AMITAVA ROY, CJ

CRLMC. NO. 403 OF 2007

DINESH DIPTIMAY NAYAK @ GUDU .....Petitioner

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 – Ss. 173 (2), 190, 200

Police submitted Charge sheet against the petitioner and Opposite party Nos. 2 & 3 saying that no case is made out against them for the offences U/ss. 307, 363, 34 IPC – Informant lodged protest petition implicating them for the said offences – Magistrate took cognizance basing on the statements in the protest petition and collecting particulars of the accused persons from the informant – Order challenged – Since the protest petition is construed to be an original complaint, learned Magistrate should have followed the procedure set out in Chapter XV of the Code enfolding Sections 200 to 203 and cognizance ought to have been taken U/s. 190 (1) (a) of the said Code – Held, the impugned order taking cognizance against the petitioner and Opp.Party Nos. 2 & 3 is set aside.

(Paras 13 to 16)

Case laws Referred to:-

1.AIR 1968 SC 117 : (Abhinandan Jha & Ors.-V- Dinesh Mishra)
2.(2004) 7 SCC 768 : (Gagadhar Janardan Ahatre-V- State of Maharashtra & Ors.).

For Petitioners - Mr. R.N. Biswal.

For Opp.Parties - Mr. B.N. Bhuyan, A.G.A.
Mr. D.K. Mishra.

Date of judgment : 05.12.2014

JUDGMENT

AMITAVA ROY, C.J.

The present application under Section 482 of the Code of Criminal Procedure, 1973 (for short, hereinafter referred to as "the Code") seeks to

annul the order dated 23.12.2006 passed by the S.D.J.M., Udala, in G.R. Case No.339 of 2005 taking cognizance of the offences under Sections 307/363/34 IPC against the petitioner and opp. party nos.3 and 4.

2. Heard Mr R.N. Biswal, learned counsel for the petitioner, Mr B.N. Bhuyan, learned Addl. Standing Counsel for the State-opp. party and Mr D.K. Mishra,learned counsel for opp. party no.2.

3. The recorded facts disclose that on 13.12.2005 an FIR was lodged with the Khunta P.S. by opp. party no.2 herein alleging that on 7.12.2005 his son Shri Abhijit Behera on being called by the petitioner accompanied him in a scooty/motorcycle. At about 12.45 A.M. in the night while the informant was sleeping, Dillip Kumar Nayak the father of the petitioner and others informed him that his son (Abhijit) had fallen down from the scooty, whereafter he along with Dillip Nayak and his companions went in search of Abhijit and eventually found the scooty parked at Brundagadi Chhak. As the informant could not locate his son nearby, he continued with the search and in the next morning got the information that he (Abhijit) had been admitted in Khunta P.H.C. in seriously injured condition. The informant thereafter rushed to the hospital and on medical advice the victim was shifted to Baripada and eventually to Kalinga Hospital, Bhubaneswar. According to the prosecution, after four days, Abhijit having regained his consciousness the FIR was lodged.

4. On the FIR, Khuta P.S. Case No.101 of 2005 under Sections 307/363/34 IPC was registered and on the conclusion of the investigation, charge sheet was laid against the petitioner and one Dillip Kumar Nayak under Section 279/337 IPC.

5. Being informed of the report in the final form, as above, the informant (O.P.2) filed an application in the court of the learned S.D.J.M., Udala, reiterating the statements made in the FIR and adding further that the injured had identified opp. party nos.3 and 4 to be the accused persons and had also indicated the place where he was thrown in the drain near the roadside of Titia Chhak. It was averred as well that the accused persons were influential inhabitants of the locality and that the I.O. neither examined him nor other witnesses in order to favour the persons involved. The informant (O.P.2) prayed for an order for reinvestigation of the case.

6. It is worthwhile to mention that in the said application, the informant had sated that about 1.30 A.M. in the night i.e. on 7/8.12.2005 while the search was on, he found opp. party nos. 3 and 4 near Naloya Chhak and that on his return after informing the Khunta P.S. over telephone, he had found that the petitioner sleeping in his house. According to the informant, when the petitioner was asked about his son he did not reply. Noticeably, corresponding to Khunta P.S. Case No.101 of 2005, G.R. Case No.339 of 2005 had been registered.

7. Learned trial court by order dated 18.11.2006 recorded receipt of this application under Section 173, Cr.P.C. of the informant. On 23.12.2006, the learned trial court on a consideration of the application filed under Section 173 of the Code filed by the informant, the FIR, statements recorded by the police under Section 161 Cr.P.C. of Abhijit Behera and other papers relatable to the investigation held the view that there was prima facie evidence to take cognizance of the offences under Sections 307/363/34 IPC instead of those under Sections 279/337 IPC. By order of the even date i.e. 23.12.2006, the informant was directed to furnish the detailed address of Tutu Sahu and Nalini Naik (O.P. Nos.3 and 4) including their age by 16.1.2007 and also to produce the injury report of the victim by collecting the same from D.H.H., Baripada and Kalinga Hospital, Bhubaneswar. By order dated 16.1.2007, C.S.I. was directed to handover the case record to the Bench Clerk of the concerned court to issue summons to the accused persons for their appearance fixing 16.3.2007.

8. Mr R.N. Biswal, learned counsel for the petitioner, has argued that though it was within the competence of the learned trial court on receipt of the charge sheet filed under Section 279/337 IPC to independently assess the materials collected in course of the investigation by the police and to arrive at a conclusion different from the one recorded in the report submitted in the final form under Section 173 Cr.P.C., it fell in serious error in acting upon the allegations made in the protest petition of the informant in doing so and in issuing process against the petitioner, opp. party nos.3 and 4 after taking cognizance under Section 307/363/34 IPC without following the procedure prescribed under Section 200 and 204 Cr.P.C. According to the learned counsel, as the protest petition by the informant was construed to be a complaint petition by the learned trial court independent of the report in final form submitted by the police under Section 173, Cr.P.C. it was incumbent for it to follow the procedure prescribed by the court to take cognizance of the

offence under 190(1)(a) of the Cr.P.C. and the same not having been done, the order dated 23.12.2006 is null and void.

9. Mr D.K. Mishra, learned counsel for the opp. parties has per contra submitted that as it was open for the learned trial court to disagree with the conclusion recorded by the police in its report in final form submitted under Section 173 Cr.P.C., the course adopted by it is valid and thus no interference with the order dated 23.12.2006 is called for.

10. I have examined the materials on record and have also extended my due consideration to the arguments advanced. A bare perusal of the charge sheet submitted by the police on the completion of the investigation under Section 173 of the Code would in no uncertain terms reveal that thereby the culpability of the petitioner and one Dillip Kumar Nayak under Sections 279/337 IPC had been ascertained and they were sent up for trial under the said provisions of law. It was inter alia mentioned in the said charge sheet that no case had been made out against them under Sections 363/307/34 IPC.

11. According to the police, it was a case of accident of the scooty as testified by the witnesses and the attendant circumstances in course whereof Abhijit Behera the son of informant fell down and received injury. The charge sheet did not involve in any way opp. party nos.3 and 4 in the incident. These opp. parties, however, were clearly implicated by the informant in his protest petition while asserting that it was a case under Sections 307/363/34 IPC. It can thus reasonably be concluded that the learned trial court vide order dated 23.12.2006 took cognizance of the offences under Sections 307/363/34 IPC in place of those under Sections 279/337 IPC by taking note of the contents of the protest petition filed by the informant. To reiterate thereby, the learned trial court also directed the informant to furnish the particulars of opp. party nos.3 and 4 along with their age together with the injury report pertaining to the victim. Thus, it cannot be held that the learned trial court in taking cognizance under Sections 307/363/34 IPC against the petitioner, opp. Party no.3 and opp. party no.4 had limited its scrutiny to the materials pertaining to police investigation only, culminating in the submission of the charge sheet filed under Sections 279/337 IPC.

12. The Hon'ble Apex Court in ***Abhinandan Jha and others v. Dinesh Mishra, AIR 1968 SC 117***, had been seized with the question as to whether a Magistrate can direct the police to submit charge sheet whereafter

investigation into a cognizable offence the police had submitted final report under Section 173 Cr.P.C. exonerating the persons alleged to have committed the offences referred to in the First Information Report. Their Lordships after an exhaustive survey of the various judicial pronouncements on the issue did answer in the negative. It was held that though there was certainly no obligation on the part of the Magistrate to accept the report submitted by the police, be it under Section 169 or 173 of the Code, and that if he suspected that an offence had been committed, he was entitled, notwithstanding the opinion of the police, to take cognizance under Section 190(1)(b) of the Code, it was observed in the facts of the case that the Magistrate while directing the police to submit the charge sheet had also not adopted the suitable procedure indicated in the Code while taking cognizance of the offence, treating the protest petition to be a complaint made to him. It was underlined in the textual facts that though the direction of the Magistrate to the police to file charge sheet was beyond jurisdiction it was open to him to treat the protest petition as complaint and take further proceeding in accordance with law.

13. In ***Gagadhar Janardan ahatre v. State of Maharashtra and others, (2004) 7 SCC 768***, their Lordships of the Hon'ble Apex Court held that upon receipt of a police report under Section 173(2) of the Code, a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case had been made out against the accused. It was enunciated that a Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused in exercise of power under Section 190(1)(b) of the Code. It was clarified that the Magistrate in such a situation was not bound to follow the procedure laid under Section Sections 200 and 202 of the Code for taking cognizance of the offences under Section 190(1)(b) of the Code though it would be open to him to chart the said course. Their Lordships propounded that when information is lodged but no action is taken, the informant can under Section 190 read with Section 200 of the Code lay a complaint before the Magistrate having jurisdiction to take the cognizance of the offence and then the Magistrate is required to enquire into the complaint as provided in the Chapter XV of the Code, and, in such an eventuality, if the Magistrate after recording evidence finds a prima facie case, then even instead of issuing process to the accused he is empowered to direct the police

concerned to investigate into the offence under Chapter XII of the Code and to submit a report.

14. It is thus apparent from the preponderant judicial view adumbrated as above that even on the submission of a report by the police under Section 173(2) of the Code stating that no case had been made out against the accused, it is competent for the Magistrate to disagree with the said conclusion on a scrutiny of the materials collected in course of the investigation and either take cognizance of the offence alleged or direct further investigation under Section 156(3) of the Code. It is also amply clear that if such a course is adopted, the Magistrate is not bound to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of the offences under Section 190(1)(a) though it is open for him to do so.

15. However, if the protest petition is construed to be an original complaint and reliance is placed thereon by the Magistrate, he has to essentially follow the procedure as set out in Chapter XV of the Code enfolding Sections 200 to 203. In such an eventuality, therefore, the cognizance of the offence would be construed to be under Section 190(1)(a) of the Code for which the procedure enjoined under Chapter XV has to be unsparingly observed.

16. In the case in hand, on a scrutiny of the materials on record as a whole, this Court is left with the impression that the learned trial court while taking cognizance of the offence under Sections 307/363/34 IPC against the petitioner and opp. party nos.3 and 4 had traversed beyond the materials collected in course of the investigation by the police and had consciously relied upon the statements made in the protest petition by way of additional materials without, however, adhering to the procedure prescribed under Chapter XV of the Code. This, in comprehension of the Court, is not permissible in view of the law laid down by the Hon'ble Apex Court as adverted to herein above.

17. In the above factual and legal premise, this Court is thus inclined to sustain the challenge laid to order dated 23.12.2006 taking cognizance of the offences under Sections 307/363/34 IPC against the petitioner and opp. party nos.3 and 4 and steps consequential thereto in G.R. Case No.339 of 2005. The order dated 23.12.2006 is thus set aside. The petition is allowed.

Application allowed.

2015 (I) ILR - CUT- 637

FULL BENCH

AMITAVA ROY, CJ, C.R. DASH, J & DR. A. K. RATH, J.
O.J.C. NO.13383 OF 1999 (With Batch)

M/S. MANISHA ENTERPRISES & ORS. .....Petitioners.

.Vrs.

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

ODISHA SALES TAX ACT, 1947 – S. 5 (2) (A) (a) (i) & (ii)

Whether there is conflict of opinion in the decisions rendered by this Court i. e. State of Orissa -Vrs- M/s. Sahoo Traders (S.J.C. No.27 of 1990, disposed of on 22.12.1994) and Tilakraj Mediratta –Vrs- State of Orissa [1992] 86 STC 453 (Ori.) – Held, there is no conflict of opinion in the above decisions rendered by this Court – The reference is answered accordingly. (Para 13)

Case law Referred to:-

(1992) 86 STC 453 : (Tilakraj Mediratta-V- State of Orissa)

For Petitioners - M/s. J.M. Pattnaik, L.K. Nayak, D. Mohanty,
M/s. M.L. Agrawala & S.P. Dalai,
M/s. Jagabandhu Sahoo, B.K. Mishra, S.K.Mohanty, G.K. Sahoo,
M/s. B.P. Mohanty N.Paikray R.P.Kar, A.N. Ray, M.K.Badu & A. Das.
M/s. S. Kanungo, Ch. S. Mishra, R.N. Pattnaik, N.R. Mohanty, N.K. Nanda & Ch. H. Satpathy.

For Opp.Parties - Mr. R.P. Kar, Standing Counsel (Commercial Taxes).

Date of Judgment : 20.02.2015

JUDGMENT

C.R. DASH, J.

In M/s. Manisha Enterprises *vrs.* State of Orissa and others (O.J.C. No.13383 of 1999), one Division Bench of this Court had the occasion to consider two earlier decisions rendered by this Court in the case of **State of**

Orissa *vrs.* M/s. Sahoo Traders (S.J.C. No.27 of 1990 disposed of on 22.12.1994) and **Tilakraj Mediratta *vrs.* State of Orissa,** (1992) 86 STC 453. Said Division Bench, vide order dated 02.11.2000 has referred the matter for decision by the Larger Bench with the following observation :-

> "We have carefully perused the decisions rendered in both the cases and there appears to be conflict in opinion. It is therefore necessary to resolve the controversy by a Larger Bench in the interest of justice."

The Reference therefore centers round the basic premise that there is conflict of opinion in the decisions rendered in both the aforesaid cases.

2. The background fact, which requires reproduction for resolving the dispute is as follows :-

Pending Second Appeal before the Sales Tax Tribunal, the petitioner in O.J.C. No.13383 of 1999, i.e. M/s. Manisha Enterprises moved the Additional Commissioner of Commercial Taxes, Northern Zone, Orissa, Sambalpur for grant of stay against the demand in Revision Case No.II AST – 132 / 98-99. The Revision having been dismissed vide order dated 10.05.1999, the petitioner came up with the aforesaid writ petition, i.e. O.J.C. No.13383 of 1999 challenging the validity of the aforesaid order.

3. The petitioner M/s. Manisha Enterprises is a proprietorship concern carrying on business in salt, rice-bran, edible oil, oil-cake, etc. Originally assessment of the year 1994-95 was completed under Section 12(4) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as 'the Act' for short) as per the assessment order dated 22.02.1996. On the allegation that some portion of the turnover of the petitioner escaped assessment, the Sales Tax Officer started proceeding under Section 12 (8) of the Act. Despite notice, the petitioner did not appear. Consequently, the Sales Tax Officer proceeded ex parte on the basis of the materials available on record, and by order dated 30.08.1997 raised an extra demand of Rs.41,635/-. According to the Sales Tax Officer, during the material period the petitioner effected purchase of rice-bran worth Rs.8,91,164.97p. from the registered dealers free of tax on the strength of Declaration Form XXXIV with clear stipulation in the declaration for resale thereof inside the State of Orissa in a manner so that such resale would be subject to tax under the Act. The petitioner, however, in alleged contravention of Section 5(2)(A)(a)(ii) of the Act sold the same to S.S.I. Units free of tax against the Declaration Form 1-D thereby attracting

the tax liability as envisaged in the second proviso prescribed therein. Against the aforesaid order made under Section 12 (8) of the Act, the petitioner M/s. Manisha Enterprises filed Sales Tax Appeal Case No. AA 47(SA-II) of 1997-98 before the Assistant Commissioner of Commercial Tax, Sambalpur Range, Sambalpur, who, vide order dated 17.12.1998 dismissed the appeal. The petitioner thereafter filed Second Appeal before the Sales Tax Tribunal, Orissa and moved the revisional authority for stay. Stay having been refused, as already indicated, the petitioner moved this Court in O.J.C. No.13383 of 1999.

The contention of the petitioner is that, rice-bran were sold to the tax exempted units, for which no sales tax was collected and, therefore, there was no justification for extra demand in assessment under Section 12 (8) of the Act. The revisional authority rejected the aforesaid contention relying on the judgment of this Court in **State of Orissa *vrs.* M/s. Sahoo Traders,** S.J.C. No.27 of 1990 disposed of on 22.12.1994, wherein it is held as follows :-

> "The question that arises for consideration is when the selling dealer purchases goods by giving declaration in form XXXIV and then sells the same to another registered dealer but that purchasing dealer is entitled to certain tax concession for certain period and produces the declaration form in Form 1-A, whether the selling dealer contravenes the declaration given by it. Xx. But in interpreting a particular provision, when the language of the provisions is clear and unambiguous, it is not for the Court to search for any hidden intention. Xx. Bearing in mind the aforesaid well settled principles of interpretation of statute and on examining the facts and circumstances of the present case, we answer the question posed by holding that the assessee violated and contravened the provision of section 5(2)(A)(a)(ii) of the Act and there has been a contravention of the declaration given by him. The question is answered in favour of the revenue and against the assessee."

Learned counsel for the petitioner in the aforesaid O.J.C. (O.J.C. No.13383 of 1999) submitted that the decision of this Court in the case of **M/s. Sahoo Traders** (supra) runs counter to another decision of this Court rendered in **Tilakraj Mediratta *vrs.* State of Orissa,** (1992) 86 STC 453, wherein it is held as follows :-

"Under Section 5(2)(A)(a)(i) the sale of any goods notified from time to time as tax-free under Section 6 is deducted from the gross turnover of a selling dealer for the purpose of computation of taxable turnover. In other words, a selling dealer who produces evidence to show that it has sold goods covered by notification issued under section 6 and the conditions and exceptions are complied with, is entitled to a deductions while its taxable turnover is computed. The selling dealer in order to be entitled to the deduction has to produce at the time of assessment the declaration Form 1-A which it has obtained from the purchasing dealer. In the instant case, there is no dispute that the purchasing dealer had issued Form 1-A to the petitioner. It is also not disputed that the certification of the Unit is in terms of the requirement of entry 26-A of the list of exempted goods. According to the department, if the goods have not been utilized for the purpose indicated in the declarations, deduction to the selling dealer is not to be allowed. In our view, the stand is fallacious. It is not for the selling dealer to go after the purchasing dealer to find out as to in what manner he utilized the goods which it has purchased on the strength of the declaration forms in order to be entitled to the deduction. Such a requirement would fasten an impossible burden on the selling dealer. The question, however, has rightly been posed by the learned counsel for the department that if there is misuse, on whom the department shall lay its hands. It is the purchasing dealer who is getting exemption on fulfillment of certain conditions. Therefore, if goods purchased on the basis of the declaration are put to a different use the benefit of exemption is to be denied to it. The selling dealer cannot be faulted if there is any diversion or change of user. In this connection, the fifth proviso to sub-section (1) of section 5 of the Act is relevant, and has application.

Therefore, in our view the authorities were not correct in taxing the petitioner for any alleged change in user of the goods purchased by issue of Form 1-A by the purchasing dealer. It is open to the department to appropriately levy tax on opposite party no.7 if it is established that the goods purchased by it on the strength of Form 1-A was put to a different use or that there has been any contravention of the declaration."

On perusal of the aforesaid decisions, the Division Bench of this Court held that there appears to be conflict of opinion and referred the matter to the Larger Bench. Twelve other cases involving similar questions have been tagged subsequently and some of the cases have been referred subsequently for resolution of the same conflict of opinion.

4. We have heard Mr. J.B. Sahoo and other learned counsels for the petitioners in all the cases and Mr. R.P. Kar, learned Standing Counsel, Commercial Tax Department.

5. Perusal of the decisions in the case of **State of Orissa *vrs.* M/s. Sahoo Traders** (supra) and the decision in the case of **Tilakraj Mediratta *vrs.* State of Orissa** (supra) show that both the decisions relate to two different provisions of the Orissa Sales Tax Act, 1947. While the former relates to provision contained in Section 5(2)(A)(a)(ii) of the Act, the latter relates to Section 5(2)(A)(a)(i) of the Act. Section 5 of the Act deals with rate of tax and Section 5(2) of the Act specifies the meaning of the expression "taxable turnover". It is worthwhile to reproduce the provision of Section 5(2) for better understanding of the issue.

"**5. Rate of tax** –

(1) xx xx xx xx

(2)

(A) In this Act, the expression "taxable turnover" means that part of a dealer's gross turnover during any period which remains after deducting therefrom :-

(a) his turnover during that period on –

(i) The sale of any goods notified from time to time as tax free under Section 6 and of the packing materials, if any, in respect of such goods.

(ii) sales to a registered dealer of goods specified in the purchasing dealer's Certificate of Registration for resale by him in Orissa in a manner that such resale shall be subject to levy of tax under this Act; and on sales to a registered dealer of containers or other materials for the packing of such goods:

xx xx xx xx"

6. A cursory reading of the aforesaid provisions shows that, under Section 5(2)(A)(a)(i) of the Act the sale of any goods notified from time to time as tax free under Section 6 is deducted from the gross turnover of a selling dealer for the purpose of computation of a taxable turnover. In other words, a selling dealer, who produced evidence to show that it has sold goods covered by notification issued under Section 6 and the conditions and exceptions are complied with, is entitled to a deduction while its taxable turnover is computed. So far as Section 5(2)(A)(a)(ii) is concerned, it is found that when a selling dealer otherwise entitled to tax free purchase by giving declaration in Form XXXIV has to resell the goods in Orissa in a manner that such resell shall be subject to levy of tax under the Act. In other words, if the selling dealer in a series of sale purchases goods by giving declaration in Form XXXIV, he has to sell the same to another registered dealer in the State of Orissa in a manner that would be subject to levy of tax under the Act.

7. In the case of **Tilakraj Mediratta *vrs.* State of Orissa** (supra) there was no dispute that the purchasing dealer had issued Form 1-A to the petitioner. It is beneficial to note here that declaration in Form 1-A is issued in respect of purchase or sale of raw materials in terms of serial no.26-A of the Notification No.20206-CTA-14/76-F dated the 23rd April, 1976 notifying sale of certain goods specified in the notification to be exempted from tax subject to conditions and exceptions mentioned in the notification itself. It was also not disputed that the certification of the unit is in terms of the requirement of entry 26-A of the list of exempted goods. The Commercial Tax Department raised the issue, if the goods have not been utilized for the purpose indicated in the declarations, deduction to the selling dealer is not to be allowed. Such a stand by the Department was negatived as fallacious by this Court. It was held that, it is not for the selling dealer to go after the purchasing dealer to find out as to in what manner he utilized the goods, which it has purchased on the strength of the Declaration Forms in order to be entitled to the deduction. Such a requirement would fasten an impossible burden on the selling dealer. It is the purchasing dealer, who is getting exemption on fulfillment of certain conditions. Therefore, if goods purchased on the basis of the declaration are put to a different use, the benefit of exemption is to be denied to it, i.e. the purchasing dealer. The selling dealer cannot be faulted if there is any diversion or change of user.

8. In the case of **State of Orissa *vrs.* M/s. Sahoo Traders** (supra), the question that arose for consideration is, when the selling dealer has purchased goods by giving declaration in Form XXXIV and then sells the same to another registered dealer, but that purchasing dealer is entitled to certain tax exemption for certain period and produces the declaration in Form 1-A, whether the selling dealer contravenes the declaration given by it. Adverting to the literal interpretation of the provision of Section 5(2)(A)(a)(ii) of the Act, this Court held that, in interpreting a particular provision when the language of the provision is clear and unambiguous, it is not for the Court to search for any hidden intention. It was further held that, if the selling dealer has purchased the goods in a series of sale by giving declaration in Form XXXIV and has sold the same to another registered dealer, that purchasing dealer is entitled to certain tax exemption and produces declaration in Form 1-A, then the selling dealer, who had purchased goods by giving declaration in Form XXXIV, has contravened the declaration given by it and he has violated the provision in Section 5(2)(A)(a)(ii) of the Act.

9. Both the decisions have dealt with different subjects, different texts and different provisions of the Act. The consequence that followed so far as the assessee is concerned in both the cases are different. Contextually also both the cases are different.

10. It is found that in **State of Orissa *vrs.* M/s. Sahoo Traders** (supra) this Court noticed the case of **Tilakraj Mediratta *vrs.* State of Orissa** (supra) and distinguished. In the case of **State of Orissa *vrs.* M/s. Sahoo Traders** while distinguishing **Tilakraj Mediratta *vrs.* State of Orissa** (supra), it was held thus :-

> "……The learned counsel appearing for the assessee, on the other hand, contended that if the purchasing dealer is entitled to exemption for a specified period under the provisions of the Orissa Sales Tax Act, then the sale to him tantamounts to the fact that the sale has been subject to levy of tax under the Act and, therefore, there is no contravention of the declaration given by the selling dealer. In support of this contention, reliance is placed on the bench decision of this Court in the case of **Tilakraj Mediratta *vrs.* State of Orissa,** (1992) 86 STC 453. On going through the aforesaid decision, we are of the considered opinion that the said decision is of no assistance to the present case. In the aforesaid case the question for consideration

before the Court was whether the selling dealer was entitled to the deduction from his taxable turnover, if he produced evidence to show that he had sold goods in accordance with Section 5(2)(A)(a)(i) of the Orissa Sales Tax Act, or he would be held liable if the purchasing dealer made a contravention after purchasing the goods and the answer had been in favour of the assessees, who was the selling dealer. But, in the case in hand, the said question really does not arise for consideration. On a plain literal and grammatical meaning being given to the provisions contained in Section 5(2)(A)(a)(ii), the conclusion is irresistible that if the dealer purchases goods by using declaration in Form XXXIV and then resells the same to another registered dealer, but that transaction is not leviable to tax because of tax concession being enjoyed by the said purchasing dealer, it would be a contravention of the declaration given in Form XXXIV as well as the provisions of Section 5(2)(A)(a)(ii) of the Act……".

It is clear from the aforesaid observation that the case of **Tilakraj Mediratta *vrs.* State of Orissa** (supra) was placed before this Court in the case of **State of Orissa *vrs.* M/s. Sahoo Traders** (supra) to substantiate the contention that if the purchasing dealer from a seller, who has given declaration in Form XXXIV, is entitled to exemption for a specific period under the provisions of the Act, then the sale to him tantamounts to a sale that has been subject to levy of tax under the Act and, therefore, there is no contravention of the declaration given by the selling dealer in Form XXXIV. Same is the contention raised by Mr. J.B. Sahoo and other learned counsels appearing for the petitioners in the present cases, and relying on a catena of decisions, which we do not feel inclined to reproduce here for the sake of brevity, have contended that this Court in **State of Orissa *vrs.* M/s. Sahoo Traders** (supra) has not correctly decided the issue.

Whether the case **State of Orissa *vrs.* M/s. Sahoo Traders** (supra) has been correctly decided, is a question beyond the reference. The reference has been made on the supposition that there is conflict of opinion in **State of Orissa *vrs.* M/s. Sahoo Traders** (supra) and **Tilakraj Mediratta *vrs.* State of Orissa** (supra). We have to see whether there is any conflict of opinion and find out if there is conflict of opinion, which of the decisions holds the field. We have already held in paragraph-9 of the judgment that both the decisions have dealt with different subjects, different texts and different provisions of the Act and they are contextually different. In view of such

fact, we do not feel inclined to delve into the question, for the time being, beyond the reference to resolve as to whether **State of Orissa *vrs.* M/s. Sahoo Traders** (supra) has been correctly decided.

