statutes provides for the manner of dealing with all incidents of unfair means adopted in examination and the procedure and powers of the authorities to deal with the same. Sub section (2) of Section 214 provides for issuance of notices to the persons to be affected by the proposed action for adoption of unfair means and giving opportunity of hearing to them. Feeble allegations with regard to violation of such principle of natural justice made in the writ application were not pressed by the learned counsel for the petitioner at the time of hearing. Sub sections (3), (4) and (5) of Section 214 of the Statutes provides that all materials including the reply of the candidates and the report of the Board of conducting examiners and other reports and materials pertaining to the matter shall be placed before the examination committee and on consideration of all such materials if the committee comes to the conclusion that there has been resort to unfair means, it may recommend to the syndicate for imposition of any of the penalties prescribed in sub section(5) of Section 214. Clause (iv) of sub section(5) of Section 214 provides for the penalty of cancellation of result of the examination and debarring the candidates from appearing at the next examination for use of unauthorized or incriminating material at the examination. Sub section (6) of Section 214 specifically envisages that the syndicate on consideration of the recommendations of the examination committee shall decide on the penalties to be imposed for the alleged misconduct and that all such orders imposing penalties shall be published in the University Notice Board and the Gazette.

11. It is clear from the aforesaid provisions of the Statutes that the examination committee is empowered only to recommend the penalties to be imposed for the misconduct and the syndicate has to take the final decision about such penalties whereafter the order of the syndicate imposing the

penalty shall be published. No provision of the Statutes or any other law has been brought to the notice of the Court to indicate that the final decision about imposition of penalties shall be taken by the examination committee or that any recommendation by the examination committee of any penalty can be ratified by the syndicate.

12. It is trite law that if a Statute provides for performance of any act in a particular manner, the act must be performed in the manner prescribed or not at all.

13. In the case of ***The Marthwada University v. Seshrao Balwant Rao Chavan: AIR 1989 SC 1582*** interpreting Section 84 of the Marthwada University Act, which provides for delegation of powers of the authorities of the University, it was held as follows :

> "**22.** The other infirmity in the said resolution goes deeper than what it appears. The resolution was not in harmony with the statutory requirement. Section 84 of the Act provides for delegation of powers and it states that any officer or authority of the University may by order, delegate his or its power (except power to make Ordinance and Regulations) to any other officer or authority subject to provisions of the Act and Statutes. Section 24(1) (xli) provides for delegation of power by the Executive Council. It states that the Executive Council may delegate any of its power (except power to make Ordinances) to the Vice-Chancellor or to any other officer subject to the approval of the Chancellor (underlining is ours). The approval of the Chancellor is mandatory, without such approval the power cannot be delegated to the Vice-Chancellor. The record does not reveal that the approval of the Chancellor was ever obtained. Therefore, the resolution which was not in conformity with the statutory requirement could not confer power on the Vice-Chancellor to take action against the respondent."

Dealing with the contention that the Executive Council of the University ratified the action taken by the Vice-Chancellor, the Hon'ble Court further held in paragraph-24 as follows :

> "**24.** By this resolution, we are told that the Executive Council has ratified the action taken by the Vice-Chancellor. Ratification is generally an act of principal with regard to a contract or an act done by his agent. In Friedman's Law of Agency (Fifth Edition) Chapter 5 at p.73, the principle of ratification has been explained:

> "What the 'agent' does on behalf of the 'principal' is done at a time when the relation of principal and agent does not exist: (hence the use in this sentence, but not in subsequent ones, of inverted commas). The agent, in fact, has no authority to do what he does at the time he does it. Subsequently, however, the principal, on whose behalf, though without whose authority, the agent has acted, accepts the agent's act, and adopts it, just as if there had been a prior authorization by the principal to do exactly what the agent has done. The interesting point, which has given rise to considerable difficulty and dispute, is that ratification by the principal does not merely give validity to the agent's unauthorized act as from the date of the ratification: it is antedated so as to take effect from the time of the agent's act. Hence the agent is treated as having been authorized from the outset to act as he did. Ratification is 'equivalent to an antecedent authority'."

Finally the Hon'ble apex Court in paragraph-26 held that the principles of ratification do not have any application with regard to exercise of powers conferred under statutory provisions, and that the statutory authority cannot travel beyond the power conferred and any action without power has no legal validity and it is ab initio void and cannot be ratified.

14. In the case in hand, it is apparent that the examination committee of the University recommended the penalties of cancellation of the examination concerned and debarring the Centre Superintendent and Invigilators from conducting any examination related works for one year. Statutorily the examination committee does not possess the power to take a final decision about imposition of penalties, which power has been conferred only on the syndicate as per sub section (6) of Section 214 of the Statutes. It is only after the Syndicate passes order imposing the penalties that such order can be published. No provision in the Statutes authorizing the Syndicate to delegate its power to impose penalties on the examination committee has been brought to the notice of the Court. The instant impugned notification imposing penalties was published only on the basis of recommendation made by the examination committee of the University and the penalty order (notification) so published on 28.05.2013 was subsequently ratified by the Syndicate in its meeting dated 18.06.2013, which is a post facto ratification.

In the circumstances, it must be held that the impugned notification under Annexure-3 imposing the penalty on the petitioner-institution has no legal basis.

15. Learned counsel for the opposite parties placed reliance on a decision of this Court reported in ***2013 (Supp.-I) OLR-1045: Sri Biswaranjan Sethi and others v. Sri Jagannath Sanskrit Biswavidyalaya and another.*** This decision was rendered only on factual contentions with regard to allegation of adoption of malpractice at the examination and the questions of power of the authorities to impose the penalty and ratification of decision of one authority by any other or superior authority was not raised or considered. Therefore, the decision cited by the learned counsel for the opposite parties has no application to the present case.

16. On the aforesaid analysis, this writ petition is allowed and the impugned notification under Annexure-3 in so far as it relates to punishment of cancellation of the results of 4th Paper, Vyakarana Upasastri (New & Old) Examination,2013 of the students of the petitioner's Institution and the punishment of debarring the Centre Superintendent and the Invigilator from examination related works is quashed. It is directed that the Syndicate of the opposite party-University shall consider the recommendation of the examination committee with regard to the proposed penalties in respect of the petitioner's Institution and shall take an independent decision within a period of two months from the date of communication of this order. The writ petition is accordingly disposed of. Requisites for communication of this order shall be filed within one week.

Writ petition disposed of.

2015 (I) ILR - CUT- 545

B.K. NAYAK, J.

O.J.C. NO. 4353 OF 1997

PRADEEP KUMAR BEHERA & ORS. ……..Petitioners

.Vrs.

COMMISSIONER OF LAND RECORDS & SETTLEMENT, ORISSA & ORS. ……..Opp.Parties

ODISHA CONSOLIDATION OF HOLDING & P.F.L. ACT – 1972
Ss. 5(1), 13(1)(4), 37 (R/W SECTION 15(b) OF THE OSS ACT, 1958)

Publication of ROR U/s 13(1) of the Consolidation Act before issuance of order by the State Government U/s 5(1) of the said Act de-notifying consolidation operation in respect of the concerned village – Whether correctness of such ROR can be examined by the revisional authority under the consolidation Act or the revisional authority under the OSS Act ? Held, Consolidation Commissioner or Director of Consolidation has no authority to exercise revisional power U/s 37 of the Consolidation Act to examine the Correctness of the ROR published U/s 13(1) of the Act – In view of the deeming provision in section 13(4) of the consolidation Act an ROR published U/s 13(1) before publication of cancellation notification U/s 5(1) shall have all the consequences attached to the ROR as if it is one published under the OSS Act and correctness there of can be examined by the Settlement Commissioner U/s. 15(b) of the said Act. (Para 25)

Case laws Referred to :-

1. 1989 (I) OLR 367 : Govinda Ch. Tripathy & Ors. -V- The State of Orissa, Represented by the Secy. to Govt. of Orissa, Revenue Deptt. & Ors.
2. AIR 1957 (SC) 540 : Garikapati Veeraya -V- N.Subbiah Choudhry & Ors.

For Petitioners - Mr. J.R. Dash
For Opp.Parties - M/s. N.P. Parija, S.R.Patnaik, L.Mishra & K.K.Jena (Opp. Paty No.2)
Amicus Cuties - Mr. N.K.Sahu & U.K.Samal

Date of hearing : 20.10. 2014
Date of judgment: 28.11. 2014

JUDGMENT

B.K.NAYAK, J.

Order dated 27.01.1997 (Annexure-4) passed by the Commissioner, Land Records & Settlement, Orissa, Cuttack in R.P. Case No.3437 of 1995 under Section 15 of the Orissa Survey and Settlement Act,1958, has been assailed in this writ application.

2. The present opposite party nos.2 to 5 filed R.P. Case No.3437 of 1995 under Section 15 of the Orissa Survey and Settlement Act challenging the

correctness of R.O.R. published under Section 13 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act in respect of land under Khata No.577 of mouza-Nuapada, Tahasil-Cuttack Sadar since in the R.O.R. the lands were recorded in favour of Subash Chandra Behera, the predecessor-in-interest of the writ petitioners to the exclusion of opposite party nos.2 to 5. By the impugned order, the revision was disposed of directing Tahasildar, Cuttack to include the names of the present opposite party nos.2 to 5 jointly with Subash Chandra Behera.

3. The learned counsel for the petitioners only challenges the jurisdiction of the Commissioner, Land Records and Settlement to entertain the revision and pass the impugned order. Undisputedly the R.O.R. in question was published under Section 13(1) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act and soon thereafter an order by the State Government under sub section (1) of Section 5 of the Consolidation Act was published cancelling Government notification under Section 3(1) of the said Act whereby the village in question had been brought under consolidation operation.

The contention of the learned counsel for the petitioners is that even though in terms of sub-section (4) of Section 13 of the Consolidation Act, the R.O.R. published under sub-section (1) of the said section be deemed to have been made under the Orissa Survey and Settlement Act because of order of de-notification issued under Section 5(1) of the Consolidation Act, since the R.O.R. has been published on determination of right, title and interest by the competent authorities under the Consolidation Act, it was only the Commissioner, Consolidation or the Director, Consolidation, who could have revisional jurisdiction under Section 37 of the Consolidation Act to decide the correctness, legality and propriety of the R.O.R. and the Commissioner of land records and settlement could not have entertained the revision since the authorities under the Orissa Survey and Settlement Act have no jurisdiction to decide the question of right, title and interest in land. His submission is that the deeming provision of Section 13(4) of the Consolidation Act does not confer jurisdiction on the Settlement Commissioner to decide the correctness of the R.O.R. published under Section 13(1) of the Consolidation Act. Extending his argument he submits that in view of Section 51 of the Consolidation Act investing jurisdiction on the Consolidation authorities and ousting the jurisdiction of the Civil Court to decide the question of right, title and interest in the land within the consolidation area and a publication of the

R.O.R. under Section 13 of the Consolidation Act is based on the decision of the question relating to right, title and interest by the consolidation authorities, the Settlement Commissioner cannot sit on judgment over the said R.O.R. Drawing analogy from Section 22 of the Consolidation Act, he submits further that a final consolidation R.O.R. published under sub-section (1) of Section 22 of the Consolidation Act is also deemed to be an R.O.R. prepared under the Orissa Survey and Settlement Act as per sub section(4) of Section 22 but the correctness of such R.O.R. can be subjected to scrutiny only by the revisional authority under the Consolidation Act and, therefore, for the same reason an R.O.R. published under Section 13(1) of the Consolidation Act may be scrutinized by the revisional authority under the said Act and not by the revisional authority under the Orissa Survey and Settlement Act. He also submits that issuance of an order of de-notification of consolidation under Section 5(1) of the Consolidation Act does not obliterate the decision of the consolidation authorities with regard to right, title and interest in land which has culminated in publication of R.O.R. under Section 13(1) of the Act inasmuch as such publication is made after hearing of objections, appeals and revisions with regard to right, title and interest in land. He further logicises his contention stating that even after issuance of a notification under Section 41 of the Consolidation Act closing consolidation operation in an area the revisional authorities under the Consolidation Act continue to have jurisdiction with regard to orders passed by sub-ordinate authorities under the Act and for the same reason even after de-notification of consolidation by publication of order under Section 5(1) of the Act, the revisional authorities under the Consolidation Act will continue to have jurisdiction.

4. Learned counsel for opposite party no.2, on the other hand, submits that issuance of order under Section 5(1) of the Consolidation Act de-notifying consolidation operation not only has the effect of stopping the consolidation proceeding in the consolidation area, but also has the effect of obliterating all orders passed by the consolidation authorities deciding right, title and interest in the land in the consolidation area and that since the consolidation proceeding in the area is stopped from being brought to its logical end, the preparation of the R.O.R. under Section 13(1) of the Act is only for the purpose of having consequences attached to publication of an R.O.R. under the Orissa Survey and Settlement Act, by virtue of the deeming provision of Section 13(4) of the Consolidation Act. Therefore, the Settlement Commissioner in exercise of its revisional jurisdiction under

Section 15 of the Orissa Survey and Settlement Act can examine the correctness of the entries made in the R.O.R. published under Section 13(1) of the Consolidation Act.

5. Mr. N.K. Sahu, the learned amicus curiae supports the contentions raised by the learned counsel for the petitioners. Mr. U.K. Samal, the learned amicus curiae while supporting the contention of the learned counsel for opposite party no.2 to the extent that publication of de-notification order under Section 5(1) of the Consolidation Act obliterates and sets at naught all orders and actions of the consolidation authorities in respect of their decisions on right, title and interest in land, further contends that neither the revisional authorities under the Consolidation Act nor the authorities under the Orissa Survey and Settlement Act can have power or jurisdiction to examine the correctness of the entries made in the R.O.R. and that any person aggrieved by any entries made in any such R.O.R. shall have to take recourse to the common law forum by instituting a civil suit.

6. The question that falls for consideration is whether the correctness of R.O.R. published under Section 13(1) of the Consolidation Act before issuance of order under Section 5(1) of the said Act de-notifying consolidation operation in respect of the village concerned can be examined by the revisional authority under the Consolidation Act or the revisional authority under the Orissa Survey and Settlement Act ?

In order to answer the question, necessarily we have to decide the effect of an order published under Section 5(1) of the Consolidation Act de-notifying consolidation operation in the concerned area. If Section 5(1) notification has the effect of obliterating or setting at naught all orders passed and action taken by the Consolidation Authorities under the Act prior to the issuance of such notification including orders passed determining right, title and interest in the land, then the revisional authorities under the Consolidation Act will have no power and jurisdiction to examine the correctness of the R.O.R. published under Section 13(1) of the Act. If the revisional authority under the Consolidation Act will have no jurisdiction, the further question would be whether the revisional authority under the Orissa Survey and Settlement Act will have the jurisdiction to examine the correctness of the R.O.R. published under Section 13(1) of the Consolidation Act by virtue of the deeming provision of sub-section (4) of Section 13 of the said Act.

7. In order to answer the question, it is necessary to examine the scheme of the Orissa Consolidation Act and the Orissa Survey and Settlement Act and some relevant provisions thereof.

8. The Orissa Survey and Settlement Act,1958 was enacted by the State Legislature to consolidate and amend the laws relating to survey, preparation of record of rights and settlement of rent on land holdings in the State of Orissa. Different parts of the State, prior to the enactment of the Orissa Survey and Settlement Act 1958 (in short 'OSS Act') were being governed by different tenancy laws for the purpose of survey, record of rights and settlement of rent, such as the Bengal Survey Act, the Orissa Tenancy Act, the Madras Survey and Boundaries Act, the Madras Estates Land Act, the C.P. Settlement Act, the C.P. Tenancy Act etc. Under the OSS Act survey includes all or any other operations incidental to the determination, measurement and record of a boundary or boundaries. Record of Rights under the Act are prepared having particulars and entries including the name of the tenant or occupant, the class to which each tenant belongs and the nature of interest, extent of the land held by each tenant or occupant, name of the landlord and/or proprietor of each tenant, the rent and charges for irrigation payable by each proprietor or landlord, tenant or occupant and the special conditions or incidents of the tenancy, etc. as envisaged in Rule-21 of the OSS Rules. Settlement with reference to the OSS Act means settlement of rent to be payable by a tenant, rayat or sub-tenant to the landlord in respect of the land held. Chapter-IV of the OSS Act deals with settlement of rent whereas Chapter-II deals with survey. Chapter-III of the Act deals with record of rights (ROR). Proceedings with regard to survey, record of rights and settlement of rent are taken up separately by order of Government passed to that effect from time to time under different provisions of the Act. However, Section 36 of the OSS Act authorizes the Government to make order directing simultaneous proceedings to be taken up in respect of survey and preparation of R.O.R; preparation of R.O.R. and settlement of rent; or survey, preparation of R.O.R. and settlement of rent with respect to any local area.

The OSS Act provides for different hierarchy of officers and personnel and vested them with power and jurisdiction for conducting different works and passing appropriate orders.

Section-11 of the OSS Act makes provision empowering the State Government to order for preparation of R.O.R. After an order by the

Government is passed, the Assistant Settlement Officer shall proceed to prepare the R.O.R. in the prescribed manner. For the purpose of preparation of R.O.R. in respect of any local area, there shall be prepared in the prescribed manner a map showing all such particulars as may be considered necessary for the purpose of R.O.R. The Assistant Settlement Officer shall first prepare draft R.O.R. and shall publish the same in the prescribed manner and shall receive and consider any objection, which may be made to any entry therein or any omission there from, during the period of publication in accordance with the provision of Section 12 of the Act. Any order passed by the Assistant Settlement Officer on any objection made to the draft R.O.R. is appealable before the Settlement. Officer under Section 12-A of the Act. As per Section 12-B of the Act, after disposal of objections and appeals, the Assistant Settlement Officer shall finally frame the R.O.Rs incorporating all such alterations giving effect to the order passed on objections and appeals and shall cause it to be finally published in the prescribed manner. Section 15 of the Act vests the Board of Revenue with jurisdiction to revise any record of rights of its own motion at any time or on application made within one year from the date of final publication of R.O.R., but not so as to affect any order passed by the Civil Court under Section 42 of the Act. Under sub section (3) of Section 13 of the OSS Act every entry in a final published R.O.R. shall be presumed to be correct until it is proved by evidence to be incorrect.

9. It is trite law that R.O.R. does not create or extinguish title and the settlement authorities lack the jurisdiction to adjudicate upon disputed questions of title. For the purpose of revenue records, the R.O.R. is prepared and the law attaches the presumption of correctness to the entries made therein. [Decision in 62 (1966) CLT 322, 39 (1973) CLT 1013 and 1989 (II) OLR-135 may be seen].

10. In order to increase agricultural production in the country by consolidating scattered holdings and re-arranging the holdings among various landowners and to make them more compact, the State Government legislated the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act,1972 (in short “the Consolidation Act”) and to implement the same created different authorities under the said Act. For starting consolidation operation in a village or group of villages, the State Government shall have to issue a notification to that effect under sub section (1) of Section 3 of the Consolidation Act. Public notice of such notification

has to be given in the prescribed manner by the Consolidation Officer. Section 4 of the Consolidation Act enumerates the effect of notification published under Section 3(1) of the Act. The effect of notification under Section 3(1) remains valid or continues till the publication of notification under Section 41 or under sub-section (1) of Section 5, as the case may be. Sub-sections (1), (3) and (4) of Section 4 of the Act, which are relevant for our purpose, are extracted hereunder :

> "**4. Effect of notification-**Upon the publication of the notification issued under Sub-section (1) of Section 3 in the *Official Gazette* the consequences as hereinafter set forth, shall, subject to the provisions of this Act, ensue in the consolidation area till the publication of notification under Section 41 or Sub-section-(1) of Section 5, as the case may be-
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> (1) The consolidation area shall be deemed to be under consolidation operations and the duty of preparation of record of rights and map of each village comprised in the area shall be performed by the Assistant Consolidation Officer who shall prepare them in the manner hereinafter provided.
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> (2) ... .
> (2-a) ... ...
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> 3. Every proceeding, relating to survey, preparation and maintenance of record-of-rights and settlement of rent shall stand abated after publication of the notification under Sub-section(1) of Section 6 ; and
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> (4) Every suit and proceedings for declaration of any right or interest in any land situate within the consolidation area in regard to which proceedings could be or ought to be started under this Act, which is pending before any Civil Court, whether of the first instance or appeal reference or revision shall, on an order being passed in that behalf by the Court before which such suit or proceeding is pending stand abated:
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> Provided that no such order shall be passed without giving the parties concerned an opportunity of being heard:
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> Provided further that on the issue of a notification under Sub-section (1) of Section 5 in respect of the said area or part thereof-

(a) every order passed by the Court under Clause(4) in relation to the lands situate in such area or part thereof, as the case may be, shall stand vacated, and

(b) all such suits and proceedings as are referred to in Clause(3) or Clause(4) which relate to lands situate in such area or part thereof, as the case may be, shall be proceeded with and disposed of in accordance with the law as if they had never abated:

Provided also that such abatement shall be without prejudice to the right of the person affected to agitate the right or interest which formed the subject-matter of the said suit or proceeding before the consolidation authority in accordance with the provisions of this Act or the rules made thereunder."