11. In 1996 a Division Bench of this Court, in the case of **M/s. Anand Steels *vrs.* State of Orissa and others,** (O.J.C. No.44393 of 1995, disposed of on 05.07.1996) had the occasion to be confronted with the issue that there is conflict in the view expressed in **State of Orissa *vrs.* M/s. Sahoo Traders** (supra) and **Tilakraj Mediratta *vrs.* State of Orissa** (supra).

In paragraph-5 of the judgment in **M/s. Anand Steels *vrs.* State of Orissa and others** (supra), after thorough discussion of the two decisions, both in **State of Orissa *vrs.* M/s. Sahoo Traders** (supra) and **Tilakraj Mediratta *vrs.* State of Orissa** (supra) and the relevant provisions of the Act, this Court held that the disputes involved in the two cases were contextually different and there was no conflict in the view expressed.

Further it was urged before this Court in **M/s. Anand Steels *vrs.* State of Orissa and others** (supra) that certain observations were made in the case of **Tilakraj Mediratta** (supra) about true import of Section 5 (2)(A)(a)(ii), which was not considered in the case of **M/s. Sahoo Traders** (supra) and, therefore, a fresh look is necessary. This Court relying on various English decisions held thus :-

> "……Judgments cannot be construed as statues. To interpret the words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statute……"

12. We find that the judgment of this Court in the case of **M/s. Anand Steels *vrs.* State of Orissa and others** (supra) was not brought to the notice of the Referring Bench at the time of consideration for making the reference.

13. Taking into consideration the provisions of the Act, as contained in Section 5 (2)(A)(a)(i) and Section 5(2)(A)(a)(ii) and decisions in the case of **State of Orissa *vrs.* M/s. Sahoo Traders** (supra) and **Tilakraj Mediratta *vrs.* State of Orissa** (supra), we are of the considered view that there is no conflict of opinion in the decisions rendered by this Court in both the aforesaid cases, i.e. **State of Orissa *vrs.* M/s. Sahoo Traders** (S.J.C. No.27

of 1990, disposed of on 22.12.1994) and **Tilakraj Mediratta *vrs.* State of Orissa,** (1992) 86 STC 453 (Ori). The Reference is answered accordingly.

Reference disposed of.

2015 (I) ILR - CUT- 646

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

W.A. NO. 506 OF 2013

SUTAR CHEMICAL PVT. LTD. & ANR. ……..Appellants

.*Vrs.*

COLLECTOR, BALASORE & ORS. ……..Respondents

A. ODISHA CONSOLIDATION OF HOLDINGS & PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – S. 35 (2)

Power of Collector U/s. 35 (2) of the Act – Whether Collector can exercise such power at any time ? – No period of limitation prescribed in Section 35 of the Act for exercise of power by the Collector to evict the transferee of a portion of chaka in contravention of Section 34 of the Act – His power cannot be confined by providing a period of limitation by judicial interpretation as it would frustrate the object of the Act to prevent fragmentation and to consolidate scattered holdings – A sale deed executed in contravention of Section 34 of the Act is not merely void but it is invalid from nativity – No legal relations come into being from the sale deed offending the Act. (Paras 23 to 27)

B. ODISHA CONSOLIDATION OF HOLDINGS & PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 - S. 35 (2), 53

Whether a vendee can take a plea of adverse possession where alienation is made in contravention of Section 34 of the Act ? – Held. No.

C. ODISHA CONSOLIDATION OF HOLDINGS & PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – S. 35 (2)

Whether the purchaser in the absence of any procedure laid down in the Act or Rules render Section 35 (2) of the Act is unworkable and unenforceable ? – Held, in the absence of any procedure laid down in Section 35 of the Act, the Collector will adher to the principles of natural justice. (Para 29)

Case laws Referred to:-

1.2012 (I) CLR-902 : (Jogendra Jena & Anr.-V- Krushna Jena & Anr.)
2.1995 Supp.(3) SCC 249 : (State of Orissa & Ors.-V- Brundaban Sharma & Anr.)
3.(2003) 7 SCC 667 : (Ibrahimpatnam Taluk Vyavasaya Collie Sangham -V- K. Suresh Reddy & Ors.)
4.(1997) 6 SCC 73 : (Uttam Namdeo Mahala-V- Vithal Deo & Ors.)
5.AIR 2004 SCC 4918 : (Situ Sahu & Ors.-V- State of Jharkhand & Ors.)
6.2009 AIR SCW 6305 : (Santoshkumar Shiuvgonda Patil & Ors.-V- Balasaheb Tukarm Shevale & Ors.)
7.AIR 1968 SC 261 : (Smt. Kalawati-V- Bisheswar)
8.AIR 1994 Allahabad 298 (FB) : (Nutan Kumar & Ors.-V- IInd Addl. DistJudge, Banda & Ors.)

For Appellants - Mr. B. Baug, Adv.

For Respondents - Mr. B.N. Bhuyan, A.G.A.
Mr. S.K. Mishra.

Date of Hearing : 17.11. 2014
Date of Judgment : 10. 12.2014

JUDGMENT

DR. A.K.RATH, J.

In this appeal under Clause-10 of the Letters Patent, the appellants call in question the legality and propriety of the judgment and order dated 10.10.2013 passed by the learned Single Judge in W.P.(C) No.31773 of 2011, whereby and whereunder, the learned Single Judge dismissed the writ petition and confirmed the order dated 28.11.2011 passed by the Collector, Balasore in Consolidation Case No.8 of 2007. By order dated 28.11.2011, the Collector, Balasore-respondent no.1 held that RSD No.4172 dated 7.12.1990,

RSD No. 4173 dated 7.12.1990 and RSD No.1147 dated 16.10.2007, which had been executed in contravention of Sec. 34 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (hereinafter referred to as "the Act"), are void. Having held so, respondent no.1 evicted the present appellants, who are opposite parties 3 and 4 in consolidation case, from the land transferred to them vide RSD No.1147 dated 16.10.2007.

2. Bereft of unnecessary details, the short facts of the case of the appellants are that one Sridhar Sahoo was the recorded owner in respect of consolidation khata no.291, chaka no.48, chaka plot No.92, area-Ac.1.16 dec. of mouza-Sanamaitapur under the Balasore Tahasil. During his life time, he had executed two registered sale deeds bearing RSD No.4172 dated 7.12.1990 in respect of khata no.291, chaka no.48, plot no.92, area Ac.0.08 dec. and RSD No.4173 dated 7.12.1990 in respect of khata no.291, chaka No.48, plot no.92, area Ac.0.40 dec. in favour of respondent nos.3 and 4. Thereafter, respondent no.4 alienated an area of Ac.0.24 dec. out of Ac.0.48 dec. in favour of Narayan Sahoo, father of respondent no.2 by means of RSD No.1283 dated 1.10.2002. While the matter stood thus, respondent no.3 intended to execute a registered sale deed of the remaining area in favour of the appellants. He made an application before the Tahasildar, Simulia to sale Ac.0.24 dec. land appertaining to khata no.291, chaka plot no.92, chaka no.48. In the said application, the amin submitted the enquiry report and sketch map. After considering the same, the Tahasildar, Simulia, respondent no.5 by order dated 12.10.2007 granted permission to sale the said land in favour of the appellants. Thereafter, respodnentno.3 had executed the registered sale deed on 16.10.2007 and delivered possession. After purchase, the appellants laid mutation case. By order dated 15.2.2008, in Mutation Case No.1683 of 2007 the respondent no.5 mutated the land in favour of the appellants and granted record of rights. The appellant no.1 had also filed OLR Case No.23 of 2008 under Sec.8(A) of the Orissa Land Reforms Act for conversion of the land. The same was allowed on 30.7.2008 and, accordingly the record of right was issued. After mutation, appellant no.1 has developed the land and constructed a weigh bridge. He has also constructed a house and installed an electric transformer for his business. While the matter stood thus, respondent no.2 had filed Consolidation Misc.Case No. 8 of 2007 before the Collector, Balasore under Sec. 35(1) of the Act for a declaration that the RSD Nos. 4172 and 4173 dated 7.12.1990 and 1147 dated 16.10.2007 are void and to delivery possession of the land.

3. Pursuant to issuance of notice, the appellants entered appearance and filed their objections contending, inter alia, that the lands were sold after obtaining due permission under Sec. 34 (3) of the Act. It was further contended that in order to harass them, respondent no.2 had also filed a Civil Suit, being C.S.No.620 of 2008, in the Court of the learned Civil Judge, Senior Division, Balasore.

4. By order dated 28.11.2011, the Collector came to hold that RSD No.4172 dated 7.12.1990, RSD No.4173 dated 7.12.1990 and RSD No.1147 dated 16.10.2007 had been executed in contravention of Sec. 34 of the Act. Having held so, the Collector declared the same as void and evicted the appellants from the land in question.

5. Assailing the order dated 28.11.2011 passed by the Collector, Balasore, the appellants filed the writ petition. Pursuant to issuance of notice, a counter affidavit was filed by respondent no.1. By order dated 10.10.2013, learned Single Judge dismissed the writ petition and thereby confirmed the order dated 28.11.2011 passed by the Collector.

6. Heard Mr.B.Baug, learned counsel for the appellants, Mr.B.N.Bhuyan, learned Additional Government Advocate for respondent no.1 and Mr.S.K.Mishra, learned advocate for respondent no.2.

7. Mr.Baug, learned counsel for the appellants submitted that the Collector-respondent no.1 has committed a manifest illegality and impropriety in initiating a proceeding under Sec. 35 of the Act after lapse of seventeen years. He further submitted that when there is no prescribed period of limitation in the statute, the proceeding ought to have been initiated within a reasonable time. Referring to Sec.57 of the Act, he submitted that the provisions of Limitation Act, 1963 except Secs. 6, 7, 8, 9, 18 and 19 shall apply to all applications, appeals, revisions and other proceedings under the Act or the Rules made thereunder. Thus, in view of Article 137 of the Limitation Act, the Collector ought to have initiated a proceeding within three years from the transfer of the land. He further submitted that necessary permission was accorded by the Tahasildar, Simulia to sale the land covered under the RSD No.4172 dated 17.12.1990 and RSD No.4173 dated 17.12.1990. According to Mr.Baug, even if the deeds are void, the appellants having in possession of the case land peacefully, continuously and to the hostile animus of owner more than 12 years and, as such, perfected title by

way of adverse possession. He further submitted that after mutation, appellant no.1 has developed the land and constructed a house thereon. He has also installed weigh bridge and an electric transformer over the said land. After lapse of seventeen years, if the lands are reverted back to the original owner, then the appellants will be seriously prejudiced. He further submitted that in absence of any procedure laid down in the Act and Rules framed thereunder for summarily eviction, the provision of Sec. 35 of the said Act is unworkable.

8. Per contra, Mr.Bhuyan, learned Additional Government Advocate and Mr.Mishra, learned counsel for respondent no.2 supported the orders passed by the Collector, Balasore and the learned Single Judge.

9. Mr.Mishra submitted that no right accrues in favour of the vendee when the sale deeds are void. He further submitted that when a person, intending to transfer or fragment a portion of chaka, is unable to do so owing to the restrictions imposed under sub-sec.2 of Sec. 35 of the Act, he may apply in the prescribed manner to the Tahasildar of the locality for this purpose. The said provision is mandatory and any transfer of the land in contravention of the provisions of Sec. 34 shall be void as would be evident from Sec. 35(1) of the Act. In the instant case, no permission was accorded by the Tahasildar, Simulia to alienate a portion of chaka and, as such, deeds are void. The subsequent permission accorded by the Tahasildar to alienate the land does not validate the initial transfer. Mr.Mishra further submitted that when Act does not prescribe the period of limitation, the Collector can exercise its power under Sec. 35(1) of the Act at any time. He further submitted that the appellants cannot take plea of adverse possession. He further submitted that Secs. 34 and 35 of the Act are the heart and soul of the Act and the aforesaid provisions protects the solemn mandate of the Act i.e. prevention of fragmentation. Any person, who has breached the mandate of the Act or is a beneficiary to such action, cannot take the plea of limitation to prevent an action under Sec.35 (2) of the Act. He further submitted that a void order is non-enforceable and non-est in the eye of law. The said order can be avoided at any point of time. He further submitted that there is no pleading with regard to adverse possession.

10. From the pleadings and submissions advanced by the learned counsel for the parties, the following points emerge for our consideration:-

1. Whether the Collector can exercise its jurisdiction under Sec. 35(2) of the Act at any time ?

2. Whether a vendee can take a plea of adverse possession where alienation is made in contravention of Sec. 34 of the Act?

3. Whether the purchaser in absence of any procedure laid down in the Act or Rules render Sec. 35(2) of the Act is unworkable and unenforceable ?

POINT NO.I

11. The Statement of Objects and Reasons given in the Bill leading to OCH & PFL Act (Act 53), reads:-

> "***Statement of Objects and Reasons-*** In the context of strategy for increasing agricultural production in the country and in pursuance thereof to give inducement and incentive to the cultivators, it is considered expedient to initiate legislation for consolidation of scattered holdings and re-arrange the holdings including fragmented holdings among various landowners to make them more compact and to provide against future fragmentation of holdings. This will help in economic farming and application of improved implements and methods of farming which are necessary for development of agriculture and increased agricultural production."

12. Section 34(1) (2) and (3) and Section 35 (1) and (2), which are relevant, are quoted hereunder:-

> "**34. Prevention of fragmentation-**
>
> (1) No agricultural land in a locality shall be transferred or partitioned so as to create a fragment.
>
> (2) No fragment shall be transferred except to a land-owner of a contiguous Chaka.
>
> xxx xxx xxx
>
> (3) Where a person, intending to transfer a fragment, is unable to do so owing to restrictions imposed under Sub section (2), he may apply in the prescribed manner to the Tahasildar of the locality for this purpose whereupon the Tahasildar shall, as far as practicable within

forty-five days from the receipt of the application determine the market value of the fragment and sell it through an auction among the landowners of contiguous Chakas at a value not less than the market value so determined.

xxx xxx xxx

35. Consequences of transfer or partition contrary to provisions of Section 34.

(1) A transfer or partition in contravention of the provisions of Section 34 shall be void.

(2) A person occupying or in possession of any land by virtue of a transfer or partition which is void under the provisions of this Act, may be summarily evicted by the Collector."

13. Further Sec. 53 of the Act, stipulates that a transfer made in contravention of any of the provisions of this Act shall not be valid or recognized, anything contained in any other law for the time being in force notwithstanding.

14. The object of Sec.53 of the Act is to consolidate and prevent fragmentation of holdings. The intention of the legislature is to encourage the development of agriculture and improve the agricultural products, and one way achieves the object by introducing consolidation schemes. The object of the Act is sought to be achieved by allotting a compact area in lieu of scattered plots, as that would facilitate large-scale cultivation, which will help in economic farming and application of improved implements and methods of farming, which are necessary for development of agriculture and increased agricultural production. Fragmentation of holdings is intended to be avoided, since that will impede the development of agriculture and interfere with increasing of production of food grains. The language employed in Section 34 of the Act is imperative, which provides that no agricultural land in a locality shall be transferred or partitioned so as to create a fragment except to a land owner of a contiguous Chaka. Sub-sec. of Sec.34 of the Act cast a duty on the owner of a Chaka intending to transfer a fragment may apply in prescribed manner to the Tahasildar of the locality for this purpose whereupon the Tahasildar as far as practicable within forty-five days from the receipt of the application determine the market value of the fragment and sell it through an auction among the land owners of contiguous Chakas at a value not less than the market value so determined. Sub-sec. 4 of the said Act

provides that when the fragment is not sold in course of the auction, it may be transferred to the State Government and the State Government, shall, on payment of the market value determined under sub-sec.(3), purchase the same and thereupon the fragment shall vest in the State Government free from all the encumbrances.

15. On a cumulative analysis of the aforesaid provisions, it is vivid and luminescent that before the owner of a Chaka intends to transfer a fragment of the same, he may apply to the Tahasildar of the locality for the said purpose, otherwise a transfer or partition in contravention of the provisions of Sec. 34 shall be void in view of Sec.35. Further in view of Sec. 53 of the Act, a transfer made in contravention of any of the provisions of the Act shall not be valid or recognized, anything contained in any other law for the time being in force notwithstanding.

16. Bearing in mind the statement of objects of the bill leading to statement of objects and reasons and provisions quoted (supra), let us examine the first submission of Mr.Baug, learned counsel that since no period of limitation has been prescribed in the Act for exercise of power under Sec. 35 (2) of the Act, the Collector has to exercise its power within twelve years from the date of transfer, as has been held by the learned Single Judge of this Court in ***Jogendra Jena and another Vrs. Krushna Jena and another***, 2012(I) CLR-902. Though the submission of Mr.Baug appears at a first blush to be attractive, but on a deeper scrutiny, it is like a billabong.

17. In ***State of Orissa and others Vrs. Brundaban Sharma and another,*** 1995 Supp. (3) S.C.C.249, the question arose before the apex Court as to whether Board of Revenue was justified to exercise its jurisdiction under Sec.38-B of the Orissa Estate Abolition Act, 1951 after a lapse of 27 years. The apex Court held that:-

> "When the revisional power was conferred to effectuate a purpose, it is to be exercised in a reasonable manner which inheres the concept of its exercise within a reasonable time. Absence of limitation is an assurance to exercise the power with caution or circumspection to effectuate the purpose of the Act, or to prevent miscarriage of justice or violation of the provisions of the Act or misuse or abuse of the power by the lower authorities or fraud or suppression. Length of time depends on the factual scenario in a given case."

The apex Court further held that it cannot be said that the Board of Revenue exercised the power under Sec.38-B after an unreasonable lapse of time, though from the date of grant of patta by the Tehsildar is of 27 years.

18. In ***Ibrahimpatnam Taluk Vyavasaya Coolie Sangham Vrs. K.Suresh Reddy and others,*** (2003) 7 Supreme Court Cases 667, the apex Court had the occasion to consider Sec. 50-B(IV) of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950, which provides that the Collector may suo motu at any point of time, call for and examine the record relating to any certificate issued or proceedings taken by the Tahasildar under the section for the purpose of satisfying himself as to the legality or propriety of such certificate or as to the regularity of such proceedings and pass such order in relation as he may think fit. The apex Court held that use of words "at any time" in sub-sec. (4) of Sec. 50-B of the Act cannot be rigidly read letter by letter. It must be read and construed contextually and reasonably. If one has to simply proceed on the basis of the dictionary meaning of the words "at any time", the suo motu power under sub-sec. (4) of Sec. 50-B of the Act could be exercised even after decades and then it would lead to anomalous position leading to uncertainty and complications seriously affecting the rights of the parties, that too, over immovable properties. Orders attaining finality and certainty of the rights of the parties accrued in the light of the orders passed must have sanctity. Exercise of suo motu power "at any time" only means that no specific period such as days, months or years are not prescribed reckoning from a particular date. But that does not mean that "at any time" should be unguided and arbitrary. In this view, "at any time" must be understood as within a reasonable time depending on the facts and circumstances of each case in the absence of prescribed period of limitation.

19. Similarly in ***Uttam Namdeo Mahala Vrs.Vithal Deo and others*** (1997) 6 Supreme Court Cases 73, the apex Court held that in the absence of any specific limitation provided in the statute, necessary implication is that the general law of limitation provided in the Limitation Act (Act 2 of 1963) stands excluded. It was further held that when there is statutory rule operating in the field, the implied power of exercise of the right within reasonable limitation does not arise.

20. Similar view has been taken in ***Situ Sahu and others Vrs. State of Jharkhand and others***, AIR 2004 Supreme Court 4918. The apex Court held

that lapse of forty years is certainly not a reasonable time for exercise of power, even if it is not hedged in by a period of limitation. On interpretation of Sec.71A of the Chhota Nagatpur Tenancy Act (6 of 1908), which empowers the Deputy Commissioner to restore possession to members of the Scheduled Tribes over land unlawfully transferred "at any time".

21. In ***Santoshkumar Shivgonda Patil and others Vrs. Balasaheb Tukarm Shevale and others,*** 2009 AIR SCW 6305, the apex Court held that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors (emphasis is ours). In the said case, it was further held that revisional jurisdiction should ordinarily be exercised within a period of three years having regard to the scheme of Act and in any event, the same should not exceed the period of five years.

22. Be it noted that in the decisions cited supra, the apex Court had the occasion to deal with the suo motu revisional jurisdiction of the authorities for exercise of power, but the same is not the case here. While exercising the jurisdiction under Sec. 35 of the OCH & PFL Act, the Collector neither exercises jurisdiction as an appellate authority nor revisional authority. Sec.35 of the Act also does not contemplate in making an application. In view of the same, reliance placed on Sec. 57 of the Act is totally misplaced.

23. Since no period of limitation has been prescribed in Sec. 35 of the Act for exercise of power by the Collector to evict the transferee of a portion of chaka in contravention of Sec. 34 of the Act, we are of the view that power of the Collector cannot be cribbed, cabined or confined by providing a period of limitation by judicial interpretation. If any period of limitation will be prescribed by the judicial interpretation, then the legislative intention of the OCH & PFL Act would be frustrated. Again there will be innumerable fragments of the chakas.

24. The matter may be examined from another angle. A transfer or partition in contravention of provisions of Sec. 34 shall be void, as would be evident from Sec. 35 (1) of the Act. What is the meaning of the word 'void'. Black's Law Dictionary defines the word 'void' as follows:-

> "Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended. An

> instrument or transaction which is wholly ineffective, inoperative, and incapable of ratification and which thus has no force or effect so that nothing can cure it."

25. In ***Smt.Kalawati Vrs. Bisheswa***r, AIR 1968 SC 261, the apex Court held that 'void' means non existent from in its very inception and ban against its recognition. It also means merely a nullity and may be ignored even in collateral proceeding as if it never were. Thus, void means non-est in the eye of law.

26. A Full Bench of Allahabad High Court in ***Nutan Kumar and others Vrs. IInd Additional District Judge, Banda and others,*** AIR 1994 Allahabad 298(FB), considered the legal status of an agreement formed in contravention of the provision of Sec.7(2) of the U.P.Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. It was held that the appellation 'Void' in relation to a juristic act, means without legal force, effect or consequence; not binding; invalid; null; worthless; cipher; useless and ineffectual. Void agreements are destitute of all legal effects and force. They are totally ineffectual rather cipher. No legal relationship, right or liabilities emanates therefrom. It was further held that an agreement offending a statute or public policy or forbidden by law is void. It is invalid from nativity. No legal relations come into being from an agreement offending a statute or public policy. Paragraphs 22 and 23 of the report are quoted hereunder:-

> "22. An agreement offending a Statute or public policy or forbidden by law is not merely void and it is invalid from nativity. It cannot become valid even if the parties thereto agree to it.
>
> 23. The concept that an agreement may be void in relation to a specified person and may be valid or voidable between the parties thereto is not applicable to an agreement the very formation whereof law interdicts; or which is of such a character that, if permitted, it would frustrate the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the court regards it as immoral or opposed to public policy. Neither party can enforce said agreement. No legal relations come into being from an agreement offending a Statute or public policy."

27. A sale deed executed in contravention of Sec.34 of the Act is not merely void, but it is invalid from nativity. No legal relations come into being from the sale deed offending the Act.

POINT NO.2.

28. The submission of Mr.Baug, learned counsel for the appellants that the appellants have perfected their title by way of adverse possession is difficult to fathom. Mr.Baug placed heavy reliance on Jogendra Jena *(supra).* With profound respect to the learned Single Judge, it is not possible on our part to agree with the ratio laid down in *Jogendra Jena (supra).* As we have held that a sale deed executed in contravention of Sec.34 of the Act is not merely void, but the same is invalid from nativity. No legal relations come into being from the sale deed offending the Act. Further Sec.53 of the Act mandates that a transfer made in contravention of any of the provisions of the Act shall not be valid or recognized, anything contained in any other law from the time being in force notwithstanding. While exercising jurisdiction under Sec.35 of the Act, the Collector neither acts as appellate or revisional authority. No application is contemplated in the section. The same is not a proceeding in stricto sensu. Applicability of Limitation Act is only relation to any applications, appeals, revisions and other proceedings except sections 6 to 9, 18 and 19. Entertainment of plea of adverse possession would have a disastrous and far reaching consequence. A statutory prohibition would be again validated. The consequence: - it will give rise to innumberable fragmentation of chakas and frustrate the legislative intention.

POINT NO.3.

29. Suffice it to say that in the absence of any procedure/mechanism laid down in Sec.35 of the Act, the Collector will adher to the principles of natural justice.

30. But the question does arise when successive transactions have been taken place and the transferee has made some improvement of the property. The submission of Mr.Baug, learned counsel for the appellants is that status of the land has been changed to homestead land from agriculture by the Tahasildar. Further appellant no.1 has developed the land, constructed a weigh bridge in a portion thereof in 2008 and in other portion constructed a house and has also installed an electric transformer for his business purpose.

The same is neither disputed nor denied. In view of the long lapse of time of seventeen years, successive transactions have been made and appellant no.1 has constructed a house, weigh bridge and installed an electric transformer over the same, it would be too iniquitous to dispossess him from the said land in question.

31. In view of the above, the order dated 28.11.2011 passed by the Collector, Balasore as well as the order dated 10.10.2013 passed by the learned Single Judge are hereby quashed. The writ appeal is allowed.

Appeal allowed.

2015 (I) ILR - CUT- 658

FULL BENCH

AMITAVA ROY, CJ , C.R. DASH, J & DR. A. K. RATH, J.

W.P.(C) NO.5738 OF 2008

AKSHAYA KU. PARIDA (DEAD)
AFTER HIM MANOJ KU. PARIDA & ORS. ……..Petitioners

.Vrs.

UNION OF INDIA & ORS. ……..Opp.Parties

CENTRAL ADMINISTRATIVE TRIBUNAL (PROCEDURE) RULES, 1987 - RULE 17

Review – Whether the Central Administrative Tribunal has jurisdiction to Condone delay in the event an application for review is filed beyond the prescribed period of limitation ? – Neither Section 22 of the Administrative Tribunals Act, 1985 nor Rule 17 of the Rules expressly excluded applicability of Section 5 of the Limitation Act – Held, in the event an application for review is filed beyond the period of limitation along with an application for condonation of delay and the applicant satisfies the Tribunal that he had sufficient cause for not preferring an application within the time, the Tribunal can condone the delay. (Para 22)

Case Laws Overruled :-

1. 2007 (II) OLR 365 : (Kanchana Badaseth -V- Union of India & Ors.)
2. 96 (2003) CLT 230 : (Rajayya Bisoi-V- Union of India & Ors.)

Case laws Referred to:-

1. 2007 (II) OLR 297 : (Basantilata Dash-V- Union of India & Ors.)
2. (1997) 6 SCC 473 : (K. Ajit Babu & Ors.-V- Union of India & Ors.)
3. AIR 1999 SC 1975 : (Industrial Credit & Investment Corporation of India Ltd.-V- Grapco Industries Ltd.)
5. 1991 SCC (L&S) 208 : (Union of India & Anr.-V- Paras Laminates (P) Ltd.)
6. AIR 1976 SC 105 : (Mangu Ram -V- Municipal Corporation of Delhi)
7. (1995) 5 SCC 5 : (Mukri Gopalan-V- Cheppilat Puthanpurayil Aboobacker)

For Petitioners - Mr. K. Mohanty.
For Opp.Parties - Mr. A.K. Bose, ASG.

Date of hearing : 15.01.2015
Date of judgment : 03.02.2015

JUDGMENT

DR. A.K.RATH, J.

Divergent views expressed by two coordinate Benches of this Court in the cases of Smt. Kanchana Badaseth v. Union of India and others, *2007 (II) OLR 365* and Basantilata Dash v. Union of India and others, *2007 (II) OLR 297* necessitated another Division Bench to refer the matter to the larger Bench. Therefore, the matter has been placed before the Larger Bench.

2. In Smt. Kanchana Badaseth (supra), a Division Bench of this Court held that in absence of any provision empowering the Tribunal to condone the delay, review application filed beyond thirty days should be rejected. While arriving at the conclusion, the Bench relied upon a decision of the apex Court in the case of K. Ajit Babu & others v. Union of India and others, *(1997) 6 SCC 473* and another Division Bench of this Court in the case of Rajayya Bisoi v. Union of India & others, *96 (2003) CLT 230*. But then, a contrary view was taken in Basantilata Dash (supra).

3. The order of reference made in the instant case by the Division Bench does not formulate the question, but it is implicit in that, we have to answer

whether the Central Administrative Tribunal constituted under the provisions of the Administrative Tribunals Act, 1985 has jurisdiction to condone the delay in the event an application for review is filed beyond the prescribed period of limitation?

4. We have heard Mr.K.Mohanty, learned counsel for the petitioners and Mr.A.K.Bose, learned Asst. Solicitor General for the opposite parties.

5. Before we proceed, we deem it necessary to note the relevant provisions of the Administrative Tribunals Act, 1985 (hereinafter referred to as "the Act") with regard to the jurisdiction, power and authority of the Tribunal. Section 19 of the Act postulates that subject to the other provisions of the Act, a person aggrieved by any order pertaining to any matter within the jurisdiction of a Tribunal may make an application to the Tribunal for the redressal of his grievance. Section 21 of the Act deals with limitation in filing the original application. Sub-section (3) of Section 21 confers power on the Tribunal to condone the delay in filing the original application, if the applicant satisfies the Tribunal that he was prevented by sufficient cause in not filing the application within the period of limitation prescribed in the Act. Section 22 of the Act has a direct bearing on the issue in question. The same is quoted hereunder;

> **"22. Procedure and powers of Tribunals**.-(1) A Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice and subject to the other provisions of this Act and of any rules made by the Central Government, the Tribunal shall have power to regulate its own procedure including the fixing of places and times of its inquiry and deciding whether to sit in public or in private.
>
> (2) A Tribunal shall decide every application made to it as expeditiously as possible and ordinarily every application shall be decided on a perusal of documents and written representations and [after hearing such oral arguments as may be advanced].
>
> 3. A Tribunal shall have, for the purposes of [discharging its functions under this Act], the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit, in respect of the following matters, namely:-

a. summoning and enforcing the attendance of any person and examining him on oath;

b. requiring the discovery and production of documents;
c. receiving evidence of affidavits;

d. subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872) requisitioning any public record or document or copy of such record or document from any office;

e. issuing commissions for the examination of witnesses or documents;

f. reviewing its decisions;

g. dismissing a representation for default or deciding it ex parte;

h. setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

i. any other matter which may be prescribed by the Central Government."

6. Rule 17(1) of the Central Administrative Tribunal (Procedure) Rules, 1987 (hereinafter referred to as "the Rules") provides that no application for review shall be entertained unless it is filed within thirty days from the date of receipt of copy of the order sought to be reviewed.

7. The question thus arises whether by invoking Section 5 of the Limitation Act, the Tribunal can condone the delay, if the applicant satisfies the Tribunal that he was prevented by sufficient cause in not preferring the application for review within the prescribed period of limitation?

8. The Limitation Act, 1963 is the general legislation in the law of limitation. Section 5 of the Limitation Act provides thus:

"**5. Extension of prescribed period in certain cases.**-Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

9. Section 29 of the Limitation Act is the savings clause. Sub-section (2) of Section 29 of the Limitation Act is quoted hereunder:

> "**29. Savings**.- (1) xxx xxx xxx
>
> (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

Sub-section (2) of Section 29 of the Limitation Act provides that Sections 4 to 24 of the Limitation Act shall be applicable to any Act which prescribes a special period of limitation, unless they are expressly excluded by that special law.

10. On a cursory perusal of Section 22 of the Act it is vivid and luminescent that the Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure. For the purpose of discharging its functions under the Act, the Tribunal shall have the same powers as are vested in a civil court under the Code of Civil Procedure while trying a suit in respect of the matter enumerated in clause (f) of sub-section (3) of Section 22 of the Act. The Tribunal while entertaining an application for review, is conferred with the same power as are vested in a Civil Court under the Code of Civil Procedure, 1908 that is to say for the purpose of entertaining an application for review, the Tribunal in our view acts as a Civil Court and is conferred to exercise all powers as are vested in a Civil Court.

11. In Industrial Credit and Investment Corporation of India Ltd. V. Grapco Industries Ltd., *AIR 1999 SC 1975*, the apex Court, while dealing with Section 22 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 which is pari materia with the Section 22(3) of the Act, held that Recovery of Debts Due to Banks and Financial Institutions Act, 1993 also confers power on the Tribunal to travel beyond the Code of Civil Procedure and only fetter that is put on its power is to observe the principles of natural justice.

12. On a plain reading of Section 5 of the Limitation Act, 1963, it is evident that the prescribed period of limitation can be extended if Court is satisfied that the applicant had sufficient cause for not preferring the appeal or making the application within the period of limitation.

13. The Supreme Court, in the case of Union of India and another v. Paras Laminates (P) Ltd., *1991 SCC (L&S) 208* while dealing with the power and function of the Customs, Excise and Gold (Control) Appellate Tribunal, held as follows :

> "The Tribunal functions as a court within the limits of its jurisdiction. It has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognized as incidental and ancillary, not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised. The powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. As stated in Maxwell on *Interpretation of Statutes* (11th edn.) "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution".

14. The provision regarding period of limitation provided in Rule 17 howsoever peremptory or imperative the language may be, is not sufficient to displace the applicability of Section 5 of the Limitation Act. It is true that the language of Rule 17 is mandatory and compulsive, in that, it provides in no uncertain terms that no application for review shall be entertained unless it is filed within thirty days from the date of receipt of copy of the order sought to be reviewed. But the same is the language of every provision prescribing a period of limitation. It is because a bar against entertainment of an application beyond the period of limitation is created by a special or local law

that it becomes necessary to invoke the aid of Section of the Act in order that the application may be entertained despite such bar.

15. While dealing with the applicability of Section 5 of the Limitation Act to the application for special leave under Section 417(3) of the Criminal Procedure Code, the apex Court in the case of Mangu Ram v. Municipal Corporation of Delhi, *AIR 1976 SC 105*, held as follows:

> "**7.** There is an important departure made by the Limitation Act, 1963 in so far as the provision contained in Section 29, sub-section (2) is concerned. Whereas under the Indian Limitation Act, 1908 Section 29, sub-section (2), cl.(b) provided that for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law the provisions of the Indian Limitation Act, 1908, other than those contained in Sections 4, 9 to 18 and 22, shall not apply and, therefore, the applicability of Section 5 was in clear and specific terms excluded. Section 29, sub-section (2) of the Limitation Act, 1963 enacts in so many terms that for the purpose of determining the period of limitation prescribed for any suit, appeal or application by any special or local law the provisions contained in Sections 4 to 24, which would include Section 5, shall apply in so far as and to the extent to which they are not expressly excluded by such special or local law. S.29, sub-s (2), cl.(b) of the Indian Limitation Act, 1908 specifically excluded the applicability of Section 5, while Section 29, sub-section (2) of the Limitation Act, 1963 in clear and unambiguous terms provides for the applicability of Section 5 and the ratio of the decision in Kaushalya Rani's case can, therefore, have no application in cases governed by the Limitaton Act, 1963, since that decision proceeded on the hypothesis that the applicability of Section 5 was excluded by reason of Section 29(2)(b) of the Indian Limitation Act, 1908. Since under the Limitation Act, 1963 Section 5 is specifically made applicable by Section 29, sub-section (2), it can be availed of for the purpose of extending the period of limitation prescribed by a special or local law if the applicant can show that he had sufficient cause for not presenting the application within the period of limitation. It is only if the special or local law expressly excludes the applicability of Section 5, that it would stand displaced. Here, as pointed out by this Court in Kaushalya Rani's case AIR 1964 SC 260 = (1964 (1) Crl. LJ 152) the

time limit of sixty days laid down in sub-section (4) of Section 417 is a special law of limitation and we do not find anything in this special law which expressly excludes the applicability of Section 5. It is true that the language of sub-section (4) of Section 417 is mandatory and compulsive, in that it provides in no uncertain terms that no application for grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal. But that would be the language of every provision prescribing a period of limitation. It is because a bar against entertainment of an application beyond the period of limitation is created by a special or local law that it becomes necessary to invoke the aid of Section 5 in order that, the application may be entertained despite such bar. Mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section 5. The conclusion is, therefore, irresistible that in a case where an application for special leave to appeal from an order of acquittal is filed after the coming into force of the Limitation Act, 1963, Section 5 would be available to the applicant and if he can show that he had sufficient cause for not preferring the application within the time limit of sixty days prescribed in sub-section (4) of Section 417, the application would not be barred and despite the expiration of the time limit of sixty days, the High Court would have the power to entertain it. The High Court, in the present case, did not, therefore, act without jurisdiction in holding that the application preferred by the Municipal Corporation of Delhi was not barred by the time limit of sixty days laid down in sub-section (4) of Section 417 since the Municipal Corporation of Delhi had sufficient cause for not preferring the application within such time limit. The order granting special leave was in the circumstances not an order outside the power of the High Court."

16. The apex Court in Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker, *(1995) 5 SCC 5* examined the question, whether the provision of the Limitation Act will apply to the Kerala Buildings (Lease and Rent Control) Act, 1965. The apex Court held that the appellate authority under the Kerala Act acts as a court and since the Act prescribes a period of limitation, which is different from the period of limitation prescribed under the Limitation Act, and there is no express exclusion of Sections 4 to 24 of

the Limitation Act, those sections shall be applicable to the Kerala Act. In paragraph-8 of the report, it is held as follows:

> "**8.** Once it is held that the appellate authority functioning under Section 18 of the Rent Act is not a persona designata, it becomes obvious that it functions as a court. In the present case all the District Judges having jurisdiction over the areas within which the provisions of the Rent Act have been extended are constituted as appellate authorities under Section 18 by the Government notification noted earlier. These District Judges have been conferred the powers of the appellate authorities. It becomes therefore, obvious that while adjudicating upon the dispute between the landlord and tenant and while deciding the question whether the Rent Control Court's order is justified or not such appellate authorities would be functioning as courts. The test for determining whether the authority is functioning as a court or not has been laid down by a series of decisions of this Court. We may refer to one of them, in the case of Thakur Jugal Kishore Sinha v. Sitamarhi Central Coop. Bank Ltd. In that case this Court was concerned with the question whether the Assistant Registrar of Cooperative Societies functioning under Section 48 of the Bihar and Orissa Cooperative Societies Act, 1935 was a court subordinate to the High Court for the purpose of Contempt of Courts Act, 1952. While answering the question in the affirmative, a Division Bench of this Court speaking through Mitter, J. placed reliance amongst others on the observations found in the case of Brajnandan Singh v. Jyoti Narain wherein it was observed as under.
>
> "It is clear, therefore, that in order to constitute a court in the strict sense of the term, an essential condition is that the court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgment which has finality and authoritativeness which are the essential tests of a judicial pronouncement."
>
> Reliance was also placed on another decision of this Court in the case of Virindar Kumar Satyawadi v. State of Punjab. Following observations found (at SCR p.1018) therein were pressed in service:
>
> "It may be stated broadly that what distinguishes a court from a quasi-judicial tribunal is that it is charged with a duty to decide

disputes in a judicial manner and declares the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it. And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question therefore arises as to whether an authority created by an Act is a court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a court."

When the aforesaid well settled tests for deciding whether an authority is a court or not are applied to the powers and functions of the appellate authority constituted under Section 18 of the Rent Act, it becomes obvious that all the aforesaid essential trappings to constitute such an authority as a court are found to be present. In fact, Mr. Nariman, learned counsel for respondent also fairly stated that these appellate authorities would be courts and would not be persona designate. But in his submission as they are not civil courts constituted and functioning under the Civil Procedure Code as such, they are outside the sweep of Section 29(2) of the Limitation Act. It is therefore, necessary for us to turn to the aforesaid provision of the Limitation Act. It reads as under:

"29(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

A mere look at the aforesaid provision shows for its applicability to the facts of a given case and for importing the machinery of the provisions containing Sections 4 to 24 of the Limitation Act the following two requirements have to be satisfied by the authority invoking the said provision.

(i) There must be a provision for period of limitation under any special or local law in connection with any suit, appeal or application.
(ii) The said prescription of period of limitation under such special or local law should be different from the period prescribed by the Schedule to the Limitation Act."

17. The Act is a special law. Rule 17 of the Rules provides for filing of review application, which is different from the period prescribed by the Schedule as the Schedule to the Limitation Act. The Schedule to the Limitation Act does not contemplate any period of limitation for filing a review application before the Tribunal.

18. Neither Section 22 of the Act nor Rule 17 of the Rules contain any express rider on the power of the Tribunal to entertain an application for review after the expiry of the prescribed period of thirty days. The legislature has not excluded the applicability of Section 5 of the Limitation Act to Rule 17 of the Rules.

19. In view of Section 29(2) of the Limitation Act, we have to examine whether Rule 17 of the Rules satisfies the twin conditions enumerated above for attracting the application of Section 29(2) of the Limitation Act.

20. In view of the authoritative pronouncement of the apex Court in the case of Mukri Gopalan (supra), a situation wherein a period of limitation is prescribed by a special or local law for an application of review and for which no provision is made in the Schedule to the Act, the second condition for attracting Section 29(2) of the Act is attracted. From the enunciation of law laid down in Mukri Gopalan (supra), it must be held that in view of Section 29(2) of the Limitation Act, the Tribunal has the jurisdiction to entertain the application for condonation of delay filed under Section 5 of the Limitation Act. Rule 17 of the Rules does not take away the jurisdiction of the Tribunal to entertain and dispose of the application under Section 5 of the Limitation Act, since applicability of Section 5 of the Limitation Act has not been expressly excluded thereby.

21. Before parting with the case, we would like to observe that in Smt. Kanchana Badaseth (supra), the Bench relied upon a decision of the apex Court in the case of K.Ajit Babu (supra). In K.Ajit Babu (supra), the short question arose for consideration was whether the application filed by the appellants under Section 19 of the Act was maintainable. The apex Court held that often in service matters the judgments rendered either by the

Tribunal or by the Court also affect other persons, who are not parties to the cases. In that context, the apex Court held that ordinarily, right of review is available only to those who are party to a case. It was further held that right of review is available if such an application is filed within the period of limitation on the grounds mentioned in Order 47 of the Code of Civil Procedure. Thus K.Ajit Babu (supra) cannot be understood as laying a law that the Tribunal is *dehors* of its power in entertaining an application for review filed beyond the prescribed period of limitation, if the same is accompanied by an application under Section 5 of the Limitation Act.

22. The logical sequitur on the analysis made in the preceding paragraphs is that neither Section 22 of the Act nor Rule 17 of the Rules expressly excluded the applicability of Section 5 of the Limitation Act. In the event an application for review is filed beyond the period of limitation along with an application for condonation of delay and the applicant satisfies the Tribunal that he had sufficient cause for not preferring an application within the time, the Tribunal can condone the delay.

23. Thus we hold that the decisions in Smt. Kanchana Badaseth (supra) and Rajayya Bisoi (supra) are not the correct enunciation of law. Accordingly, the same are overruled.

24. The reference is answered accordingly. The Registry is directed to place the matter before the assigned Bench.

Reference answered.

2015 (I) ILR - CUT- 669

PRADIP MOHANTY, J. & BISWAJIT MOHANTY, J.

JCRLA NO. 45 OF 2004

DHRUTARASHTRA BEHERADALAI ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

CRIMINAL TRIAL – Murder Case – Wife of the deceased examined as P.W.1 – P.W.1 clearly stated that the appellant doubted that his daughter was killed by the deceased by practicing witchcraft – Statement of the appellant on the previous date of the occurrence that P.W.1 would become widow on the next day proved the motive of the appellant – P.W.5 testified that the appellant was holding an axe and confessed to have killed a man of his village – Relationship per se can not be a ground to discard the evidence of a credible witness – Held, the present appellant was the author of the crime – Impugned judgement of conviction and sentence confirmed. (Para 9)

For Appellant - Mr. G.S.Pani
For Respondent - Mr. Sk.Zafrulla (A.S.C.)

Date of judgment: 05. 09.2014

JUDGMENT

PRADIP MOHANTY, J.

The appellant, having been convicted for commission of offence under section 302 IPC and sentenced to undergo imprisonment for life for commission of said offence, has preferred this appeal from jail.

2. The prosecution case, as per F.I.R (Ext.1), is that on 2.3.1999, the informant (P.W.1) who is the wife of the deceased lodged a report at Nuagaon out-post stating therein that her husband (Pratap Singh) had been to his Brinjal field to work there and after working there, he was taking rest under a mango tree. At about 11:00 AM, the appellant holding a *Tangia* came there and dealt a blow to the head of her husband for which he died instantaneously at the spot. Kanda Patra (P.W.8) who was working there in the nearby field told her (P.W.1) about the incident. The case was registered and ultimately, after completion of the investigation and other formalities, police filed charge-sheet against the present appellant and other two accused persons, namely, Pitamber Beheradalai and Purushotam Patra under sections 302/109 IPC. But at the time of consideration of charge, the above two accused persons were discharged u/s 227 Cr.P.C. Finally, as against the present appellant, charge u/s 302 I.P.C. was framed.

3. The plea of the appellant was complete denial of the allegation and he took a specific plea that he had been falsely implicated in this case.

4. In order to bring home the charge, during trial, the prosecution examined as many as 14 witnesses and exhibited 19 documents. The defence examined none despite being provided with said opportunity.

5. The trial judge, who tried the case has convicted the present appellant for offence u/s 302 I.P.C. and sentenced him to undergo imprisonment for life basing upon the evidence of the eye witnesses i.e. P.Ws.8 and 9, the circumstantial evidence of P.Ws.5 and 6, evidence of doctor (P.W.7) and the chemical examination report (Ext.19) and Serologist report (Ext.19/1).

6. Mr. G.S. Pani, learned counsel for the appellant assailed the order of conviction on the following grounds:

(i) There was no direct evidence with regard to the assault by the appellant with a *Tangia*.

(ii) The evidence of P.Ws.8 and 9 were not believable. Basing upon such evidence conviction could not be sustained.

(iii) The evidence of P.Ws. 5 & 6 were not believable as there was no material to the effect that they were close to the appellant and accordingly appellant had reposed confidence on them.

(iv) No motive/intention had been proved by the prosecution. Therefore, the case was not coming under the purview of Section 302 I.P.C. but under Section 304 IPC.

(v) All the witnesses were related to the informant and therefore, their evidence ought to be discarded in toto.

7. Mr. Zafrulla, learned Additional Standing Counsel strongly contended that the evidence of the eye witnesses were very clear and cogent with regard to the assault on the deceased by means of a *Tangia* by the appellant. According to him, the Doctor (P.W.7), who conducted the autopsy also corroborated the evidence of ocular witnesses. He specifically stated that the injuries were caused by the *Tangia* on the head of the deceased. He further contended that the accused appellant had confessed before P.W.5, P.W.6 and others by holding the *Tangia,* which was stained with blood. The said *Tangia* was seized by the police in presence of the witness.

8. Minutely gone through the evidence on record. P.W.1 is the wife of the deceased, who in her examination in chief, had stated that on the day of occurrence, her husband had been to Brinjal field to take care of the Brinjal

plants. During course of work, the appellant went there and dealt a *Tangia* blow to the head of her husband who was taking rest under a mango tree in that field. Kanda Patra (P.W.8) of their village came to her house and informed her about the incident. She rushed immediately to the spot and found her husband lying dead with profuse bleeding. Thereafter, she lodged report at Nuagaon out-post and as she was in distress mood, she requested village boy to scribe the F.I.R. on which she put her signature. She further stated that one day prior to the incident, when she went to the well to fetch water, the present appellant along with Pitamber Beheradalai and Purusotam Beheradalai who were sitting in the verandah of Pitamber Beherdalai have told that on the next day she would become widow. She came to home and informed this thing to her deceased husband. She has also stated that prior to this incident, the daughter of the present appellant expired out of Malaria fever. The appellant along with some others doubted that her husband (deceased) might have practiced witch-craft to kill his daughter for which a village meeting was also convened but the dispute could not be resolved and the appellant and some female folk of the village gave stool to her husband. On the day of occurrence, she saw appellant going to the well to bring water at about 10:00 AM, the appellant going towards the brinjal field at about 10 AM with the *Tangia*. In cross-examination, she admitted that witnesses Niranjan Bisoi (P.W.2) and Satyaban Bisoi are her own brothers. Kanda Patra (P.W.8) was her elder father-in-law in village courtesy and Bhanumati Patra (P.W.10) was the wife of her father-in-law's younger brother. Manorama Patra (P.W.4) was her sister in village courtesy. She also admitted that she could not remember the date of her examination before the magistrate for recording her statement under section 164 Cr.P.C. She was at home when her husband was murdered by the accused-appellant. She could not say the exact time when she arrived at the spot, which was one furlong away from her house. She admitted that a boy of her village scribed her F.I.R.

P.W.2 is the brother of the informant. On getting information, he came to the house of P.W.1. He stated that police came to the village where after they accompanied the police and went to the spot. On reaching at the spot, he saw the dead body of the deceased was lying there with an injury on his head. Police held inquest over the dead body in there presence and prepared the inquest report (Ext.3). Police also took blood stained sample earth and sample earth from the spot and seized the same under Ext.4. In cross-examination, he admitted that Nuagaon Out post is at a distance of 15 km away from her village. A person informed regarding the incidence for

which he first went to Nuagaon out post and thereafter he went to village Kuduteli. Nuagaon police informed this matter to Sarangagada Police and Sarangagada police informed that incidence in his home. He came to Nuagaon Police Station by jeep and from Nuagaon to Kuduteli on walk. He admitted that he could not remember in which direction the dead body of the deceased was lying. The inquest report was prepared at the spot and he along with his brother Satyaban Bisoi signed the inquest report. The sample earth and blood stained sample earth were seized, Besides the two brothers some other persons were also present at the time of preparation of inquest report.

P.Ws.3 and 4 have deposed that there was *hullah* in the village that the deceased had been murdered and his dead body was lying in the field. The evidence of P.W.4 is that he heard from the villagers that the appellant had killed the deceased. Both of them were declared hostile by the prosecution and their previous statements before the police were confronted to them but they denied to have made such statements before the police. In cross-examination, P.W.3 admitted that the land of the deceased was about two furlongs away from his land.

P.W.5 was working as a bus conductor. He stated that on the day of DOLA festival, while he was returning to Baliguda in Rajalaxmi bus, the appellant got up in the bus at Mahasingi with an axe. On being asked for payment of bus fare, the appellant expressed his inability to pay the same and told that the Thana Babu would pay his bus fare. The appellant told this witness that he had killed a man and would kill another man, if necessary, when he asked him to pay the bus fare. Out of fear, this witness sat down in his seat. On his further query, he told that he had killed a man of his village and was going to Baliguda Police Station. Thereafter, the appellant got down from the bus and went towards Baliguda Bus Owner Association Office. He admitted that he stated thisfact to the police at the time of his examination. In cross-examination, P.W.5 admitted that he had no previous acquaintance with the accused at any point of time. He could not say the father's name of the accused nor regarding the family members and relatives of the accused. He further admitted that voluntarily he did not tell to anybody regarding the incident. He was examined by the police on the date he identified the accused and after two months the police again examined him. He also admitted that he had not stated before the I.O. that after getting down from the bus, the appellant went towards the Bus Owners Association Office as the police did not ask him the question. He denied the suggestions that accused did not

come in his bus, and that at the instance of the informant and other members of the Bus Owners Association, he falsely implicated the accused.

P.W.6 is another man, who stated that on the day of occurrence, he was sitting in Bus Owners Association Office at Baliguda. At that time, the appellant got down from Rajalaxmi bus and came to the association office holding with an axe. The appellant disclosed his identity before this witness. The appellant brandished the axe and told that if any body demands bus fare, he would kill him as he had already killed a man of his village. Immediately, he contacted the police station over phone and lodged the information. At that time another bus owner, namely, Lokanath Padhi was present. Police came to the spot and seized the axe from the possession of the appellant in presence of this witness and prepared the seizure list under Ext.5. P.W.6 and said Lokanath Padhi put their signature on Ext.5. he also identified the seized axe (M.O.I). In crossexamination, he admitted that except seizure list police obtained his signatures in other paper. He admitted that there was special mark of identification in the *tangia* (axe) and similar type of axe (*tangia*) was not available in the locality. He also admitted in the Cross Examination that the content of seizure list were read over and were explained to him after which he put his signature in the seizure list. He denied a suggestion that on the date of seizure the appellant did not go to the Association Office. He admitted that the accused brandished the axe (*Tangia*) saying that he had killed a man in village Kuduteli and would kill if any body demands bus fare. After receipt of the telephone call from the association office police came and seized the *Tangia* (axe).

P.W.7 is the doctor who conducted the autopsy over the dead body of the deceased and found the following injuries:

> "I) Abrasion of size ½" X ½" on the right elbow joint;
>
> ii) Abrasion of size 1" X ½" on the left side of chest; and
>
> iii) Deep lacerated wound of size 3" X 2" on the left side of chest of head on parietal bone with fracture of right parietal bone and right frontal bone exposing the brainmatter."

He opined that all the injuries might have been caused by hard and blunt weapon. The cause of death was due to bleeding, haemorrhage and shock. He also opined that death was homicidal in nature. On examination of the axe, he gave his opinion that the injuries found on the person of the

deceased may be caused by the said axe and the injuries sustained with bleeding are sufficient to cause death of the deceased. In cross-examination, he admitted that the injuries mentioned in the post mortem report cannot be possible by fall on a stone inside the water. Injuries mentioned in the post mortem report might be caused by the blunt side of M.O.I depending upon the force used by the assailant. He also deposed that the injury might have been caused by the sharp side of blunt side of the weapon of offence. He denied the suggestion to the effect that M.O. I was not produced before him. P.W.7 also stated that the injuries of three inches size can be caused by the sharp side of the weapon having length of two inches.

P.W.8 is an eye witness to the occurrence. He had stated that the appellant is the men of his sister in village by courtesy. On the day of occurrence, he was fencing his land situated in their village. At that time P.W.9 was cultivating the land as a labourer. Rudramani Beheradalai (P.W.4) and Manorama Patra (P.W.3) were also working in the land of Rudramani Beheradalai. By that time, the appellant came there with an axe from the side of their village. Deceased after doing some work in his Brinjal field, which was situated near his land, was taking rest under a mango tree. At that time, the appellant asked the deceased to give some intoxicated substance '*nasa'*. When the deceased turned to a side after giving some '*nasa'*, the appellant dealt a blow by the means of the said axe to middle of the head of the deceased. P.W.8 saw the incident as he was present there. The deceased shouted "*marigali*" and fell down on the ground and succumbed to injury at the spot. After the assault, the appellant fled away from the spot. Out of fear, they all left the spot. When the women labourers protested, the appellant told that they would also face the same consequence. Thereafter, P.W.8 went to the house of the Ranjita Patra (P.W.1) and informed her about the incident. Thereafter, the wife of the deceased (P.W.1) lodged the report. Police came to the village and he went to the spot along with police in the police jeep. Police verified the dead body and he identified the dead body of the deceased Pratapsingh Patra. They found a deep cut injury on the head of the deceased. The spot where the dead body was lying was drenched with blood. Police held inquest over the dead body and prepared the inquest report (Ext.3). He further stated that the appellant suspected that the deceased had used witch-craft on his daughter causing her death prior to three months of this incident. So on that grudge and in order to take revenge, he killed the deceased. He heard this from the appellant himself for which a village meeting was convened. In his re-examination he stated that he could identify the Axe used

by the appellant for communication of offence and accordingly stated that M.O. I was that axe. In cross-examination, he admitted that he was not related to the deceased-Pratapsingh Patra and the informant Ranjita Patra. His land at Gamadadi is at a distance of 150 cubits away from the land of the deceased. On the year of occurrence, he took on *Bhag-Chas* basis from Balunki Beradalai of his village and cultivated Dalua variety of paddy. So he could say the boundary of the land of Balunki Beheradalai. He had stated that in the east side of the land, there was land of Sudhir Beheradalai, on the west side of the land, there was land of Purusottam Patra, in the North side of the land, there was land of Simanchal Beheradalai and in the south side there was forest. He also admitted that he had engaged Brukodar Amayat (P.W.9) as labourer in his *Bhag -Chas* field. He and Brukodar Amayat came to the court on the date when the statement was recorded by the Magistrate under section 164 Cr.P.C. Thana Babu brought both of them to the court for recording the statement and the magistrate recorded the same in his chamber and Thana Babu was not present there. He further stated that appellant belonged to a different street of the village. His house stands in another *Sahi*. Suggestion was given that he had not seen the accused on the date of occurrence and prior to the date of occurrence, he denied the same. He admitted that the axe was fitted with a wooden handle. He denied suggestions to the effect that the appellant was not holding M.O. I., i.e. the axe on the date of occurrence and that the appellant did not use the same for commission of crime on the date of occurrence.