Section 6(1) of the Consolidation Act provides that after publication of notification under Section 3(1), the Director of Consolidation shall issue a notification constituting under and initiating preparation of maps and land register in respect of each unit which shall be published at a conspicuous place of the village for a period of not less than fifteen days, whereupon the Assistant Consolidation Officer shall prepare the map of each village in the consolidation area and prepare a register known as "Land Register" showing particulars of the lands, interests therein, rent and cess settled therefor and such other details as may be prescribed. The Assistant Consolidation Officer shall also determine in consultation with the consolidation committee the valuation of lands and houses etc taking into consideration different factors and also determine the shares of individual land owners in joint holdings for the purpose of effecting partition to ensure proper consolidation.

Section 7 of the Act empowers the A.C.O and the C.O. to effect partition of the joint holdings on application of the interested parties. They have also power to settle the fair and equitable rent and cess payable in respect of any land, notwithstanding anything contained in any other law for the time being in force.

After publication of notification under Section 6(1) of the Act, the A.C.O. in consultation with the consolidation committee prepares in respect of the each Unit under the consolidation operation a statement of principle to be followed in carrying out the consolidation operation in the Unit.

As per Section 9 of the Act, the copy of the map, Land Register and other records, if any, prepared under Section 6 together with the Statement of

the principles, shall be published in the Unit in the prescribed manner. Notices containing relevant extract from the land register are to be sent to the land-owners mentioned in the land register under sub-section (3) of Section 9. Any person interested may within the stipulated period file before the A.C.O. objection on the correctness of entries in the records and the extract furnished therefrom or relating to partition.

Section 10 of the Act provides that objections relating to right, title and interest in the land which can be disposed of by conciliation among the parties concerned shall be disposed of by the A.C.O. Objections which can not be disposed of by conciliation shall be forwarded by the A.C.O. to the C.O. for disposal. In terms of Section 11, objections forwarded by the A.C.O. shall be heard by the C.O. after giving the parties concerned opportunity of hearing and after such local inspection as may be deemed necessary.

Any person aggrieved by an order of the A.C.O. or the C.O. has a right of appeal to the Director of Consolidation under Section 12 of the Act. Appellate orders of the Deputy Director can be challenged in revision by the aggrieved party before the Consolidation Commissioner under Section 36(1) of the Act, which shall be final.

On the basis of orders passed under Sections10, 11 and 12, the map and land register prepared under Section 6 shall be revised and be published for a period of fifteen days in the unit for information of all concerned as per provision of sub-section(1) of Section 13.

11. Section 13 of the Consolidation Act provides as under :

> "**13. Revision of map and land register**-(1) The map, land register and other records, if any, prepared under Section 6 shall be revised, if necessary, on the basis of the orders passed under Sections 10, 11, and 12 and shall be published for a period of fifteen days in the unit for information of all concerned.
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> (2) [*Deleted*]
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> (3) The map, land register and other records, if any, may thereafter be maintained from time to time on the basis of orders passed by competent authorities under the relevant provisions of this Act.
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> (4) Where in respect of any village an order is published under Sub-section(1) of Section 5 at any time after the publication of the map

and land register under Sub-section(1), the map and the record-of-rights prepared on the basis of such land register shall, for all intents and purposes, be deemed to have been prepared under the Orissa Survey and Settlement Act,1958 (Orissa Act, 3 of 1959), provided they are published in the same manner as required by Sub-section (2) of Section 22 and extracts of the record-of-rights are supplied to the land-owners at the time of such publication."

12. At this stage, it is apposite to see the provision of Section 5 of the Consolidation Act, which is extracted hereunder :

"**5. Cancellation of notification**-(1) It shall be lawful for the State Government at any time to cancel, by publication of an order to that effect in the *Official Gazette*, the notification made under Sub-section(1) of Section 3 in respect of the whole or any part of the area specified therein.

(2) Where a notification has been cancelled in respect of any area under Sub-section (1), such area shall cease to be under consolidation with effect from the date of the cancellation."

13. Section 15 of the Consolidation Act provides as under:

"**15. Decision of matters relating to changes and transactions affecting right or interest recorded in revised records**-(1) All matters relating to changes and transfers affecting any of the rights, title and interest recorded in the land register published under Section 13 for which cause of action arose after the publication of records under Section 9 may be raised before the Assistant Consolidation Officer as and when they arise but not later than the date of publication of the order, if any, under Sub-section(1) of Section 5 or the date of confirmation of the scheme under Sub-section(1) of Section 21, whichever is earlier:

Provided that it shall also be competent for the Assistant Consolidation Officer to consider such cases *suo motu.*

(2) The provisions of Sections 6 to 12 shall, *mutatis mutandis,* apply to the hearing and disposal of any matter raised under Sub-section(1) as if it were a matter raised under the aforesaid sections."

14. Under Section 17 of the Act, the Assistant Consolidation Officer shall after publication of map and land register under Section 13(1) prepare a

provisional consolidation scheme on the basis of map and land register published under Section 13 and as revised under the provisions of the Act. The A.C.O. is also empowered to prepare provisional consolidation scheme by exchange of lands of different land owners or land of the Government with that of any land owner. The provisional consolidation scheme prepared by the A.C.O. shall be published in the Unit in the prescribed manner and extracts thereof shall be sent to the land-owners. Any person interested and affected by the provisional consolidation scheme may file an objection before the C.O. as per Section 18 of the Act and such objections are disposed of by the C.O. under Section 19 after hearing the parties and consolidation committee. Any person aggrieved by the order of the Consolidation Officer may appeal to the Director, Consolidation under Section 20 of the Act.

After disposal of the objections and appeals under Sections 19 and 20, the Director, Consolidation shall confirm the provisional consolidation scheme with such modifications as may be necessary in the interest of proper consolidation. The confirmed consolidation scheme becomes final except as otherwise provided under the Act.

15. After confirmation of the provisional consolidation scheme final map and record of rights are prepared and published under Section 22 of the Act, which runs as under :

> "**22. Preparation and publication of final map and record-of-rights and coming into force of the final consolidation scheme**-(1) (a) As soon as may be after confirmation of the Provisional Consolidation Scheme the Consolidation Officer shall cause to be prepared for each village in the consolidation area a final map and record-or-rights on the basis of the Consolidation Scheme so confirmed.
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> (b) The map and the record-of-rights shall contain such particulars as are required under the Orissa Survey and Settlement Act,1958 (Orissa Act 3 of 1959) with such modifications as may be prescribed and shall also show the rent and cess determined under Sub-section(3) of Section 7.
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> (2) The map and the record-of-rights prepared under Sub-section (1) shall be published in the prescribed manner and the Final Consolidation Scheme shall come into force from the date of such publication.

(3) The relevant extract of the record-of-rights shall be supplied to the land-owners at the time of publication.

(4) The map and the record-of-rights published under Sub-section(1) shall, subject to alterations and modifications made in pursuance of orders passed under Section 15 or 36 or orders referred to in Sub-section(3) of Section 41, for all intents and purposes be deemed to have been prepared under the Orissa Survey and Settlement Act,1958."

As per Section 23 of the Act, on an after the date of publication of the map and record of rights under sub-section (2) of Section 22, a land-owner shall be entitled to enter into possession of the land allotted to him.

Section 25 provides that on an application made within sixty days from the date of coming into force of the final consolidation scheme by the land-owner who is unable to enter into possession of the land allotted to him under the Scheme, the A.C.O. may put the land-owner into actual physical possession of the lands so allotted. Under sub-section(3) of Section 25 in the absence of any application by the land-owner, the A.C.O. may on his own motion at any time before the issue of notification under sub-section(1) of Section 41 put the land-owner into actual physical possession of the allotted lands, if he has reason to believe that the land-owner has not entered into possession. Under sub-section (2) of Section 25 on expiry of six months from the date on which the land-owner becomes entitled to enter into possession of the lands in accordance with Section 23 or where an application has been made to the A.C.O. under sub-section (1), on the expiry of six months from the date of such application, the land owner shall, if not entered into possession earlier, be deemed to have entered into actual possession of the land.

16. Section 31 of the Consolidation Act provides for consequences to ensue on land-owner entering into possession. The said Section is extracted hereunder :

> "**31. Consequences to ensue on land-owner entering into possession**-With effect from the date on which a land-owner enters or is deemed to have entered into possession of the Chaka allotted to him in accordance with the provisions of this Act, the following consequences shall ensue-

(1) The right, title, interest and liabilities of every land-owner in respect of his original holding shall cease:

Provided that where the land-owner is allotted his original holding either wholly or in part in the Final Consolidation Scheme his right, title, interest and liability in such holding or part thereof, as the case may be, shall remain unaffected;

(2) Every landowner shall have the same right, title, interest and liabilities in the "Chaka" allotted to him as he had in the original holding and the rights and interests of all other persons in respect of such original holdings shall stand transferred to the said "Chaka" or to such part thereof as specified in the Final Consolidation Scheme."

17. Section 36 of the Consolidation Act gives the Consolidation Commissioner powers of revision against any decision of the Director of Consolidation. Section 37 confers suo motu power of revision on the Consolidation Commissioner and the Director, Consolidation and in doing so those authorities may call for and examine the records of any case decided or proceedings taken up by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings or as to the correctness, legality or propriety of any order passed by any such authority.

18. Section 41 of the Consolidation Act provides for closure of consolidation operation which shall be after preparation and publication of final R.O.R. under Section 22, though the operation of the provisions of Chapter-IV relating to enforcement of the final consolidation scheme as contained in the final R.O.R. may continue. Section 41 of the Act is quoted here in below:

"**41. Closure of consolidation operations**-(1) As soon as may be after the final maps and the records have been prepared under Section 22, the State Government shall issue a notification to the affect that the consolidation operations have been closed in the unit and then the village or villages forming part of the unit shall cease to be under the consolidation operations:

Provided that the issue of a notification under this section shall not affect the operation of the provisions contained in Chapter IV.

(2) Notwithstanding anything contained in Sub-section(1), consolidation operations shall not be deemed to have been closed in respect of any case or proceeding pending under the provisions of this Act on the date of issue of notification under Sub-section(1).

(3) The orders passed by the competent authorities in matters referred to in Sub-section (2) shall be given effect to by such authorities as may be prescribed."

19. Section 51 of the Consolidation Act bars the jurisdiction of the Civil Courts to decide the question relating to right, title and interest in land lying within the consolidation area and confers on the authorities under the Act power to decide such question subject to provisions of Section 4(3) and Section 7(1) of the Act.

20. From the aforesaid provisions it is clear that with effect from the date of publication of notification under Section 3(1) of the Consolidation Act, a village or group of villages, as mentioned in the notification, is brought under consolidation operation, whereupon the authorities under the said Act become competent to exercise jurisdiction and powers conferred on them under the Act and by virtue of provision of Section 51 such authorities become competent to decide the question of right, title and interest in land and the jurisdiction of the civil court to decide such question gets ousted. Even where questions of right, title and interest in land brought under consolidation operation are pending before the civil court, they stand abated on an order being passed to that effect by the court in accordance with the provision of sub-section(4) of Section 4. However, consequent upon issue of cancellation notification under Section 5(1) of the Act as per second proviso to sub-section(4), orders of abatement of suits involving questions of right, title and interest in land automatically stand vacated and all such suits shall proceed and be disposed of by the court as if they had never abated. It is also seen that as per provision of sub-section (3) of Section 4 every proceeding relating to survey, preparation of record of rights and settlement of rent, which might be pending before the authorities under the OSS Act shall also stand abated after publication of notification under sub-section (1) of Section 6 by the Director, Consolidation initiating preparation of map and land register in respect of the consolidation area. This otherwise means that henceforward maps and land register in respect of each unit in the consolidation area shall be prepared by the consolidation authorities, particularly, the A.C.O. It is abundantly clear from sub-section(2) of Section

6 that the land register would show the particulars of the lands, nature of interest of person in such land and the rent and cess settled therefor. Objections to any entry in the land register which may relate to right, title and interest in the land or the rent and cess settled for the same have to be decided by the authorities under the Consolidation Act. The legislature, therefore, has in its wisdom enacted the provision of abatement of suits in civil court relating to right, title and interest and the proceedings of survey and record of rights and settlement of rent pending before the authorities under the OSS Act in order to avoid conflicting decisions. Therefore, clause (b) of the second proviso to sub-section(4) of Section 4 of the Consolidation Act also provides for vacation of abatement of proceedings pending before the settlement authorities on publication of order of cancellation of consolidation operation under Section 5(1) of the Act.

21. Under Section 5 of the Consolidation Act, it is competent for the State Government at any time to cancel the notification made under Section 3(1) by publication of an order in the official Gazette. This, in other words means that the Government may issue an order of de-notification of consolidation operation by publishing the same in the official Gazette at any time and as per sub-section (2) of Section 5, on publication of the order, consolidation operation started in a particular area in pursuance of notification under Section 3(1) of the Act shall cease with effect from the date of cancellation or de-notification. Though this Section empowers the Government to issue cancellation order "at any time", it has been held by this Court in the decision reported in ***1989 (I) OLR 367: Govinda Chandra Tripathy and others v. The State of Orissa represented by the Secretary to Government of Orissa, Revenue Department and others*** that the power to issue order of cancellation can be exercised only before publication of final map and R.O.R. under Section 22(1) of the Act.

22. It has been argued by the learned counsel for the petitioner and Mr. N.K. Sahu, the learned Amicus curie that since the consolidation operation ceases with effect from the date of cancellation order, record of right (Land Register) prepared and published under Section 13 (1) of the Consolidation Act amounts to final decision on question of right, title and interest of the land-owner in the land after hearing of objection cases and appeals of the aggrieved person, any grievance to the entries made in such R.O.R. can be agitated before either the Consolidation Commissioner or the Director, Consolidation under Section 37 of the Act and not before the Settlement

Commissioner under Section 15 of the OSS Act inasmuch the Settlement Commissioner has no power or jurisdiction to decide the questions of right, title and interest in land. It is further argued that where the R.O.R. under Section 13(1) of the Act is published during pendency of appeal or revision under Sections 12 and 36 of the Act, even after publication of cancellation order under Section 5(1), such appeal or revision shall continue to be heard and disposed of by the authorities under the Act. It is also argued that even where R.O.R. is published under Section 13(1) on the basis of any order passed in objection or appeal and soon thereafter cancellation notification is published under Section 5(1) of the Act, the party aggrieved by the original or appellate order cannot be deprived of his right to appeal, which is a vested right. In this respect reliance has been placed on the decision of the apex Court reported in ***AIR 1957 (SC) 540 :Garikapati Veeraya v. N.Subbiah Choudhry and others***, and similar other decisions. The cited decision will have no application inasmuch as it related to question of abolition of the appellate forum in respect of a proceeding by amendment of law. Therefore, the Hon'ble apex Court held that right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. It was further observed that the vested right of appeal can be taken away only by a subsequent enactment, if it so provides, expressly or by necessary intendment and not otherwise.

In the instant case, we are not confronted with any change of forum of appeal or taking away the right of appeal by way of amendment of Statute. Rather, we are confronted with the cancellation of consolidation operation and the effect thereof, which has nothing to do with amendment of law with regard to forum of proceeding.

23. The provision of Section 15 of the Consolidation Act makes it manifestly clear that no finality is attached to the R.O.R. prepared and published under Section 13(1) of the Act since it is subject to change and modification on the happening of the circumstances enumerated in Section 15. Since under the Consolidation Act the authorities thereunder apart from deciding in question of right, title and interest in land in the consolidation area also decide the matter of settlement of rent and cess and preparation of

R.O.R. indicating the nature of interest, the legislature thought it fit to attach some finality to the record of rights published under Section 13(1) of the Act as if the record of rights was published under the OSS Act, by incorporating the deeming provision under sub-section(4), though consolidation operation was cancelled as further continuance of the operation was found unnecessary and undesirable. The intention was that the matter of settlement of rent and preparation of R.O.R. which has reached the final stage should not stand cancelled as allowing matter of preparation of R.O.R. and settlement of rent to be taken up afresh or to be continued from the stage where it stood abated under Section 4(3) of the Act, would amount to duplication of work. The deeming provision in Section 13(4) of the Consolidation Act to treat the R.O.R. for all intents and purposes to have been prepared under the OSS Act has been incorporated with the intention of avoiding such duplication where the consolidation operation was no more desired to be undertaken.

24. The publication of cancellation order under Section 5(1) must be held to have the effect of obliterating and setting at naught all decisions of the consolidation authorities with regard to right, title and interest in land for the reason that for want of notification under Section 3 (1) of the Act, the authorities under the Consolidation Act cannot continue to exercise the power and jurisdiction under the Act within the consolidation area. Section 3(1) notification is the starting point that entitle the authorities under the Act to exercise the power and jurisdiction in respect of the area brought under consolidation. Once the Section 3(1) notification is cancelled, the authorities under the Act become disentitled to exercise their power in respect of the de-notified area.

25. The matter can be looked into from another angle. As has been seen earlier, upon issuance of notification under Section 3(1) of the Consolidation Act, the authorities under the Act become entitled to exercise power to decide the question of right, title and interest in land within the area covered under the said notification and if any suit relating to right, title and interest in respect of any such land is pending before the civil court on the date of such notification, on order being passed to that effect, such suits abate and thereafter the question of right, title and interest in respect of the land in question is to be decided by the authorities under the Consolidation Act. We have seen earlier that as per clause (b) of the second proviso to sub-section (4) of Section 4 of the Act, on the issue of cancellation notification under Section 5(1) of the Act the suit which got abated because of notification

issued under Section 3(1) of the Consolidation Act, shall be proceeded and disposed of by the civil court, as if it had never abated. In case we hold that by publication of R.O.R. under Section 13(1) of the Act prior to publication of Order under Section 5(1) has the effect of attaching finality to decisions on questions relating to right, title and interest in land covered under the R.O.R., the law enacted in the second proviso to Section 4(4) of the Act would create an anomalous and incongruous position, meaning thereby, that the consolidation authorities will continue to have power and jurisdiction to hear appeal or revision under Sections, 12, 36 and 37 of the Act and at the same time, the civil court will also continue to proceed with the suit, which had earlier abated but revived due to publication of cancellation order under Section 5(1) of the Act and decide the question of right, title and interest in respect of the very same land, resulting in conflicting decision by two forums. It can never be assumed that legislature intended to create such anomalous situation, which would have the effect of leading to inconsistent decisions being passed by two forums in respect of the same subject matter.

It is a salutary principle of interpretation of statute that the provision of an Act should be read harmoniously so as to avoid anomaly and conflict. Hence, in view of the provisions of the Consolidation Act and OSS Act as discussed above, it must be held that the Consolidation Commissioner or Director of Consolidation has no authority to examine in exercise of revisional power under Section 37 of the Consolidation Act, the correctness of R.O.R. published under Section 13(1) of the Act and preceded by publication of cancellation order under Section 5(1) of the Act. In view of the deeming provision of Section 13(4) of the Consolidation Act an R.O.R. published under Section 13(1) before publication of cancellation notification under Section 5(1) shall have all the consequences attached to the R.O.R. as if it is one published under the OSS Act and, therefore, correctness thereof can be examined by the Settlement Commissioner under Section 15(b) of the said Act. By exercising power under Section 15 of the OSS Act, the Settlement Commissioner does not decide right and title in the land. For the reasons aforesaid, contention of the learned counsel for the petitioner fails and the writ petition is dismissed.

Before parting, this Court puts on record sincere appreciation for the painstaking assistance rendered by Mr. N.K. Sahu and Mr. U.K. Samal, the learned Amicus curies.

Writ petition dismissed.

2015 (I) ILR - CUT- 564

S. K. MISHRA, J.

W.P.(C) NO. 9507 OF 2010

KIRAN SADANGI ……..Petitioner

.Vrs.

TAPAN KUMAR KHADENGA …….Opp.Party

CIVIL PROCEDURE CODE, 1908 – S.152.

Amendment of judgment and decree – Suit for divorce valued at 11,000/- in which permanent alimony claimed for Rs. 15, 00,000/- – Learned Court below valued the suit at Rs. 15,00,000/- instead of Rs. 11,000/- which relates to the main relief – Application U/s 152 for correction was rejected – Hence the writ petition – The error is clerical and the learned Civil Judge has failed to exercise the jurisdiction conferred upon him – Held, the impugned order is quashed – Direction issued to change the valuation of the suit to Rs. 11,000/ and accordingly correct the Certified copy issued to the petitioner.

(Paras-12,13)

Case laws Referred to:-

1.1984 (I) OLR 650 : (Chhala Banchhar-V- Rajan Banchhar & Ors.)
2.AIR 1984 Orissa 151 : (Baby Sagarika Jena (Rosy) & Anr. -V- Bishnu Charan Jena)
3. AIR 1976 Orissa 32 : Rama Kumari Meher -V- Meenaketan Meher

For Petitioner - M/s. S.P. Mishra, B.S. Panigrahi, A. K. Dash, S.K. Samantaray & B. Mohanty.
For Opp.Parties - M/s. P.K. Mohapatra, R.R.Mishra & S.K. Mishra.

Date of Judgment : 20. 09 2013

JUDGMENT

S.K.MISHRA, J.

The order passed by the learned Civil Judge (Senior Division), Berhampur on 23.04.2010 in O.S. No. 27 of 2001 refusing to exercise his jurisdiction under Section 152 of the Code of Civil Procedure, 1908, hereinafter referred as the "Code" for brevity, is in question in this case.

2. The present petitioner being the plaintiff filed the suit for decree of divorce, permanent alimony, litigation expenses etc. The defendant (husband) appeared and filed his written statement. He agreed for decree of divorce but disputed the permanent alimony. After hearing, the judgment was passed on 20.02.2009 decreeing the suit in part on contest against the defendant. So far as permanent alimony is concerned, the Court instead of granting one time payment, granted relief on a quarterly basis at the rate of Rs.7,500/- per quarter to the plaintiff and the relief of maintenance to her daughter also on a quarterly basis at the rate of Rs.2000/- per quarter, but refused cost and expenses of litigation. Such judgment and decree was challenged by the petitioner before the learned District Judge, Berhampur, which has been registered as Mat. Appeal No.1 of 2009. The petitioner filed certified copy of the judgment and decree and on perusal of the same she found that a clerical error had crept in the decree prepared by the office relating to jurisdictional value of the aforesaid suit by erroneously mentioning Rs.15,00,000/- instead of putting the actual value given by the plaintiff in the plaint filed under Section 13 of the Hindu Marriage Act, hereinafter referred to as the "Act" for brevity, at Rs.11,000/- as against the word "value of the suit" in the certified copy of the decree.

3. In order to correct the decree as aforesaid, she filed a petition on 03.08.2009 in the aforesaid Mat. Appeal. However, the learned District Judge, by his order dated 17.02.2010 observed that the petition for correction of the decree may be made before the lower court and the petitioner, if so advised, may make a prayer before the lower court for correction of the decree thereby disposed of the said petition. It is further stated that the appellate court further observed that the plaintiff-appellant's prayer that the documents may be submitted in the appeal, may be returned to her for correction.

4. The plaintiff accordingly filed an application before the learned Civil Judge (Senior Division). She has stated at paragraph 22 of the plaint that she had valued the suit at Rs.11,000/- and the defendant in his written statement has never objected to the said valuation put by the plaintiff and that the defendant never pleaded that the same is erroneous. Also by way of amendment, she claimed Rs.15,00,000/- in place of Rs.5,00,000/- towards permanent alimony and the same was allowed by the Court and at that stage also the defendant did not file any objection to the aforesaid jurisdictional value of Rs.11,000/- of the suit. On such argument, the petitioner prayed for

correcting the valuation of the suit in the decree and for necessary correction of the certified copy.

5. The respondent (opposite party in this case) has filed his written counter affidavit and prayed that the petition filed by the petitioner be rejected. As per the respondent, the petitioner has prayed for decree of divorce and permanent alimony of Rs.15,00,000/-, hence, she claimed two reliefs in the suit. The plaintiff filed a separate petition before the appellate Court to amend the decree to which he filed his counter stating that there is no clerical or arithmetical mistake so as to be corrected. According to him, such petition of the plaintiff before the appellate court was rejected. The respondent further objected that since the suit is for decree of divorce and permanent alimony and the plaintiff has to value his suit of the decree for divorce and also for the valuation of the permanent alimony separately and therefore no mistake was committed by the original court in mentioning the valuation of the suit at Rs.15,00,000/- and valuation of Rs.11,000/- can never be considered to be the valuation of the suit. He further states that as far as the same is between the petitioner and the court and the respondent has no role to play in this case at all. It is his further objection that any order passed by the original court is subject to the provision of Section 28(3) of the Act is appealable and the claim of permanent alimony of Rs.15,00,000/- being appealable before the High Court and not in the District Court, Ganjam. He further states that under Section 17 of the Court Fees Act where two reliefs are prayed, court fee is to be paid on the relief requiring higher court fee and in the facts and circumstances of this case, the valuation put by the plaintiff at Rs.11,000/- is for value of the divorce and the valuation of Rs.15,00,000/- is the value of the permanent alimony. It is apparent that the petitioner being a lady was exempted from payment of court fee, but she cannot take advantage of non-objection of the valuation either by the court or by herself. Accordingly, the respondent claimed that the valuation has been correctly given in the decree and it requires no interference.

6. Having considered the rival statement and after perusing the materials on record, the learned Civil Judge (Senior Division) held that Section 17 of the Court Fees Act in essence speaks that where two reliefs are prayed, the court fee to be paid is for the relief requiring higher court fee and, therefore, the plaintiff having enhanced the permanent alimony amount to Rs.15,00,000/-, the valuation in higher side i.e. Rs.15,00,000/- is to be accepted as the valuation of the suit. Even though the plaintiff did not amend the original valuation of Rs.11,000/-, the valuation given by her is not

binding on the Court. It was further held that even though the plaintiff did not amend the original valuation and the same was allowed to continue till conclusion of the suit, she cannot take advantage of saying that since she has not changed the valuation although she changed the permanent alimony amount, the earlier valuation has to be accepted. Therefore, it was further held that in terms of Section 17 of Court Fees Act, the higher amount of relief i.e. higher claim of permanent alimony has to be taken to be the valuation of the suit.

7. The learned Civil Judge further held that the ratio decided in **Chhala Banchhar v. Rajan Banchhar and others,** 1984 (I) OLR 650 is not applicable to the present case as the figure mentioned in the decree against the valuation of the suit represents the intention of the Judge. Thus, it was held that there was no clerical or arithmetical error on the face of it. The petition under Section 152 read with Section 151 of the Code was rejected by the learned Civil Judge (Senior Division).

8. It is not disputed that the suit was for a decree of divorce. In the said petition, the petitioner (wife) also prayed for permanent alimony and maintenance as provided under Section 25 of the Act. It is stated that the prayer to grant permanent alimony is not an independent relief and it is consequential and ancillary relief to the main relief of divorce. Therefore, it is not necessary to separately and independently value the relief, apart from the valuation of the suit as stated in the plaint.

9. In the reported case of **Baby Sagarika Jena (Rosy) and another v. Bishnu Charan Jena,** AIR 1984 Orissa 151; this Court held that a petition under Section 26 of the Act was filed by mother (divorced) for maintenance and education of two minor children against father (divorced) after passing of the decree for divorce by mutual consent by the Sub Judge and the earlier divorce proceeding under Section 13-B was valued at Rs. 250/-, the petition under Section 26 need not be registered as suit. Section 7 (ii) of the Court-fees Act is not attracted. The valuation in divorce proceeding shall govern the valuation of petition under Section 26. In view of the provisions of Sections 26, 23(2) of the Act and Section 21 (I) of the Bengal, Agra and Assam Civil Courts Act, the appeal against order under Section 26 lies to the District Judge and not to the High Court. This Court further held that even if an order with respect to the custody, maintenance and education of children has not been made either by an interim order or by incorporation in the decree in the main proceeding, such an order can be made subsequently in the same

manner as if the main proceeding for obtaining such decree were still pending. When the court's jurisdiction under that section is invoked after the passing of the decree in the main proceeding, the court may make an order which might have been incorporated in the decree as if the main proceedings were still pending before it.

10. Somewhat similar question was answered by a Division Bench of this Court in **Rama Kumari Meher v. Meenaketan Meher,** AIR 1976 Orissa 32. The matter was referred to the Division Bench regarding payment of court fee while deciding the said issue the Court at paragraph 11 has held that there is provision for passing of orders under the Act which are not decrees. Orders of the Court granting pendente lite maintenance and expenses of proceedings under Section 24, granting of permanent alimony and maintenance subsequent to the decree under Section 25 and giving direction of interim custody of children under Section 26 are orders and not decrees. If orders are passed under Sections 25 and 26 relating to permanent alimony and maintenance or custody of children in the decrees itself, then such orders constitute component part of the decree and are assailable in the appeal against the decree itself. After discussing several cases, at paragraph 13, the Court further held that the relief granting alimony appears to be ancillary to the main relief for judicial separation or divorce as the case may be. Thus, when an appeal is preferred against a decree for judicial separation challenging with it an order passed by the trial Judge granting alimony, then no advalorem court-fee is payable on the said relief as the amount was granted by way of alimony.

A similar question arose before this Court in **Nrusingh Charan Nayak v. Smt. Hemant Kumari Nayak,** AIR 1978 Orissa 163; wherein the Division Bench has come to the conclusion that the Courts other than the principal Civil Court of original jurisdiction which by notification made under Section 3(b) of the Act are conferred with jurisdiction to entertain proceedings under the Act are not "District Court proper" and irrespective of valuation, an appeal would not lie against decrees of such Courts to the High Court.

11. In applying the aforesaid principles to the present case, this Court comes to the conclusion that any application under Section 13 of the Hindu Marriage Act to the prayer for decree of divorce is the main relief sought and grant of permanent alimony is not a main relief, rather it is an ancillary and consequential relief to the main relief. For example, without an application

for judicial separation or divorce, an application of permanent alimony is not maintainable independently. As decided in the afore-cited case, an application for permanent alimony can be filed during the pendency of the case as well as after the passing of the decree of divorce. So the valuation made in the plaint regarding the relief claimed will not be guided by the quantum of alimony prayed for. Thus, the learned Civil Judge (Senior Division) has erred in holding that the value of the suit should be Rs.15,00,000/- and not Rs.11,000/-.

12. Learned Civil Judge (Senior Division) has held that the valuation made in the decree represents the intention of the Judge at the time he made it. This is erroneous, firstly because; the valuation of the suit was not challenged by the defendant. No issue regarding valuation was cast by the learned trial Judge. Consequently, no finding has been given on the valuation of the suit by the trial Judge in the judgment. Therefore, the valuation as mentioned in the decree itself has been done by the ministerial staff and it has been counter-signed by the learned trial Judge. Thus, it cannot be said that it stands to represent the intention of the Judge. Accordingly, it is held that such an error is clerical error, which has been suggested by the chief ministerial officer of the Court.

13. In that view of the matter, the learned Civil Judge has failed to exercise the jurisdiction conferred upon him, thereby a great miscarriage of justice has resulted for which the petitioner is running from pillar to post to get her appeal adjudicated by the competent court. Accordingly, the writ application succeeds. The order dated 23.04.2010 passed by the learned Civil Judge (Senior Division), Berhampur in O.S. No. 27 of 2001 is hereby quashed. It is ordered that the valuation of the suit be changed to Rs.11,000/- and accordingly, the correction be made thereof and on the certified copies given to the petitioner. The same be done within a period of 21 days from today. The learned District Judge is also directed to dispose of the appeal as early as possible. The writ application is accordingly disposed of.

Writ petition disposed of.

2015 (I) ILR - CUT- 570

C. R. DASH, J.

W.P.(C) NO. 21088 OF 2013

KESHAB SAHUKAR ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp. Parties

ODISHA GRAMA PANCHAYAT ACT, 1964 – S.4(3)

Shifting of Grama Panchayat Head Quarter from village Saradhapur to village Laxmipur – Duty of the State Government to decide the location depending upon the requirements in public interest – Merely because 214 villagers of village Saradhapur voted against shifting and 62 villagers of village Laxmipur voted in favour of shifting in the meeting Dt. 22.05.2013 can not be considered as genuine when none of the villagers of other villages constituting the Grama Panchayat were not present in that meeting – As a matter of fact village Laxmipur is centrally located and it has topographical advantage in relation to the Grama Sasan where as village Saradhapur is an isolated place having natural barriers – Nothing on record that the Government has any extraneous consideration in taking the impugned decision – Impugned decision can not be said to be incorrect.

(Paras 10,11)

Case Laws Referred to :-

1. 2011 (Supp.-II) OLR-943 : Sarpanch, Allaori G.P. & Ors. -V- State of Orissa & Ors.
2. 97 (2004) C.L.T. 607 : Pedenti Malana & Ors. -V- State of Orissa & Ors.
3. 91 (2001) C.L.T. 249 : Bijay Ku. Behera & Ors. -V- State of Orissa & Ors.
4. 96 (2003) C.L.T. 454 : Harihar Swain & Ors. -V- State of Orissa & Ors.
5. 100 (2005) C.L.T. 397 : Smt. Babita Negi & Ors. -V- State of Orissa & Ors.

For Petitioner - M/s. Umesh Ch. Mohanty, T.Sahoo, B.K.Swain & B.Behera

For Opp. Parties - Addl.Govt.Adv. (for O.Ps. 1,2&3)
Tanmay Mishra,
J.K.Mohapatra (Caveator)
M/s. Manoj Ku. Mishra, T.Mishra and J.K.Mohapatra (Intervener)
M/s. Amiya Ku. Mishra, A.K.Sharma, M.K.Dash, P.K.Dash & S.Mishra (for O.P.5)

Date of Judgment : 09.01.2015

JUDGMENT

C.R. DASH, J.

The petitioner, who is a denizen of village Saradhapur in the district of Rayagada and ex-Panchayat Samiti Member, has filed this writ petition praying to quash the office Notification dated 28.08.2008 (Annexure-1), order dated 20.08.2013 (Annexure-5) and recommendations of the Sub-Collector, Gunupur dated 21.06.2001 (Annexure-7). Further the petitioner has prayed for issuance of a direction to opposite party nos.1 to 3 to allow functioning of the Headquarter of Saradhapur Gram Panchayat at village Saradhapur.

2. The facts relevant for disposal of the writ petition are as follows :-

Laxmipur Gram Panchayat was created on 10.03.1966 vide Notification No.3706 dated 10.03.1966 issued by the Government in Panchayatraj Department, Odisha after bifurcation of aforesaid Laxmipur Gram Panchayat from Jagadalpur Gram Panchayat. Laxmipur Gram Panchayat after its creation vide its Resolution No.6 dated 20.06.1977 resolved to function the Gram Panchayat Office at Saradhapur village for the time being till construction of Gram Panchayat Office at Laxmipur. Subsequently recommendation was made by the Sub-Collector, Gunupur for re-shifting of the Gram Panchayat Headquarter from Saradhapur village to Laxmipur village with justification vide Letter No.6109 dated 21.06.2001 (Annexure-7). Basing on the said recommendation of the Sub-Collector, the Collector, Rayagada had submitted a proposal to the Government in

Panchayatraj Department, Odisha for considering re-shifting of the Gram Panchayat Headquarter from village Saradhapur to village Laxmipur vide its Letter No.693 dated 24.07.2001 (Annexure-A/2 to the counter affidavit filed by opposite party nos.2 and 3). In exercise of power conferred under Sub-Section 3 of Section 4 of the Orissa Gram Panchayat Act, 1964, the State Government passed order to the effect that the Headquarter of the Grama Sasan (Gram Panchayat) of village Saradhapur in Muniguda Block of Rayagada district shall be situated in village Laxmipur within the limits of the said Grama, vide Notification No.35510/PR, dated 28.08.2008 (Annexure-1).

3. The present petitioner and other villagers of village Saradhapur filed a representation before the appropriate Government not to shift the Headquarter of the Gram Panchayat from village Saradhapur to village Laxmipur. When no action was taken on the said representation, the villagers of Saradhapur Gram Panchayat were constrained to file writ petition, i.e. W.P. (C) No.13794 of 2008 before this Court. This Court disposed of that writ petition on 13.03.2013 with the following order :-

> "Though notice was issued to Opposite Parties No.7 and 8, copies have already been served on Opposite Parties No.1 to 6, who are government officials, no counter is forthcoming from their side till date. However, learned Standing Counsel submitted that instruction given by the Opposite Party No.4 is not clear.
>
> Considering the above facts and circumstances of the case, this court disposes of the writ petition with a direction to the Opposite Party No.4, Collector-cum-District Magistrate, Rayagada to convene a general meeting of both the villages and discuss the proposal for shifting of the Headquarters of the Grama Panchayat in the interest of the local people and the resolution to be passed in the said meeting shall be communicated to Opposite Party No.3, Secretary, Panchayatiraj Department, Bhubaneswar, who will take a final decision in the matter of shifting of Headquarters of the Grama Panchayat keeping in view the provision contained under Section 4(3) of the Act.
>
> The above exercise shall be completed within a period of three months from the date of production of a certified copy of this order.

> Till a decision is taken, status quo as on today, with regard to the Headquarter at Saradhapur Gram Panchayat under Muniguda Block in the district of Rayagada shall be maintained by the parties."

4. In compliance of the aforesaid order, the District Administration, Rayagada convened a general meeting on 22.05.2013 of both the villagers of Saradhapur and Laxmipur and discussed over the proposal of shifting the Gram Panchayat Headquarter from Saradhapur to Laxmipur. The villagers of both the villages put forth their views in support of their demands and canvassed to the hilt that the Headquarter of the Gram Panchayat should function in their respective villages. In the said meeting 214 persons from village Saradhapur cast their vote in favour of existence of the Gram Panchayat Headquarter at village Saradhapur and 62 persons of Laxmipur present in the meeting cast their votes in favour of shifting of the Gram Panchayat Headquarter to Laxmipur. The detailed report in this regard was sent to the Government in Panchayatraj Department vide Office Letter No.475 dated 10.06.2013 (Annexure-C/2 to the counter affidavit filed by Opp. Party nos.2 and 3). After taking into consideration the report of the Collector dated 21.06.2001 (Annexure-7) for shifting of the Gram Panchayat Headquarter from village Saradhapur to village Laxmipur, the report of the meeting held pursuant to the order of this Court in W.P. (C) No.13794 of 2008 submitted to the Government vide Annexure-C/2, Sketch Map of the entire Gram Panchayat area, etc., the notification dated 20.08.20013 vide Annexure-5 was issued by the Government in Panchayatraj Department (opp. party no.1) for shifting of Saradhapur Gram Panchayat Headquarter to village Laxmipur.

5. Notification of the Government, vide Annexure-5 is impugned in this writ petition on the following grounds :-

(i) In breach of the direction of this Court in W.P. (C) No.13794 of 2008, the general meeting of both the villagers of village Saradhapur and Laxmipur was held under the Chairmanship of Sub-Collector, Gunupur instead of Collector-cum-District Magistrate, Rayagada.

(ii) When majority people of village Saradhapur, i.e. 214 persons have cast their votes against shifting and only 62 persons of village Laxmipur have voted in favour of the shifting, it is to be held that the

Government in issuing the Notification dated 20.08.2013 vide Annexure-5 has not taken into consideration the majority view.

(iii) The decision of the Government vide Annexure-5 is otherwise arbitrary and violative of Section 4(3) of the Orissa Gram Panchayat Act, 1964.

6. Learned Additional Govt. Advocate and learned counsel for other private opposite parties, in unison, support the impugned Notification vide Annexure-5 and submit that the Government in Panchayatraj Department has taken into consideration all the aspects including the topography, situation of village Laxmipur at the central location, etc. including the report of the District Administration vide Annexure-C/2 before issuance of the Notification vide Annexure-5 and there is no illegality in issuing the said Notification.

7. Sub-Section (3) of Section 4 of the Orissa Gram Panchayat Act, 1964 reads as follows :-

> "(3) The office and headquarters of the Grama Sasan shall be situated within the limits of the Grama and unless otherwise ordered by the State Government in the village bearing the name of the Grama."