P.W.9 is another eye witness to the occurrence. He stated that on the day of occurrence, he had been to the field of Uttam Patra. Uttam Patra and Bholanath Patra were present in their fields which were adjacent to the spot. Manorama Patra (P.W.3), Buduku Beheradalai and Rudramanai Beheradalai (P.W.4) were transplanting paddy. By that time, the appellant came from the village side with an axe on his shoulder. The appellant went near the deceased who was taking rest under a mango tree being tired. The appellant asked the deceased to give some '*nasa'*. Deceased gave '*nasa'* and by the time the deceased was turning a little to his side, the appellant dealt an axe blow on the head of the deceased an a result of which he fell down on the ground and trembled. On being asked as to why he dealt the axe blow, the appellant replied that he would kill the persons who would protest his action. Out of fear, they left the spot and informed the wife of the deceased accordingly. By the time, the villagers reached the spot, the deceased had already expired. In crossexamination, he stated that he did not remember the

date of his birth so also the date of birth of his son and daughter. He could not say whether Kanda Patra (P.W.8) was the younger brother of the father-in-law of the wife of the deceased. A suggestion was given that at the instance of Kanda Patra he was deposing falsehood, he denied the same. A suggestion was also given that he had not seen the occurrence, but he denied the same.

P.W.10 has stated that the appellant along with his wife and children were residing in their house being separated from his father. Prior to the incident, one daughter of the appellant died out of fever. The appellant suspected that the deceased had killed his daughter by practising witch-craft for which a meeting was convened in the village and the matter was compromised. She has further stated that on the previous day of occurrence, while P.W.1 was going to fetch water from the tube well which was situated in front of the house of the appellant, at that time the accused-Pitamber Beheradalai and Pursushottam patra were sitting in the verandah told P.W.1 (AJI PANI NEYITHA KALIKI RANDHA HEBU". She heard this incident from P.W.1 and the next day at about 11:00 AM, she heard from P.W.5 that the appellant killed the deceased by axe blow near their paddy land. In cross-examination, she admitted that Kanda Patra (P.W.8) was not the Dadi Sasura of the informant. The father of Pratapsingh Patra (deceased) married for the second time for which there was a difference between the deceased and his father and for this reason, the deceased was staying in their house. He also admitted that four years prior to the occurrence, the daughter of the appellant died. He could not say the distance between the house and the paddy field to which the deceased had been to plough. She was examined by the police on the next day of the occurrence.

P.W.11 is the police constable who took the appellant to the hospital for examination of nails. The doctor clipped the nails and kept in a bottle along with a paper. He handed over the same to the I.O, who seized the same in his presence. On the same day, the appellant produced a shirt before the O.I.C. and the O.I.C. suspecting blood stains in the shirt, seized the same in his presence and prepared the seizure list (Ext.10). In cross-examination he admitted that the bottle containing the nail clippings of the accused was handed over to him by the doctor and the same was in a sealed condition. He admitted that the nail clippings were seized at the police station. He had seen the accused producing the shirt (M.O.II) before the O.I.C. He had not singed the seizure list and he could not say whether the appellant had signed the seizure list or not.

P.W.12 is the O.I.C. of Baliguda P.S. On the day of occurrence, at about 5:30 PM, while he was at Nuagaon out Post, he received a written report from the informant (P.W.1) and entered the said fact in the station diary. The report was sent to police station for registration. During course of investigation, he examined the complainant, held inquest over the dead body of the deceased and prepared inquest report, send the dead body for post mortem examination, visited the spot and prepared the spot map, examined some witnesses at the spot, seized blood stained earth and sample earth and a wooden *lathi* stained with blood fro the spot and the prepare the seizure list (Ext.4). On the same day, he apprehended the appellant and seized the wearing apparel of the deceased under Ext.13. On that day also, he seized the blood stained shirt of the appellant (M.O.II) and prepared the seizure list (Ext.10). He stated that on 2.3.1999, A.S.I. of police Ananda Chandra Dhal (P.W.14) seized the *Tangia* from the possession of the present appellant and kept the same at the police. He sent the seized *Tangia* to the doctor, who conducted the post mortem examination with a request opine as to whether the injures inflicted over the deceased could be caused by the said *Tangia*. On 17.5.99, he handed over the charge or investigation to his successor (P.W.13) on transfer. During his investigation, he also examined P.W.3 and P.W.4. In cross-examination, he admitted that he had not ascertained who had scribed the F.I.R. (Ext.1) and after receipt of Ext. 1, he examined the informant at Nuagaon Police out post and held inquest over the dead body. He also examined P.Ws. 2, 8 and 9 on the same day at the spot. He also examined P.Ws. 3, 4 and 10 at village Kuduteli on the same day. He deposed that P.W.1 had not stated before him that the appellant was telling in different places that he would kill her husband. He had also examined Brukodar Amayat (P.W.9) who had not stated before him that soon after the occurrence, on return to the village he informed the incident to the wife of the deceased. He also stated that P.W. 10 had not stated before him about the well from where P.W.1 had gone to fetch water was situated in front of the house of the appellant. P.W. 10 had also not stated before him that P.W.1 on returning home told about the talk between the appellant, Pitambar and Purushottam to her husband in her presence.

P.W.13 is the O.I.C. Baliguda P.S. who took charge of the investigation from his successor (P.W.12). He forwarded the seized articles to the laboratory for chemical examination. After completion of the investigation, he filed charge-sheet against the present appellant. In cross-examination he admitted that he had properly investigated into the matter. To

the suggestion that there were no material against the accused to submit charge sheet against him, he denied the same.

P.W.14 the A.S.I. of Police attached to the Balliguda Police Station. He stated that while he was at police station, he got information that one person is whirling a *Tangia* at Balliguda bus stand. He entered the information in the station diary and proceeded to the bus stand. After reaching there, he found the member bus owner associations guarding the appellant in front of the association office. He seized the said *Tangia* from the appellant in presence of the witnesses and prepared the seizure list (Ext.5). He also recorded the statement of the conductor (P.W.5) of the bus from which the appellant got down at the bus stand. In cross-examination, he had not mentioned the measurement of the *Tangia* seized. He admitted that he had not given any endorsement in Ext. 5 that he had read over and explained the contents to the seizure witnesses. He also stated the P.W.5 admitted that after getting down from the bus, the appellant went somewhere, which was not known to him. P.W.5 had not told before P.W.14 that the appellant had told him that Thana Babu would pay the bus fare. He (P.W. 14) further stated that P.W. 6 had not stated before him that the appellant confessed before him to have killed a man of Kuduteli.

9. From the above, it is evident that there is no material to disbelieve the evidence of P.W.1, the wife of the deceased, who went to the out-post and lodged FIR. She had also stated that on the previous date of occurrence the appellant, Pitambar Beheradali and Purusotam Beheradali were talking in the verandha of Pitambar Beheradali that she would become widow on the next date. The above noted version is supported by the statement of P.W.1 recorded under section 164 Cr.P.C. There is also no contradiction with regard to the motive of the accused. P.W.1 has clearly stated that the appellant doubted that his daughter was killed by the deceased practising witch-craft. This motive part has been corroborated by P.W.8

P.W.2 is the brother of the informant, in whose presence the police held inquest over the dead body and prepared the inquest report. He (P.W.2) put signature on the inquest report. Not much has been elicited in his cross examination.

P.Ws. 5 and 6 both were examined by the prosecution as the witnesses to the extra judicial confession. P.W.5 was the conductor of the

bus. He specifically stated that the appellant was holding an axe and when he demanded to pay the ticket charge, the appellant expressed his inability to pay and told that he had killed a man of his village and would kill another man, if necessary. P.W.6, who was sitting in Balliguda Bus Association Office also corroborated the statement of P.W.5 to the extent that the appellant told that if anybody demand bus fare, he would kill him. P.W. 6 had stated that the appellant disclosed himself to be Dhrutarashtra Beheradalai and stated that he had already killed a man of village Kuduteli while brandishing the axe. He immediately contacted police station over phone and informed the said fact, where after police came and seized the *Tangia* from the possession of the appellant. Police prepared the seizure list there and he put signature to the seizure list. It is evident from the above fact that when the conductor demanded fare, the appellant threatened the conductor and disclosed the fact of killing a man of Kuduteli village and the fact of killing was also corroborated by P.W.6. In presence of P.W.5 and 6 the appellant disclosed about the murder done by him after terrorising the said witnesses. Therefore, the accused voluntarilydisclosed the killing of a man of Kuduteli by him, which amounts to extra judicial confession. Nothing material has been demolished in the cross examination to the above effect. The M.O.I, which was seized by the police was identified by P.W.6, who had stated that such type of axe was not available in that locality. In such background, this Court cannotreject the evidence of P.Ws.5 and 6 merely because there is no material to show that the appellant was close to P.Ws. 5 and 6 so as to repose confidence in them before making confession. Rather there is no reason for P.Ws. 5 and 6 to state falsely against the appellant. In fact both of them have denied suggestion relating to false implication.

P.Ws. 8 and 9 are the ocular witnesses, who narrated the incident. P.W.8 had specifically stated that the appellant came from the side of their village with an axe and at that time deceased was taking rest under a mango tree near their land. The appellant asked the deceased to give him some intoxicant substance '*nasa*' and when the deceased was turning sides after giving '*nasa*' to the accused, the accused dealt a '*Tangia*' blow on the middle of the head of the deceased. He had seen the incident as he was present there. The deceased shouted '*marigali*' and died at the spot instantaneously and the accused fled away form the spot. He identified axe, M.O. I used by the appellant for commission of the crime. In the cross examination nothing has been elicited to demolish the above version of P.W. 8. Rather he specifically stated that he was in no way related to the deceased. On the year of

occurrence, he took that land on *Bhag Chas* basis from Balunki Beheradalei and he engaged P.W.9 as labourer to work in his *Bhag Chas* field. His statement recorded under section 164 Cr.P.C. also supports his version. In cross examination nothing has been brought out by the defence to discredit his testimony. P.W. 9 is another ocular witness, who also corroborated the evidence of P.W.8. P.W. 9 further stated that when he asked as to why he dealt the axe blow on the head of the deceased, the accused replied he would kill the person who would protest his action and disclose this fact. Nothing material has been elicited in the cross-examination by P.W.9 so as to demolish the core prosecution story. In such background, we are unable to accept the contention by the learned counsel for the appellant that the evidence of P.Ws. 8 and 9 are not believable and there exists no direct evidence with regard to assault by the appellant by a *Tangia*/Axe.

The medical evidence also complements the ocular evidence as the doctor (P.W.7) found that the injuries might have been caused by M.O. I, the Axe. P.W.7 has also opined that injuries sustained with bleeding was sufficient to cause death of the deceased. He opined that injuries might be caused by sharp side or blunt side of M.O. I.

P.W. 10 in his evidence has tried to corroborate the motive of the appellant as has been stated by the informant, P.W.1 to the effect that prior to the occurrence one daughter of the appellant died out of fever and the appellant suspected the deceased to have killed the daughter by practising witch-craft. Though the matter was compromised in the village meeting, but the appellant still bore grudge against the deceased. He further corroborated the statement of P.W. 1 to the effect that on the previous day of the occurrence while P.W.1 was going to fetch water from the well, which was situated in front of the house of the accused, the appellant along with Pitambar Beheradalei and Purushottam Patra were sitting in the verandha of the appellant and told P.W.1 that "*AJI PANI NEITHA KALIKI RANDHA HEBU*' , where after P.W.1 came to her village and told her husband in presence of P.W.10 and P.W.10 consoled her saying "*KIYE KAHAKU MARI DEVUCHI*" . On the next date the incident took place. But this statement of P.W. 10 may not be acceptable as she had not stated all these things before I.O. (P.W.12). In any case as indicated earlier motive part has been proved by P.W. 1 & 8.

Chemical examination also proved human blood to be detected from the weapon of offence *Tangia*, wooden *lathi* and the full shirt of the appellant and no explanation was given by the accused under section 313 Cr.P.C. as to how the human blood came to his shirt and *Tangia*.

With regard to contention of the learned counsel for the appellant that all the witnesses were/are related to the informant and therefore their version should be discarded in toto, let us remind everybody that it is settled principle of law that relationship per se cannot be a ground to discard the evidence of a credible and truthful witness and their evidence is to be only critically scrutinised. Also in the instant case, there is no material that the main prosecution witnesses like P.Ws. 5, 6, 7 & 9 and I.Os. are the direct relatives of informant and therefore are interested witnesses. Besides, P.W.8 has clearly denied that he is no way related to the P.W.1 or deceased. P.W.10 has stated that P.W.8 is not the *Dadi Sasura* of informant (P.W.1). However, P.W.1 has stated in her cross examination that P.W.8 is her elder father-in-law by village courtesy. Thus, P.W.8 is not a direct relative of P.W.1. In any case his version has been corroborated by P.W.9 in material particulars. In the instant case, P.Ws.1 and 8 have specifically stated the motive/intention of the appellant to assault the deceased. Both P.Ws. 8 and 9 have seen the occurrence. After the occurrence, the appellant came in a bus holding the weapon of offence and in the bus, he declared that he had killed a person of village *Kuduteli*. The *Tangia* was seized in presence of the witnesses and the same along with the shirt of the appellant were sent for chemical examination. The Chemical examination revealed human blood in the weapon of offence and in the shirt.

Taking all these things into account, there cannot be any doubt that the present appellant was the author of the crime and non else. In such background, there is no force in the arguments advanced by the learned counsel for the appellant and also no material on the record to come to the conclusion that the case is coming under section 304 IPC.

In view of the above, this Court is not inclined to interfere with the impugned judgement of conviction and sentence. JCRLA is accordingly dismissed.

Appeal dismissed.

2015 (I) ILR - CUT- 683

PRADIP MOHANTY, J. & BISWAJIT MOHANTY, J.

W.P.(C) NO. 3433 OF 2014

LAXMIDHAR DEHURI ……..Petitioner

.Vrs.

UNION OF INDIA & ORS ……Opp. Parties

SERVICE LAW – Promotion – Though cause of action arose in 1998 petitioner made the first representation in 2003 – He also did not prefer to file O.A before the CAT within 1½ years there after in the back ground of sections 20, 21 of the Administrative Tribunals Act, 1985 – He rather made two other representations and filed the O.A. in 2013 – No liberal view could be taken for filing of the representations – No sufficient cause to explain such inordinate delay – Petitioner is negligent in pursuing his legal remedies – No reason to interfere with the impugned order. (paras- 8 to 11)

For Petitioner - M/s. Prem Kumar Mohanty
For Opp. Parties - M/s.Anup Kumar Bose (A.S.G)

Date of judgment: 19.01.2015

JUDGMENT

BISWAJIT MOHANTY, J.

The petitioner has filed the present writ application with the following prayer;

"(i) Writ of certiorari quashing the order dated 13 September, 2013 passed by the Central Administrative Tribunal, Cuttack.

(ii) Writ of mandamus to the Directorate of Census Operation the Opposite Party No 1 to give promotion to the petitioner to the post of Assistant Compiler with effect from 12.5.98 and further to the post of Compiler till upto date of the disposal of this writ application with all consequential pay and emoluments.

(iii) And to issue such other writ/writs or order which may provide complete relief to the petitioner as may deem fit and proper in the interest of justice."

2. The petitioner being a member of Scheduled Tribe was appointed as a Peon during 1982. In the year 1995, he passed H.S.C. Examination. As per the Gradation List for the post of Peons under Annexure-1, while his name appeared against Sl. No.13, name of one K.B. Mohanata appeared against Sl. No.21.2. Thus, the petitioner claimed that he was/is senior to said K.B. Mohanta. In the year 1997, the petitioner was promoted to the post of Daftary. On 18.5.1998, the above named K.B. Mohanta was promoted to the post of Assistant Compiler in Group "C". Much after, on 17.10.2003 under Annexure-2 Series, the petitioner submitted a representation for promotion to the post of Group "C". On 9.1.2004 (under Annexure-2 Series), again he made a representation with a prayer to give him promotion to the Group "C" post (Assistant Compiler) with effect from 1998. Vide Annexure-4 dated 29.1.2004, he was intimated that promotion quota from Group "D" to Group "C" posts of Assistant Compiler had already been exhausted and his case for promotion against reservation quota from Group "D" to Group "C" would be considered as and when vacancies would arise, as per Rules. Despite assurances when nothing was done, on 16.1.2005 under Annexure-2 Series, he submitted another representation praying therein that as vacancies were now available in the grades of Assistant Compiler and L.D. Clerk, the authority should consider his case sympathetically and pass necessary orders along with his promotion against one of the said vacancies. During 2006, vide Annexure-3, the petitioner was informed that his case for promotion to the Group 'C' post against the percentage reserved for Group "D" employees would be considered by the DPC in its next meeting along with other eligible Group "D" employees. Vide Annexure-7, dated 16.11.2007, the matter was enquired into by the Research Officer & Regional Head of National Commission for Scheduled Tribes which recommended that the petitioner should be given promotion to Group "C" post with effect from 1998. Despite this when nothing was done, on 14.6.2007, the petitioner requested opposite party no.2 to consider his grievance petition dated 9.1.2004 under Annexure-2 Series as he had become eligible for promotion to the Group "C" (Assistant Complier) post since 1998. Further, he submitted a representation on 14.1.2013 under Annexure-8 to the Director of Census Operations, Orissa and prayed that his case for promotion to the post of Assistant Compiler in Group "C" post with effect from 18.5.1998 be considered when his junior was promoted. Ultimately nothing was done and the petitioner filed O.A. No.636 of 2013 before the learned Central Administrative Tribunal, Cuttack Bench, Cuttack with the following prayer;

"RELIEF SOUGHT FOR :

In view of the facts stated above, the applicant prays for the following relief(s) :-

(i) Original Application be allowed ;

(ii) The Respodent No.1 and 2 directed to consider the case of the applicant and give promotion to the post of Assistant Compiler in the Group-C Post w.e.f 18.05.98 when his junior was promoted with all service benefits.

(iii) Such other order/orders be passed granting complete relief to the applicant."

3. This Court called for the LCR vide order dated 19.8.2014. From the order sheet of the learned Tribunal, it appears that the case was registered on 11.9.2013 and the matter was taken up on 13.9.2013 and was dismissed on the same date vide Annexure-9 at the initial stage.

4. Heard Mr. D.P. Mohanty, learned Senior Advocate appearing on behalf of Mr. Prem Kumar Mohanty, learned counsel for the petitioner and Mr. Anup Bose, learned Assistant Solicitor General for the opposite party.

5. Perused the documents on record and LCR. At the outset, it may be noted that several documents have been filed before this Court which were never filed before the learned Tribunal. Such documents are Annexures-1,3 and 4. It further appears that there has been some addition to the prayer of the writ application vis-à-vis the prayer made in the Original Application. Such course of action are not legally permissible. Further, since this is mainly a certiorari proceeding, we have not referred to the counter and rejoinder filed by the parties here before this Court, which were not part of LCR, i.e., records before the learned Central Administrative Tribunal.

6. In such background, let us examine the legality of the impugned order passed by the learned Tribunal. A perusal of the impugned order shows that the learned Tribunal has dismissed O.A. No.633 of 2013 filed by the petitioner on the ground of delay & laches and also on the ground of non-joinder of parties. So far as dismissal of the said Original Application on the ground of non-joinder of parties is concerned, in our considered view the same could not be a ground for dismissing the Original Application for the

simple reason that in the Original Application, no specific prayer has been made by the petitioner to give him seniority above his so-called junior, K.B. Mohanta in the promotional post. However, we agree with the reasoning given by the learned Tribunal for dismissal of the Original Application on the ground of delay and laches. Here is a case where the petitioner prayed for a direction to opposite party no.2 to consider his case and give him promotion to the post of Assistant Compiler in the Group "C" with effect from 18.5.1998 when his junior was promoted with all his benefits.

7. The undisputed facts are that the junior was promoted some time during 1998 as Assistant Compiler. The petitioner submitted his first representation more than five years after on 17.10.2003 under Annexure-2 Series with a prayer to promote him to Group "C" post. In the said representation, there is no whisper about any junior being promoted in 1998. There is also no prayer to give him promotion with effect from 18.5.1998. For the first time on 9.1.2004 under Annexure- 2 Series, the petitioner made a request to promote him to Group "C" post of Assistant Compiler w.e.f. 1998. Again on 16.1.2005 under Annexure-2 Series, the petitioner prayed to allow him promotion as there existed vacancies in the grades of Assistant Compiler and L.D. Clerk. Vide Annexure-7, the Research Officer & Regional Head on 16.11.2006 made a recommendation in favour of the petitioner that he should be given promotion to the Group "C" post with retrospective effect with effect from 1998. On 14.6.2007 under Annexure-2 Series the petitioner again requested the authorities to consider his grievance petition dated 9.1.2004 under Annexure-2 Series. Thereafter, it appears that the petitioner went into deep slumber to be woken up more than five years after. On 14.1.2013, he submitted a representation under Annexure-8 to promote him with effect from 18.5.1998 to the post of Assistant Compiler in Group "C" when K.B. Mohanta was given promotion.

8. A narration of all these facts would clearly show that all throughout the petitioner has been negligent in pursuing his legal remedies. Though the cause of action arose on 18.5.1998, he filed his first representation in casual manner more than five years after, in the year 2003. Even if a liberal view of the matter is taken, the petitioner should have filed the Original Application within 1 ½ years from 17.10.2003 in the background of Section 20(2)(b) and Section 21(1)(b) of the Administrative Tribunals Act, 1985. This he never did. Further, though vide Annexure-7 a recommendation was made in his favour by the Research Officer & Regional Head of National Commission of

Scheduled Tribes in 2006 and though again he filed a representation on 14.6.2007, however, he slept over the matter for more than five years to file a representation again on 14.1.2013 under Annexure-8. Instead he could have moved the learned Tribunal in 2006-07 itself. Apart from the settled principles of law that repeated representations do not save the delay; this is a case where there does not exist any sufficient cause to explain delay in filing first representation in 2003, i.e., more than 5 years after cause of action arose. Similarly, there exists no sufficient cause for waiting from 2006 to 2013.

9. It is well settled that a court is not expected to give indulgence to such indolent person, who compete with "Kumbhakarna" or for that matter with Rip Van Winkle. (*See* Chennai Metropolitan Water Supply and Sewerage Board and others v. T.T. Murali Babu reported in AIR 2014 SC 1141).

10. In such background, we refuse to accept the submissions made by Mr. Mohanty, learned Senior Advocate for the petitioner that the impugned order passed by the learned Tribunal is unconstitutional and is in violation of the provisions of Sections 20 and 21 of the Administrative Tribunals Act, 1985 and also his submission that the learned Tribunal went wrong in dismissing the Original Application on the ground of delay and laches when according to him there has been no delay and laches on the part of the petitioner as he was pursuing his remedies all throughout. Mr. Mohanty relied to Section 12-A of the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 to advance the case of the petitioner. In our opinion, as per Section 3 the said Act applies to appointments to the posts and services under the Odisha State only. The petitioner being a Central Government employee cannot derive any benefit from the same.

11. During course of hearing, Mr. Mohanty relied on the decisions of the Hon'ble Supreme Court in the cases of Amrit Banaspati Co. Ltd. and another v. State of Punjab and another) reported in AIR 1992 SC 1075, Ram Sewak Prasad v. State of U.P. and others reported in AIR 1991 SC 1818, Vineet Narain and others v. Union of India and another reported in AIR 1998 SC 889, Vishwas Anna Sawant and others v. Municipal Corporation of Greater Bombay and others reported in AIR 1994 SC 2408, Commissioner of Commercial Taxes, A.P., Hyderabad and another v. G. Sethumadhava Rao and others reported in AIR 1996 SC 1915, State of Mysore v. Krishna Murthy and others reported in AIR 1973 SC 1146, R.M. Ramaul v. The State of Himachal Pradesh and others reported in AIR 1991 SC 1171 and Sheshrao

Janjluji Bagde v. Bhaiyya, S/o Govindrao Kerale and others reported in AIR 1991 SC 76. Perused the decisions. In our considered view, the above decisions cited by Mr. Mohanty have no application to the present case as they do not discuss the consequence of an inordinate delay in approaching the Central Administrative Tribunal, which functions under Administrative Tribunals Act, 1985. For all these reasons, the writ application is without any merit and the same is dismissed. No costs.

Writ petition dismissed.

2015 (I) ILR - CUT- 688

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

JCRLA NO. 48 OF 2006

PENTA SABAR ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

PENAL CODE, 1860 – S.304 , Part-1

Murder – Quarrel between husband and wife over giving of meal – No evidence on record that prior to this incident there was quarrel of such magnitude which could have prompted the appellant to murder his wife after twenty years of marriage, having a son aged six years – In course of sudden fight the appellant-husband acted hastily in wrapping up his Lungi around the neck of his wife and pressed it, which resulted in her death – It was doubtful that the appellant had intended to cause death of the deceased or he had an intention to cause such bodily injury resulting such death – Held, conviction of the appellant U/s. 302 I.P.C. is set aside – Appellant is held to be guilty U/s. 304, Part-1 I.P.C. (Para 12)

For Appellant - Mrs. Tapaswani Sinha
For Respondent - Sk.Zafarulla, (A.S.C.)

Date of hearing : 07.01.2015
Date of judgment: 12.01.2015

JUDGMENT

VINOD PRASAD, J.

The sole appellant-Penta Sabar was prosecuted for committing uxoricide by murdering his second wife Gurubari Sabar, sister of the informant Sharma Sabar, on 24.12.2004 at 5 p.m., inside the bed room of his house situated in village Janiguda, under police circle Paralakhemundi, district Gajapati, by the Additional District and Sessions Judge, in Sessions Case No. 9/2005/Sessions Case No. 158/05(GDC) and was adjudged guilty of that crime under Section 302, IPC and resultantly was convicted of that crime and sentenced to imprisonment for life and to pay a fine of Rs.5000/- and in default to serve another six months RI vide impugned judgment and order dated 05.05.2006. Challenge in this appeal by the convicted accused appellant is to the aforesaid verdict.

2. The back ground incident, as is evident from the FIR Ext.1, materials collected during the investigation and the deposition of the witnesses during the trial, reveals that the deceased Guribari Sabar was the second wife of the appellant, a cultivator, resident of village Janiguda, P.S. Parlakhemundi, District Gajapati. Incidentally the appellant was also the second husband of the deceased whose first husband was one Kurei Sabar. Both, from Kurei Sabar as well as from the appellant, deceased was blessed with a son each both named as Jisaya. First Jisaya Sabar from the earlier husband Kurei Sabar and the deceased resided in the informant's village Kotapeta under Serango Police Station, District Gajapati, where as the other son Jisaya from the appellant and the deceased resided in village Janiguda. After twenty years of their marriage, when their son was aged about six years, on the ill fated day, i.e., 24.12.2004, at 5 p.m. there was a quarrel between the appellant and the deceased in the witnessing of Santiamma Sabar, daughter-in-law of the appellant/deceased and it is alleged that the appellant with the help of his Lungi strangulated his wife Gurubari Sabar to death. Information regarding demise of the deceased was conveyed to her brother Sharma Sabar/PW.2 at his poultry by his agnatic elder brother Lakia Sabar/PW.4. Both the brothers then arrived at the scene of the incident saw the cadaver of the deceased covered with a blanket and a Lungi was tied around her neck. Both the brothers then laid the search for the appellant, who was located by them at village Kathalakaitha at the house of his elder brother but seeing them appellant fled away. The incident was narrated to the Sarpanch

S.Balaraju/PW.7 of village Podami by the brother of the deceased Sharma Sabar and on his advice, Sharma Sabar/PW.2 got the FIR Ext.1 scribed through Jayadev Apata/PW.8 and then tramping to a distance of 11 Kms., informant/PW.2 got his FIR registered on 25.12.2004 at 1.30 p.m. at Parlakhemundi P.S. as Case No. 219 of 2004 under Section 302, IPC.