Interpreting the aforesaid provision, this Court in the case of **Sarpanch, Allaori G.P. and others *vs.* State of Orissa and others,** 2011 (Supp.-II) OLR – 943, has held that, ordinarily the Headquarter of the Gram Panchayat should be fixed in the village bearing the name of the Grama. In appropriate case, it can be fixed in some other village. Almost same is the view of this Court in the case of **Pedenti Malana and others *vs.* State of Orissa and others,** 97 (2004) C.L.T. 607. So far as the power of the Government to locate the Headquarter of a Gram Panchayat is concerned, this Court in a catena of decisions has held that such power is an administrative power of the Government. This Court, in the case of **Bijay Kumar Behera & others *vs.* State of Orissa & others,** 91 (2001) C.L.T. 249, has held that discretion is vested upon the Government to locate the Headquarter of the Gram Panchayat. That discretionary power has to be exercised on relevant consideration germane to the issue and cannot be permitted to be exercised on extraneous consideration. Though the Court is restrained to interfere with the discretion exercised by the State Government so long as the said discretion is exercised bona fide, but it would be fully

entitled to interfere when it comes to the conclusion that the discretion has been exercised arbitrarily basing on extraneous consideration or has been exercised ignoring the relevant materials. Absence of any mode or guidelines does not vest unfettered power upon the Government. On scrutiny of the documents available if it is found that the Government, while exercising the discretionary power, has decided the matter without application of mind to the relevant materials and/or has taken into consideration the matters which are extraneous and not germane to the object, the Writ Court, in exercise of the power under Article 226 of the Constitution of India, can interfere with such decision. Same is the view of this Court in the case of **Harihar Swain and others *vs.* State of Orissa and others,** 96 (2003) C.L.T. 454. It is specifically held in that case that, fixation of the Headquarter of a Gram Panchayat in any particular village is essentially an administrative matter and, so long as relevant considerations have weighed with the Government in fixing the Headquarters in a particular village, the High Court cannot interfere with the decision of the Government like an appellate authority and quash the decision of the Government. While exercising powers under judicial review, the High Court under Article 226 of the Constitution has only to see whether administrative power has been exercised within the limits of law after taking into account the relevant considerations, and so long as the High Court is satisfied that the power has been exercised within the limits of law after taking into account the relevant considerations, the High Court will not interfere with the same on the ground that it should have been located at a different place. It has further been held that, power has been vested in the State Government to decide the location of the office and the Headquarters of the Grama Sasan and such power can be exercised by the State Government from time to time depending upon the requirements of the public interest and there is no statutory bar for the Government to re-consider and take a fresh decision in the public interest. Same is the view of this Court in the case of **Smt. Babita Negi and others *vs.* State of Orissa and others,** 100 (2005) C.L.T. 397.

8. In the aforesaid background of law, the contentions raised by learned counsels for the parties are to be weighed. This Court, vide order dated 13.03.2013 passed in W.P. (C) No.13794 of 2008, directed the Collector-cum-District Magistrate, Rayagada to convene a general meeting of both the villagers, i.e. Saradhapur and Laxmipur and discuss regarding the proposal of shifting of the Headquarters of the Gram Panchayat in the interest of the local people, and Resolution to be passed in the said meeting was directed to be

communicated to the Secretary, Panchayat Raj Department, Govt. of Odisha, Bhubaneswar, who was authorized to take a final decision in shifting of the Headquarter of the Gram Panchayat keeping in view the provisions contained in Section 4(3) of the Orissa Gram Panchayat Act, 1964.

9. The Collector, however, got a meeting convened under the Chairmanship of the Sub-Collector, Gunupur. The resolution of the meeting has been filed as Annexure-4 to the writ petition. The meeting was held on 22.05.2013 at 9.00 A.M. under the Chairmanship of the Sub-Collector, Gunupur. The deliberations of the meeting have been recorded in detail. The number of people attended and participated in the voting from both the villages has been recorded. It is found from Annexure-4 that the direction of this Court in W.P. (C) No.13794 of 2008 has been complied in letter and spirit. Though the Collector has not convened the meeting, it has been convened at the behest of the Collector under the Chairmanship of the Sub-Collector, Gunupur. I do not find any infirmity in the Sub-Collector presiding over the meeting though direction was issued to the Collector-cum-District Magistrate, Rayagada to convene the general meeting of both the villages. The Resolution of the meeting has been sent to the Government in Panchayat Raj Department, Bhubaneswar vide Letter No.475, dated 10.06.2013 (Annexure-C to the Counter Affidavit filed by Opposite Party Nos.2 and 3). While issuing the impugned Notification vide Annexure-5, the Commissioner-cum-Secretary, Panchayat Raj Department has taken into consideration the aforesaid Resolution dated 22.05.2013, as asserted in the Counter Affidavit filed by opposite party nos.2 and 3. In view of such facts and situation, it cannot be held that the direction of this Court in W.P. (C) No.13794 of 2008 has been observed in breach so far as the meeting dated 22.05.2013 is concerned.

10. Next, it is contended that, so far as shifting of the Gram Panchayat Headquarter from village Saradhapur to Laxmipur is concerned, 214 villagers of village Saradhapur voted against the shifting and 62 villagers of village Laxmipur voted in favour of the shifting. The Panchayat Raj Department, Bhubaneswar, while issuing the impugned Notification vide Annexure-5, is alleged to have not taken into consideration the majority view expressed in the Resolution dated 22.05.2013 passed in the meeting held under the Chairmanship of the Sub-Collector, Gunupur. Saradhapur is one of the villages of the concerned Gram Panchayat. Laxmipur is another village of the selfsame Gram Panchayat. Admittedly, in the meeting dated 22.05.2013

pursuant to the direction of this Court the villagers of village Saradhapur and village Laxmipur were present. No villagers of other villages constituting the Gram Panchayat were present in the said meeting. The aforesaid meeting cannot be said to be a referendum for location of the Gram Panchayat Headquarter. It cannot be also said to be reflection of the majority view and majority wish of the entire Grama Sasan. It cannot also be held that the popular will of the entire Grama Sasan in favour of existence of the Gram Panchayat Headquarter at village Saradhapur is reflected in the voting of 214 villagers of village Saradhapur, who voted against the shifting.

11. The Government, while issuing the impugned notification, have taken into consideration the view of the Collector, Sub-Collector, topographical advantage of both the villages, central location of village Laxmipur in relation to the Grama Sasan, as found from the Sketch Map vide Annexure-D/2, natural barriers which isolate the village Saradhapur and topographical advantage of village Laxmipur, and so on, in deciding to shift the Headquarters of the Gram Panchayat from village Saradhapur to village Laxmipur. There is nothing on record to show that the appropriate Government was moved by any extraneous consideration in taking the impugned decision and in issuing the impugned Notification vide Annexure-5. All considerations germane to the decision have been taken into view before deciding the issue and the Notification impugned in this writ petition cannot be said to be arbitrary.

12. For the aforesaid reasons, the Writ Petition is dismissed being devoid of any merit.

Writ Petition dismissed

2015 (I) ILR - CUT- 577

R. DASH, J.

FAO NO. 298 OF 2013

EASTERN BIDI WORKS PVT. LTD. & ANR. .....Appellants

.Vrs.

KAILASH CHANDRA AGARWAL .....Respondent

TRADE MARKS ACT, 1999 – S.135

Trade Marks – Passing off – Appellants manufacture 'Bidi' with a trade mark "New Orissa Bidi" – Respondent started same business in the trade name "Nutan Orissa 'Bidi" – Dishonest intention on the part of the Respondent in passing off goods – Appellants-plaintiffs have a good prima facie case, balance of convenience lean in their favour and there is every likelihood to suffer irreparable loss – Denial of interim injuction merely on the ground of delay is not justified – Held, petition for interim injunction is allowed – The respondent-defendant is restrained from using identical or deceptively similar labels and wrappers to pass off his produce "Nutan Orissa 'Bidi'" till disposal of the suit. (Paras 5 to 8)

Case laws Referred to:-

1.2004 (3) SCC 90 : (Midas Hygiene Industries (P) Ltd.-V- Sudhir Bhatia)
2.2007 (6) SCC 1 : (Heinz Italia & Anr.-V- Dabur India Ltd.)

For Appellants - M/s. M.C. Jena, P.K. Tripathy, M. Jena, P.K. Khuntia, B.K. Jena.
For Respondent - M/s. Arjun Chandra Behera, B.K. Barik, G.R. Ray.

Date of hearing : 11. 3. 2014
Date of judgment: 21. 3. 2014

JUDGMENT

R. DASH, J.

This appeal is in challenge of the order dated 18.5.2013 passed in I.A. No.250 of 2012 by the learned District Judge, Cuttack, refusing to grant interim injunction restraining the defendant-respondents from using the labels and wrappers mentioned in schedule 'B' of the interim application to pass off its business and products as those of the plaintiff-appellants.

2. The appellants as plaintiffs in the suit before the learned District Judge have claimed that plaintiff No.1 is a private Limited Company manufacturing 'Bidis' in the trade name 'New Orissa Bidis' and selling the products under the said Trade name since 1945. The plaintiffs got the trade name registered under the Trade and Merchandise Marks Act 1958 which has now expired but the plaintiffs have filed a fresh application before the

competent authority to get the Trade Mark registered in their name. They have also got registered the colour combination, get-up, design and the general lay out of the labels and wrappers which are used for the purpose of package of the product under the Indian Copyright Act, 1957. It is claimed that due to good quality of the product, it had acquired a distinct reputation and goodwill amongst the 'Bidi' consuming public who used to purchase the product by having a look at the labels and wrappers used for the package of the product. Thus the labels and wrappers of the product have become the exclusive property of the plaintiffs and no one else is legally entitled to use or utilize the same. It is alleged that the respondent-defendant being an unscrupulous and dishonest person, taking advantage of the popularity and goodwill of the appellants' product started manufacturing cheap and inferior quality of 'Bidi' and has been passing off the same as the appellants' product by using identical and deceptively similar labels and wrappers with the Trade name 'Nutan Orissa 'Bidi'' which phonetically resembles to the plaintiffs' trade mark i.e., "New Orissa Bidi". It is alleged that for the last about 8-9 months preceding filing of the suit the sale of plaintiffs' product has been substantially reduced by 50%. On investigation, they came to know that the defendant has been passing off his products as that of the plaintiffs' and due to such illegal and unlawful action on the part of the defendant, the plaintiffs have sustained a huge loss of Rs.5,00,000/-. Therefore, plaintiffs have filed a suit for damages with prayer for permanent injunction restraining the defendant from passing off his product by using the plaintiffs' labels and wrappers which are deceptively looking like that of the plaintiffs.

2. The defendant in his objection has denied all the allegations made by the plaintiffs. He has asserted that the labels and wrappers used for his product with the Trade name 'Nutan Orissa Bidis' is not similar to the labels and wrappers used by the plaintiffs. The Trade Mark name is also not phonetically similar. So, the case of passing off has not been made out by the plaintiffs. It is further asserted that the plaintiffs having not registered their trade mark for their brand product, they cannot claim any protection against use of any such trade mark as claimed by them.

3. Learned court below having considered the submissions made on behalf of the parties and the material objects placed before it, observed that the defendant is producing 'Bidis' using labels and wrappers for the package of his product which are almost identical to the labels and wrappers used by the plaintiffs, resulting passing off of his product as the product of the

plaintiffs. The learned lower court further observed that even in the absence of registration of their trade mark, the plaintiffs can approach the court to prevent passing off someone's product as their product. The learned lower court has further observed that both the parties are selling 'bidis' using similar looking labels and wrappers but the use of the labels and wrappers by the plaintiffs is much prior to the defendant started selling his product. Learned court below further held that the plaintiffs-petitioners have got a good prima facie case, the balance of convenience leans in their favour and they are likely to suffer irreparable injury. Despite of such observation, the learned lower court has rejected the prayer for interim injunction solely on the ground that they have not come out with a case as to when the defendants-opposite party used the aforesaid labels and wrappers to pass off his product with further observation that they have not come to the court with promptitude to redress their grievances.

4. The appellants challenge the impugned order contending that the observation on the promptitudness in filing the suit is contrary to the facts pleaded in the plaint as well as various pronouncement made by the apex court in numerous cases. Learned counsel for the respondent on the other hand submits that the labels and wrappers used for the package of respondent product are quite different from that of the appellants and both are not similar looking and that the appellants copyright registration has expired in 2002, for which they cannot institute any proceeding to prevent or to recover damages for the infringement of unregistered trade mark.

5. As per section 134 (1)(c) of the Trade Marks Act, 1999, no suit for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's Trade Mark, whether registered or unregistered, shall be instituted in any court inferior to a District Court having jurisdiction to try the suit. It implies that suit for passing off can be filed in the appropriate forum for the use of a Trade Mark whether registered or unregistered.

Undisputedly, the suit out of which the present appeal arises is one for passing off. It is not disputed that the appellants have a Trade Mark for its product 'New Orissa Bidi'. It is also not disputed by the respondent that his product "Nutan Orissa Bidi" is being sold in the market with labels and wrappers of particular style and design but his case is that the labels and wrappers used for his product, is totally different from that the appellants'. In his counter, the respondent has made a chart showing the distinct features

differentiating the name, label and wrapper used for his product from that of the appellants' but the learned District Judge has observed in the impugned order that both the parties are selling similar product i.e., Bidi and the labels and wrappers used by the respondent-defendant by both of them are deceptively similar to each other. The learned lower court has compared the relevant materials object produced before it and arrived at such a conclusion. It is also not in dispute that the appellants had started using labels and wrappers in selling their product much prior to the respondent-defendant. Under such circumstances, this court finds that the learned court below has rightly concluded that the appellant-plaintiffs have a good prima facie case, the balance of convenience lean in their favour and there is every likelihood to suffer irreparable loss.

6. In **Midas Hygiene Industries (P) LTD –v- Sudhir Bhatia** 2004(3) SCC 90, it is observed by the apex court that in a suit for passing off, interim injunction should not have been refused merely on the ground of delay and laches. In **Heinz Italia and another –v- Dabur India Ltd.,** 2007 (6) SCC 1, the apex court held that if it could be prima facie shown that there was dishonest intention on the part of the defendant in passing off goods, an injunction should ordinarily follow and the mere delay in bringing the matter to court was not a ground to defeat the case of the plaintiff. In the case at hand, the appellant-plaintiffs have pleaded that about 8-9 months before filing of the suit they first came to know that the defendant had been passing off its product. There is nothing on record to disbelieve that averment made in the plaint. Therefore, it can not be said that the appellant had not approached the court with promptness. Moreover, in view of the observation of the apex court, denial of interim injunction merely on the ground of delay in bringing the action is not justified.

7. Considering the facts and submissions, this court is of the considered view that the interim relief prohibiting the respondent-defendant from using identical or deceptively similar labels and wrappers to pass off his product ant to be granted.

8. In the result, the appeal is allowed. The impugned order is set aside. The petition for interim injunction is allowed. The respondent-defendant is restrained from using the labels and wrappers shown in schedule B of the injunction petition for passing off his product "Nutan Orissa Bidi" till disposal of the Suit.

Appeal allowed.

2015 (I) ILR - CUT- 582

DR. B. R. SARANGI, J.

O.J.C. NO.17573 OF 2001

TAPAN KUMAR KAR ……..Petitioner

.*Vrs.*

UNION OF INDIA & ORS. ……..Opp.Parties

A. CONSTITUTION OF INDIA, 1950 – ART. 226

Writ petition – Territorial jurisdiction – Disciplinary proceeding initiated and order of removal passed against the petitioner at Hyderabad – Petitioner a native of the State of Odisha – The appellate order addressed to the petitioner to his local address – Held, the plea that this Court has no jurisdiction in the writ petition cannot be sustained. (Para 11)

B. CONSTITUTION OF INDIA, 1950 - ART. 311

Departmental Proceeding – Non-supply of documents asked for by the delinquent-Petitioner and not allowing him defence assistance – Violation of the principles of natural justice – Punishment imposed by the disciplinary authority and confirmed by the appellate authority are quashed – Opposite Parties are directed to reinstate the petitioner in service with all consequential financial and service benefits.

(Para 12)

Case laws Referred to:-

1.AIR 1981 SC 136 : (S.L. Kapoor-V- Jogmohan)
2.AIR 1991 SC 471 : (Union of India-V- Md. Ramzan Khan)
3.AIR 1983 SC 104 : (Board of Trustees of the Port of Bombay-V- Dillip Kumar Raghavendranath Nadkarni & Ors.)
4.AIR 1982 SC 710 : (A. K. Ray-V- Union of India)
5.AIR 1983 SC 454 : (Bhagat Ram-V- State of Himachal Pradesh)
6.1993 LAB. I..C. 521 : (Inspector-General of Police & Anr.-V- Sukanta Ku. Nayak)
7.AIR 2000 SC 277 : (Hardwari Lal-V- State of U.P. & Ors.)
8.AIR 2006 SC 45 : (Narendra Mohan Arya-V- United India Assurance Co. Ltd. & Ors.)
9.2000 (II) OLR 126 : (Janardan Mohanty-V- Union of India)
10.2002 (Suppl.) OLR 463 : (Tapan Kumar Dalai-V- Union of India & Ors.)

For Petitioner - M/s. P.K Nayak
For Opp.Parties - Mrs. Bharati Dash, A.S.C. (Central Govt.)

Date of hearing : 31.10.2014
Date of judgment : 11.11.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who was working as a Constable under the Central Reserve Police Force has filed this application seeking issuance of

> "a writ in the nature of certiorari/mandamus or any other appropriate writ/writs, direction/directions, order/orders quashing the order contained in Annexure-14, so also the orders contained in Annexure-18 and any other documents prejudicial to the interest of petitioner;
>
> And direct the opposite party no.3 to reinstate the petitioner in his service as a regular constable allowing all consequential service and financial benefits right from the date of his appointment by regularizing the period of his illegal termination till reinstatement i.e. from 20.06.92 to 25.4.97, from 25.3.99 to 21.4.99 from 10.10.99 to 5.2.2000 and from 29.9.2000 till the date of his reinstatement".

2. The case of the petitioner is that he was enlisted as a temporary Constable (G.D.) as per order dated 01.05.1991, Annexure-1 passed by the Commandant, 114 Bn. CRPF., Bhubaneswar in August, 1991. He was deputed to 113 Bn. CRPF, Hyderabad to undergo basic training with his co-recruits from 07.08.1991 to 20.06.1992. On 20.06.1992, he was surprised to receive the order of his termination from service from the Commandant, 113 Bn. CRPF, Hyderabad which was passed without any basis or holding any inquiry into any misconduct. Therefore, he approached this Court by filing O.J.C. 340 of 1993. After hearing the parties, this Court vide judgment dated 18.11.1996 quashed the order of termination and directed the opposite parties to reinstate him in service forthwith but directed that the petitioner would not be entitled to any salary from the date of termination till reinstatement. In compliance with the said judgment, the petitioner was reinstated in service on 25.04.1997. After a lapse of five years opposite party no.5-Commandant again started a departmental proceeding on 03.05.1997 on the self-same ground on which he was terminated from service earlier and was reinstated

in service vide judgment of this Court. In the departmental proceeding the petitioner was imposed punishment by the disciplinary authority without giving him an opportunity to prefer appeal vide Annexure-4 dated 24.03.1999. Consequently, he had to undergo punishment of discharging the duties of Quarter Guard for 28 days with effect from 25.03.1999 to 22.04.1999 with forfeiture of all pay and allowances. After execution of punishment, the petitioner could be able to prefer an appeal before the appellate authority where he was found not guilty and was consequently exonerated of the punishment. After reinstatement, he was posted in various places in India including the troublesome places like Jammu and Kashmir where he discharged his duty like other Constables. He was served a movement order on 09.10.1999 vide Annexure-5 with 2nd time basic training at RTC-II-Avadi which order was, however, stayed by this Court vide order dated 26.11.1999 while entertaining the writ petition bearing O.J.C. No.13467 of 1999. By then, the petitioner in compliance with the movement order dated 09.10.1999 had proceeded to Avadi but during transit he lost his personal belongings between Vijayawada and Nellore. He reported this fact to Railway Police Station, Chennai Central. He was given a Police Certificate from the Railway Police Station, Chennai Central, Tamilnadu vide Annexure-6 in that regard and thereafter he went to RTC-II, Avadi and reported the above facts to the Sr. Sepoy (H.C.) who refused to accommodate him as he had no training accounterments. The petitioner contacted 113 Bn. over telephone, but he was informed that they had nothing to do in the matter since he had been issued the movement order. He fell ill and came back to his village and underwent treatment as he was suffering from infective Hepatitis. While undergoing treatment on 16.10.1999 he intimated this fact to the Commandant 113 Bn., Hyderabad requesting 15 days' C.L. or leave till the recovery of his health condition vide Annexure-7. Instead of considering his predicament, the Commandant 113 Bn. issued him a letter on 25.10.1999 directing him to report to duty immediately with all connected documents failing which disciplinary action would be initiated against him vide Annexure-8. The petitioner challenged the movement order vide Annexure-5 on the ground of mala fide and arbitrariness of the opposite parties in O.J.C. No.13467 of 1999 and this Court by order dated 26.11.99 granted him interim protection in Misc. Case No.12564 of 1999 and the said interim order was extended by this Court vide order dated 16.12.1999 in Annexure-9. The petitioner after being fit returned to 113 Bn. Hyderabad and reported to duty on 06.02.2000 and being allowed to join he continued to

perform his duty. The medical report produced by him was accepted by the concerned authority. While so continuing he was served with a memorandum containing articles of charges on 09.03.2000 in Annexure-11 series which read as follows:

"**Article-I**

That the said No.913143277 Recuit Tapan Kumar Kar of HQ/113 Bn. While functioning as Recruit/GD committed an act of "disobedience of orders" in his capacity as a member of the force u/s 11(1) of CRPF Act 1949 in that, when he was given movement order dated 09.10.99 with direction to report to the Principal, Recruits Training Centre-2 CRPF, Avadi he failed to report there.

Article-II

That the said No.913143277 Recruit Tapan Kumar Kar of HQ/113 Bn. While functioning as Recruit/GD committed an act of "Misconduct" in his capacity as a member of the force u/s 11(1) of CRPF Act 1949, in that, when he was given movement order dated 09.10.99 with direction to report to the Principal, Recruits Training Centre-2 CRPF, Avadi he proceeded to his hometown without prior permission of competent authority".

The articles of charges mentioned above only indicate non-compliance with movement order Annexure-5 which had been stayed until further orders by this Court in O.J.C. No.13467 of 1999. The petitioner came to know about the proceeding on 23.03.2000 which was taken up by opposite party no.3 on day to day basis on 25.03.2000 with shortest possible notice depriving him of the opportunity to cross-examine the departmental witnesses effectively and on 23.04.2000 he submitted an application before enquiry officer-cum-Commandant, Warangle in Annexure-12 praying to summon the defence witnesses officially as named therein and permit him to engage a lawyer or retired police officer as his defence assistance and also to fix the venue of enquiry at Bhubaneswar for examination of un-official witnesses. On his application vide Annexure-12, the enquiry officer illegally and arbitrarily neither passed any order assigning any reason nor did allow him to get examined his defence witnesses or to supply him copies of the desired documents. He was thus given no opportunity to get his desired witnesses examined in defence. The enquiry officer without providing any reasonable opportunity to the petitioner of being heard and in gross violation

of the principles of natural justice with bias and prejudice submitted a report on 05.07.2000 vide Annexure-13. On the basis of the said report, the D.I.G. of Police CRPF, Hyderabad passed the final order of removal of the petitioner from service on 29.09.2000 at Jammu and Kashmir vide Annexure-14. Against the said order of removal, the petitioner preferred an appeal on 15.05.2001 in Annexure-16. The appellate authority vide order dated 04.01.2002 in Annexure-18 confirmed the order of his removal from service passed by the disciplinary authority vide Annexure-14. Hence the present writ petition.

3. Mr. P.K. Nayak, learned counsel for the petitioner, strenuously urged that the entire inquiry proceeding was vitiated in non-compliance with the principles of natural justice, more particularly non-supply of the documents asked for by the petitioner as well as non-examination of material witnesses and also not allowing him defence assistance. He further submitted that the harshest punishment i.e., removal from service, imposed by the disciplinary authority, confirmed by the appellate authority is liable to be quashed being violative of the principles of natural justice.

To substantiate the allegations, Mr. Nayak has relied upon the judgments of the apex Court in ***S.L. Kapoor v. Jogmohan*****,** AIR 1981 SC 136, ***Union of India v. Md. Ramzan Khan*****,** AIR 1991 SC 471, ***Board of Trustees of the Port of Bombay v. Dillip Kumar Raghavendranath Nadkarni & others*****, ,** AIR 1983 SC 104, ***A.K. Ray v. Union of India***, A.I.R. 1982 SC 710, ***Bhagat Ram v. State of Himachal Pradesh***, A.I.R. 1983 SC 454, ***Inspector-General of Police and another v. Sukanta Kumar Nayak***, 1993 LAB.I.C.521, ***Hardwari Lal v. State of U.P. and others***, AIR 2000 SC 277, ***Narendra Mohan Arya v. United India Insurance Co. Ltd and others***, A.I.R. 2006 SC 45, ***Janardan Mohanty v. Union of India***, 2000 (II) OLR 126 and ***Tapan Kumar Dalai v. Union of India & others***, 2002(Suppl.) OLR 463.

4. Mrs. Bharati Dash, learned Central Government Counsel for the opposite parties, refuting the allegations of the petitioner, argued that there was compliance with the principles of natural justice by supplying him the documents, his material witnesses having been examined and as such no prejudice was caused to him and therefore, this Court may not interfere with the impugned orders.

5. After hearing the learned counsel for the parties and going through the records, this Court proposes to deal with the case on the basis of the allegations made, materials available on record and the law governing the field.

The Parliament enacted an Act to provide for the constitution and regulation of Armed Central Reserve Police Force called "Central Reserve Police Force Act, 1949" (hereinafter referred to as the "1949 Act"). Section-9 to Section-14 thereof deal with offences and punishments. Sub-section (1) of Section-11 reads as follows:

> 11. Minor punishment-(1) The Commandant or any other authority or officer as may be prescribed, may, subject to any rules made under this Act, award in lieu of, or in addition to, suspension or dismissal anyone or more of the following punishments to any member of the Force whom he considers to be guilty of disobedience, neglect of duty, or remissness in the discharge of any duty or of other misconduct in his capacity as a member of the Force, that is to say-
>
> (a) reduction in rank;
>
> (b) fine of any amount not exceeding one month's pay and allowances;
>
> (c) confinement of quarter-guard for not more than twenty-eight days, with or without punishment drill or extra guard, fatigue or other duty; and
>
> (e) removal from any office of distinction or special emolument in the Force.

The removal from service has been contemplated under 1 (e) of Section-11. In exercise of power under Section-18 of the Central Reserve Police Force Act 1949, the Central Govt. has made a rule called the Central Reserve Police Force Rules, 1955 (hereinafter referred to as the "1955 Rules"). Chapter-VI of 1955 Rules deals with discipline. Rule-27 states about the procedure for the award of punishments. As per the table under sub-rule-A of Rule-27 Clause-8 deals with removal from any office of distinction or special emolument in the Force which reads as follows:

Sl. No.	Punishment	Subedar (Inspector)	Sub-Inspector	Others except Const. & Enrolled followers	Consts. & enrolled followers	Remarks
1	2	3	4	5	6	7
xx	xx	xx	xx	xx	xx	xx
8	Removal from any office of distinction or special emolument in the Force	DIGP	DIGP	Comdt.	Comdt.	May be inflicted without a formal departmental enquiry

Sub-Rule 3, 4 and 5 of Rule-27 reads as follows:

> (3) when documents are relied upon in support of the charge, they shall be put in evidence as exhibits and the accused shall, before he is called upon to make his defence, be allowed to inspect such exhibits.
>
> (4) The accused shall then be examined and his statement recorded by the officer conducting the enquiry. If the accused has pleaded guilty and does not challenge the evidence on record, the proceedings shall be closed for orders. If he pleads "Not guilty", he shall be required to file a written statement, and a list of such witnesses as he may wish to cite in his defence within such period, when shall in any case be not less than a fortnight, as the officer conducting enquiry may deem reasonable in the circumstances of the case. If he declines to file a written statement, he shall again be examined by the officer conducting the enquiry on the expiry of the period allowed.
>
> (5) If the accused refuses to cite any witnesses or to produce any evidence in his defence, the proceedings shall be closed for orders. If he produces any evidence the officer conducting the enquiry shall proceed to record the evidence. If the officer conducting the enquiry considers that the evidence of any witness or any document which the accused wants to produce in his defence is not material to the issues involved in the case, he may refuse to call such witness or to allow

such document to be produced in evidence, but in all such cases he must briefly record his reasons for considering the evidence inadmissible. When all relevant evidence has been brought on record, the proceedings shall be closed for orders.

6. In view of the above mentioned provisions of law available and taking into the fact of the case, it is to be considered whether there was compliance with the provisions of law or not.

A. Violation of the principles of natural justice

In the enquiry proceeding conducted by the enquiry officer on day to day basis, no opportunity was given to the petitioner for cross-examination of the witnesses. Request was made by him for cross-examination of the witnesses on 24.03.2000 and 25.03.2000. As required under the law, enquiry officer was to provide adequate opportunity to the petitioner to meet the charges against him by effective cross-examination to know what were the materials available against him so that he would have been given an opportunity to cross-examine the prosecution witnesses. As it appears from the materials available on record that no such opportunity was given to the petitioner to cross-examine the prosecution witnesses by providing him adequate materials and opportunity.

7. The age old principle laid down by the apex Court is in the case of ***Khem Chand v. Union of India***, AIR 1958 SC 300 which has been followed by many judgments of the apex Court. It is settled that the delinquent in a disciplinary proceeding is entitled to an opportunity to know the material against him; to have the evidence recorded in his presence; to have the right of cross- examining the witnesses examined and to have a chance to examine witnesses in support of his defence. But, in the present case because of the day to day proceeding, it appears that no such opportunity was given to the petitioner.

b. Denial of opportunity to engage defence assistance

As it appears, in the reply dated 23.04.2000, the petitioner clearly stated that since the gravamen of charges involved intricate points of law and facts, it is not possible on his part with inadequate academic attainment to put up a successful defence with irrefutable digression for which he required the help of defence assistance well conversant with relevant law and rules to

present his defence case convincingly for demolishing the charges completely. Therefore, he sought permission to engage a lawyer or a retired police officer as his defence assistance. But no order was passed by the enquiring officer on the said representation vide Annexure-12. Further, the appellate authority considering such contention stated that prayer for service of a defence assistance was untenable under CRPF Rules and particularly when no presenting officer was appointed by the disciplinary authority. The Assistant Commandant-cum-Enquiry Officer being a highly qualified and experienced person and acquainted with all intricacies of law while discharging his duty as an enquiry officer also acted as the prosecutor. Therefore, in absence of any legal assistance it was difficult on the part of the petitioner who was a Class-IV employee to combat with the enquiry officer-cum-prosecutor who was well versed with facts and law both. The finding of the appellate authority that there being no such provision under the Rules to appoint a defence assistance therefore, that opportunity was not given to the petitioner was absolutely misconceived one.

In ***Mahendra Singh Gill v. Chief Election Commissioner***, AIR 1978 SC 851, the apex Court held that the silence of a statute has no exclusionary effect except where it flows from necessary implication. This view has also been reaffirmed by the apex Court in ***S.L. Kapoor*** (supra). In paragraph-10 of the case of ***Board of Trustees of the Port of Bombay*** (supra), the apex Court held as follows:

> "Even in a domestic enquiry there can be very serious charges and adverse verdict may completely destroy the future of the delinquent employee. The adverse verdict may also stigmatize him that his future would be bleak and his reputation and livelihood would be at stake. Such an enquiry is generally treated as a managerial function and enquiry officer is more often a man of the establishment. Ordinarily, he combines the role of a presenting cum prosecuting officer and an Enquiry Officer, a judge and a prosecution rolled into one……. A man of the establishment done the robe of a Judge. It is held in the establishment office or part of it. Can it even be compared to adjudication by an impartial arbitrator or a Court presided over by an unbiased Judge".

But no material has been produced before this Court by the opposite parties to counter the contentions raised by the learned counsel for the

petitioner. Therefore, the necessary implication would be that even if Rule-27 of 1955 Rules does not mention any such provision, essence of compliance with the principles of natural justice cannot be denied.

In ***Inspector-General of Police and another*** (supra), this Court held in paragraph-16 as follows:

> "so, it would not be incorrect to think that the right to be represented by a defence assistance in the enquiry was regarded as a part of natural justice".

This Court also referring to decision of the apex Court in ***Union of India v. Tulasiram Patel***, AIR 1990 SC 1480 held that violation of natural justice would even amount to violation of Article-14 of the Constitution of India. In pargraph-17 of the judgment this Court observed that Article-21 comes to play even where livelihood is involved and the procedure about which this Article speaks of has to be fair, just and reasonable.

In ***A.K. Ray v. Union of India***, AIR 1982 SC 710, a Constitution Bench of the apex Court observed in paragraph 95 that the embargo on the appearance of legal practitioners should not be extended so as to prevent the detune being aided or assisted by a friend who is not legal practitioner. It was further observed that every person whose interest is adversely affected as a result of the proceeding which have a serious import is entitled to be heard in those proceeding and be assisted by a friend. The further observation in paragraph-95 is that" Just as a person who is dumb is entitled, as he must to be represented by a person who has speech, even so, a person who finds himself unable to present his own case is entitled to take the aid and advice of a person who is better situated to appreciate the facts of the case and language of the law.

In view of the well settled principle of law laid down by the apex Court and this Court, this Court holds that the denial of engagement of defence assistance amounted to violation of the principles of natural justice.

c. ***Refusal to examine defence witness by the enquiry officer***

No reasonable opportunity was provided to the petitioner to put forth his defence case successfully inasmuch as the defence witnesses cited by him were systematically refused to be examined by the enquiry officer without specifying any reason to the detriment and colossal prejudice to the

petitioner and summoning of official witnesses according to sweet will to depose in favour of the prosecution was nothing but bias against the petitioner. The procedure laid down under Rule-27 (c) (5) of CRPF Rules has been given a complete go by inasmuch as no reason was stated by the enquiring authority as well as the appellate authority as to why the defence witnesses cited by the petitioner were not material to the issue involved in the proceeding.

The petitioner in his application for affording him opportunity to get his defence witnesses examined as per Annexure-12 clearly and categorically cited as many as 13 number of material witnesses and documents to be produced by them, points to be proved and through whom they were to be summoned. Out of them, first witness was OIC (SHO) Govt. Rly Police Station Chennai Railway Station who had to prove the kit bag of the petitioner being stolen as he had investigated into the said case of theft which was true, second witness was Sentry constable who was on duty at entry gate of RTC-II Avadi in between 1 P.M. and 2 P.M. of 10.10.1999 through Gate Entry Register in which the name of the petitioner had been entered and he had been allowed to go inside the campus of RTC.II. Third was Battalion Hav. Major of RTC-II who was a Punjabi Sardar, who had to prove that the petitioner had met him and had reported to him about his arrival for basic training on 10.10.1999, but he abused the petitioner and didnot accept the movement order. Defence witness no.4 was the revered Principal, RTC-II, Avadi who had to produce the advance intimation sent from CRPF Bn. 113 about the arrival of the petitioner for basic training on 10.10.99 and any other previous correspondence made with him. He had to prove that the petitioner was deputed for basic training whimsically without obtaining any order from his higher authorities and without any previous programme for which the RTC-II staff were not prepared to accept the movement order which was not lawful. Witness no.5-Srikant Kumar Sarangi was a person who had met the petitioner at Chennai Railway Station when he was badly suffering from fever and was in a semi conscious condition. Ashok Kumar Das, the brother-in-law of the petitioner was a Constable of Police V.S.S. Nagar Police Out-Post who had helped the petitioner to go to his village. Trilochan Kar was a person who got the petitioner admitted at the Primary Health Centre, Bari and then at the District Headquarter Hospital Jajpur. Kshetrabasi Swain was a person who had helped the petitioner for his treatment and witness nos.9 and 10 were the treating physicians of the petitioner. Witness no.11 was the Officer-in-Charge (SHD) Binjharpur P.S. who had to prove that on receipt of

the letter from the commandant 113 Bn. CRPF, he had made enquiry at the native village of the petitioner, about his illness and treatment as well as loss sustained by him due to super cyclone. Witness no.12 was an Officer/Asst. of CRPF Bn. Office who had to prove that no action had been taken on intimation of the petitioner dated 16.10.99 to the Commandant. Witness no.13 was J.P. Bharati S.I. (A) 133 Bn. Who had to prove that the medical certificates produced to the petitioner were genuine ones.

In ***Hardwari Lal v. State of U.P. and others***, AIR 2000 SC 277, the apex Court set aside the dismissal order for non-examination of material witness which offended the principles of natural justice.

B. <u>Non-consideration of material documents</u>

(a) No materials produced with regard to disobeying of movement order.

There is no iota of evidence from the side of the prosecution disclosing the source establishing the allegation that the petitioner disobeyed the movement order intentionally or deliberately and for which there was initiation of proceeding and his removal from service and therefore the charges were illegal, arbitrary, perverse and not sustainable under law.

The petitioner having been removed from the service on the basis of no evidence, the punishment imposed by the disciplinary authority as well as the appellate authority was grossly bad and untenable in the eye of law and as such Annexures-14 and 18 are liable to be quashed.

In ***Narendra Mohan Arya v. United India Insurance Co. Ltd. and others***, AIR 2006, the apex Court observed in para-45 that Court while exercising its power of judicial review has to see whether sufficient material had been brought on record to sustain finding-consience of Court does not have much role to play.

(b)The petitioner disclosed the circumstances in his representation dated 16.10.1999 for which he could not report himself before 113 Bn. which were not rejected by the authority as false or fabricated and as such initiation of proceeding against the petitioner on the ground of disobedience of the movement order or on the ground of misconduct was an outcome of non-application of mind inasmuch as in appeal when such contention was raised the appellate authority also ignored the same. That itself is a ground

that materials available on record were not taken into consideration by the authorities.

8. Another facet of argument is that from the evidence available in Annexures-12, 14 and 18 it appears that in absence of any contrary material of proof on record that the illness of the petitioner was false or the documents submitted before the authorities for grant of leave were not genuine, the certificate issued by the medical officer could not be ignored by the disciplinary as well as appellate authority. On the self same allegation, the authority could not have proceeded with the proceeding to hold that the allegation of charges levelled against him was proved. The prosecution having not adduced or proved any documentary evidence, primary or secondary, to establish the charage of non-compliance with the movement order, adverse inference ought to have been drawn against the prosecution and no inference could have been drawn on the basis of hearsay knowledge of P.Ws.1 and 2 as they were not competent witnesses in the proceeding.

As it appears, in the departmental proceeding the authorities concerned had not considered under what circumstances the petitioner failed to report on duty before 113 Bn. In the absence of any documentary proof that the petitioner did never go to RTC II Avedi in disobedience of the movement the impugned order cannot be sustained. The authorities having not enquired into the genuineness of explanation of the petitioner and the certificate produced by him for grant of leave and the same having not been discarded by the disciplinary authority himself who was the authority to grant leave, the rejection or non-acceptance of the explanation of the petitioner in absence of contrary materials, the entire proceeding was vitiated.

9. There is no justifiable reasons to indicate as to why the petitioner was to be sent for basic training for second time as the same could not be a substitute for refresher course. Admittedly, the petitioner had undergone the basic training and thereafter he having been posted to discharge the duties of a regular Constable in different places including troublesome places like Jammu & Kashmir for more than two and half years after the order of reinstatement passed by this Court quashing the order of termination from service.

10. Needless to indicate, the movement order dated 09.10.99 was stayed by this Court in Misc. Case No.12564 of 1999 on 26.11.1999 arising out of

O.J.C. No.13467 of 1999. But, during pendency of the writ petition since the removal order had been passed by the authority concerned and the petitioner had preferred appeal, the writ petition was disposed of as infructuous by this Court. The authority during continuance of the interim order could not have passed removal order. The petitioner having preferred appeal thereby submitting to the jurisdiction of the authority, this Court thought it proper not to go into the writ petition and allowed the authority to proceed with the disciplinary proceeding.

11. Mrs. Bharati Dash, learned counsel appearing for the Central Government referring to the counter affidavit strenuously urged that this Court has no jurisdiction to entertain this writ petition as the order of termination was issued because of initiation of proceeding at 113 Bn. CRPF Hyderabad and the order of removal from service having passed at Hyderabad. But as it appears, the petitioner is a native of the state of Orissa and a part of the cause of action arose within the jurisdiction of this Court. Besides, earlier this Court had entertained the writ petition filed by the petitioner in OJC 340 of 1999 which was disposed of on 15.11.1996 for self-same cause of action.