The Inspector-in-Charge of Parlakhemundi P.S. registered the crime and instructed the investigation to S.I. Siba Prasad Biswal/PW.9, who immediately initiated the investigation, examined the informant, came to the spot, conducted inquest on the cadaver of the deceased, prepared inquest report Ext.5 and then dispatched the dead body for autopsy purposes. The appellant was arrested on the same day and since he complained of assault and injury, he was also sent for medical examination. Wearing apparels of the deceased were seized by preparing seizure memo whereas her ornaments were given under the zimanama to Jisaya Sabar. Other witnesses were interrogated by the I.O. and their statements were recorded including that of the scribe PW.8. Autopsy report was received and wrapping up the investigation, appellant was charge sheeted for murdering his wife under Section 302, IPC. Injury report respecting the accused is Ext.6.

3. Autopsy on the cadaver of the deceased was conducted on 26.12.2004 by Dr. Prasant Kumar Padhi/PW.3, who detected the following three injuries on the corpse of the deceased:-

(1) Bruise 3”x2” on the right side of the scalp above eye lid.

(2) Bruise 3”x2” on posterior aspect of occipital region.

(3) Abrasion 2”x3” on left knee.

Further examination of the cadaver revealed extra vessation of blood into subcutaneous tissue of neck and adjacent muscles. Carotid arteries internal coat were ruptured. The cornua of the higher bone and superior cornua of the thyroid cartilage were fractured. Larynx and trachea were congested and contain frothy mucous. Lungs were marked congested with presence of haemorrhagic patches. All internal visceras like lever, kidney, spleen, brain were darkly congested. Stomach was empty. Chambers of heart empty. Injuries on the cadaver were opined to be ante mortem in nature and the cause of death was due to asphyxia consequent to strangulation, which was homicidal in nature. P.M. examination report of the deceased is Ext.3, and 36 to 48 hours had lapsed since she was murdered. On a query made by the I.O., doctor/PW.3 has further opined on 21.01. 2005, through his opinion

Ext.4, that the ligature mark on the cadaver of the deceased was possible by the Lungi/M.O.-I, which was recovered from her corpse by the police.

4. Accused was summoned and in due course after observing necessary formalities his case was committed to the Court of Session, where it was registered as Sessions No.158/05(GDC) and subsequently re-numbered as Sessions No. 9/2005 on its transfer to the file of the learned Additional Sessions Judge, Parlakhemundi. Appellant was charged with offence under Section 302, IPC on 4.08.2005 by the learned trial judge/Additional Sessions Judge, Parlakhemundi and since he denied the same and claimed to be tried, he was prosecuted for that crime to establish his guilt.

5. Reliance was placed by the prosecution to prove the appellant's guilt on nine witnesses. Magata Sabar/PW.1, Sharma Sabar/PW.2, Lakia Sabar/PW.4, Santiamma Sabar/PW.5, Buda Sabar/PW.6 are the fact witnesses whereas Dr. Prasant Kumar Padhi/PW.3, S.Balaraju/PW.7, Jayadev Apata/PW.8 who scribed the report and I.O.-Siba Prasad Biswal/PW.9 are the formal witnesses. No defence witness was examined by the accused nor was any documentary evidence led. FIR of the incident is Ext.1, seizure list in respect of Lungi of the appellant and command certificate is Ext.2, Autopsy report is Ext.3, opinion by the doctor respecting Lungi as a weapon to strangulate the deceased is Ext.4, inquest report of the deceased is Ext.5, injury requisition of the appellant is Ext.6 and custody/zimanama of the ornaments of the deceased is Ext.7 and the spot map of the incident place is Ext.8.

6. Learned trial judge after summating and weighing through the oral and documentary evidences returned a verdict of appellant being guilty of the crime of murder and therefore convicted him under Section 302, IPC and sentenced him to life imprisonment with fine of Rs.5000/-(Rupees five thousand) and in default to serve six months additional R.I. through the impugned judgment and order giving rise to the instant appeal at the behest of the convicted accused-appellant.

7. In this back ground, we have heard Mrs. Tapaswani Sinha for the appellant and Sk.Zafarullha, learned Additional Standing Counsel for the State and have scanned the entire trial court record and the evidences.

8. Unleashing the criticism of the impugned judgment, learned counsel for the appellant raises many contentions including that none of the facts

have been established conclusively and nobody is an eye witness to the incident. The appellant has been falsely implicated and that there are discrepancies galore on the testimony of the witnesses and consequently the impugned conviction and sentence are indefencible. Learned Additional Standing Counsel refuting the contentions argues to the contrary and urges that but for the appellant, nobody else could have committed murder of the wife and the chain of events brought on record conclusively establishes his guilt beyond any shadow of doubt. Near and dear relatives of the appellant have appeared as witnesses against him who had no reason to concoct a story against the head of the family as the real perpetrator of the crime and therefore, the appeal is devoid of merit and deserves to be dismissed.

9. After giving our thoughtful considerations over the rival contentions and after scrutinizing the evidence, we are of the opinion that so far as conviction of the appellant is concerned, the same seems to be infallible, as but for him nobody else could have committed the crime. The reasons for our conclusion are that the incident had occurred in the wintery evening on 24.12.2004 at 5 p.m. and normally at that time, in villages, the people are inside their houses/hutments. The presence of the appellant and the deceased inside their house therefore is very natural. Further we find that Magata Sanar/PW.1 in no uncertain terms has stated that he had witnessed this appellant strangulating the deceased by wrapping the Lungi around her neck and pulling it from both the ends. At that time Santiamma Sabar/PW.5, daughter-in-law of the appellant and deceased was also present and was dissuading the accused from assaulting her mother-in-law, which forbidding did not yield any result. It is further statement of PW.1 that after the deceased died, accused sprinted away into the Jungle. House of PW.1 is at a distance of 20-24 feet away from the house of the deceased and the appellant and therefore his presence at the place of the incident is not something which is unnatural. Giving topographical descriptions, PW.1 had deposed that the house of the appellant consisted of one kitchen and a bed rooms and since the front door was locked, he had peeped through the ventilated portion of the bari side door and was able to witness the deceased lying on the floor while the appellant was strangulating her facing towards PW.1. It has been further stated that the accused had seen PW.1 peeping through the door. This incident was conveyed to Lakia Sabar/PW.4 by PW.1, who was brother of the deceased. During cross-examination the details have got elicited by the defence itself and therefore there remains no manner of doubt that the deceased was done to death inside the bed room by the appellant.

10. The testimony of PW.1 has been corroborated in all material aspects by the informant Sharma Sabar/PW.2, who was conveyed about the murder of his sister by his brother Lakia Sabar/PW.4. Arriving at the scene of the incident, informant himself had seen the dead body of his sister covered with a blanket and the Lungi was tied around her neck. They had searched for the appellant and then at the advice of the Sarpanch S.Balaraju/PW.7, the informant/PW.2 had dictated the FIR to scribe Jayadev Apata/PW.8 and then had lodged it at the police station. Informant is also a witness of the seizure of the Lungi vide seizure memo Ext.2. He was at Parlakhemundi on the date of the incident and from his cross-examination we do not find anything worthwhile damaging the prosecution story in its main substratum. His cross-examination further reveals that the appellant was at the house of his elder brother and seeing the informant he had escaped from the house.

11. Coming to another fact witness-Lakia Sabar/PW.4, he has also corroborated his predecessor fact witness and has deposed that after coming to know about the demise of the deceased from Magata Sabar, he had gone to the house of the appellant and had seen his dead sister, thereafter this witness had informed the incident to his brother Sharma Sabar, the informant/PW.2, who had lodged the FIR regarding the incident. Virtually the defence had abdicated its responsibility in seriously challenging the testimony of this witness Lakia Sabar and therefore, there remains little doubt that the deceased lost her life inside her house in the bed room after being strangulated with the help of a Lungi belonging to the appellant. Santiamma Sabar/PW.5, who is the daughter-in-law of the appellant as well as of the deceased, in no uncertain terms had narrated that she had witnessed the accused dragging the deceased wrapping his Lungi around her neck. On the date of the incident she was a girl of sixteen years of age and her statement during the trial was recorded one year after the incident and at that time she was seventeen years of age. From her cross-examination only an omission has been pointed out that she had not stated before the police that the appellant had quarreled with the deceased at 1p.m. and had threatened her. To us, such an omission is of no value as P.W.5 had no reason to lie against her own father-in-law to ruin her marital life. No suggestion has been given to her that she had any animus against the appellant and therefore, her straight forward evidence inspire confidence and we treat her to be a truthful and creditworthy witness, whose narration about the actual strangulation cannot be brushed aside. Another important feature is that Buda Sabar/PW.6, who is the brother of the appellant, also appeared as a witness against him

and testified that the deceased had murder his wife. Buda Sabar, like PW.5, also had no reason to implicate the appellant as the sole perpetrator of the crime and nothing has been elicited from him, which may create a doubt in the prosecution story or he is being a witness against the appellant. Thus, we have no hesitation in concluding that so far as guilt of the appellant is concerned, the same has been cemented convincingly without any other premise or hypothesis and therefore, conviction part of the appellant is untenable and we hereby concur with the opinion of the learned trial judge that the guilt of the appellant has been established beyond all shadow of reasonable doubt.

12. This leads us to the question as to whether the appellant can be made responsible for committing the murder of his wife or in the facts and circumstances his crime will be one of culpable homicide not amounting to murder punishable under Section 304, Part(1) of the IPC. In this respect we find that the evidence of daughter-in-law/PW.5 is that the incident between the appellant and the deceased was preceded by a quarrel. Narration in the case diary and the statement of PW.5 informs us that the quarrel took place over giving of meal. Prosecution has not been fair enough to the court and in fact it has failed to bring the real statement before the court that the incident started because of giving of meal. Further, the testimony of PW.5 in the court also indicates that there was some altercation between the deceased and the appellant in course of which the appellant had assaulted the deceased. In view of the aforesaid, we are in great doubt that in fact the appellant intended to cause death of the deceased or had an intention to cause such bodily injury as in all probability could have resulted in her death. Case of the appellant, in our opinion does not fall in any of the categories enumerated in Section 300, IPC, so as to clothe the guilt of murder around the appellant's neck. Bruises on the right side of the scalp above the eye lid, on posterior aspect of occipital region and abrasion on the left knee, the three physical injuries noted by the doctor are also not indicative of the fact that the culprit (appellant) had the requisite intention to commit murder of the deceased. In our view the incident had started all of a sudden at the spur of the moment because of some altercation between them. There is no evidence on record that prior to this incident, there was a quarrel of such magnitude between the appellant and the deceased, which could have prompted the appellant to commit her murder after twenty years of their marriage and after having a son aged about six years. What is perceptible is that all of a sudden in a fight between wife and the husband, out of sheer outrage, the appellant-husband

acted hastily in wrapping up his Lungi around her neck and pressing it , which resulted in deceased's demise. Here we would like to add that the means of strangulating the deceased was also an unconventional Lungi, it is neither string nor any other blunt object and therefore it seems that when the incident started, appellant had no intention to commit murder of the deceased. Our analysis as above refrains us from convicting the appellant for a charge of murder and persuade us to conclude that the appellant can be held to be guilty only for an offence of culpable homicide not amounting to murder punishable under section 304, Part-1, IPC and we hereby hold as such.

13. Coming to the sentence part of it, the appellant was arrested on 25.12.2004 and therefore has already undergone 10 years of RI. In our opinion the substantive sentence undergone by the appellant is sufficient to meet the ends of justice.

14. Concluding the decision, we hereby allow the appeal in part. Conviction of the appellant for charge under Section 302, IPC and sentence of life imprisonment with fine of Rs.5000/-, are scored out and instead, appellant is convicted under Section 304, Part-I, IPC and for that crime he is sentenced to the period of imprisonment already under gone by him. The appellant was allowed bail by this Court on 31.10.2011 and therefore, he need not surrender. His personal bail bonds are discharged and he is set at liberty.

15. The appeal is allowed in part as above.

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

Appeal allowed in part.

2015 (I) ILR - CUT- 696

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

CRIMINAL APPEAL NO. 308 OF 1998

MANAS KUMAR BEHER .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

(A). EVIDENCE ACT, 1872 – S.6

Resgestae – Murder Case – P.W.4 is the sole eye witness – P.Ws. 2 & 3 arrived at the spot on hearing hullah – P.W.4 immediately disclosed the incident to them naming the appellant as the assailant – No interval between the fact in issue and the fact sought to be proved – It is an exception to the general rule of admissibility of hearsay evidence – Statements are so connected with the fact in issue as to from a part of the same transaction - Held, immediate disclosure made by P.W.4 before P.Ws. 2 & 3 is admissible as resgestae U/s. 6 of the Act.

(B). PENAL CODE, 1860 – Ss. 307, 320, 323, 325

Charge framed against appellant U/s. 307 I.P.C – Trial court held him guilty U/s. 323 I.P.C – Finding challenged in this appeal – Appellant assaulted P.W.4 in which tooth of P.W. 4 was uprooted – Fracture or dislocation of a tooth is defined as "grievous hurt" under clause "Seventhly" U/s. 320 I.P.C – Held, conviction of appellant U/s. 323 I.P.C is setaside and he is convicted U/s. 325 I.P.C and sentenced to undero R.I. for six months. (Para 10)

(C). EVIDENCE ACT, 1872 – S.134

Evidence has to be weighed and not counted – Quality of the evidence is important but not the quantity – No legal impediment to convict a person on the testimony of a solitary witness provided the evidence is clear, cogent and trust worthy.

In this case P.W.4 is the grand father of the appellant – His evidence clearly indicates the motive of the appellant to commit the crime – He being an injured his presence at the spot cannot be doubted – Though he was subjected to lengthy cross-examination nothing has been elicited to discredit his version – His testimony is

also corroborated with the medical evidence – Held, there is no infirmity or illegality in the appreciation of evidence by the learned trial court in convicting the appellant. (Para 8)

(D). PENAL CODE, 1860 – S. 304-Part I

Murder Case – Appellant mercilessly assaulted the deceased causing number of external and internal injuries which clearly indicates that the action is nothing but culpable homicide amounting to murder – Though there was some previous dispute but on the date of occurrence there was no quarrel or any kind of grave and sudden provocation – The appellant who stayed away came prepared to assault the deceased – Intention of the appellant to murder being clear the prayer to convert this case from section 302 I.P.C to section 304 Part-I I.P.C is not warranted. (Para 9)

For Appellant - M/s. B.Mishra, R.Mishra, S.Mishra, D.Sahu, P.K.Sahoo, B.K.Mishra, O.P.Sahu, B.S.Mishra

For Respondent -Mr. Sk. Zafarulla, (A.S.C.)

Date of hearing. :16. 02. 2015
Date of Judgment : 24.02. 2015

JUDGMENT

S.K.SAHOO, J.

The appellant was charged under section 302 Indian Penal Code in the Court of learned Additional Sessions Judge, Bhubaneswar in S.T. Case No.3/75 of 1996 for committing murder of his grandmother Nirupama Behera (hereafter "the deceased") on 26.10.1995 at about 7 a.m. at Bapujinagar, Bhubaneswar. He was further charged under section 307 Indian Penal Code for attempting to commit murder of his grandfather Akulananda Behera (P.W.4) on the same day, time and place.

The learned trial court vide impugned judgment and order dated 26.9.1998 found the appellant guilty under sections 302 and 323 I.P.C. and accordingly convicted him of such offences and sentenced him to undergo imprisonment for life under section 302 I.P.C. No separate sentence was awarded for offence under section 323 I.P.C.

2. The prosecution case as per the F.I.R. lodged by Akulananda Behera (P.W.4) on 26.10.1995 at about 8 a.m. at Capital Police Station, Bhubaneswar, in short, is that the informant was staying in his house situated at Plot No.229,

Bapujinagar, Bhubaneswar with his wife (deceased) who was aged about 74 years. His elder son Birendra was staying at his village Bairagipada with his family members and he was a cultivator. The younger son of the informant Rabindra Kumar Behera was staying in America with his family. Birendra tried to forcibly occupy the house of the informant at Bapujinagar and when the informant and the deceased protested, they were threatened with dire consequences. On 17.9.1995 and 17.10.1995 Birendra and his eldest son Manas Kumar Behera (appellant) came to the residential plot of the informant and tried to forcibly occupy the same. The informant protested for which Birendra attempted to kill him and the appellant also threatened to kill the informant by a vegetable cutter. At the instance of the local gentlemen namely Surendra Narayan Sarangi (P.W.2), Balaram Mohanty and others, the matter was pacified. Birendra took away his KVP Certificate as well as post office pass book on 19.10.1995 and assured not to create any disturbance in future and a written agreement to that effect was also executed.

It is the further prosecution case as per FIR that on 26.10.1995 at about 7 a.m. while the informant had been to latrine, he heard shout "Bopalo Mali" and coming out of the latrine, the informant saw the appellant was assaulting the deceased mercilessly by means of a Katha Falia (wooden plank) as a result of which the deceased had sustained bleeding injuries on her head and was in a senseless condition. When the informant challenged the appellant, he was pushed into the bath room and assaulted on his head with the said wooden plank by the appellant for which he also received some injuries and lost one tooth. As the appellant closed the bath room door from outside, the informant shouted for help through the window and some persons hearing his shout came and opened the door and brought him outside.

3. On receipt of such FIR from P.W.4, the Inspector-in-charge of Capital Police Station namely Manoranjan Mohanty (P.W.8) registered Capital P.S. Case No.715 of 1995 under section 307 IPC on 26.10.1995 and took up investigation. He issued requisition for the medical examination of P.W.4 and his wife (deceased) and proceeded to Capital hospital where he found the deceased lying in the Female Surgical Ward in serious condition. P.W.8 also issued requisition to the Medical Officer for recording the dying declaration of the deceased but it could not be recorded as she was unconscious. The deceased was shifted to S.C.B. Medical College and Hospital, Cuttack on the very day for better treatment. P.W.8 visited the spot at 8.30 a.m. on 26 10.1995 and prepared spot map Ext.9. On his requisition, the Scientific Officer visited the spot and collected blood stained earth, sample earth from the spot which were seized along with a piece of wooden bar and tooth of P.W.4 under seizure list Ext.4. On 26.10.1995 P.W.8 seized one agreement being produced by P.W.4 under seizure list Ext.3. P.W.8 received information that the deceased expired at S.C.B. Medical College and Hospital on 26.10.1995 at about 9 a.m. and accordingly the case was converted to one under section 302 I.P.C. The

appellant was arrested and forwarded to the Court. Prayer was made by the I.O. before learned S.D.J.M., Bhubaneswar to send blood stained wooden plank, blood stains collected in a filter paper, sample filter paper, blood stained scrapping collected from bath room and sample scrapings to Forensic Science Laboratory, Rasulgarh for chemical examination in sealed packet. After completion of investigation, charge sheet was submitted against the appellant.

4. The defence plea is one of denial. It is pleaded by the appellant that due to land dispute, he has been falsely implicated in the case.

5. In order to prove its case, the prosecution examined nine witnesses.

P.W.1 Dr. Ashok Kumar Patnaik was the Asst. surgeon attached to Capital Hospital who first treated the deceased Nirupama Behera and noticed some injuries vide injury report Ext.1. He opined that the injuries are possible by split firewood (Katha Falia).

P.Ws.2 Surendra Narayan Sarangi stated about the previous dispute between the informant on the one hand and the appellant and his father on the other. He further stated that on the date of occurrence when he arrived at the spot hearing hullah, the informant disclosed before him regarding the assault made by the appellant on the deceased as well as on him by means of a wooden plank and putting him inside the latrine. He is a witness to the seizure of wooden plank, cotton pieces stained with blood and one tooth of the informant under different seizure lists.

P.W.3 Biraja Prasad Roy is a post-occurrence witness who stated regarding the disclosure made by the informant before him regarding assault on the deceased as well as on him by the appellant.

P.W.4 Akulananda Behera is the informant in the case and he is an eye witness to the occurrence and also an injured in this case. He is also a witness to the seizure of agreement vide Ext.2 and different articles.

P.W.5 Debraj Bhuyan was the A.S.I. of Police, Mangalabag Police Station who stated about the registration of Mangalabag P.S. U.D. Case No.575 of 1995 on receipt of causality memo from the Neurosurgery Dept., S.C.B. Medical College and Hospital, Cuttack. He conducted inquest over the dead body of the deceased and proved inquest report Ext.7. He also sent the dead body for post mortem examination and subsequently received the post mortem report.

P.W.6 Nabakishore Mahalik is the son-in-law of the deceased who took the deceased first to Capital Hospital, Bhubaneswar and then to S.C.B. Medical College & Hospital, Cuttack for treatment.

P.W.7 was the Asst. Surgeon of Capital Hospital who examined the informant on police requisition on 26.10.1995 and proved his report Ext.6/1.

P.W.8 Manoranjan Mohanty was Inspector-in-charge, Capital Police Station who is the Investigating Officer in the case.

P.W.9 Dr. Nayan Kishore Mohanty was the Asst. Professor, FMT, S.C.B. Medical College and Hospital, Cuttack who conducted post mortem examination over the dead body of Nirupama Behera and proved his report vide Ext.11.

No witness was examined on behalf of the defence.

The prosecution exhibited 11 documents and also marked one material object i.e., Katha Falia (wooden plank) as M.O-I. Ext.1 is the injury report, Ext. 2 is the agreement, Exts.3 and 4 are the seizure lists, Ext.5 is the written FIR, Ext. 6/1 is the injury report of P.W.4, Ext.7 is the inquest report, Ext.8 is the dead body challan, Ext.9 is the spot map with index, Ext.10 is the forwarding letter of S.D.J.M., Bhubaneswar for chemical examination, Ext.11 is the post mortem report and Ext.12 is the chemical examination report.

6. The learned counsel for the appellant contended that the learned trial court should not have relied upon the solitary testimony of P.W.4 to convict the appellant more particularly in view of hostile relationship between the parties. He further contended that if the prosecution case is that due to civil dispute and to forcibly occupy the house of the informant at Bapujinagar, the appellant killed the deceased, he would not have spared the informant to become a witness against him.

The learned Additional Standing Counsel Sk. Zafarulla on the other hand submitted that the evidence of P.W. 4 is clinching and trustworthy which is corroborated by P.W.2 and P.W.3 and therefore the learned trial court has not committed any illegality in convicting the appellant.

7. Let us first discuss how far the prosecution has proved that the deceased met with a homicidal death.

Apart from the inquest report Ext.7, the prosecution relies upon the evidence of P.W.9 Dr. Nayan Kishore Mohanty who conducted autopsy over the dead body of the deceased and found the following external injuries:-

(i) A scalp haematoma with swelling of size 7 c.m. x 7 c.m. X 2 c.m. situated on left parietal eminence 5 c.m. above the root of left ear;

(ii) Two lacerated wounds of size 5 c.m. X 0.5. c.m. X bone deep and 4 c.m. X 0.5 c.m. X bone deep situated in a ‘Y’ shape manner on the left side of occipito-mastoid region of the head where the surrounding scalp tissue

looking contused with haematoma and swelling formation of size 12 c.m. X 10 c.m. X 2 c.m;

(iii) Abraded contusion where the abrasion was 2 c.m.X 1.5. c.m. situated over the contused scalp haematoma of size 10 c.m. X 10 c.m. placed on the right posterior parietal region 8 c.m. above the mastoid prominence.

(iv) Contusion looking bluish black of size 3 c.m. X 3 c.m. situate just behind the right ear on mastoid region.

(v) Contusion of 5 c.m. X 3 c.m. looking bluish black situated on the nape of the neck on the left side of the midline transversely placed;

(vi) Abraded contusion 10 c.m. X 2 c.m. with an incised looking lacerated wound on its proximal and of size 1 c.m. X 0.4. c.m. X skin deep extending on the dorsal aspect of right hand from the ulnar tuberosity diagonally to reach up to the knuckle of right index finger where the dorsam of right hand was swollen diffusely;

(vii) Contusion of scalp bluish black colour with haematoma formation of size 4 c.m. X 2 c.m. situated along the sagittal line on left side vertex adjacent to the midline;

(viii) Abraded contusion 3.5 c.m. X 2 c.m. looking bluish black situated vertically on the dorsum of left hand along the first inter metacarpal space where the dorsum of left hand was diffusely swollen;

(ix) Parallel contusion 4 c.m. x 1 c.m. with intervening normal skin of 1 c.m. situated on the back in between the two medial angles of scapula:

(x) Parallel abraded contusion 4 c.m. X 1 c.m. each being intervened with a normal skin of 1 c.m. broad situated over the left scapula.

Internal Injuries

(i) The under surface of the scalp was contused corresponding to external scalp injuries and associated with sub-scalpal haematoma involving left parietal left occipitomastoid right posterior parietal and right mastoid region;

(ii) The left temporalis muscle shows infiltration of extra vassated blood and the muscle was contused;

(iii) Fissure fracture extending from left side external occipital protuberance runs onwards to the vertex from where it runs laterally and interiorly crossing the left coronal suture and runs downwards to involve the lateral aspect of left frontal bone where it involved the roof of left orbit in left anterior cranial fossa through the retro orbital pad of fat was protruding and from its

posterior and it extends to the right side to involve the occipital crest and ends at right interior external occipital proturbance and involves the occipital fossa;

(iv) Contusion of left frontal lobe of brain with surface laceration and its inferior surface;

(v) Contusion of right frontal lobe on its tip of size 4.5 c.m. X 3 c.m. and on its lateral aspect for 4.5. c.m. X 4.5. c.m.

(vi) Contusion of left temporal lobe of brain on outer surface of size 4.5. c.m. X 4 c.m. and on its tip for 2 c.m. X 2 c.m.

(vii) The posterior inferior surface of the left cerebrum was contused;

(viii) There was gross oedema of brain tissue;

(ix) There was fracture of 3rd and 4th metacarpal of right hand with extravasation into the subcutaneous tissue of dorsum of right hand.

P.W.9 opined all the injuries both internal and external to be ante mortem in nature and caused by hard and blunt force impact to the head. Death was opined to be cranio-cerebral injuries. All the injuries found on the dead body of the deceased were opined to be sufficient to cause death in ordinary course of nature. The post mortem report has been marked as Ext.11. There is no cross examination to P.W.9. The learned counsel for the appellant also did not challenge the findings of P.W.9 in the post-mortem report. After going through the evidence on record particularly the evidence of P.W.9 and post mortem report Ext.11, we hold that the prosecution has conclusively established that the death of the deceased was homicidal in nature and it was due to cranio-cerebral injuries.

8. The star witness on behalf of the prosecution is none else than P.W.4 who is not only an injured eye witness but also the grandfather of the appellant.

Being an injured, the presence of P.W.4 at the spot cannot be doubted. The learned counsel for the appellant contended that due to civil dispute, the appellant has been falsely entangled in the crime. It is difficult to accept that P.W.4 being the grandfather would implicate his grandson (appellant) falsely in a case of murder. Merely because there was civil dispute between the parties, the same by itself cannot be a ground to discard his evidence although while accepting the same, it is the solemn duty of the Court to make a deeper probe and scrutinize the evidence with more than ordinary care and caution. It is well settled principle of law that enmity is a double-edged weapon. It can be a ground for false implication. It can also be a ground for assault. P.W.4 has stated as to how he was assaulted by the appellant inside the latrine. The injury report of P.W.4 proved by P.W.7 corroborates the evidence of P.W.4.