In ***Janardan Mohanty v. Union of India***, 2000 (II) OLR 126, this Court taking into account the fact that the petitioner while posted at Ranchi, had been removed from service. He being a permanent resident of Orissa, question arose whether the cause of action arose in Orissa or not. This Court held that right to invoke Article-226 of the Constitution of India was a constitutional right which should not be made illusory or unenforceable upon narrow construction of the concept of cause of action. The service of copy of the appellate order will give rise to a cause of action if service of the said order was an integral part of the cause of action. Since part of cause of action arose in the State of Orissa where he was served with a copy of the order, this Court has jurisdiction to entertain this writ application and the petitioner cannot be denied the relief on the ground of lack of territorial jurisdiction of this Court.

Similar view has also taken by this Court in ***Tapan Kumar Dalai*** (supra) where this Court held that the question of territorial jurisdiction must be decided on the facts pleaded in the petition, the truth or otherwise of the averments made in the petition being immaterial. The appellate order vide Annexure-18 having been addressed to the petitioner to his local address, this

Court has territorial jurisdiction. In that view of the matter the plea taken by the opposite parties that this Court has no jurisdiction in the matter cannot be sustained.

12. On the analysis of facts and law made above, this Court holds that the order of punishment imposed by the disciplinary authority vide order dated 20.09.2000 (Annexure-14) and confirmation thereof by the appellate authority vide order dated 04.01.2002 (Annexure-18) having been passed in gross violation of the principles of natural justice are vitiated. Accordingly, the same are quashed. The opposite parties are directed to reinstate the petitioner in service forthwith with all consequential financial and service benefits to him as due and admissible in accordance with law. The writ application is thus allowed.

Writ petition allowed.

2015 (I) ILR - CUT- 596

DR. B.R.SARANGI, J.

W.P.(C) NO. 4356 OF 2005

NITYANANDA PRUSTY ……..Petitioner

.Vrs.

O.F.D.C. LTD. & ORS. ……..Opp. Parties

SERVICE LAW – Continuance of disciplinary proceeding after retirement – Delinquent officer guided under the Orissa Forest Corporation Service Rules, 1986 – No such provision in the Rules at the time of retirement Dt.30.04.1998 – Relevant provision under Rule 123-A incorporated in the Rules by way of amendment w.e.f. 24.02.2004 – Amended Provision is prospective but not retrospective – Neither the disciplinary authority nor the appellate authority acted in consonance with the Rules – Impugned orders quashed – Direction issued to the authorities for payment of retiral dues along with 12% interest P.A. to the petitioner. (Paras 14, 15, 16)

Case Laws Relied on :-

1. AIR 1999 SC 1841 : Bhagirathi Jena v. Board of Directors, O.S.F.C. and Ors,
2. 2014 (8) SCALE 216 : Dev Prakash Tewari v. U.P. Cooperative Institutional Service Board.
3. 2008 (II) OLR 612 : Sukadev Behera v. M.D. OFDC, Ltd., 4.
4. 2013 (II) ILR CUT 109 : Sarat Chandra Das v. Orissa State Warehousing Corporation,
5. 1999 (II) OLR 433. : Dhruba Charan Panda and others v. State of Orissa and Ors.
6. 2014 (8) SCALE 216. : Dev Prakash Tewari v. U.P. Cooperative Institutional Service Board.

For Petitioner - M/s. K.C.Kar, P.K.Mishra, J.K.Pradhan
For Opp. Parties - M/s. C.A.Rao, S.K. Behera

Date of hearing : 24.11.2014
Date of judgment: 18.12.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who is a retired Deputy Divisional Manager of the Orissa Forest Development Corporation, has filed this application challenging the order dated 21.05.2004 passed by the Disciplinary Authority following disciplinary proceeding imposing penalty of recovering an amount of Rs.3,01,179/- from the retiral dues of the petitioner and arrears, if any, and balance amount, if any, shall be realized by instituting legal action vide Annexure-6 and confirmation thereof vide order 15.02.2005 passed by the Appellate Authority under Annexure-7 and consequential direction for realization of dues vide office order dated 19.10.2004 under Annexure-8.

2. The factual matrix of the case in hand is that the petitioner joined service under Orissa Forest Development Corporation as Sub-Divisional Manager in the year 1966. While continuing as Divisional Manager in Rairakhol Commercial Division during the year 1984-85 and 1985-86, there was shortage of timbers in Ramed-II Depot of Rairakhol Division. The shortage was detected on the basis of a special audit conducted between 7.5.1988 and 14.10.1988. On the basis of such audit report, vide letter dated 20.08.1993, the petitioner was called upon to deposit the cost of timber

amounting to Rs.16,99,206.70/- and submit his explanation within 30 days. Thereafter the petitioner was transferred and consequently he had not been communicated anything regarding the shortfall by granting reasonable time for clarification to the audit objection. Without doing so, the proceeding had been initiated against him by framing charges on 09.06.1994 vide Annexure-3. The petitioner submitted explanation on 25.07.1994 and another on 19.06.2001. Consequently, an inquiry officer was appointed, who conducted the inquiry to the charges leveled against him and ultimately the inquiry officer submitted his inquiry report exonerating the petitioner of all the charges on 27.07.2001 vide Annexure-4 with following conclusion and suggestions:

> "The audit para has been raised due to the following reasons:
>
> (1) Improper verification of record by audit.
>
> (2) Non-compliance of the objections raised by audit by the concerned officer, in absence of delinquent officer as he was transferred.
>
> As analyzed above, I am to say that:

1. All the charges may be dropped, in view of the analysis made above.
2. It is open to the appropriate authority to take suitable action against the concerned staff for improperly raising the audit para, as well as non-compliance of the audit objections, in time, as analyzed above.
3. The audit para may be settled/dropped accordingly."

3. The Disciplinary Authority agreed with the finding of the inquiry officer with regard to charge Nos. II,III,IV and V levelled against the petitioner and held that the said charges should be dropped. But he disagreed with the enquiring officer with regard to charges I and VI and on considering the materials available before him came to the conclusion that the enquiry officer relying on Ext.-P.W.6 came to hold that the concerned depot incharge was responsible for the shortage but the said P.W.6 relates forest working and not in case of depot and therefore the petitioner cannot be exonerated of gross negligence of his duty because his duty is to ensure proper functioning of his subordinates and to check their works/performance. He further concluded that though the charge is for more than Rs.30,00,000/- at least Rs.3,00,000/- be recovered from the petitioner. Therefore, he proposed to

recover a sum of Rs.3,00,984/- from the petitioner and called upon him to show cause in writing within 15 days as to why the above penalties shall not be imposed and finally the disciplinary authority vide order dated 21.5.1994 under Annexure-6 imposed following penalty:-

> "**ORDER** :
>
> The amount of Rs.3,01,179/- (Rs.3,00,000.00 + Rs.1,179.00) shall be recovered from the payable retrial dues and arrears, if any, to this extent and balance amount, if any, shallbe realized by instituting legal action if considered worth the cost."

4. Against such order of imposition of punishment, the petitioner preferred appeal before the appellate authority, which has been rejected vide order dated 15.02.2005 under Annexure-7. Consequence thereof, vide office order dated 19.10.2004 under Annexure-8 the direction was issued that retrial and arrear dues amounting to Rs.3,82,682/- be adjusted against the corporation outstanding dues of Rs.6,01,950.46 and the balance sum of Rs.2,19,268.46/- be recovered by instituting legal action.

Hence this application.

5. Mr. K.C. Kar, learned counsel for the petitioner, strenuously urged that the direction given under Annexure-8 for adjusting the retrial dues of Rs.3,82,082/- towards recovery adjustment of outstanding dues of Rs.6,01,950.40 and directing for recovery if not recovered outstanding amount of Rs.2,12,268/- by instituting legal action is not permissible. Therefore, he seeks to quash the said order. In addition to that, it is stated that the disciplinary authority while disagreeing with the findings given by the inquiry officer with regard to charge Nos.(I) & (VI) has not assigned any reasons and subsequently the appellate authority while rejecting the order of the disciplinary authority has not considered the case of the petitioner on merits and a cryptic order rejected the appeal without application of mind by non-complying the principles of natural justice. Therefore, he seeks for quashing of the order of imposition of penalty by the disciplinary authority and confirmation made thereof by the appellate authority and consequential order vide Annexures-6, 7 and 8 respectively as the same are contrary to the Orissa Forest Development Corporation Rules, 1986 and settled principles of law laid down by the apex Court. To substantiate his contention, Mr. Kar

relies upon the judgments in ***Bhagirathi Jena v. Board of Directors, O.S.F.C. and others***, AIR 1999 SC 1841, ***Dev Prakash Tewari v. U.P. Cooperative Institutional Service Board***, 2014 (8) SCALE 216, ***Sukadev Behera v. M.D. OFDC, Ltd.***, 2008 (II) OLR 612, ***Sarat Chandra Das v. Orissa State Warehousing Corporation***, 2013 (II) ILR CUT 109, ***Dhruba Charan Panda and others v. State of Orissa and others,*** 1999 (II) OLR 433.

6. Mr. C.A. Rao, learned Sr. Counsel for the Corporation strenuously urged that the petitioner cannot be exonerated of the liability of making good the loss caused to the corporation due to the illegality and irregularity committed during his tenure in the Corporation and there is no such provision available under the rules not to recover the amount after the retirement of an employee. In view of the amendment to the provision under Rule-123 A, power has been vested with the authority to initiate and continue proceedings after superannuation/retirement/termination of service. Therefore, the direction given by the authority for recovery of the amount is wholly and fully justified. Accordingly, this Court may not interfere with the same.

7. After considering the contention raised by learned counsel for the parties and on going through the records, it appears that the Orissa Forest Development Corporation has framed rules to regulate the service of its employees called "The Orissa Forest Corporation Service Rules, 1986, (hereinafter called as 'the 1986 Rules'). Chapter-VIII deals with disciplinary rules. Rule 121 deals with penalties wherein it is stated that for good and sufficient reasons and as hereinafter provided be imposed on an employee/workman, namely, minor penalties and major penalties. Minor penalties have been specified in clauses-(i) to (vi) whereas major penalties have been enumerated in clauses-(vii) to clause-(x). Clause-(iv) of Rule-121 deals with recovery from pay of the whole or part of any pecuniary loss caused by the employee/workman to the Corporation by negligence or breach of orders or misappropriation or any other reasons. Rules-125 dealt with procedure for imposing minor penalty. Rules 122 deals with disciplinary authorities whereas Rule 123 prescribes the authority to institute proceedings. When the matter stood thus, amendment of 1986 Rules was made by incorporating the Rule-123-A, which reads as follows:-

> "123-A. Authority to initiate and continue proceedings after superannuation/retirement/termination of service.

1. (a) Competent disciplinary authority as enumerated in Rule 123 may institute disciplinary proceedings against any employee after superannuation for his misconduct and for whole or part of any pecuniary loss caused to the Corporation if he is found prima facie responsible for such misconduct or negligence in duty during the period of his service including the service rendered on reemployment after retirement.

Such departmental proceeding shall be deemed to be proceeding under this Rule and shall be continued and concluded by the authorities by which they were commenced in the same manner as if the corporation employee had continued in service.

Such departmental proceedings referred to above if instituted while the employee was in service, whether before his retirement or during his re-employment.

iii) Shall not be instituted save with sanction of Board of Directors, if the CMD is the disciplinary authority and of the CMD if the disciplinary authority is subordinate to CMD.

iv) Shall be conducted by such authority and at such place as the disciplinary authority may direct ad in accordance with the procedure applicable to disciplinary proceedings in which an order of dismissal from service could be made in relation to the corporation employee during his service.

b) Disciplinary proceedings instituted while the employee/workman was in service, whether before his retirement or during his reemployment, shall be continued and concluded by the authority by which they were commenced in the same manner as if the employee/workman had continued in service.

1. (c) In the case of Corporation employee/workman, who has retired on attaining the age of superannuation or otherwise and against whom any disciplinary or judicial proceedings are instituted or were disciplinary proceedings continued under clause (a) and (b) the whole or part of the retrial and other payable dues to the extent of

loss alleged shall be withhold till final disposal of disciplinary proceeding and /or judicial proceedings."

The above mentioned rules clearly indicate the authority to initiate and continue proceedings after superannuation/ retirement/ termination of service and such amendment has been made pursuant to the notification dated 24.02.2004.

8. Mr. K.C. Kar, learned counsel for the petitioner states that the petitioner retired from service on 30.04.1998, i.e. prior to 24.02.2004 when there was no such provision to initiate or continue proceeding after superannuation/retirement/termination from service. In the present case, the proceeding was initiated against the petitioner by framing charge on 9.6.1994 vide Annexure-3 and punishment was imposed by the disciplinary authority under Annexure-6 on 21.05.2004 and the same was confirmed by the appellate authority on 15.02.2005 vide Annexure-7 and consequential direction for realization of dues was passed vide office order dated 19.10.2004 under Annexure-8, but Rule-123-A was incorporated by way of amendment with effect from 24.02.2004. The provision of rule-123-A may apply prospectively and not retrospectively. In that view of the matter, the proceeding initiated for recovery of the amount cannot be sustained.

9. Mr. C.A. Rao, learned Sr. Counsel for the Corporation strenuously urged that the authority can initiate or continue proceeding after superannuation/retirement/termination from service. In the present case, while the proceeding was in continuance, the amendment came. Therefore, it is applicable to the petitioner and consequently he is liable to pay the demand raised in Annexure-8 forthwith. It is stated that since the disciplinary authority was in seisin of the matter that amounted to continue a proceeding, therefore, no illegality has been committed by such continuance of proceeding by the authorities.

10. As it appears, there was no provision contained in 1986 Rules prior to 24.02.2004 for continuance of disciplinary proceeding after retirement of a delinquent officer. No material has also been produced before this Court to indicate that the authority competence to proceed against the petitioner even after his superannuation. Rather, referring to the amended provision of 1986 Rules, which has been incorporated on 24.02.2004, it is stated that it is applicable to continue proceeding.

11. The further question raised is that the disciplinary authority while differing with the findings of the inquiry officer having not assigned any reasons, the order of punishment passed in the proceeding cannot be sustained. It appears from in Annexure-5 that the disciplinary authority perused the report of the inquiry officer and stated that the inquiry officer has acquitted the petitioner of the charges levelled against him and recommended to drop the charges and while concurring in the finding of the inquiry officer with regard to charge nos. (ii) to (v), the disciplinary authority did not agree with the findings of the inquiry officer on charge nos. (i) and (vi) and held the two charges to have been proved. But such disagreement which has been referred to in Annexure-5 has not been based on cogent reasons. Therefore, the punishment inflicted on the petitioner in the departmental proceeding is vitiated.

12. It appears that the appellate authority while rejecting the appeal in Annexure-7 vide order dated 15.02.2005 has not assigned any reasons, rather by a cryptic order mechanically rejected the same. Therefore, neither the disciplinary authority nor the appellate authority has acted in consonance with the provisions of law. Thereby, the impugned order of punishment and the order passed by the appellate authority confirming the same cannot be sustained in the eye of law.

13. In ***Bhagirathi Jena v. Board of Directors, O.S.F.C. and others***, AIR 1999 SC 1841, the apex Court held that in absence of any provision, the disciplinary proceeding so initiated stands closed after retirement of the delinquent officer. In paragraph-5 of the said judgment the apex Court held as follows:

> "It will be noticed from the abovesaid regulations that no specific provision was made for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of departmental enquiry after superannuation."

Similar view has also been reiterated in ***Dev Prakash Tewari v. U.P. Cooperative Institutional Service Board***, 2014 (8) SCALE 216.

14. So far as the contention raised by Mr. C.A. Rao, learned Senior Counsel appearing for the Corporation with regard to the applicability of

Rule-123-A, which has been given effect from 24.02.2004 that it is applicable to a continue proceeding, the same fact has also been considered by this Court in ***Sukadev Behera*** case (supra) wherein referring to ***Bhagirathi Jena*** case (supra), this Court held that since the petitioner retired from service on 31.03.1999 and disciplinary proceeding initiated on 12.07.2003, amendment of the rules being prospective and no provision in the pre-amended rules to initiate such a proceeding, proceeding initiated against the petitioner cannot be said to be legal and accordingly quashed the same. Similar view has also been taken by this Court in ***Sarat Chandra Das*** (supra).

15. Applying the aforesaid principles to the present context, the petitioner having been retired from service on 30.04.1998 though the proceeding was initiated against him by framing charge on 9.6.1994 in absence of any provision under pre-amended rules, continuance of the said proceeding after retirement of the petitioner was not justified and cannot be sustained in the eye of law. Therefore, the reliance placed on the amended provisions of Rule-123-A can only be applied prospectively not retrospectively.

16. Taking into consideration the ratio decided by the apex Court in ***Bhagirathi Jena*** and ***Dev Prakash Tewari*** cases (supra) and as well as by this Court in ***Sarat Chandra Das*** (supra), this Court is of the considered opinion that continuance of proceeding against the petitioner after his retirement in absence of specific rules under 1986 Rules was unwarranted. Accordingly, the order dated 21.05.2004 passed by the Disciplinary Authority vide Annexure-6 and confirmation thereof by the appellate authority on 15.02.2005 vide Annexure-7 and consequential direction for recovery of the amount vide office order dated 19.10.2004 under Annexure-8 cannot be sustained. Accordingly, the same are quashed. The authorities are directed to pay the retiral dues of the petitioner along with interest @12% per annum within a period of four months from the date of passing of the judgment.

17. With the above observation and direction, the writ petition is allowed. However, there is no order to cost.

Writ petition allowed.

2015 (I) ILR - CUT- 605

DR. B. R. SARANGI, J.

O.J.C. NO.8421 OF 1994

BANA BIHARI JENA .....Petitioner

.Vrs.

COMMANDANT, 12 B.N., C.R.P.F.
ZUBZA KOHIMA, NAGALAND & ORS. .....Opp.Parties

DISCIPLINARY PROCEEDING – Proceeding not conducted fairly – Presumption could be drawn that the same caused prejudice to the charged employee.

In this case inquiry report not supplied to the delinquent officer – No opportunity to give effective reply to the inquiry report – Punishment of dismissal imposed by disciplinary authority was affirmed by the appellate authority – Violation of principles of natural justice for non application of mind by the authorities – Held, impugned order quashed – Matter is remitted back to the disciplinary authority to consider the same from the stage of giving opportunity to the petitioner-delinquent officer to give his reply to the findings of the enquiring officer.

Case laws Referred to:-

1.AIR 1991 SC 471 : (Union of India & Ors.-V- Mohd. Ramzan Khan)
2.2000 (II) OLR 126 : ((Sri) Janardan Mohanty-V- Union of India & Ors.)
3.(1996) 3 SCC 364 : (State Bank of Patiala & Ors.-V- S.K. Sharma)
4.AIR 2006 SC 2324 : (Marwar Gramin Bank-V- Ram Pal Chouhan)
5.(2009) 2 SCC 541 : AIR 2009 SC 1375 : (Union of India-V- Prakash Kumar Tandon)

For Petitioner - M/s. D.R. Pattnayak, S.K. Mallick, M.K. Khuntia & S. Pattnayak.

For Opp.Parties - Mr. A.K. Bose, Asst. Solicitor General.

Date of hearing : 13.11.2014|
Date of judgment : 27.11.2014

JUDGMENT

DR. B.R.SARANGI, J

The petitioner, who was working as LNK/Constable in D/12 under Central Reserved Police Force has filed this application assailing the order

dated 18.5.1994 passed by the Disciplinary Authority, namely, the Commandant, 12 Bn,CRPF, Zubza, Nagaland opposite party No.1 imposing on him major penalty of dismissal from service vide Annexure-3 and confirmation thereof in appeal by the appellate authority, namely, the DIGP,CRPF, Hyderabad, opposite party No.2 vide order dated 21.1.1995, Annexure-5.