The evidence of P.W. 4 that the appellant dealt blows after blows on the deceased including her head is corroborated by the post mortem report Ext.11.

The immediate disclosure made by P.W.4 before P.W.2 and P.W.3 who arrived at the spot hearing hullah is admissible as res gestae under section 6 of the Evidence Act. Res gestae of a crime includes the immediate area and all occurrences and statements immediately after the crime. Statements made within the res gestae of a crime are admissible on the basis that spontaneous statements in the circumstances are reliable. It is an exception to the general rule of admissibility of hearsay evidence. The rationale of making certain statements or facts admissible under Section 6 of the Evidence Act was on account of spontaneity and immediacy of such statement or fact, in relation to the "fact in issue" and thereafter, such facts or statements are treated as a part of the same transaction. In other words, to be relevant under Section 6 of the Evidence Act, such statement must have been made contemporaneously with the fact in issue, or at least immediately thereupon, and in conjunction therewith. If there is an interval between the fact in issue and the fact sought to be proved, then such statement cannot be described as falling in the "res gestae" concept. The test to determine admissibility under the rule of "res gestae" is embodied in words "are so connected with a fact in issue as to form a part of the same transaction". It is therefore, that for describing the concept of "res gestae", one would need to examine, whether the fact is such as can be described by use of words/phrases such as, contemporaneously arising out of the occurrence, actions having a live link to the fact, acts perceived as a part of the occurrence, exclamations (of hurt, seeking help, of disbelief, of cautioning, and the like) arising out of the fact, spontaneous reactions to a fact, and the like. The illustration (a) under Section 6 of the Evidence Act, especially in conjunction with the words "are so connected with a fact in issue as to form a part of the same transaction" implies that it must be contemporaneous with the acts and there should not be interval which would allow fabrication.

Section 134 of Indian Evidence Act is based on the maxim that “evidence has to be weighed and not counted”. The Court is concerned with the quality and not the quantity of the evidence for proving a fact. There is no legal impediment in convicting a person on the testimony of solitary witness provided that the evidence is clear, cogent, trustworthy, unimpeachable and above board. If the evidence of the eye witness is wholly reliable, the Court can have no difficulty in accepting such evidence and convicting an accused even without any corroboration.

The testimony of P.W.4 clearly indicates the motive on the part of the appellant to commit the crime. Being an injured, his presence at the spot cannot be doubted. His evidence is corroborated by the medical evidence. His conduct in disclosing the occurrence immediately before P.W. 2 and P.W.3 naming the appellant as the assailant puts stamp of truthfulness on his version. Though he was

subjected to lengthy cross examination by the defence but nothing substantial has been elicited to discredit his version. P.W.9 has categorically stated that the external injuries on the head and hand of the deceased can be caused by the weapon like M.O. I. The wooden bar which was the weapon of offence was sent for chemical examination and human blood was found on the same.

In view of the evidence of P.W.4 and the medical evidence brought on record by the prosecution coupled with prompt lodging of First Information Report by P.W.4 and other surrounding circumstances, we are of the view that there is no infirmity or illegality in the appreciation of evidence by the learned trial Court in convicting the appellant.

9. The learned counsel for the appellant submitted that the appellant was an young boy of 21 years of age at the time of occurrence and he was a student and perhaps being misguided by his father on the spur of moment, he might have assaulted the deceased due to previous civil dispute and therefore the case may at best come under section 304 Part-I IPC. We are not at all impressed with the argument in as much as the manner in which the appellant has mercilessly assaulted the deceased who was an aged lady causing number of external and internal injuries clearly indicates that the action is nothing but culpable homicide amounting to murder. Though there was some previous dispute but on the date of occurrence there was no quarrel or any kind of grave and sudden provocation. The appellant who was staying in a different village in a different district came prepared and assaulted the deceased as well as P.W.4. The intention of the appellant to commit the murder is clear not only from the nature of injuries, part of the body where the injuries were caused but also the weapon used for causing such injuries.

10. In view of the discussions and independent analysis of the evidence on record, we find that the learned trial Court has rightly convicted the appellant under section 302 IPC and sentenced him to undergo imprisonment for life. The learned trial Court though framed charge against the appellant also under section 307 IPC for assaulting P.W.4 but held that such offence is not attracted as P.W.4 has sustained simple injuries as stated by the doctor P.W.7 and there is also no evidence if any attempt was made to do away with the life of P.W.4 even after he was confined in the attached bath room (latrine). The learned trial Court held that the evidence led in the case cannot be considered sufficient to establish with certainty the existence of requisite intention or knowledge to make the appellant liable under section 307 IPC and accordingly held the appellant guilty under section 323 IPC but awarded no separate sentence. We are of the view that the finding of the learned trial Court in convicting the appellant under section 323 IPC is contrary to the evidence on record. P.W.4 has not only stated about the assault on him by the appellant with the Katha Falia but also stated that the police also seized his tooth, which was uprooted being assaulted by the appellant in the latrine where he was confined. The seizure list

Ext.4 dated 26.10.1995 also indicates about the seizure of one tooth of P.W.4. P.W.2 also states about the seizure of one tooth of P.W.4. Section 320 IPC defines "grievous hurt". Dislocation of tooth which comes under clause "seventhly" under section 320 IPC is "grievous hurt". Therefore we find that the proper section attracted will be section 325 IPC and not 323 IPC. Since, we find that the conviction of the appellant under section 323 IPC is unsustainable, we set aside the same and instead, convict the appellant under section 325 IPC, and sentence him to undergo rigorous imprisonment for six months for that offence. Both the sentences awarded to the appellant shall run concurrently.

In the net result, we alter the conviction of the appellant from section 323 IPC to section 325 IPC and sentence him to undergo six months' Rigorous Imprisonment for that offence. We, however, find no reason to set aside the conviction of the appellant under section 302 IPC and sentence of life imprisonment, as imposed by the impugned judgment and order.

With the aforesaid alteration, the appeal stands dismissed.

The appellant is on bail as per the order of this Court dated 17.11.2005 passed in Misc. Case No.20 of 2005. He is directed to surrender forthwith before the trial Court to serve out the sentence awarded by the trial Court failing which the learned trial Court shall proceed against the appellant in accordance with law.

Lower Court Records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action. Accordingly the criminal appeal is dismissed.

Appeal dismissed.

2015 (I) ILR - CUT- 705

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

W.P.(C) NO. 14332 OF 2014

RAMAKANTA MAHAKUD ……..Petitioner

.Vrs.

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

ODISHA MINOR MINERALS CONCESION RULES, 2004 - RULE 4(5)

Settlement of stone quarry in scheduled areas – Lease for the year 2014-15 – Neither the opinion of the Grama Sabha nor the Grama Panchayat has been obtained prior to grant of lease in favour of O.P.5 – Contravention of Rule 4(5) of the Rules 2004 and Rule 4 (k) of the provisions of the Panchayats (Extension to the scheduled Areas) Act, 1996 – Merely because the Tahasildar had addressed a letter to the Sarapanch of the Grama Panchayat and the Sarapanch did not give any respond to the said letter, cannot and does not amount to recommendation of the Grama Panchayat – Held, the grant of lease of Tulasichaura stone quarry No.3 in favor of O.P. 5 for the year 2013-14 and 2014-15 is quashed

For Petitioner - M/s. Ch. Aswini Ku. Das
For Opp. Parties - M/s. S.P.Sarangi

Date of Order : 03.12.2014

ORDER

I.MAHANTY, J.

Heard Mr. R. Das Nayak, learned counsel for the petitioners, Mr. P.P. Mohanty, learned counsel for opposite party No.5 and Mr. M.S. Sahoo, learned Additional Standing Counsel on behalf of the State.

This writ application has come to be filed by one Ramakanta Mahakud, Ward Member of the Tulasichaura, Naranpur Grama Panchayat in the district of Keonjhar along with several other individuals seeking to quash the order of quarry lease i.e. Tulasichaura Stone Quarry No.3 in favour of opposite party No.5 for the year 2014-2015.

Learned counsel for the petitioners submits that although, opposite party No.5 was the highest bidder for the Tulasichaura Stone Quarry, the grant of the said quarry in favour of him was in contravention of Rule-4(5) of the Orissa Minor Minerals Concession Rules, 2004 which is extracted hereinbelow:

"Rule-4(5) No prospecting license or mining/quarry lease or its renewal or auction of source shall be granted in Scheduled Areas without recommendation of the concerned Grama Panchayat."

It is further asserted on behalf of the petitioners that the role of the Grama Sabha or the Grama Panchayat in granting of prospecting license or

mining/quarry lease or its renewal or its auction also is mentioned in the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 and in particular Rule-4(k) which is extracted hereunder:

"4(k) the recommendations of the Grama Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas;"

It is further asserted by the learned counsel for the petitioners that neither the opinion of the Grama Sabha nor the Grama Panchayat has been obtained or has been taken prior to holding of the auction by the State or grant of the lease for the year 2014-15 in favour of opposite party No.5.

It would also be relevant herein to note that the very self same writ petitioner had approached this Court earlier in W.P.(C) No.14322 of 2013 with a prayer to quash the auction of Tulasichaura Stone Quarry No.3 granted in favour of the self same opposite party No.5 for the earlier year i.e. 2013-14. In the said writ application, the present opposite party No.5 has been arrayed as opposite party No.7. The State have filed a counter affidavit in the earlier writ application and in paragraph-6 of the counter affidavit filed by the Tahasildar, Keonjhar, it is stated as follows:

> "So, for augmentation of Government revenue through annual public auction, the aforementioned Tulasichaura Stone quarry has been put to public auction declaring the same as new Sairat source of Stone quarry. For this purpose, according to the Orissa Minor Minerals Rules, 2004 under provision of Rule 27, opposite party No.3 has sent request letter to the Sarapanch (opposite party No.6) of Naranpur Grampanchayat vide his letter No.3042/dated 23.06.2012 inviting the views of the Grampanchayat. The letter of O.P. No.3 was received by the Sarapanch (O.P. No.6), Naranpur on 24.06..2013. But, the Sarapanch (O.P. No.6), Naranpur did not answer the request letter and did not advance the views of the Grampanchayat, neither to the O.P. No.3 nor to other opposite party No.1 & 2. Accordingly to the provision of above stated Orissa Minor Minerals Rules, 2004 the opposite party No.3 wait for 2 months for the views of the Naranpur Panchayat and thereafter according the said rule, considered that the Panchayat has nothing to view on the matter. So he proceeded further according the rules which is given under paragraph 3 to 5 of this petition."

Learned counsel for opposite party No.5 admits that also in the present year, neither the opinion of the Naranpur Grama Panchayat has been obtained nor any Grama Sabha has been held before holding auction or grant of lease in favour of opposite party No.5.

On a perusal of Rule-4(5) of the Orissa Minor Minerals Concession Rules, 2004 read with Rule-4(k) of the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996, it is clear therefrom that in scheduled areas prior to auction or settlement of the quarry or mining lease, recommendation of the concerned Grama Panchayat is mandatory. The aforesaid rule read with Rule-4(k) of the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 makes it clear that the recommendation of the Grama Sabha or the Panchayat at the appropriate level shall be mandatory prior to grant of prospecting license or mining license for minor minerals in scheduled areas.

In this respect, learned counsel for the petitioner places reliance on a judgment of the Hon'ble Supreme Court in the case of **Orissa Mining Corporation Ltd. vs. Ministry of Environment & Forest & Others,** 2013(6) SCC 476 in which the Hon'ble Supreme Court in para-50 has observed that the requirements of the PESA Act apply only to minor minerals and in such event, the recommendations of the Grama Sabha or the Grama Panchayat is mandatory prior to grant of prospecting license or mining lease for minor minerals in scheduled areas.

In view of the above, the mere fact that the Tahasildar had addressed a letter to the Sarapanch of the Grama Panchayat and the Sarapanch did not give any respond to the said letter, cannot and does not amount to recommendation of the Grama Panchayat. Consequently, the action of the state in holding the auction itself is in violation of Rule-4(5) of the Orissa Minor Minerals Concession Rules, 2014 as well as Rule-4(k) of the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996.

Accordingly, the writ application is allowed and grant of lease of Tulasichaura Stone Quarry No.3 in favour of opposite party No.5 for the years 2013-14 & 2014-15 is quashed. The State is also directed to ensure that in future, if any quarry lease or mining lease is contemplated for grant of rights over minor minerals, the requirements of both the Orissa Minor Minerals Concession Rules, 2004 as well as the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 must be complied with prior to

putting the said quarry or area to auction and on consultation with the Grama Sabha or the Grama Panchayat as the case may be and not mere failure of a Sarapanch to reply to the letter of the Tahasildar. It is open for the Tahasildar/Collector, Keonjhar to take immediate steps for auction of Tulasichaura Stone Quarry No.3 subject to complying with the provisions as indicated hereinabove.

Mr. Mohanty, learned counsel for opposite party No.5 (the highest bidder) in whose favour lease of Tulasichaura Stone Quarry No.3 was granted both for the year 2013-14 and 2014-15 submits that opposite party No.5 in spite of having deposited the money in question has not operated the quarry in view of the pendency of both the writ application.

In view of the submission made, opposite party No.5 is at liberty to file an application before the Tahasildar, Keonjhar, who shall forward his recommendation to the Collector for consideration of refund of the amount deposited, if any, strictly in accordance with law. A free copy of this order be handed over to the learned counsel for the State for necessary communication.

Writ petition allowed.

2015 (I) ILR - CUT-709

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

W.P.(C) NOS. 10154 , 8931 & 9003 OF 2005

DEBESH DAS ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – Art. 226, 227

Certiorari Proceeding – Scope – Petitioners filed OGLS Cases before the Tahasildar claiming settlement of the land in their possession U/s. 3(4) of the OGLS Act, as amended in the year 1990 –

Tahasildar rejected their prayer in the absence of any evidence that they are occupying the lease hold area as 'Sub-Lessee' or 'Subsequent Sub-lessee' – The said finding was confirmed by the sub-collector and collector in exercise of their appellate as well as revisional jurisdiction – Findings are based on cogent reasons and not perverse – This Court finds no error of law to permit any interference with the impugned orders.

Case Law Relied on :-

1. 59 (1985) C.L.T. 407 : Satyapriya Mohapatra -V- Ashok Pandit & Ors.

For Petitioner - M/s. H.M.Dhal, B.B.Swain, A.K.Pattanayak, D.Pattanayak & K.Dhal (in all the writ petitions)

For Opp. Parties 1 to 4 - Mr. B.Bhuyan (Addl. Govt. Advocate) (in all the writ petitions)

For Opp. Parties 5 & 6 - Mr. Ramakant Mohanty, Sr. Adv. (in all the writ petitions)

Date of hearing : 06. 01.2015
Date of judgment: 06.01. 2015

JUDGMENT

I. MAHANTY, J.

In the above three writ applications since a common issue of law and fact has been raised, the same are taken up together on the consent of the learned counsel for the respective parties.

2. In this batch of writ applications, the petitioners have sought to challenge the orders in Annexures-1, 2 and 3 passed under the Orissa Government Land Settlement Act, 1962 rejecting their applications filed for settlement of the land in their favour.

3. Shorn of unnecessary details, suffice it is to note herein that each of the petitioners filed OGLS cases before the Tahasildar (Sadar), Sambalpur-Opposite Party No.4 seeking settlement of land in their names on which, they claim to be in occupation/possession as sub-lessees under the private opposite parties 5 and 6. The said OGLS applications were rejected on

31.07.2002 under Annexure-1 and the appeals preferred by the petitioners before the Sub-Collector, Sambalpur were also dismissed vide order dated 21.04.2003 under Annexure-2. Thereafter the petitioners preferred revision before the Collector, Sambalpur and the said revisions were also dismissed DEBESH DAS on 26.02.2004 under Annexure-3. Challenging the concurring orders passed by the Tahasildar (sadar), Sambalpur; Sub-Collector, Sambalpur (appellate authority) and Collector, Sambalpur (Revisional authority), the present applications came to be filed.

4. The brief case of the petitioners is that the petitioners were sub-lessees under the predecessors of Opposite Parties 5 and 6 prior to the cut-off date i.e. 09.01.1991 and raised a claim on the basis of Section 3(4) of the Orissa Government Land Settlement (Amendment) Act, 1990 which is quoted as hereunder:

> **"3. Reservation and settlement of Government land** (4) Notwithstanding anything to the contrary contained in the preceding sub-sections or in any law or any custom, practice or usage having the force of law –
>
> (a) any Khasmahal land or Nazul land, except where such land is used as homestead in any urban area, which has been leased out prior to the appointed date, shall whether the lease, where it had already expired, has been renewed or not prior to such date, be deemed to have been leased out under this Act to the person holding such land whether as a leasee, or as a sub-lessee either under the lessee or under a sub lessee:
>
> Provided that –
>
> (a) (i) any such lessee who is entitled to receive any rent from sub-lessee under him, or
>
> (ii) any such sub-lessee who is entitled to receive any rent from a subsequent sub-lessee under him,
>
> Under any instrument executed for such lease or sub-lease, as the case may be, shall be paid a compensation by the sub-lessee or subsequent sub-lessee, as the case may be, equivalent to ten times the said rent in the manner as may be prescribed.
>
> (b) The compensation so payable shall, if not paid by the concerned sub-lessee or subsequent sub-lessee, as the case may be

within the prescribed period, be recoverable from him by the Tahasildar having jurisdiction over the area as arrears of land revenue and be paid to the concerned lessee or sub-lessee, as the case may be, in the manner as may be prescribed;

(b) any Gramakantha Parambok land or Abadi land, except where such land is used as homestead in any urban area, which is in occupation by any person for not less than five years as on the appointed date, shall be settled with the said person in such manner, by such officer and subject to such terms and conditions as may be prescribed:

Provided that any such land which is situated in an urban area shall be settled on lease-hold basis and in case of other lands settlement shall be on raiyati basis;

(c) any Khasmahal land, Nazul land, Gramakantha Parambok land or Abadi land, which is used and in occupation by any person as homestead in ay urban area for not less than five years as on the appointed date, shall, subject to the payment of compensation in the case of Khasmahal and Nazul land as mentioned in the proviso to Clause (a), be settled –

(i) in the case of Khasmahal or Nazul land, with the person lawfully holding such land on and from the date the compensation is paid; and

(ii) in the case of Gramakantha Parambok and Abadi land, with the person in occupation of such land on and from the appointed date, on permanent basis with heritable and transferable rights.

Explanation – For the purposes of this sub-section, the expression 'appointed date' shall mean the date of publication of the Orissa Government Land Settlement (Amendment) Act, 1990 in the *Official Gazette*."

Both the parties accept that the cut-off date in terms of the said (Amendment) Act, 1990 was 9.1.1991.

5. Learned counsel for the petitioners asserts that on their applications being filed, the Tahasildar conducted a spot enquiry on 30.01.2002 as per direction of the Collector and recorded a finding that the petitioners were

found to be in occupation of a portion of the leasehold land on "monthly rental basis".

6. It appears that certain rent receipts were also produced by the petitioners in the OGLS case which indicate that the petitioners claiming settlement were occupying their land on "monthly rental basis". The Tahasildar reached a finding of fact that "the petitioners have also not produced any substantive documents/evidences to prove that they are occupying a portion of the leasehold land as "sub-lessee" or "subsequent sub-lessee" and consequently, rejected the application on a finding that, the petitioners are occupying the land on monthly rental basis under the predecessors of Opposite Parties 5 and 6.

7. Mr. Mohanty, learned Senior Advocate appearing for Opposite Parties 5 and 6 submits that the land in question had been leased out by a registered lease-deed No.103/1948 in favour of Yubarani Saheba Smt. Sade Rajya Laxmi by the Government for the purpose of constructing a Cinema Hall on 26.04.1948 and prior to the terms of lease expired on 31.3.1960, applications had been filed by Yubarani Saheba seeking renewal of the lease for the period of 90 years and sanction order thereon was passed by the competent authority on 1.4.1960. Basing upon the said sanction order, Nazul Renewal Case No.453 of 1969 was filed whereafter, the Collector, Sambalpur communicated the sanction of renewal to the Tahasildar by order dated 10.5.1979. The Tahasildar, Sambalpur in compliance of the directions of the Collector, called upon Yubarani Saheba to deposit rent and solatium by direction dated 27.8.1979. Before the actual renewal lease-deed executed, Yubarani Saheba passed away in the year, 1984 and opposite parties 5 and 6 who are the successors of the original lessee applied for substitution and modification of the renewal sanction order in their favour.

The Tahasildar, Sambalpur submitted the case record before the Collector on 19.06.1986 seeking his approval of the revision of the earlier order dated 10.05.1979 and to direct settlement in favour of the substituted legal heirs (Opposite Parties 5 and 6). While the matter was pending, OGLS (amendment) Act, 1990 came into force on 9.1.1991 whereafter, Nazul Misc. Case No.19/1992 was initiated for the purpose of grant of sanction of lease in favour of Opposite Parties 5 and 6. While the said Nazul Misc. Case was pending, directions were issued for deposit of premium in favour of opposite parties 5 and 6. Necessary premium was deposited and directions were also issued for correction of ROR in favour of Opposite Parties 5 and 6. Although

the entire procedure for renewal of Nazul case in favour of Opposite Parties 5 and 6 were completed, the present petitioners filed OGLS cases before the Tahasildar claiming settlement of the land in their possession on the basis of Section 3(4) of the OGLS Act, as amended in the year 1990.

8. As discussed hereinabove, the Tahasildar rejected the prayer of the petitioners, inter alia, on the finding that the petitioners could not produce any substantive documents/evidence to prove that they are occupying the portion of the leasehold area as "sub-lessee" or "subsequent sub-lessee". The said finding has been confirmed by both the appellate authority as well as the revisional authority.

9. Sri Mohanty, learned Sr. Advocate for opposite parties 5 and 6 placed reliance on the judgment of this Court in the case of Satyapriya Mohapatra v. Ashok Pandit and others, 59 (1985) C.L.T. 407 and in particular, the observation of the Hon'ble Court in Para-10 and 11 thereof which is quoted hereinbelow:

> "10. Concurrent findings of facts of competent authorities giving cogent reasons therefore are not open to challenge unless such findings are perverse and based on no evidence. See AIR 1983 SC 535 Mrs. Labhkumar Bhagwani Shah v. Janardhan Mahadeo Kalan. In certiorari proceedings, the High Court does not sit as an appellate authority and it is not to review the evidence and arrive at an independent finding, as observed by the Supreme Court in 1983 UJ (SC) 297 : "(AIR 1983 SC 454), Bhagat Ram v. State of Himachal Pradesh. As has been held by the Supreme Court in AIR 1975 SC 1297 Babhutmal Raichand Oswal v. Laxmibai R. Tarte, the power of superintendence of the High Court is limited to see that the subordinate Courts or Tribunals function within the limits of their authorities. It cannot correct some errors of fact by examining the evidence and reappreciating it. In AIR 1984 SC 38 Mohd. Yunus v. Mohd. Mustaqim, it has been held:
>
> "A mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Article 227.
>
> The supervisory jurisdiction conferred on the High court under Article 227 of the Constitution is limited to seeing that an inferior Court or Tribunal functions within the limits of its authority and not to correct an error apparent on the face of the record, much less an

> error of law. In this case there was, in our opinion, no error of law much less an error apparent on the face of the record, there was no failure on the part of the learned Subordinate Judge to exercise jurisdiction nor did he act in disregard of principle of natural justice. Nor was the procedure adopted by him not in consonance with the procedure established by law. In exercising the supervisory power under Article 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or re-weigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decisions."
>
> These principles of law have been referred to and followed by this Court in (1984) 57 Cut LT 368 : (1984 Cri LJ 1389) Bharat Sasmal v. Addl. Sessions Judge, Puri and others.
>
> 11. There has been no jurisdictional error in the instant case nor has there been violation of the principles of natural justice. No error of law has been committed. No finding has been passed apparently on the basis of an error of the record. We find that none of the contentions raised on behalf of the petitioner can prevail. The decisions taken by the House Rent Controller and the appellate authority are not to be interfered with by this Court in its writ jurisdiction."

10. In the aforesaid judgment, the Hon'ble High Court came to hold that the power of superintendence of High Court is limited to see that the subordinate courts or tribunals function within the limits of their authorities but it cannot correct some errors of fact by examining the evidence and re-appreciating it.

11. Learned Senior Counsel for the private opposite parties 5 and 6 essentially submits that the present case, in essence, seeks the interference of this Court in the writ jurisdiction by re-appreciating the facts of the case.

12. After having heard the learned counsel for the respective parties and on perusing the impugned orders as well as the citation referred hereinabove, we queried the learned counsel for the petitioners as to whether any evidence is on record to substantiate the fact that the petitioners were sub-lessees. Learned counsel for the petitioners fairly admits that no documentary evidence in support of the claim of the petitioners as 'sub-lessee' is

available. Apart from the same, admittedly, no oral evidence has also been led to substantiate their case of being sub-lessees.

13. Considering the submissions made, we are of the considered view that this Court has to limit its exercise of authority within the limits of its jurisdiction that is "power of superintendence" and three forums below, i.e. the Tahasildar, Sub-Collector as well as the Collector having exercise the jurisdiction over the matter, we find no error of law to permit any interference with the same.

Accordingly, we find no merit in this batch of writ applications and the same stands dismissed. Interim orders dated 7.3.2006 passed in all the writ applications stand vacated.

Writ petitions dismissed.

2015 (I) ILR - CUT- 716

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

W.P.(CRL.) NO.146 OF 2014

MD. KADIM @ MD. KADIM KHAN ……..Petitioner

.*Vrs.*

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

NATIONAL SECURITY ACT, 1980 – S.3 (2)

Order of detention – Grounds – Detaining Authority has simply reproduced the report of the Superintendent of Police in the grounds of detention, without applying his mind independently to the facts and circumstances of the Case – Non-application of mind on the part of detaining authority – Held, order of detention is quashed. (Para 12)

Case laws Referred to:-

1.(2006) 35 OCR 740 : (Logen Kumari Samal @ Bhalu-V- State of Orissa & Ors.)

2.(1985) 1 SCC 561 : (Jai Singh & Ors.-V- State of Jammu & Kashmir)

For Petitioner - M/s. Debasis Saring, S.K. Dash, S.Mohapatra & A.K. Mishra.
For Opp.Parties -Mr. M.S. Sahoo, Addl. Standing Counsel. Mr. A.K. Bose, Asst. Solicitor General of India.

Date of Judgment : 19.09.2014

JUDGMENT

B.N. MAHAPATRA, J.

Challenge in the present writ petition has been made to the legality of order of opposite party No.2-Collector, Sambalpur passed on 24.10.2013 in exercise of power under Section 3(2) of the National Security Act, 1980 (for short, "NS Act") directing detention of the petitioner on the ground that there is non- application of mind on the part of the Detaining Authority in passing the order of detention.

2. Shorn of unnecessary details, petitioner's case in a nut-shell is that the grounds of detention issued by opposite party No.2 on 25.10.2013 was served on the detenu on 26.10.2013 while the petitioner-detenu was in Circle Jail, Sambalpur. The detenu made a representation on 14.11.2013 to the State Government against the order of detention. Further case of the petitioner is that his representation was referred to the Advisory Board and the Board found that there was sufficient cause for rejection of the representation of the detenu dated 14.11.2013. The said representation had been considered and rejected by the State Government. Similarly, the detenu was informed on 06.12.2013 that his representation had been considered and rejected by the Central Government. The detenu was informed about rejection of his representation vide letter dated 18.12.2013.Hence, the present writ petition.

3. Though several grounds had been taken to challenge the order of detention in the writ petition, Mr. Sarangi, learned counsel for the petitioner confined his argument to the ground that the order of detention has been passed mechanically without application of mind by the detaining authority; therefore, the order of detention passed under Annexure-1 is not sustainable in law. Mr. Saring drew attention of this Court to the report of the

Superintendent of Police as well as the grounds of detention and submitted that those were prepared on the very same day the detention order was passed. The grounds of detention is the exact verbatim reproduction of the report of the Superintendent of Police which indicates that instead of applying his mind independently to the facts and circumstances of the case, the Detaining Authority has simply reproduced the report of the Superintendent of Police in the grounds of detention. Therefore, it was argued that the order of detention is not sustainable in law. In support of his contention, Mr. Saring relied upon the decision of this Court in the case of *Logen Kumari Samal @ Bhalu vs. State of Orissa & Ors., (2006) 35 OCR 740.*

4. Mr. M.S. Sahoo, learned Additional Standing Counsel for the State-opposite party Nos.1 and 2 submitted that the detaining authority after applying his judicial mind to the facts and circumstances of the case passed the order of detention. It does not suffer from any infirmities or non-application of mind. The facts are based on records. It has been mentioned that the petitioner's antisocial and criminal activities are in high pitch and the general laws are not sufficient to curb his activities. In order to maintain public order in the society, detention order in the instant case is justified. Records of the instant case shows that the petitioner has no respect for the law of the land and went on continuing with antisocial and criminal activities repeatedly after being released from Jail.

5. On the rival contentions of the parties, the only question that falls for consideration by this Court is whether the order of detention is not sustainable in law on the ground of non-application of mind on the part of the Detaining Authority.

6. On perusal of the grounds of detention passed under Annexure-2 and the report of the Superintendent of Police, Sambalpur dated 23.10.2013 under Annexure-3, it reveals that the grounds of detention appear to be mere reproduction of the report of the Superintendent of Police, Sambapur submitted before the Detaining Authority. The grounds of detention run about seven and half pages; similarly, report of the Superintendent of Police, Sambalpur also runs about nine pages. The differences noticed between the two are that (i) the detenu has been addressed as 'you' in the detention order instead of stating his name as has been done in the report of the Superintendent of Police, Sambalpur and (ii) the conduct of the detenu has been described in different words in the first paragraph of both.

7. It would be relevant to reproduce here at least two paragraphs from the grounds of detention and two paragraphs from the report of the Superintendent of Police, Sambalpur to illustrate the 1st difference.

The relevant paragraph of the grounds of detention is extracted below:

> "At present you are in Circle Jail, Sambalpur being remanded in G.R. Case No.1712/13 in the file of the Court of S.D.J.M., Sambalpur arising out of Khetrajpur P.S. Case No.123 dt. 22.08.2013 u/s 394/307/34 IPC read with sec. 25 Arms Act. You have filed a Bail application No.742/13 in the Court of Sessions Judge, Sambalpur for your release on bail. Hon'ble Court has fixed the date to 25.10.2013 for consideration of bail application and there is every likelihood of your release on bail. In the event of your release on bail you will again indulge yourself in heinous crimes and lawless activities affecting the public order which will be detrimental to the maintenance of public order. The copy of letter No.3254/Sadar Court dtd. 22.10.2013 of the Court Asst. Sub-Inspector, Sambalpur addressed to S.P. Sambalpur and Bail Application No.742/13 is enclosed as Annexure-J and J-1."

Similarly, the relevant paragraph of the report of the Superintendent of Police, Sambalpur is extracted below.

> "At present he has been lodged in Circle Jail, Sambalpur being remanded in G.R. Case No.1712/13 in the file of the Court of S.D.J.M., Sambalpur arising out of Khetrajpur P.S. Case No.123 dt. 22.08.2013 u/s 394/307/34 IPC read with sec. 25 Arms Act. He has filed a Bail application vide No.742/13 in the Court of Sessions Judge, Sambalpur for his release on bail. The Hon'ble Court has fixed 25.10.2013 for consideration of bail application and there is every likelihood of his being released on bail. In the event of his release on bail he will again indulge himself in heinous crimes and lawless activities affecting the public order which will be detrimental to the maintenance of public order. The copy of letter No.3254/Sadar Court dtd. 22.10.2013 of the Court Asst. Sub-Inspector, Sambalpur address to S.P. Sambalpur and Bail Application No.742/13 is enclosed as Annexure-J and J-1."

A portion of last paragraph of the grounds of detention is extracted below:

> "Unless you are detained, there is every likelihood that you would continue to indulge in such activities prejudicial to the maintenance of public order as the normal laws of the land do not appear to have any impact on you..."

A portion of last paragraph of the report of the Superintendent of Police, Sambalpur reads thus:

> "....Unless he is detained, there is every likelihood that he would continue to indulge in such activities prejudicial to the maintenance of public order as the normal laws of the land do not appear to have any impact on him."

8. To illustrate that the conduct of the detenu has been described in different words in 1st paragraph of both grounds of detention and report of Superintendent of Police, it would be appropriate to reproduce here the first paragraph of both the "grounds of detention" and the "report of the Superintendent of Police", Sambalpur.

The first paragraph of the grounds of detention is quoted hereunder:

> "You are a hardcore criminal and involved in a series of unlawful offence in Sambalpur town. You are a habitual offender and committed crimes in Sambalpur town by terrorizing the peace loving citizens. You have started your criminal activities since 2010 and committed crimes repeatedly one after one disregarding to the law of the land which creates fear in the mind of peace loving citizens of Sambalpur town and its adjacent areas. You have never refrained from your unlawful antisocial activities and terrorizing the peace loving citizens. Due to your propensity for murderous attack in public, a sense of fear has been installed in the minds of the people at large. Many such incidents of, murderous attack on public which have taken place in broad day light have gone unreported. No peace loving citizen dares to oppose you rather prefer to bow down silently to your illegal activities. The crimes committed by you are narrated below:"

The first paragraph of the report of the Superintendent of Police, Sambalpur is extracted below:

> "One Md. Kadim aged about 21 years, S/o. Md. Jafar of Kumbharpada, P.S.-Town, Dist: Sambalpur has indulged in a series of criminal and antisocial activities since 2010. A large no of innocent people of different professions have become victims of his gruesome act. Dhanupali, Town and Khetrajpur P.Ss. of Sambalpur district have become his area of operation for unlawful activities like robbery, extortion, theft, dealing with stolen property, rioting and attempt on the life of the general public especially belonging to the traders and business class. He, with his gang members, has committed a series of crimes forming unlawful assemblies using fatal weapons in public view in broad day light in the most crowded and busiest places and close to educational institutions. He has attempted to take the lives of innocent people as hired "GOONDA". Due to his propensity for murderous attack in public, a sense of fear has been installed in the minds of people at large. Mere presence of Md. Kadim in a locality is sufficient for spreading the psychology of fear, panic and terror, among the general public many of his acts in broad day light have gone unreported. No peace loving citizens dares to show any type of resistance or oppose him preferring to bow down silently to his illegal activities.
>
> A brief note of some of his reported antisocial/criminal activities resulting in frequent disruption of Public order are as under:"

09. The above facts clearly show that there is non-application of mind on the part of the detaining authority while passing the order/grounds of detention.

10. At this juncture, it would be beneficial to refer to the judgment of the Hon'ble Supreme Court in the case of ***Jai Singh and others vs. State of Jammu & Kashmir, (1985) 1 SCC 561,*** wherein it is held as under:

> "...Thereafter follow various allegations against Jai Singh, paragraph by paragraph. In the grounds of detention, all that the District Magistrate has done is to change the first three words "the subject is" into "you Jai Singh, s/o Ram Singh, resident of Village Bharakh, Tehsil Reasi". Thereafter word for word the police dossier is repeated

> and the word "he" wherever it occurs referring to Jai Singh in the dossier is changed into "you" in the grounds of detention. We are afraid it is difficult to find greater proof of non-application of mind. The liberty of a subject is a serious matter and it is not to be trifled with in this casual, indifferent and routine manner. We also notice that in the petition filed by the detenu, he had expressly alleged that he and the others had already been taken into custody in connection with a criminal case on July 6, 1984 itself and all of them were in custody since then. The detenu has given details of where he was taken and when. He has also referred to the circumstance that an application for bail was moved on his behalf on the eighteenth before the High Court and it was only thereafter that the order of detention was made. These facts have not been denied in the counter-affidavit filed by the respondents. In fact we are unable to find anything in the records produced before us, either in the police dossier submitted to the District Magistrate for action or in any other document forming part of the record that the District Magistrate was aware that the petitioner was already in custody. There is nothing to indicate that the District Magistrate applied his mind to the question whether an order of detention under the Jammu & Kashmir Safety Act was necessary despite the fact that the petitioner was already in custody in connection with the criminal case. The cases of the other six petitioners are identical and in the circumstances, we have no option, but to direct their release forthwith, unless they are wanted in connection with some other case or cases."

11. The principles decided in the above case are applicable to the present case.

12. In view of the above, the order of detention under Annexure-1 dated 24.10.2013 passed by the District Magistrate, Sambalpur directing detention of the petitioner-detenu, namely, Md. Kadim @ Md. Kadim Khan is quashed and the petitioner-detenu be set at liberty forthwith, if his detention is not required in connection with any other case.

13. In the result, the petition is allowed. No order as to costs.

Writ petition allowed.

2015 (I) ILR - CUT- 723

I.MAHANTY, J. & B. RATH, J.

W.P.(C) NO. 6748 & 9323 OF 2014

ABHAYA SAMANTARAY .....Petitioner

.Vrs.

THE COLLECTOR, PURI & ORS. .....Opp. Parties

ODISHA MINOR MINERALS CONCESION RULES, 2004- RULE-36

Auction of sand sairat – Petitioner became the highest bidder for the year 2013-14 and deposited the full amount involved in the bid on 15.03.2013 – As there was delay in Environmental clearance he was asked to execute the agreement on 16.12.2013 and allowed to operate the sairat only from December 2013 till 31-03 -2014 – Action challenged – Held, the petitioner should be allowed to operate the sairat for one year from the date he was asked to execute the agreement – Direction issued to the Opp. parties to allow the petitioner to operate the sairat for the balance period. (para-7)

For Petitioner - M/s. S. Mohapatra M/s. K.P.Mishra & T.P.Tripathy
For Opp. parties- Additional Standing Counsel

Date of Hearing : 14.01.2015
Date of Judgment : 22.01.2015

BISWANATH RATH,J

Both the writ petitions arise out of a common cause of action and in view of common pleading involved in both the writ petitions having same cause of action in both the writ petitions can be decided together by a common judgment. Hence, we proceed to decide both the above writ petitions together.

2. Pleadings as involved in W.P.(C) No.6748 of 2014 is that petitioner was an applicant against the Tender Process in the matter of auction of a Sand Sairat at Talapada for a period of one year. Petitioner became the highest bidder to the aforesaid Sand Sairat for the year 2013-2014. As assessed, petitioner deposited a sum of Rs.4,50,000/- on 15.03.2013, the full

and final amount involved in the bid. It is alleged by the petitioner that even though the amount involved was deposited on 15.03.2013 yet the opposite party no.3 could not obtain the Environmental Clearance till end of August, 2013 and ultimately the opposite party no.3 could obtain the Environment Clearance on 04.09.2013. After the Environmental Clearance was obtained, petitioner approached the opposite parties for issuing the "R" Form for extraction of sand immediately. It is alleged by the petitioner that the matter was delayed at the hand of the opposite parties and ultimately after issuing the Form "R" on 28.12.2013, the Tahasildar directed the petitioner to execute the agreement within 3 days but again due to paucity of time with the Competent Authority the agreement could not be finalized. But ultimately petitioner was allowed to operate the Sand Sairat from December, 2013 making period of lease valid up to 31.03.2014. Petitioner alleged that the authorities did not act in terms of Rule 36 and Rule 53 of the Orissa Minor Mineral Concession Rules, 2004 (for short 'the OMMC Rules, 2004') and by not allowing the petitioner to operate for one year, the petitioner has been greatly prejudiced and suffer financially. Thus in filing the 1st writ petition [W.P.(C) No.6748 of 2014] the petitioner sought for direction to the opposite parties to allow the petitioner to operate the particular Sand Sairat for a period of one year from the date of execution of the agreement. Petitioner alleged that during pendency of the above writ the opposite parties without considering the request of the petitioner to allow him to operate for one year from the date of actual commencement proceeded for bringing out a fresh auction notice dated 09.05.2014 as available at Annexure-7 in the W.P.(C) No.9323 of 2014 was filed by the petitioner challenging the fresh auction notice in connection with the very same Sand Sairat. The petitioner by filing the above writ petition again sought for a direction from this Court for quashing the fresh auction notice dated 09.05.2014 and at the same time directing the opposite party no.3 therein to extend the time of operation of Sairat for full term of one year following a decision of this Court in W.P.(C) No.28583 of 2013.

3. Per contra pending consideration of the writ petitions opposite parties 1 to 3 filed a counter affidavit in W.P.(C) No.6748 of 2014 inter alia contending therein that up set price for particular bid (Sand Sairat source at Talapada) for the year 2013-14 was fixed and approved by the Sub-collector, Puri @ Rs.4,00,000/-(rupees four lakhs) vide order dated 04.02.2013. Petitioner being found as the highest bidder, the bid was knocked down in favour of the petitioner vide order dated 15.03.2013. Opposite parties 1 to 3

admitted that the petitioner had deposited the balance bid price on 15.03.2013 along with the security deposits. These opposite parties contended that even though form "R" permitting the petitioner to operate the source with effect from 01.04.2013 by issuing form "R" on 21.03.2013 but the same could not be made effective as the Environmental Clearance was granted by Environment Impact Assessment Authority vide letter dated 28.08.2013 and even though the petitioner was asked to execute the agreement vide letters dated 16.12.2013 and 28.12.2013 but petitioner proceed with operate the source without executing any agreement till 31.03.2014. Considering the bid period to be from 01.04.2013 till 31.03.2014, the opposite parties submitted that the petitioner cannot be allowed to continue after 31.03.2014 and after expiring of bid period the opposite parties have already gone for another advertisement for auctioning the very Sand Sairat for 2014-2015 by giving of for a fresh advertisement. It is in these premises, the opposite parties claimed for dismissal of the 1st writ petition for there being no illegality committed by the opposite parties and in view of fresh advertisement, there is scope for interfering in the 1st writ as well as in the 2nd writ petition.

4. There is no denial to the fact that the period of bid involved was 2013-2014. There is no denial to the fact that the petitioner was found to be the highest bidder in the alleged auction process and bid was also knocked down in his favour by issuing a letter dated 15.03.2013. There is also no denial to the fact that the petitioner has deposited the balance bid amount on 15.03.2013 along with security deposits. Rule 36 of the OMMC Rules, 2004 speaks of validity of auction and Rule 53 of the above Rule speaks for an agreement in the matter between the parties, Rules 36 and Rule 53 of the OMMC Rule, 2004 reads as follows:-

> "Rule 36- Validity of action – The auction shall be valid for a maximum period of one year from the date of execution of auction agreement."
>
> "Rule 53 – Agreement – An agreement containing the terms and conditions of auction sale, quarrying operation etc.. shall be executed by the successful bidders and the competent authority as per provisions of the Registration Act, 1908 and the Stamp Act, 1899 within seven days from the date of payment of bid amount in full."

5. Reading of both the above provisions make it clear that the period of auction under the OMMC Rule, 2004 is for a maximum period of one year

from the date of execution of the auction agreement. Similarly, it is mandatory to have an agreement containing the terms and conditions of the auction sale between successful bidders and the competent authority shall have to execute the agreement within seven days from the date of payment of bid amount in full. The facts as borne from the writ petition as well as the counter affidavit makes it clear that even though the petitioner deposited the entire balance bid amount on 15.3.2013 along with other security deposits but the Tahasildar, Pipili-opposite party no.3 could be able to get a Clearance Certificate, as granted by State Environment Impact Assessment Authority only in the month of August, 2013. Further, from the pleading of the opposite parties in their counter affidavit, this Court is unable to find a reason as to if the Environmental Clearance Certificate was issued on 28.8.2013 then why the opposite parties took time till middle of the December to ask the petitioner to execute the agreement on 16.12.2013 as well as 28.12.2013 respectively. All these seems make it clear that even though the petitioner made the full deposit on the bid amount along with security deposit on 15.3.2013 but he had no scope to get into the execution of the agreement prior to 16.12.2013 at the minimum. Again all these facts make it clear that even though bid was knocked for one year but the petitioner has been allowed to operate the sand sairat at the maximum from 16.12.2013 till 31.3.2014. Further, in view of the provisions, as contained in Rule 53 of the OMMC Rule, 2004, under no circumstances the petitioner can be permitted to operate the sand sairat in absence of an agreement. Such matters has drawn the attention of this High Court again and again. In considering similar request involved in W.P.(C) Nos.889,890, 891 and 892 of 2012 decided by another Division Bench of this Court and as reported in **2012 (I) OLR-813**, after taking into consideration the provisions contained under Rule 36, Rule 48 and Rule 53 of the of OMMC Rules, 2004, this Court has come to the following finding:-

> "For the reasons stated supra, the period of delay in executing the lease documents shall be excluded from the period of lease. As per Rule 36 of the Rules, 2004, the lease period of one year from the date of agreement shall be given effect to. Hence, that period shall be added to the agreement and the petitioners shall be permitted to extract minor minerals from the sairats in question for a period of one year from the date of agreements. Therefore, it is open for the competent authority either to allow the petitioners to extract the

minor minerals for a period of one year from the date of agreements or to refund the bid amount to the petitioner on pro rate basis."

Similar matter was also considered by another Division Bench of this Court in W.P.(C) No.28583 of 2013 and taking into consideration of a decision dated 12.3.2014 taken by the State Government in such matters taking into consideration the submission of the Government Advocate that the date when all the statutory clearance are obtained by the successful bidder will be the date of agreement and it is under the circumstance, the Division Bench in the said case disposed the matter involved in W.P.(C) No.28583 of 2013 in approval of the judgment of this Court passed on 28.3.2012 in W.P.(C) No.5754 of 2011 came to hold that the prescribed one year validity of auction under the existing rule shall be reckoned from the date when all statutory clearance are obtained by the successful bidder.

6. During course of argument of both the above cases, parties have brought to the notice of the Court the proceeding of the State Government dated 12.3.2014. Perusal of the decision of the Government also makes it clear that Government in consideration of the fact that since the source is allotted through open public auction and substantial period is already lost for obtaining clearance, shorter tenure would encourage the miner to concentrate more on over exploitation/un-scientific mining without any measures being taken for protection of environment and/or safety of the workers and therefore decided to have longer period of validity for auction under the existing Rules. It is in this view, the State also decided to suitably extend the period of auction in terms of the observations made by this Court in the judgment dated 28.3.2012 passed in W.P.(C) No.5754 of 2011.

7. In view of the above and particularly, in view of the direction contained in W.P.(C) No.5754 of 2011 there remains no doubt in considering the validity of auction in the matter of sand quarry auction. Law is fairly well settled holding that the validity of the auction is to be at the minimum from the date of obtaining of statutory permissions. But keeping in view the fact involved in the case at hand, there is no denial that the statutory clearance for working out the quarry operation was obtained vide letter dated 28.08.2013. Further taking into consideration the submission of the opposite parties 1 to 3 in paragraph-9 of their counter that even though the petitioner was asked to execute the agreement vide letters dated 16.12.2013, 28.12.2013 and also taking into consideration the submission of the petitioner as made in paragraph-4 of the writ petition that he could be able to start operation of

sand sairat on 12.12.2013 in view of issuance of valid transit transportation pass under form "R" by the competent authority, the petitioner should be allowed to operate the quarry for one year from the date of asking to come forward for agreement on 16.12.2013 excluding the period he has already operated. Since we have directed the petitioner to operate the sairat for the balance period, the fresh auction process initiated vide Annexure-7 in W.P.(C) No.9323 of 2014 cannot be maintained and the same is hereby set aside.

8. Under the circumstances, both the writ petitions succeed to the extent direction given hereinabove. In view of our direction allowing the petitioner to operate the quarry for balance period, we direct the opposite parties to issue necessary order in favour of the petitioner indicating therein the period of operation for the sand sairat which order to be issued to the petitioner within a period of two weeks from the date of communication of this judgment. However, there shall be no order as to cost.

Writ petition allowed.

2015 (I) ILR - CUT- 728

SANJU PANDA, J.

W.P.(C) NO. 23942 OF 2013

KIRTAN BIHARI SAHOO @ KIRTAN SAHU .....Petitioner

.Vrs.

DILLIP KU. MAHARANA & ORS. .....Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-13, R-8

Impounding of document – Document in question is a "Chuktinama" which is an agreement but not a sale deed though consideration money was received and possession was delivered in presence of witnesses – Section 33 (1-a) was inserted to Section 33 of

the Indian Stamp Act, 1899 by way of amendment by the State of Odisha, stipulates that if a document is produced within three years from the date of its registration, the same is to be impounded, if it appears to the authority that it is not duly stamped – In this case the "Chuktinama" was executed on Dt.25.07.1990 and produced in the Court on Dt.10.05.2013 – Held, the impugned order rejecting the application to impound the document is correct and this Court is not inclined to interfere with the same. (Para 7)

Case law Referred to:-

2009 (I) CLR (SC) 752 : (Avinash Kumar Chauhan-V- Vijay Krishna Mishra)

For Petitioners - M/s. S.P. Mishra, Sunil Kumar Panda, K. Panda & P.C. Mishra.
For Opp.Party No.1 - M/s. Arijeet Mishra, S.K. Jena, S. Biswal, R. Mohanty.

Date of Judgment: 25.02.2015

JUDGMENT

S. PANDA, J.

This Writ Petition has been filed by the petitioner challenging the order dated 03.9.2013 passed by the learned Civil Judge (Senior Division), Kenojhar in C.S No.190 of 2010 rejecting an application filed to impound a document after receiving the penalty and stamp duty.

2. The brief facts of the case are that opposite party no.1 as plaintiff filed C.S No.190 of 2010 before the learned Civil Judge (Senior Division), Keonjhar for declaration of right, title, interest and for permanent injunction over Suit Schedule-A property in respect of Plot No.482 under Khata No.58 measuring an area of Ac.0.25 decimals of Mouza – Alanapada. In the plaint it was stated that the plaintiff has purchased the said property by Registered Sale Deed dated 21.9.2007 and the Records of Right was issued in his favour in Mutation Khata No.90/36. However, the defendants are obstructing him to go to his land by putting a fence in front of it having no right over the suit property.

3. After receiving notice the petitioner-defendant no.2 appeared in the suit and filed written statement inter alia taking a stand that Suit Schedule-A property was recorded in the name of one late Bhikari Barik. After his death,

his widow Soudamini and two sons alienated the property in favour of one Bidyadhar Mahanta in the year 1977 and possession was delivered to the purchaser through the father guardian Kulamani Mahanta. The purchaser who is defendant no.7 sold the property to one Rebati Sahu, wife of the present petitioner on 25.7.1990 by executing a 'Chuktinama' and delivered possession after receiving the full consideration amount. Since then the petitioner is peacefully enjoying the same. It was also stated that the plaintiff has intentionally suppressed material facts regarding Civil Suit No.38 of 2010 filed by him against one Gitanjali Mahanta to declare the Registered Sale Deed No.1848 dated 11.12.2009 as null and void on the ground of misrepresentation of facts and to declare that he is the sole owner of the property. The petitioner also raised valuation of the suit property as the suit property was valued at Rs.3,60,000/- in the Sale Deed executed in favour of Gitanjali Mahanta.

4. While matter stood thus the petitioner has filed an application on 10.5.2013 under Order 13, Rule 8 C.P.C read with under Section 33 of the Indian Stamp Act, 1899 to impound a document i.e. a 'Chuktinama' dated 25.7.1990 and to mark the same as exhibit. It was also stated that as the document was not properly stamped, the petitioner is ready and willing to pay proper stamp duty, if he will be directed by the Court. The plaintiff filed his objection to the said application stating that the alleged 'Chuktinama' is a forged and fabricated document. The court below after hearing the parties by the impugned order rejected the said application with a finding that the document is not coming under the purview of Section 33 (1-a) of Stamp Act with Orissa Amendment.

5. Learned counsel appearing for the petitioner submitted that in view of Section 33 of the Indian Stamp Act, 1899 when a document was produced before the court / authority a duty caste upon the said authority, if it appears to him that the same is not duly stamped to impound the same. However, the court below without applying its judicial mind rejected the application by the impugned order which need be interfered with. In support of his contention he has relied on the decision in the case of **Avinash Kumar Chauhan Vs. Vijay Krishna Mishra** reported in **2009 (I) CLR (SC) 752.**

6. Learned counsel appearing for opposite party no.1 however supported the impugned order and submitted that the document in question was executed in the year 1990 and as the period of limitation was over to

impound the same, the court below rightly rejected the application. Hence the impugned order need not be interfered with.

7. Considering the rival submission of the parties and after going through the materials available on record, it appears that it is not disputed that the so-called document 'Chuktinama' is an agreement and not a Sale Deed though consideration amount was received and possession was delivered in presence of witnesses. The executant had put his signature on the Revenue Stamp and witnesses have also put their signature. The document was produced before the court below on 10.5.2013 which is beyond the period of limitation. The Apex Court in the case of **Avinash Kumar Chauhan** (supra) has not considered the period of limitation as the document in question in the said case as produced before the court was of the year 2007 whereas the same was executed in the year 2006. Law is well settled that each case is to be considered on its own facts and circumstances and a little difference of facts have an impact on the decision. The court below has discussed regarding the period of limitation as stipulated under the Indian Stamp Act, 1899 as well as its amendment in respect of State of Odisha wherein sub-section (1-a) was inserted to Section 33 of the Principal Act, which stipulates that within three years from the date of registration of the instrument, on production of the same it is to be impounded if it appears to the authority that the instrument is not duly stamped.

8. In view of the discussions made hereinabove and as there is no error apparent on the face of the record, this Court is not inclined to interfere with the impugned order in exercise of the jurisdiction under Article 227 of the Constitution of India. Accordingly this Writ Petition along with Misc. Case is dismissed

Writ petition dismissed.

2015 (I) ILR - CUT- 732

SANJU PANDA, J.

C.M.P. NO. 11 OF 2015

M/S. BHARAT MOTORS & ORS. ……..Petitioners

.Vrs.

RAMESH KUMAR BHAWASINKA ……Opp.Party

ARBITRATION & CONCILIATION ACT, 1996 - S. 8.

Reference to arbitration – Failure of the applicant to file original arbitration agreement or duly certified copy there of – Non-compliance of the mandatory provision – Impugned order rejecting application U/s.8 of the Act is affirmed.

In the present case the lease period has already been over and the plaintiff has already issued a notice U/s. 106 of T.P. Act to the defendants terminating the tenancy – The lessee has no further right over the suit properties – Held, this Court is not inclined to interfere with the impugned order. (Paras 8,9)

Case laws Referred to:-

1.AIR 1972 SC 819 : (Bhawanji Lakhamshi & Ors.-V- Himaltal Jamnadas Dani & Ors.)
2.AIR 1973 SC 508 : (Badrilal-V- Municipal Corporation of Indore)
3.AIR 2008 SC 1016 : (Atul Singh & Ors.-V- Sunil Kumar Singh)
4.(2003) 5 SCC 531 : (Sukanya Holdings Pvt. Ltd.-V- Jayesh H. Pandya & Anr.)

For Petitioners - M/s. Bhaktahari Mohanty, B. Mohanty, R.K. Nayak, T.K.Mohanty, P.K.Swain, M. Pal.
For Opp.Party - M/s. Soumya Mishra, S.K. Sahoo, D.Priyanka, B.S. Panigrahi.

Date of Judgment : 25.02.2015

JUDGMENT

S.PANDA, J.

This Civil Miscellaneous Petition has been filed by the petitioners challenging the order dated 09.12.2014 passed by the learned Senior Civil

Judge, 1st Court, Cuttack in C.S No.6785 of 2014 rejecting the application filed under Section 8 of the Arbitration and Conciliation Act, 1996.