12. The factual matrix of the case in hand is that the petitioner was on duty at Police Check Post on rotation basis from 1800 hrs. on 15.7.1993 to 0600 hrs. on 16.7.1993. At 0500 hrs. on 16.7.1993, the petitioner was relieved from his duty at the Check Post by one L/Nk. Bhaskar Boyote. At about 0520 hrs. on 16.7.1993 the said Check Post came under ground attack by the UGs terrorists. On the very same day, the petitioner was placed under suspension by the disciplinary authority in exercise of powers conferred by Rule 27 (A) of the CRPF Rules, 1955, vide Annexure-1, pending contemplation of disciplinary proceeding against him. On 17.12.1993, charges were framed against him and five others and a joint departmental inquiry was held by 1955 Rules under Section 11 (1) of CRPF Act, 1949, which reads as follows:-

ARTICLE-I

"That the said No.801130718 L/Nk Bhaskar Bhoyet and No.851260131 Ct. B.B. Jena of D/12 Bn CRPF, while functioning as LNK/Constable in D/12 Bn CRPF on 15.7.1993 and 16.7.1993 committed neglect on duty/remissness in the discharge of their duties and other misconduct in their capacity as members of the Force U/s 11 (1) of CRPF Act, 1949, in that while on duty at Police Check Post, Pfutsero left the post was not on duty on the early hours of 16.7.1993 when 2 UGs entered the retiring room of Check Post and taken away arms and ammunition by killing 2 persons of own Force without any resistance. Since the entire section was supposed to be on duty till 0600 hrs. Further, they also advised the other 3 Cts. Of the Check Post who were returning to the post after attending call of nature, not to proceed towards the post, as firing is on, which is attributed to gross negligence and remissness in discharge of duties and other misconduct and prejudicial to good order and discipline of the Force.

ARTICLE-II

That the said No. 911164563 Ct P.K. Chavan of D/12 CRPF, while functioning as constable in D/12 Bn CRPF on 16.7.1993 committed neglect of duty/remissness in the discharge of his duty and other misconduct, in his capacity as a member of the Force U/s 11 (1) of CRPF Act, 1949, in that while on sentry duty upto 0600 hrs. on 16.7.1993, he left the post without any relief, leaving his personnel open in the retiring room of the post. As a result 2 UG insurgents sneaked into the 1st floor of the balcony, entered the second room and taken away arms and ammunition by killing 2 persons of own force, which is prejudicial to good order and discipline of the Force.

ARTICLE-III

That the said No. 911164064 Ct K. Suresh, No. 911164411 Ct. B.V. Mathe and No. 911163842, Ct. G. Anand Kumar of D/12 Bn CRPF, while functioning as constables in D/12 CRPF on 15.7.1993 and 16.7.1993 committed remissness in the discharge of their duty in their capacity as members of the Force U/s 11 (1) of CRPF Act, 1949, in that they while on duty at Police Check Post, Pfutsero from 1800 hrs of 15.7.1993 to upto 0600 hrs. on 16.7.1993, left the post at 0515 hrs. on 16.7.1993 to attend the call of nature, when they were supposed to be duty along with entire section which is pre-judicial to good order and discipline of the Force."

13. Thereafter, the Dy. Commandant 12th Bn, CRPF was appointed as the inquiry officer on 29.12.1993, who conducted the inquiry and submitted his report on 9.5.1994 without serving copy of the same to the delinquent officer. It is stated that prior to the order passed in Annexure-2 on 18.5.1994, the inquiry officer had submitted inquiry report on 9.5.1994 which has been referred to in paragraph-3 in Annexure-3 without serving copy thereof to the petitioner, the delinquent officer. Being aggrieved by the order of the disciplinary authority, the petitioner preferred appeal before the appellate authority on 8.11.1994, but the same was rejected on 21.01.1995. Hence, this application.

14. Mr. D.R. Pattnayak, learned counsel for the petitioner, strenuously urged that the incident occurred after the duty hours of the petitioner.

Therefore, he was no way connected with the issue and he was falsely implicated for no reason. It is stated that the disciplinary authority imposed major penalty of dismissal of the petitioner from service without supplying Xerox copy of the inquiry report to him. As a result, due opportunity of hearing was not given to him. It is further submitted that the inquiry report was submitted by the inquiry officer, vide Annexure-3 on 9.5.1994, in which it was specifically mentioned that the petitioner had to reply to that in writing to the disciplinary authority within 15 days of receipt of the same, though it was candidly stated that copy of such inquiry report had not been supplied to him. Assuming such a report was supplied to the petitioner when 15 days time granted was yet to elapsed, the disciplinary authority with undue haste passed the order of punishment on 18.5.1994 vide Annexure-3 dismissing the petitioner from service. Therefore, the entire proceeding was vitiated due to non-supply of the inquiry report and non-compliance with principles of natural justice. It is further stated that, the appellate authority also did not apply his mind while rejecting the petitioner's appeal stating to be devoid of merit. With regard to the territorial jurisdiction of this Court, it is stated that since a part of the cause of action arose within the territorial jurisdiction of this Court, this Court has got jurisdiction to entertain this application.

In order to substantiate his contention, Mr. Patnaik has relied upon judgment of the apex Court in **Union of India and others v. Mohd. Ramzan Khan, AIR 1991 SC 471** and judgment of this Court in **(Sri) Janardan Mohanty v. Union of India and 3 others, 2000 (II)** ***OLR 126***.

5. Mr. A.K. Bose, learned Asst. Solicitor General, strenuously disputed the contention raised by Mr. Patnaik and referring to paragraph-6 of the counter affidavit submitted that the duty hours of the petitioner as Centry at the Check Post was from 1945 hrs. of 15.07.1993 to 2130 hrs on 15.7.1993 as per the duty register and after completion of his duty, he handed over charge of Centry duty to Ct. P.D. Bhai. The Check Post duty is performed on shift basis and all personnel were required to be present during the shift time i.e. 1800 hrs. on 15.7.1993 to 0600 hrs. on 16.7.1993, till relieved by other Section. Referring to paragraph-10 of the counter affidavit he further submitted that copy of the inquiry report was furnished to the petitioner vide letter dated 9.5.1994, by which principles of natural justice had been complied with and this Court should not interfere with the order passed by the disciplinary authority confirmed by the appellate authority. He further

submits that this Court has no jurisdiction to entertain this application as the cause of action arose outside the territorial jurisdiction of this Court.

6. Countenancing the submission of Mr. Bose, Mr. Patnaik submitted that a part of the cause of action verily arose within the State of Orissa, as the petitioner belongs to State of Orissa and the orders passed by the authorities were communicated to him in the State of Orissa, within the territorial jurisdiction of this Court. To substantiate his contention Mr. Patnaik referred to the decision of this Court in ***Janardan Mohanty*** (supra), wherein this Court held that if a part of the cause of action having arisen within the territorial jurisdiction of this Court, the writ petition was maintainable. After perusing the said decision, this Court is of the considered view that since all correspondences were made with the petitioner by the opp. Parties in his address in State of Orissa, the cause of action in the present case did arise within the territorial jurisdiction of this Court to entertain the writ application.

7. As it appears from the aforesaid facts and circumstances and the records available, it is admitted fact that the petitioner was on duty from 1800 hrs. on 15.7.1993 to 0600 hrs. on 16.7.1993 which was on rotation basis. He had handed over charge of the check post in question at about 0500 hrs., of 16.07.1993. Therefore by the time the ground attack was made by the terrorists at 0520 hrs. of 16.07.1993, the petitioner was not on duty. No allegation of his negligence of duty could therefore be made or attributed to him on that count.

8. As it appears from the records, the inquiry officer submitted his report on 9.5.1994 where after the disciplinary authority granted 15 day's time to the petitioner to give his reply to the accusation against him by the inquiry officer, from the date of communication to him but copy of such inquiry report was never served on him. Even before expiry of that 15 day's period, the disciplinary authority passed the impugned order dismissing the petitioner from service on 18.5.1994 just after 9 days of service of copy of the inquiry report. Therefore the time shown to have been granted to the petitioner to file his reply to the inquiry report was an empty formality and that too before compliance of the same, the impugned order of punishment had already been passed by the disciplinary authority dismissing the petitioner from service. Even though such objection was raised before the appellate authority, the same fell in the deaf ears of the said authority who

confirmed the order of punishment in gross non-compliance with the principles of natural justice. Such aspect was considered by the apex Court in **Union of India and others v. Mohd. Ramzan Khan*, AIR 1991 SC 471***.

9. In ***State Bank of Patiala and others v. S.K. Sharma***, (1996) 3 SCC 364 : AIR 1996 SC 1669 a two-judge Bench of the Supreme Court, after an elaborate discussion has summarized the position in relation to disciplinary proceeding as follows:

> "We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee) :
>
> (1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.
>
> (2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.
>
> (3) In the case of violation of a procedural provision, the position is this : procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no

interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4) (a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived if, then the order of punishment cannot be set aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in B. Karunakar, (1994 AIR SCW 1050). The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action - the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and not adequate opportunity, i.e., between "no notice"/"no hearing" and "no fair hearing." (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (audi alteram partem). (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the stand-point of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.)

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of state or public interest may call for a curtailing or the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision.

Similar view has also been taken by the apex Court in ***Marwar Gramin Bank v. Ram Pal Chouhan***, (2006) 9 SCC 691 : AIR 2006 SC 2324.

In ***Union of India v. Prakash Kumar Tandon***, (2009) 2 SCC 541 : AIR 2009 SC 1375, the apex Court has laid down a fair and simple proposition which states that if disciplinary proceedings were not conducted fairly, presumption could be drawn that the same caused prejudice to the charged employee.

10. Keeping the above proposition of law laid down by the apex Court in mind and applying the same to the present context, the action taken by the authority in dismissing the petitioner from service was clearly hit by principles of natural justice as no opportunity of hearing had been given to the petitioner to give effective reply to the inquiry report, as copy thereof was never served on the petitioner and even before expiry of the time 15 days' granted 15 days shown to have been granted to the petitioner to give reply, the major punishment was imposed by the disciplinary authority.

11. Therefore, taking a totality of the circumstances into account, this Court is of the view that punishment of dismissal from service of the petitioner was bad in law as the same was in violation of principles of natural justice and the order of confirmation thereof by the appellate authority is also not sustainable being without application of mind.

12. For the aforesaid discussion, both the order dated 18.5.1994 vide Annexure-2 and order dated 21.1.1995 vide Annexure-5 passed by the disciplinary authority and appellate authority, opposite parties No. 1 & 2, respectively, are hereby quashed and the matter is remitted back to the disciplinary authority opposite party No. 1 with a direction to him to consider the matter from the stage of giving opportunity to the petitioner-delinquent officer to give his reply to the finding of the Enquiry Officer vide Annexure-1 copy thereof being served him and by affording opportunity of hearing to him in compliance with the principles of natural justice and pass appropriate order within a period of four months from the date of receipt of this order.

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

Writ petition disposed of.

2015 (I) ILR - CUT- 614

D. DASH, J.

R.F.A. NO.168 OF 2008

SAROJINI DEI @ DAS & ORS. ……..Appellants

.Vrs.

SATYA PRASAD PATTNAIK & ORS. ……..Respondents

A. EVIDENCE ACT, 1872 – S.101

Burden of proof – Suit to declare the registered partition deed void – Plaintiff, aged about 90 years, an illiterate Pardanashin lady – Defendant No.1 (son of the plaintiff) managed to execute the deed of partition on the pretext of executing a deed of power of attorney – Vendee must prove that the contents of the document were read over and explained to the executant – Neither the scribe nor any witness of the document examined to prove due execution of the deed of partition by the plaintiff and the plaintiff having fully understood its nature and contents affixed her signature – Held, the impugned judgment dismissing the suit is set aside – The suit of the plaintiff is decreed declaring the partition deed as nonest in the eye of law.

(Paras 21,22,23)

B. HINDU LAW – Suit to declare the registered partition deed void – Defendant No.1 (son of the plaintiff) claims that though the suit property stands in the name of his mother it was the joint family property – Law is well settled that the property standing in the name of individual member of a joint family would not ipso facto constitute joint family property – One who asserts that such property takes the character of joint family property has to show that the joint family had sufficient nucleus available for acquisition of the property and on such fact being proved, the burden shifts to the individual member claiming the property to be his self-acquisition in showing that surplus of the joint family nucleus was not utilized for such acquisition.

(Para.14)

Case laws Referred to:-

1,AIR 1979 Orissa 162 : (Debraj Pradhan & Ors.-V- Ghanshyam & Anr.)
2.AIR 1983 Orissa 135 : (Smt. Manohari Devi & Ors.-V- Chaudhury Sibnava Das & Ors.)
3.AIR 1925 P.C. 204 : (Farid-un-Nisa-V- Munishi Mukhtar Ahmad)
4.XXVI (1960) CLT 304 : (Chandal Bewa-V- Madhav Panda & Ors.)

5.70(1990) CLT 720 : (Prasanna Kumar Giri-V- Radhashyam Paul & Ors.)
6.1993 (II) OLR 568 : (Kumadei-V- Md. Abdul Latif)
7.AIR 1963 SC 1203 : (Smt. Kharbuja Kaer-V- Jangbahadur & Ors.)

For Appellants - M/s. S.K. Dash, A.K. Otta, S.K. Dash, A. Dhalasamant, S. Das, B.P. Dhal.
For Respondents - None.

Date of hearing : 12.09.2014
Date of judgment : 24.09.2014

JUDGMENT

D. DASH, J.

The unsuccessful plaintiff as the appellant has filed this appeal against the judgment and decree passed by the learned Civil Judge (Sr. Division), Bhubaneswar dismissing her suit.

2. For the sake of convenience, to bring clarity and avoid confusion, the parties herein after have been referred to as they have been arranged in the court below.

3. The plaintiff' has filed this suit for a declaration that the registered deed of partition purported to have been executed on 08.09.2003 by her as void.

It is pertinent to mention here that the defendant no. 1 is the son of the plaintiff whereas the defendant no. 2 is her grandson i.e., pre-deceased son's son and defendant no. 3 to 6 are her daughters.

4. According to the case of the plaintiff, the subject matter of the purported partition deed is her self acquired immovable property where the defendants have no manner of right, title, interest and possession. It is her case that she being an old illiterate, rustic and pardanashin lady was depending on her son defendant no. 1. The defendant no. 1 who is her son persuaded her to execute a deed of power of attorney in his favour for better management of her immovable properties and to look after those. So, she was taken to the Sub-Registrar's Office by the defendant no. 1 under an impression that she was to execute a deed of power of attorney. The plaintiff claims to be having not known reading and writing except putting her signature. It is her further case that defendant no. 1 got the deed drafted and

the contents were never read over and explained to her. She was asked to simply put her signature on the document that too under the impression that she was executing a deed of power of attorney and accordingly it was registered on 12.09.2004. When the defendant no. 1 openly declared to sale some property, out of acquired property of the plaintiff, it came to her knowledge that by practising fraud by way of misrepresentation and undue influence taking advantage of relationship as well as her age, ignorance etc, such a deed of partition has been brought into existence instead of a deed of power of attorney which she actually intended to execute.

Therefore, she filed this suit for the declaration that registered said deed no. 6632 dt. 08.09.2003 is invalid, inoperative and void.

5. The defendant no. 1 in his written statement while traversing the plaint averments pleaded that property forming the subject matter of said deed of partition originally belonged to the mother of the plaintiff which she had transferred during her life time in favour of the plaintiff by registered the sale deed dated 06.04.1950. It is his further case that this land was purchased in the name of the plaintiff by her husband i.e., the father of the defendant no. 1. However though the ROR has remained in the name of the plaintiff, she alone was not having the right, title and interest over the same. So, it is stated that the property under the partition deed is the joint family property. It is further stated that the plaintiff has consciously executed the deed of partition with full knowledge and that was registered in accordance with law. With these pleadings he prayed to non-suit the plaintiff.

6. The defendant No. 2 almost sail in the same boat with defendant no. 1. It is his case that all the properties covered under the deed of partition are their joint family properties being purchased by his grandfather in the name of the plaintiff who is his grandmother and it has been in joint enjoyment of all the members of the family. It is his case that in order to maintain cordiality, peace amongst them for all times to come, there came the suggestion for partition and they all sat together in the village and discussed the matter in great detail. Whereafter, as per the instruction of the plaintiff, the deed of partition was drafted and she knowing fully well the nature and contents of the said partition deed as well as its true import became a signatory to the same which was ultimately registered. It is also his case that on 08.09.2003 said plaintiff had sold the land measuring Ac.0.54 decimals to her granddaughter, Subhadarshinee Pattnaik and also prior to it on 12.02.2004 some lands were sold by her. Thus it is stated that the deed of

partition is immune from being attacked on the grounds as projected in the plaint.

7. The daughters of the plaintiff are defendant no. 3 to 6 and they have filed separate written statement in support of the case of the plaintiff.

8. On such rival pleading, the court below has framed three issues and out of all those the most important is that of the validity of registered deed of partition dated 08.03.2003 and as to if it is sustainable in the eye of law or not. The other issues are in respect of existence of cause of action and entitlement of the plaintiff to the reliefs claimed.

9. In the trial the plaintiff has examined two witnesses including herself where as from the side of the contesting defendants, the mother of defendant no. 2 has been examined. Besides the above, the defendant No. 2 has proved the certified copy of the registered sale deeds dated 08.09.2003 as Ext. A-1, dated 11.02.2004, Ext. C-1 and the original of those as Exts. – J-1 and H-1 respectively.

10. The trial court as it appears has rightly taken up the issue no. 2 first for decision. It has been held that the scope in the suit does not remain to decide as to whether the properties described in the so called deed of partition is the joint family property or not. Next, it is held that the court cannot adjudicate upon the issue of the execution of the deed in question by the plaintiff which would have stood for decision, had the defendant filed the suit challenging validity of the deed of the partition.

It has been held that the plaintiff is neither a pardanashin nor illiterate women and thus the burden rests on her to prove that defendant no. 1 and 2 had obtained the deed of partition in the guise of power of attorney.

Lastly coming to the factual aspect of the rival case, on the basis of evidence and upon their appreciation, the trial court has arrived at a conclusion that this deed of partition, Ext. – 2 was duly executed by the plaintiff with full knowledge and understanding. With these findings, the plaintiff has been non-suited.

11. Learned counsel for appellant in challenging the findings submitted as under:-

(A) (i) that as per the pleading of the defendant no. 1 and 2, that the property was purchased by the husband of the plaintiff in her name, the property is to be presumed to be the property of the plaintiff when

there is no evidence at all that it was purchased from the joint family nucleus;

(ii) that the registered deed of partition, (Ext.2) even if accepted for the sake of argument to have been duly executed, the same on the admitted facts and circumstances as well as the evidence on record has no value in the eye of law and is nonest for the reason (a) that accepting the case of the plaintiff when it is her self-acquired property, it can't be the subject matter of partition and so by this deed of partition even admitting it to have been duly executed, legally, there can be no flow of right, title and interest of allotted properties in favour of defendant no. 1 which could have been only by way of gift.

(iii) that accepting the case of defendant no 1 and 2 that it is the joint family property as pleaded to have been because of purchase in the name of plaintiff by her husband, the deed of partition in the absence of defendant no. 3 to 6 carries no value in the eye of law.

(B) that the plaintiff being an old, pardanashin, illiterate and rustic lady, the burden of proof of execution of said deed being with defendant no. 1 and 2 and they having filed to do so, the suit ought to have been decreed.

12. None appeared for the respondents despite of the opportunities being given in that regard.

13. Admittedly, the subject matter of the deed of partition, which is the immovable property stood recorded in the name of the plaintiff. When it is claimed by the plaintiff to have been her own self acquired property, the contesting defendants counter it projecting a case that it is joint family property giving the reason thereof that it is so because it has been purchased by the husband of the plaintiff in her name.

This Court is unable to accept for a moment that how the trial court could bypass said controversy by saying that the same is not required to be decided in the present suit. The view appears to be erroneous. When the immovable property which is the subject matter of so called partition is asserted by the plaintiff that it was her self-acquired property stating thereby that it could not have formed the subject matter of partition and when the defendant nos. 1 and 2 bank upon the said partition and assert their respective right, title and interest over the allotted properties, there remains no reason for the trial court not to take up such an exercise when it touches

the very root. The trial court was therefore under legal obligation to decide this aspect in order to effectually and finally answer the issue no.2.

14. The position of law is well settled that the property standing in the name of individual member of a joint family would not ipso facto constitute joint family property. One who asserts that such property takes the character of joint family property has to show that the joint family had sufficient nucleus available for acquisition of the property and on such fact being proved, the burden shifts to the individual member claiming the property to be his self-acquisition in showing that surplus of the joint family nucleus was not utilized for such acquisition. (***Debraj Pradhan and others Vrs. Ghanshyam and another, A.I.R. 1979 Orissa, 162***)

15. The presumptive doctrine available in respect of the property acquired in the name of a male member of the joint family is not available in case of property standing in the name of the female members and that in the latter case, it is for the party who claims properties as joint family property to specifically plead the particulars and details in the pleadings and establish the same by adducing necessary evidence. (***Smt Manohari Devi and others Vrs. Chaudhury Sibnava Das and others, A.I.R. 1983 Orissa, 135***).

16. Adverting to the case in hand, the said property has been put to partition and deed of partition has come into being with said property as the subject matter. In the present case, on the face of the record standing in the name of the plaintiff and the presumption standing in her favour that it was her property, first of all it is found that the contesting defendants have not been able to discharge the burden of proof by giving evidence of that nature and in the above stated light that the property is to be taken to be the joint family property. Moreover, if on a plain reading their pleading is accepted that the property was purchased by the husband of the plaintiff in her name; that itself does not make out a case that the property would be taken to be joint family property in the absence of such pleading and clear, cogent and acceptable evidence that the money utilized for the purpose of acquisition of the said property was from the joint family fund or with utilization of the surplus of nucleus of the joint family. If husband purchases a property in the name of his wife then no presumption also lies that it is the property of the husband and if it is claimed so, it has to be proved that the said purchase was not only made by the husband but also that the benefit was not intended under the transaction to percolate to the so-called purchaser so as to say that was just a name lender. So, here when the pleadings of the parties are gone

through this Court do not find any difficulty in coming to a conclusion in the absence of any evidence being let in by the contesting defendants in the light of what has been stated above, the property has to be held to be the property of the plaintiff.

17. Furthermore, the enjoyment of said property by defendant nos. 1 and 2 in view of relationship cannot also give rise to an inference to the contrary. Next point arises that it is a case where during the life time of the plaintiff, a partition is being made in respect of her own property amongst her, her son and grandson leaving other members of the family i.e. daughters. So, in view of the above finding that it is the property of plaintiff, there was absolutely no occasion for partition of the same as has been said to have been done. If at all the property was intended to be parted with in part by the plaintiff, it could have been by way of gift. In that view of the matter, this document of partition has no legal foundation. Law is well settled that what cannot be done directly is not permissible to be made indirectly. So, on this ground alone the purported deed of partition, Ext.2=Ext.J-1 is nonest in the eye of law and cannot be taken to have conferred any sort of right in favour of defendant nos.1 and 2 in respect of that property as said to have been allotted.

18. Now, let us accept for a moment that it is the joint family property and it was the subject matter of partition between the plaintiff and the defendant nos.1 and 2, which is the very case of the contesting defendants. If that is so, as per the case of the contesting defendants that the husband having purchased the property in the name of the plaintiff-wife, the members of the joint family were having the right over the property, the plaintiff and all the defendants, who come as the class-1 heirs of the husband of the plaintiff have their right, title and interest over it. So, here the partition has been effected living some members having subsisting right over the property that too having unity of title and possession with those members who are parties to the so called partition. When all those heirs of the husband of the plaintiff have the interest over the property having unity of title and possession, it does not appear to be permissible in such a case for some members of the family to sit and partition the property amongst themselves depriving others which could have only been done after the relinquishment of the interest by those other members of the joint family i.e. the defendant-daughters. So, examining the case from that angle also the deed of partition Ext 2=Ext.J/2 has no value in the eye of law and it conveys no right, title and

interest whatsoever, in favour of defendant nos.1 and 2 in exclusion of daughters-defendants with respect to the property specifically allotted to them. Even, ignoring the nomenclature of the document as deed of partition, it cannot for a moment be considered as a family arrangement when it is not the case of defendant nos. 1 and 2 and moreover that is also legally not tenable as the defendant-daughters are not parties to it. This aspect has been overlooked by the trial court.

19. Adverting to the case of plaintiff as regards her ignorance of execution of such a deed of partition and taken from her in the guise of a deed of power of attorney, it is seen that the plaintiff in the case is aged about 70 years. She is none other than the mother of the defendant no.1 and grandmother of defendant no.2 when also she is having three daughters. By this deed of partition, she is not only parting her interest in respect of those properties allotted to the defendant nos.1 and 2 depriving herself of that but also further depriving her daughters. Admittedly, the plaintiff was then residing with the defendant nos.1 and 2, who was a minor and was being looked after by his mother guardian. It is the case of the plaintiff that she was taken to the Sub-Registrar's Office for the purpose of execution of power of attorney for appointing defendant no.1 as the attorney to look after the said property and for better management. The case of the plaintiff appears to be more probable if the facts and circumstances are viewed that the property being her property, there was no scope for partition of the same during her life time; that the age of the plaintiff as a factor standing on the way of better management; when also it is the eldest male member of the family i.e. the son is being appointed as the agent which in view of all the above is a natural and ordinary feature. In view of such relationship as well as other surrounding circumstances and in view of the evidence available on record, I disagree with the view of the trial court that the principles relating to execution of a document as regards its burden of proof would not be resting upon the defendant nos. 1 and 2 to prove that plaintiff executed said deed of partition fully knowing the nature and contents of the same with independent advice and that it was a conscious execution on her part. The trial court on the basis of prior sales by plaintiff etc. has held her not to be a pardanashin lady. The view is untenable in the eye of law. It is not the law that one who has executed the deeds before can not fall within the category of pardanashin woman. The mental state of the executants and all other surrounding factors at that time are also relevant consideration and upon cumulatively viewing all those, a decision on that score is taken. Furthermore, when there stands

such direct relationship, living together, it remains the duty to see that the relationship is not taken advantage of and the trust and confidence of the executant upon the beneficiaries are not abused. The principle in that regard is very clear that the law throws around her a cloak of protection.

20. At this juncture, before proceeding for further examination, the settled position of law are required to be discussed and stated for reference for proper appreciation of evidence in arriving at a correct decision.

The law as to the burden of proof has been summarized in a decision of Privy Council in case of ***Farid-un-Nisa- Vrs.- Munishi Mukhtar Ahmad***; AIR 1925 P.C. 204:-

> "The law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the granter. In such cases, it must also, of course, be established, that the deed was not signed under duress, but arose from the free and independent will of the granter. The law as just stated too well settled to be doubted or upset."
>
> xxxxx xxxxx xxxxx
>
> "The law of India contains well known principles for own disadvantage when they have not the usual means of fully understanding the nature and effect of what they are doing".
>
> The position thus emerges that executant being a pardanashin woman, the deed was read out to her; it must further be shown that it was explained to her, or that she understood its conditions and effect; and that the explanation included all material points as well as the general nature of transaction. The principle upon which the law affords protection as above is founded on equity and good conscience.
>
> xx xx xx
>
> "… The legal position has been very well-settled. Shortly it may be stated thus: The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a paradahnashin

lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial."

As held by this Court in ***Chandal Bewa v. Madhav Panda and others*** XXVI (1960) CLT, 304, that when a question arises as to whether the document has duly been executed by an old and illiterate lady belonging to a village, in order that the documents may be enforced against her, or, as a matter of that, in order that it may be found by the Court that the documents were properly executed, the vendee must prove that the documents were read over and explained to the illiterate executant, who is a lady, and she knew the nature and character of the transactions while she became a willing party to the documents and particularly that she was aware of the acreage involved in the transactions.

On the aforesaid, this Court then has taken a view that there is no justification as to why a rule applicable to a paradahnashin ladies on the ground of their ignorance and illiteracy should be restricted to that class only and should not also apply to the case of a poor lady who is equally ignorant and illiterate, but is not paradahnashin, simply because she does not belong to that class, the object of the rule of law being to protect the weak and the helpless, the distressed and the down-trodden and it should not be restricted to a particular class or community. Even in the case of a lady who is outside the paradahnashin class, it is for those who deal with her to establish that she had the capacity of understanding that she has been entering into the transaction voluntarily and with full knowledge and import of what the transactions actually meant. In case of ***Prasanna Kumar Giri vrs. Radhashyma Paul and others*** 70 (1990) CLT 720, it has also been so held. Same is the view taken in case of ***Kumadei Vrs. Md. Abdul Latif*** 1993(II) OLR 568. Reliance has been placed upon the decision in ***Smt. Kharbuja Kaer vrs. Jangbahadur and others***; AIR 1963 SC 1203, that as regards documents taken from a paradahnashin women, the Court has to ascertain that the party executing them has a free agent and has been duly informed of what she was about that reason for the rule is; that ordinary presumption that a person understands the document to which he has affixed his name does not apply in case of a paradahnashin women: that burden shall always rests

upon the person who seeks to sustain a transaction entered into with a paradahnashin lady to establish that the said document was entered into by her after clearly understanding the nature of the transaction: that it should be established that it was not only her physical act but also her mental act and that the burden can be discharged not only by proving that the document was explained to her and that she understood it but also by other evidence direct and circumstantial.

21. Testing the facts and circumstances as it reveals from the evidence on record in the light of the principles enunciated in the aforementioned decided cases, it is seen that the defendant no.1 who is the eldest male member of the family and one such beneficiary, has not come to the dock to give evidence and instead, the mother of the defendant no.2, has given the evidence particularly when the plaintiff has asserted that she being given to understand that she was to execute a deed of power of attorney in favour of defendant no.1, this deed of partition has been taken from her which she came to know later. Under the circumstance adverse inference is bound to be drawn against due execution of the so called deed of partition as he would have been the best person to state in denial with other facts as well. Plaintiff in her evidence has denied to have executed any deed of partition having any knowledge about it and has further stated to have not executed Ext.2=Ext.J-1 knowing it to have been a deed of partition. He has further stated to have not been read over or explained with the contents of the document and that it was not her conscious execution backed by any independent advice. She has further stated to have gone to the Sub-Registrar's Office for execution of a deed of power of attorney and under that impression when she had signed; the defendant nos.1 and 2 had fraudulently snatched away such deed of partition.

From the side of defendant nos.1 and 2 neither the scribe of the document has been examined nor any other witness in respect of due execution of the deed of partition by the plaintiff to prove that having fully understood its nature and contents, plaintiff affixed her signatures. D.W.1-Malabika Mohanty, the mother of the defendant no.2 is also not stating in any specific term in that regard as what the law requires to discharge the burden of proof of due execution of the document especially in view of the challenge levelled by the plaintiff. Therefore, the case of defendant nos.1 and 2 neither gets saved from scylla nor from charybdis.

22. In the upshot of the above discussion the finding rendered by the trial court on issue no.2 is found to be unsustainable in the eye of law and thus, this Court has the least hesitation in setting it aside. Consequent upon the same, the issue nos.1 and 3 are also accordingly answered in favour of the plaintiff. Therefore, the judgment passed by the learned Civil Judge (Sr. Division), Bhubaneswar, dismissing the suit of the plaintiff and the decree accordingly drawn are liable set aside.

23. Resultantly, the appeal stands allowed and in the circumstances without cost throughout. The suit of the plaintiff is hereby decreed declaring the so called deed of partition dated 08.09.2003 as nonest in the eye of law.

Appeal allowed.

2015 (I) ILR - CUT- 625

D. DASH, J.

R.S.A. NO.435 OF 2012

MAHESWAR DAS & ORS. .....Appellants

.Vrs.

HARISH CH. SAHU & ORS. .....Respondents

LIMITATION ACT, 1963 - S. 5

Condonation of delay – Though the delay is nominal lower appellate Court refused to condone delay as the appellants have not substantiated their case of illness by filing medical certificate – Nothing is shown that the adversary is prejudiced or has been materially affected or right which accrued in favour of the adversary after long lapse of time is being taken away – The lower appellate Court should have a justice oriented approach and ought not to have refused to condone such delay, ultimately refusing to entertain the memorandum of appeal. (Para 3)

For Appellants - M/s. P.Ch. Acharya.
For Respondents - M/s. S.P. Mishra, S. Mishra,
S.K. Samantaray, B.S. Panigrahi,
S. K Sahoo.

Date of hearing : 09.01.2015
Date of judgment: 09.01.2015

JUDGMENT

D. DASH, J.

The present appeal arises out of an order passed by the learned District Judge, Mayurbhanj, Baripada refusing to condone the delay of two days in presenting the memorandum of appeal challenging the judgment and decree passed by the learned Civil Judge (Jr. Division), Baripada in C.S. No.235 of 2007. The appeal has been admitted on the substantial question of law as under:

"Whether the observation of the lower appellate court that the ground advanced by the appellants in the limitation petition for condonation of delay in filing the appeal is not convincing and is sustainable in law?"

2. Heard learned counsel for the parties. Perused the impugned order.

3. Facts necessary to be stated for the purpose are the following:-

The judgment being passed on 30.06.2011, the decree was signed on 08.07.2011. The copy application has been made before the expiry of the period of the appeal. It has been averred in the petition that the appellants because of their illness and heavy rain in the area could not establish contact in time with their learned counsel for which this delay of few days has occasioned. The lower appellate court simply for the reason that the appellants have not substantiated their case of illness by filing medical certificate has refused to condone the delay and admit the memorandum of appeal. The approach of the First Appellate Court as it appears in such case of nominal delay in presenting the memorandum of appeal challenging the judgment and decree of the trial court being viewed with other conduct of the appellants does not appear to be in the direction of advancement of the cause of justice and rather it is in a way of preventing free flow therefrom. It has always been said that such pedantic approach in the matter is not to be taken and it should be a justice oriented approach. Here in the present case when it has not been shown as to how the adversary has been materially affected or would be caused with serious prejudice and the right which accrued in favour of the adversary after long lapse of time is being taken away, the lower appellate court ought not to have refused to condone such nominal delay in finally refusing to entrain the memorandum of appeal. Thus here on the face

of the affidavit and taking into consideration, the nominal delay, non-filing of medical certificate ought not to have taken as the ground to hold that no sufficient cause is shown for non-filing of appeal in time. So, the ground is not at all convincing and sustainable in the eye of law and it rather stems out of perversity. Therefore, the substantial question of law framed is answered in favour of the appellant.

4. In the result, the appeal stands allowed and in the circumstances without cost. The order of the First Appellate Court is hereby set aside and the delay is hereby condoned. It is for the lower Appellate Court now to proceed with the appeal for its disposal in accordance with law. In order to save delay, the parties are directed to appear before the lower Appellate Court on 10.02.2015 to receive further instruction. Considering the submissions of the learned counsel for the parties, it is directed that the First Appellate Court would do well to dispose of the suit within a period of three months being computed from the aforesaid date.

Appeal allowed.

2015 (I) ILR - CUT- 627

BISWANATH RATH, J.

W.P.(C) NO. 6923 OF 2008

EDGULA BABU RAO & ANR. ……..Petitioners

.Vrs.

THE GENERAL MANAGER,
EAST COAST RAILWAY & ANR. ……Opp. Parties

Railway accident – F.I.R. lodged by Station Superintendent basing on the information received from the concerned driver – Deceased, a girl student of +2 Arts, while crossing an un-manned level crossing, her chapel stuck on the track as a result of which she faced the accident – Statements attached to the Final Form establish that the death is due to rail accident – Even though the Railway Authority has constructed a railway overbridge near the particular site there was no display board giving sufficient notice not to cross the rail line – Held,

Railway Authority is responsible for the accident – Direction issued to O.P. 1 for payment of Rs. 3,00,000/- as ex-gratia compensation to the bereaved family. (Paras 4, 5)

For Petitioner - M/s. S.Tripathi & A.K.Panda
For Opp. Parties - M/s. D.K.Sahoo & K.K.Sahoo (For O.P. 1)

Date of hearing : 01.12.2014
Date of Judgment : 10.12.2014

JUDGMENT

BISWANATH RATH, J.

Fact involved in this case is that on 21.08.2006 at about 9.30 A.M., one R.N. Prasad Rao, Station Superintendent (East Coast Railway), Rayagada lodged a written report in Rayagada G.R.P.S. through daily Entry No.472, basing on an information given by the Driver of Tirupati-Bilaspur Express Train that the aforesaid train run-over a girl, at K.M. No.343/4-3. On the basis of such report, U.D. Case No.34 of 2006 dated 21.08.2006 was registered in Rayagada G.R.P.S. and necessary Post-mortem was also conducted. Upon completion of enquiry and investigation a Final Form was filed revealing the death of the deceased at daily market level crossing and an accidental one. From the said enquiry, it revealed that Edgula Karuna, the daughter of present petitioner, who was a student of +2 Arts Rayagada Womens' College, was going to the college by walk. While crossing the railway track at the daily market level crossing, her Chapal stuck on the track for which she tried to collect the same, in the process the Express Tirupati-Bilaspur Train, which was moving from the left side of the Rayagada Railway Station dashed and run over the girl student consequently the girl student died on the spot itself. The Police Report further also reveals that the death of the deceased was due to train accident at the Unmanned Level Crossing, petitioners alleged that due to gross negligence, apathy, carelessness of both the opposite parties, the unnatural death of the daughter has taken place. Statements of different persons have been recorded, which indicate the victim was crossing an Un-manned Level Crossing when the accident took place. It is further alleged by the petitioners that the death of their daughter took place owing to breach of safety standard and on dereliction of bounden duty by the opposite party no.1, i.e., Railway Authority. Further it is also alleged that the death has taken place for no

precautionary measures taken by the Railway Authority at the spot in spite of the area remaining busy. Petitioners also accused District Administration for their not taking any precaution in the locality. In the above premises, the petitioners claimed a sum of Rs.5,00,000/-(rupees five lakhs) against the opposite party no.1 and Rs.2,00,000/-(rupees two lakhs) against opposite party no.2. In this way they claimed a whole sum of Rs.7,00,000/-(rupees seven lakhs) as compensation as against the opposite parties.

2. Per contra, the District Administration on its appearance filed a counter through opposite party no.2 inter alia contending therein that though the daughter of the petitioners met with an accident with the Tirupati-Bilaspur Express Train, which run over her on 21.08.2006 the same is on account of negligence of her own and the opposite party no.2 has nothing to do with the same. The opposite party no.2 further claimed that the writ petition claiming compensation on account of death due to negligence by the Railway Authority cannot be maintainable. It also submitted that the Track where the accident took place since passes through a daily market, the Railway Authority constructed a fly-over bridge over the said railway track for the convenience of the people of the locality. The fly-over is already available and no one in the locality is permitted to cross the railway line.

3. Similarly in filing a counter affidavit, the opposite party no.1 while admitting the accident to have taken place at the particular spot states that the particular train has run over the deceased and the fact that a U.D. Case is registered on the basis of F.I.R. lodged by the Station Superintendent, Rayagada Railway Station even then it is not responsible for the death of the deceased. It is claimed that the deceased was a girl student of +2 Arts Rayagada Womens' College. There is no Manned/Unmanned Level Crossing in the area but there is a fly-over bridge near the track. The deceased did not use Fly-over Bridge but trespassed the railway track and met the consequence. It is submitted that there is a road over bridge at the spot of accident and in this view of the matter, the Railway Authority cannot be held responsible for the death of the deceased consequently Railway Authority is also not liable to pay compensation.

4. Heard the parties. Taking into consideration the respective pleas and the documents available on record, I find there is no dispute on the death due to Rail Accident. The copy of the First Information Report of the Station Superintendent East Cost Railway Rayagada reveals that the train in question run over the girl at K.M. No.343/4-3. The Final Report attached therein also

reveals that the death of the deceased was due to running over a particular train at that particular site. The Final Form was submitted with the observation that the death of Edgula Karuna is due to accidental death. The statements attached to the Final Form also establish that the death is due to rail accident, involving the particular train. Some evidence indicates that the deceased was passing through the railway line whereas some evidence discloses that the death has taken place due to railway accident while the deceased was crossing the level crossing. At the same time, counters filed by both the parties reveal that the accident has taken place in the busy locality. Eeven though the Railway Authority has constructed a railway over bridge near the particular site it no where appear that there was any prohibition to cross the rail line by sufficient notice at the particular area or even by placing a display Board. The District Administration as well as the Railway Authority have emphasized on the availability of a railway over bridge in the locality but both the counters remain silent as to whether there was an indication by way of Notice Board/display Board or Bar bade wire fencing in the locality parallel to the Railway line considering the same to be a busy area, thereby, restricting the movement of the local people to avoid the railway track. I held the Railway Authority is responsible for the loss of the life. Further, from the facts as has been admitted by the parties the accident has taken place on 21.08.2006 and this writ petition could not be heard till end of 2014, at this stage there is no possibility of asking the petitioners to claim compensation by instituting a proceeding before the Competent Authority, which would be grossly barred by this time.

5. Under the circumstances considering the peculiar facts involved in the case and the fact that petitioners have lost their young daughter in a railway accident, further considering that no proceeding before Competent Authority claiming appropriate court is permissible at this stage, I direct the Railway Authority the opposite party no.1 to make payment of at least a sum of Rs.3,00,000/-(rupees three lakhs) as ex-gratia compensation to the bereaved family. The amount as directed be paid to the bereaved family within a period of one month from the date of judgment.

6. The writ petition succeeds to the extent directed above. However, there shall be no order as to costs.

Writ petition allowed.