2. The brief facts of the case are that the opposite party as plaintiff filed C.S No.6785 of 2014 before the learned Civil Judge (Senior Division), 1st Court, Cuttack against the petitioners for eviction from the suit premises. In the plaint the plaintiff *inter alia* pleaded that he is the owner of Hal Plot No.558/834 corresponding to Khata No.38/13 of Mouza – Machua Bazar, Cuttack bearing Holding No.843 comprising an area of Ac.0.200 decimals out of an area of Ac.0.630 decimals in a compact area consisting of four rooms with other pucca constructions under Cuttack Municipal Corporation. The suit premises was given on rent by a lease agreement executed on 28.11.1946 in favour of one Ganesh Lal Didwania, one of the Director of petitioner no.1-M/s Bharat Motors for utilization of the land and the building for showroom garage, workshop etc. The said rent agreement was for a period of 21 years w.e.f. 01.12.1946. After completion of the period of lease agreement the Partners of M/s Bharat Motors started making correspondences with the plaintiff who became the owner of the property by then for fresh agreement of tenancy. Accordingly a tenancy agreement was executed between the plaintiff in one hand and M/s Bharat Motors represented through its Partners on 19.7.1985. The aforesaid agreement was for a period of four years w.e.f. 01.8.1984 till 31.7.1988 @ Rs.2,100/- as monthly rent with increase of 20 % after expiry of the lease period subject to execution of fresh agreement. Subsequently on 28.2.1998 another agreement was executed for the period from August, 1988 to July, 1992 @ Rs.2,520/- per month and from August, 1992 to July, 1996 @ Rs.4,000/- per month. On 06.4.1998 another agreement was executed for the period from August, 1996 to July, 2000 @ Rs.5,000/- per month and from August, 2000 to July, 2004 @ Rs.6,000/- per month. On expiry of the aforesaid agreement dated 06.4.1998 another house rent agreement was executed between the parties on 06.8.2007 for the period from August, 2004 till March, 2007 @ Rs.6,000/- per month and from April, 2007 to July, 2008 @ Rs.10,000/- per month. In the said agreement it was stipulated that petitioner no.1 tenant would continue to occupy and enjoy the plot of land, showroom, workshop and other premises situated on the suit plot till completion of the period of tenancy. While matter stood thus prior to completion of the aforesaid period of tenancy the plaintiff on 02.7.2008 requested petitioner no.1 to vacate the premises and handover possession of the schedule premises on or before 01.8.2008. After receiving the said letter, petitioner no.1 through one of his Partner written a letter to the plaintiff

requesting him to enter into a fresh negotiation for execution of a new agreement and expressed their intention to continue with the tenancy as they are not in a position to vacate the same and they went on paying Rs.10,000/- towards monthly rent which was received by the plaintiff on protest. The tenancy agreement expired on 31.7.2008 and prior to that the plaintiff issued letter to the petitioners requesting them to give vacant possession of the premises but in spite of such letter the petitioners continued therein and went on sending Rs.10,000/- per month towards monthly rent though the monthly rent of the premises in question was much more. Since the petitioners intention not to accede to the request of the plaintiff was clear, the plaintiff sent a notice under Section 106 of T.P Act through his lawyer on 07.3.2014 for terminating the tenancy and to vacate the premises of the same on or before 31.3.2014. The petitioners in spite of receipt of the notice gave as usual evasive reply for which the plaintiff was constrained to file the suit for eviction of the petitioners.

3. After receiving notice the petitioners-defendants appeared in the suit and before filing their written statement they filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 to refer the matter for Arbitration. In the said application they have taken a stand that in the concluding paragraph of the agreement dated 06.8.2007 entered into between the parties it is stipulated that any dispute between the Tenant and the Landlord arising out of this agreement would be referred to the Arbitration of Sri K.P.Mishra, Advocate, Tulsipur, Cuttack, whose decision would be final and binding on both the parties.

4. The plaintiff filed his objection to the said application stating that none of the terms and conditions of the agreement dated 06.8.2007 survives after the period of tenancy indicated in the said agreement is over. The tenancy was till 31.7.2008 and thereafter the period of tenancy referring to the agreement has not been extended between the parties. Notice of termination of the agreement has been issued to the tenant. A tenant holding over after cessation of the tenancy agreement cannot refer to the non-existent agreement for the purpose of referring the matter for Arbitration. The application has been filed with a mala fide intention in order to prolong the proceeding without any justifiable reason. The defendants are no more the tenants under the plaintiff and are the trespassers in respect of the premises in question and are liable to be evicted in accordance with law. The Civil Court is competent to pass a decree of eviction under the T.P Act.

5. The court below after hearing the parties by the impugned order rejected the application with a finding that the defendants as per the plaint averments are trespassers and it is not a fit case where court should exercise its power as provided under Section 8 of the Arbitration and Conciliation Act, 1996.

6. Learned counsel appearing for the petitioners submitted that in view of the clause stipulated in the agreement dated 06.8.2007 entered into between the parties the matter should be referred for Arbitration instead of continuation of the suit. He further submitted that the petitioners continued to pay the monthly rent to the plaintiff which was received by him. In support of his contention he has relied on the decisions reported in **AIR 1972 SC 819, AIR 1973 SC 508** and **(2011) 14 SCC 66.**

6.1 In the case of **Bhawanji Lakhamshi and others Vs. Himatlal Jamnadas Dani and others** reported in **AIR 1972 SC 819** the Apex Court held that acceptance of rent may waive claim of landlord to evict the tenant.

6.2 In the case of **Badrilal Vs. Municipal Corporation of Indore** reported in **AIR 1973 SC 508** the Apex Court held that the appellant being merely a tenant by sufferance there is no need for any notice before he could be evicted.

6.3 In the case of **SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Pvt. Ltd.** the Apex Court held that an arbitration agreement in an unregistered but compulsorily registrable document could be acted upon and enforced for the purpose of dispute resolution by arbitration.

7. Learned counsel appearing for the opposite party supported the impugned order and submitted that none of the terms and conditions of the agreement dated 06.8.2007 survives after the period of tenancy indicated in the said agreement is over. He further submitted that the petitioners filed the application with a mala fide intention to prolong the proceeding and to harass the opposite party. Hence the impugned order need not be interfered with as the Civil Court is competent to adjudicate the matter in dispute between the parties.

8. Law has been well settled by the Apex Court in the case of **Atul Singh and others Vs. Sunil Kumar Singh** reported in **AIR 2008 SC 1016** that an application under Section 8 (1) of the Arbitration and Conciliation

Act, 1996 shall not be entertained unless it accompanied by the original arbitration agreement or a duly certified copy thereof and Court has to first decide whether there was an agreement between the parties to refer the matter for arbitration before filing of their first statement. Further in the case of **Sukanya Holdings Private Ltd. Vs. Jayesh H.Pandya and another** reported in **(2003) 5 SCC 531** it was held that where a suit is commenced in respect of a matter which falls partly within the arbitration agreement and partly outside and which involves parties some of whom are parties to the arbitration agreement while some are not so Section 8 is not attracted. The words 'a mater' in Section 8 indicate that the entire subject matter of the suit should be subject to arbitration agreement. There is no provision in the Act for bifurcating the suit into two parts, one to be referred to arbitration for adjudication and the other to be decided by Civil Court.

9. In view of the aforesaid settled position of law and after going through the materials available on record, it appears that the plaintiff has already issued a notice under Section 106 of T.P Act through his lawyer to the defendants terminating the tenancy. Since the lease period has already been over, the lessee has no further right over the suit properties. As there is no error apparent on the face of the record, this Court is not inclined to interfere with the impugned order 09.12.2014 passed by the learned Senior Civil Judge, 1st Court, Cuttack in C.S No.6785 of 2014 in exercise of the jurisdiction under Article 227 of the Constitution of India. Accordingly this Civil Miscellaneous Petition along with Misc. Case is dismissed.

Petition dismissed.

2015 (I) ILR - CUT- 737

B. P. RAY, J.

F.A. NO. 59 OF 1980

SRIMATI KANAKABALA SWAIN (DEAD), AFTER HER, HER L.RS. SANDHYARANI DEY AND OTHERS. .....Appellants

.Vrs.

STATE OF ORISSA AND ANOTHER .....Respondent

LIMITATION ACT, 1923 - ART- 58

Suit for declaration – plaintiff was the lessee in respect of the suit land – After vesting the lease was cancelled by the collector U/s 5 (i) of the OEA ACT without notice to him – Trial Court dismissed the suit on the ground that it was not filed within three years from the date of cancellation of the lease – Hence this appeal – Since no notice was served on the plaintiff in the proceeding U/s 5(i) of the OEA Act and there was non-compliance of mandatory procedure as required under law the order passed U/s 5 (i) of the Act is nothing but a nullity and a decree for setting aside the same is not necessary under law - Learned trial Court is erred in holding that the suit is barred by limitation – Held, the impugned judgment and decree are setaside and the relief prayed in the suit is allowed.

For Appellants - Mr. N.K. Sahu.

For Respondents -Miss. S.Mishra, Addl. Standing Counsel

Date of hearing :14.11.2014
Date of judgment :14.11.2014

JUDGMENT

B.P. RAY, J.

This appeal has been filed by the appellants challenging the judgment and decree dated 21.11.1979 and 28.11.201979 respectively passed by the learned Subordinate Judge, Balasore in T.S. No. 95 of 1974-I in dismissing the suit.

2. The original plaintiff – Jagadish Chandra Swain, father of the present substituted appellants, daughter and sons, appellants 2 and 3 filed the suit, being O.S. No. 95 of 1974-I in the court of the learned Subordinate Judge, Balasore for declaration that the plaintiff was the occupancy tenant in respect of the suit land and the proceeding under section 5 (i) of the Orissa Estate Abolition Act (in short, 'the Act') being void and nullity, did not affect their right.

3. The suit land measures Ac.10.00 and was in the Anabadi Khata within the Zamindary of defendants 3, 4 and 5, namely, Jagdish Kumar Mandal, Manindra Kumar Mandal and Dinendra Kumar Mandal. They inducted Jagdish as tenant in respect of the suit land and have executed a registered lease deed on 21.5.1948. The father of the plaintiff and after his death, the plaintiffs and their mother were in cultivating possession thereof as a tenant and were paying rent to the Zamindar. In view of the fact that the original plaintiff - Jagdish Chandra Swain was deaf and dumb and mentally insane, he filed the suit represented by mother guardian. After the vesting of the Estate under the Estate Abolition Act, the original plaintiff got PARCHA in his favour. The landlord had only cultivated a small portion of the said anabadi land prior to the lease deed, but after the lease, the plaintiff's father reclaimed all the lands and had been cultivating the same before the date of vesting and on the date of vesting. Thus, he acquired rights under Section 61 of the Orissa Tenancy Act as a sthitiban raiyat in respect of Lot No.1 of the suit schedule land. After vesting of Estate, the plaintiff having not received the PARCHA for all the lands leased out to him, on enquiry, he came to learn that a case under Section 5(i) of the Act had been initiated by the Tahasildar whereunder lease had been cancelled on 23.8.1971 and the plaintiff could know about such cancellation only on 7.6.1974.

4. The contention of the plaintiff in the suit was that the proceeding under Section 5(i) of the Act was illegal and the order passed therein is unenforceable and without jurisdiction. The proceeding against him is also void due to non-observance of rules of natural justice. No notice was served on Jagdish or his guardian nor they have been called upon to give show cause or to give evidence in support of the same. The plaintiff was a born idiot and, as such, the Collector passed the impugned order in a mechanical manner although no document was filed on behalf of the lessee. He falsely recorded that registered lease deed and rent receipts were filed in the said proceeding. In view of the collusion of the Zamindars with the State Government, the

plaintiff had no knowledge of the proceeding till three years of cancellation. Thus, the O.E.A. Collector acted beyond his jurisdiction and passed order cancelling the lease on 23.8.1971 in Misc Case No. 273/304 of 1970/71 without following the procedure laid down in law on a finding that the lease has been created after 01.01.1996 by the ex-landlords to evade vesting and to get higher compensation. It was submitted by the plaintiff that such finding was without any material on records. There was no valid proceeding under Section 5(i) of the Act and in any view of the matter, such proceeding will not affect the occupancy right of the plaintiff in respect of the suit land. The plaintiff being in possession of the suit land as an occupancy raiyat/sthitiban tenant and his possession over the suit land being threatened, the plaintiff filed the suit for the relief that the proceeding under Section 5 (i) of the Act is without jurisdiction, unenforceable and illegal and, as such, liable to be ignored and for declaration of his occupancy right over the suit land. The cause of action for the suit has been stated to be on 7.6.1974 when the plaintiff could know about the order of cancellation under the aforesaid provisions of the Act.

5. The Tahasildar – defendant no. 2 did not file any written statement. The Collector, Balasore – defendant no. 1 filed written statement, though both of them contested the suit. The suit was resisted on the following grounds:

(i) There was no cause of action;

(ii) The suit was not maintainable;

(iii) The suit is barred by limitation;

(iv) The suit having been filed beyond three years from the final order i.e., 23.08.1971 under section 5(i) of the Act, the suit is barred by limitation. The suit is also not maintainable in view of the bar contained in Section 39 of the Act;

(v) The lease being prima facie ineffective and void, the same being executed after 1.1.1946 and as such there was no valid lease. The defendants having denied that the ex-intermediaries ever exercised possession over the Anabadi lands, the registered lease deed said to have been granted in favour of the plaintiff is a fake document and only a paper transaction to create evidence.

(vi) The possession of the plaintiff was also denied.

The further case of the defendants-State is that the cause of action for the suit has been manipulated though there is nothing to support that the cause of action for filing of the suit was accrued on 07.06.1974. The land measuring Ac.0.01 decimal in village – Isannagar has been included in the plaint in order to confer jurisdiction and the suit for declaration was fictitious without filing appeal against the order under Section 5(i) of the Act.

6. On the basis of the aforesaid rival pleadings of the parties, the trial court framed as many as ten issues, out of which, issue nos. 2, 6, 8 and 9 were taken up together, such as, the maintainability of the suit as to whether the suit is barred under Section 39 of the Act, whether the registered sale deed is legal, valid and operative in law and, whether the plaintiff has any right, title, interest and possession over the suit property.

7. On the aforesaid issues, the trial court has given the following findings:

The plaintiff has not been able to prove acquisition of occupancy right in respect of the suit land under Section 61 of the Orissa Tenancy Act. But as regards the plaintiff's alternative claim of acquisition of occupancy right over the suit land by registered lease deed dated 11.4.1948 (Ext. 1) and issuance of rent receipts (Exts.2 to 2/g) by the ex-Intermediaries and after vesting by the State, the trial court found that there was no challenge to the plaintiff's allegation that he was in possession over the suit properties. There was nothing on record to show that the lease deed was illegal and invalid in the eye of law. The defendants have not adduced any evidence at all to that effect. Rent was being paid by the lessee to the ex-intermediary under Exts.2 to 2/d and to the State after vesting under Exts.2/e to 2/g. Acceptance of rent by the State after vesting of the estate shows the creation of tenancy. Therefore, there is no doubt that the plaintiff has acquired occupancy right, though not under Section 61 of the Orissa Tenancy Act, but under the Orissa Estates Abolition Act by virtue of the lease and on acceptance of rent by the ex-intermediaries and after vesting by the State.

So far as issue nos. 2 and 6 are concerned, the trial court gave the following findings:-

(a) the record does not show if any notice on the lessee was, in fact, served;

(b) Jamini Kanta Swain appeared two days after the order of issue of notice. It cannot be said that notice was served as said Jamini

Kanta Swain had no authority and no such authority was produced by him for his appearance on behalf of the lessee.

(c) The order sheet dated 2.6.1971 shows that the lessee was a minor and infirm.

Thus, on going through the Ext. 6 series, the evidence of P.W. 3 and Ext. B series, the evidence of P.W. 2, it was held that Jamini Kanta Swain and Brajendra Nath Pradhan were in inimical term. The plaintiff was not minor nor an idiot though he was deaf and dumb and had deformity of limbs since birth. Thus, it was found "if it came to the notice of the Collector that the lessee was a minor and infirm, it was incumbent upon him to appoint his legal guardian, which has not been done. No authority was demanded by the Collector from Jamini Kanta Swain ad Brajendra Nath Pradhan as to on what authority, they appeared for Jagdish Chandra Swain. Thus, it was held that Jamini Kanta Swain and Brajendra Nath Pradhan had no authority to act on behalf of the plaintiff. Thus, on discussion of the law on the subject and the evidence, both oral and documentary, it was found ultimately that mandatory provisions of law have not been followed in the proceeding under Section 5(i) of the Act and the Civil Court is competent to go into the question and, therefore, Section 39 of the Act is not a bar and the suit is maintainable.

8. While deciding Issue No. 5, it was held by the trial court that the suit is for declaration. Articles 56, 57 and 58 of the Limitation Act relate to suits for declarations and the present suit comes under Article 58 of the Limitation Act, which is residuary Article. The period of limitation is three years, when the right to sue first accrues. In the present case, when the proceeding and the final order passed by the Collector under Section 5(i) of the Act was within the knowledge of the lessee and her mother-guardian, the suit should have been filed within three years from the date of order i.e., 23.08.1971. Therefore, the limitation for filing of the suit would run from the date the order passed by the Collector. The suit having been filed on 17.12.1974 by the plaintiff, the suit is clearly barred by limitation.

9. Though the trial court recorded the finding that the plaintiff has acquired the right of occupancy over the suit land on the basis of the lease deed and on payment of rent to the ex-intermediary and thereafter to the State, but dismissed the suit holding that the same is barred by limitation.

10. Mr. N.K. Sahu, learned counsel for the appellants assailing the aforesaid finding of the trial court strenuously urged that the learned court

below has committed serious error of law by recording the finding that the suit is barred by limitation, though the learned trial court on assessment of evidence has come to the conclusion that, in the proceeding under Section 5(i) of the Act, the mandatory provision of law has not been followed as no notice was ever served on Jagdish before passing of the order of cancellation on 18.03.1971 cancelling the lease. It is submitted that when an order is void ab initio, no decree for setting aside the same is necessary as the same is non est in the eye of law being a nullity. Mr. Sahu further submits that under Section 5(i) of the Act, notice to the parties concerned as a condition precedent for cancellation of the lease is mandatory. In the purported proceeding under Section 5(i) of the Act, such procedure having not been followed, the purported decision arrived at by the Collector cancelling the lease is a nullity and, therefore, there was no need to challenge such order while filing the suit for declaration of occupancy right of the plaintiff. If an order is a nullity from its very inception, no order is necessary to declare such order as void and the learned trial court has completely misdirected itself in coming to such an erroneous finding and, as such, the impugned judgment and decree passed by the trial court is liable to be set aside.

11. In support of the aforesaid contention, learned counsel for the appellants relies upon the decisions in the cases of ***Collector, Cuttack v. Atun Chandra Das and another,*** ILR 1972(1) Cuttack 753, ***Krupasindhu Misra (and after him) Biranchi Prasan Mishra and another v. Gobinda Chandra Misra and others***, 50(1980) CLT 393 (F.B.), ***Rankanidhi Sahu v. Nanda Kishore Sahu***, AIR 1990 Orissa 64, ***Ajudh Raj and others v. Moti, S/O. Mussadi***, AIR 1991 SC 1600 and ***Dewan Chand Chhaju Mal v. Raghbir Singh Milkha Singh***, AIR 1965 Punjab 502.

12. On the other hand, learned counsel for the State submits that the lease having been granted admittedly after one 1.1.1946 inducting the appellants as tenants, the O.E.A. Collector has rightly set aside the lease by entertaining the proceeding under section 5(i) of the Act. However, the learned counsel for the State is unable to satisfy this Court that before the passing the order under section 5(i) of the Act, the Collector has followed the fundamental principle in the matter of issuing notice to the plaintiffs-appellants to file their show cause in the matter. In the case of Collector, Cuttack (supra), this Court has held that under Section 5(i) of the Act, notice to the parties concerned is condition precedent for cancellation of lease is mandatory. Under the statutory rules made under the Act the forms of notice have been

prescribed for the lesser and also of the lessee. The Division Bench of this Court ultimately held that the proceeding under Section 5(i) of the Act was not valid as contemplated under law so as to raise a bar under Section 39 of the Act.

In the case of Krupasindhu Misra (and after him) Biranchi Prasan Mishra and another (supra), the Full Bench of this Court, while approving the cases of Baikuntha Das v. Smt. Sabitri Devi and another and Lalbehari Patnaik v. Saraswati Ray and others, held as follows:-

> "……..It is only after such public notice is given, the Collector would get jurisdiction to proceed to dispose of the claim case. When an Act enjoins upon a specified authority that a particular act has to be done in a particular manner so that it may have jurisdiction to act further in the matter, the Act must be done in that manner in order to be considered valid, and confer on the authority such further jurisdiction"

In the case of Rankanidhi Sahu (supra), this Court in paragraphs – 16 and 17 of the judgment, on the similar facts, held that Article 59 will apply when a suit is filed for cancellation or for setting aside a document which is not void ab initio. After a document is void ab initio and is an illegal document from its very inception, it is not required either to cancel or to set aside by filing a suit, because according to law, such a document does not exist.

In the case of Ajudh Raj and others (supra), the Hon'ble apex Court held in paragraphs –5 as follows:-

> "The principle for deciding the question of limitation in a suit filed after an adverse order under a Special Act is well settled. If the order impugned in the suit is such that it has to be set aside before any relief can be granted to the plaintiff, the Provision of Article 100 will be attracted and if no particular Article of the Limitation Act is applicable, the suit must be governed by the residuary Article 113, prescribing a period of 3 years. Therefore, in a suit for title to an immovable property which has been the subject matter of proceeding under the Special Act if an adverse order comes in the way of the success of the plaintiff, he must get it clear before proceeding further. On the other hand, if the order has been passed without jurisdiction, the same can be ignored as nullity, that is, nonexistent in the eye of

law and it is not necessary to set aside; and such a suit will be covered by Article 65.

14. In the case of Ajudh Raj and others (supra), the proposition of law as settled by the Hon'ble apex Court in paragraph-5 of the judgment fully applies to the facts of the present case.

15. Keeping in view the position of law as settled by this Court and the Hon'ble apex Court referred to above and on examination of the evidence available on record, this Court found that no notice was ever served on the lessee in the proceeding under Section 5(i) of the Act, which was initiated against the plaintiff. One Jamini Kanta Swain had appeared in the aforesaid proceeding two days after the order was passed for issuance of notice. No document was produced before the Court that said Jamini Kanta Swain had obtained any authority to represent the lessee on his behalf. Apart from this, the trial court, on examining the record has specifically recorded the finding that "If it came to the notice of the Collector that the lessee was a minor and infirm, it was incumbent upon him to appoint his legal guardian, which has not been done. No authority was demanded by the Collector from Jamini Kanta Swain and Brajendra Nath Pradhan as to on what authority they appeared for Jagdish Chandra Swain".

16. In this factual position, this Court holds that no notice was ever served on the plaintiff and the mandatory procedure as required under law was not complied with before passing of the order of cancellation dated 18.03.1971. Therefore, the order passed by the Collector under Section 5(i) of the Act is nothing but a nullity and a decree for setting aside the same is not necessary under law. The trial court is completely erred in law in holding that the suit is barred by limitation, inasmuch as the suit was filed beyond three years from the date of the order of cancellation passed by the Collector in the proceeding under Section 5(i) of the Act.

17. In the result, the appeal is allowed. The impugned judgment and decree dated 21.11.1979 and 28.11.1979 respectively passed by the learned Subordinate Judge, Balasore in T.S. No. 95 of 1974-I is set aside and the relief prayed for in the suit is allowed. The parties shall bear their respective costs.

Appeal allowed

2015 (I) ILR - CUT-745

S. C. PARIJA, J.

F.A.O. NO. 202 OF 2013

UNITED HEAD, ICICI. LOMBARD GENERAL INSURANCE CO. LTD. .....Appellant

.Vrs.

BHASKAR KHADIA & ANR. .....Respondents

MOTOR VEHICLES ACT, 1988 - Ss. 2 (28) (44) (46), 146, 147.

Trailer attached to tractor – Injured-claimant traveling in the trailer as a labourer – Tractor was insured but not the trailer – Compensation awarded – Insurance company challenged the award on the ground that since trailer was not insured separately award is liable to be set aside – Tractor, though a motor vehicle is not constructed to carry any load or passenger – In the other hand trailer is a detachable container having no independent driving system and it is not driven by a separate driver holding a licence so question of driving a trailer in a rash and negligent manner does not arise – No provision that the trailer is to be separately insured to cover the third party risk – Held, trailer is not required to be insured separately – No infirmity in the impugned award fixing liability on the Insurance Company.

Case laws Referred to:-

1.2007 (3) TAC 20 (SC) : (Oriental Insurance Company Ltd.-V- Brij Mohan & Ors.)
2.2008 (1) TAC 6 (SC) : (United India Insurance Co. Ltd.-V- Serjerao & Ors.)
3.2004 ACJ 1881 : (Gunti Devaiah & Ors.-V- Vaka Peddi Reddy & Ors.)
4.2008 (2) TAC 582 (AP) : (United India Insurance Co.Ltd., Kadapa District -V- Koduru Bhagyamma & Ors.)

For Appellant - M/s. Adam Ali Khan
For Respondents - M/s. Kalpataru Panigrahi

Date of Order : 05.02.2015

ORDER

S. C. PARIJA, J.

Heard learned counsel for the parties.

This appeal by the appellant-Insurance Company is directed against the judgment/award dated 05.02.2013, passed by the Commissioner for Employee's Compensation, Sambalpur, in W.C.Case No.38 of 2006, awarding an amount of Rs.2,19,156/- as compensation, to be deposited within thirty days, failing which interest @ 12% per annum shall be payable from the date of the judgment, till the date of deposit.

Learned counsel for the appellant-Insurance Company submits that as the trailer attached to the tractor bearing no.OR-15-J/3678 was not insured with the appellant-Insurance Company and only the risk of the driver of the tractor was covered under the policy, the injured-claimant (Bhaskar Khadia), who was travelling in the trailer as a labourer, was not covered under the policy. It is submitted that as no premium has been paid covering the risk of the coolie or labourer travelling in the trailer, the Commissioner erred in fixing the liability on the appellant to pay the compensation amount awarded. It is accordingly submitted that as the trailer attached to the tractor was not insured and admittedly the injured labourer was travelling in the said trailer, no liability could have been saddled on the Insurance Company.

Learned counsel for the appellant has relied upon decisions of the apex Court in ***Oriental Insurance Company Ltd. v. Brij Mohan and Others***, 2007(3) TAC 20 (S.C.) and ***United India Insurance Company Limited v. Serjerao and Others***, 2008 (1) TAC 6 (S.C.), in support of his contention that the trailer in which the injured labourer was traveling, being not covered under a policy of insurance, no liability can be saddled on the appellant-Insurance Company.

Learned counsel for the appellant further submits that as the injured claimant had not filed the injury report and no doctor has been examined to certify the extent of disability suffered by the claimant and consequential loss of his earning capacity, the assessment of the compensation amount is not proper and justified. It is further submitted that the award of default interest @ 12 % per annum from the date of award is also not proper and justified.

Learned counsel for the claimant-respondent no.1, with reference to the insurance policy bearing No.3008/ 104337/ 11/ 000, issued in respect of the offending tractor, which was valid from 24.10.2005 to 23.10.2006, covering the date of the accident, submits that as the Insurance Company had

collected premium of Rs.100/- towards legal liability to a coolie/labourer, it cannot deny its liability on the technical ground that the trailer attached to the tractor was not insured. It is submitted that as the tractor is not constructed to carry any passenger and being aware of such fact, the Insurance Company has insured the same and collected premium covering the risk or liability of a labourer or coolie, the plea of the Insurance Company cannot be accepted. In this regard, learned counsel for the claimant submits that as the trailer in itself is not a 'motor vehicle' and being attached to a tractor becomes a goods vehicle, there is no provision requiring the trailer to be separately insured to cover the third party risk.

Learned counsel for the claimant-respondent no.1 has relied upon a decision of the Andhra Pradesh High Court in **Gunti Devaiah and others v. Vaka Peddi Reddy and others**, 2004 ACJ 1881, wherein the Hon'ble Court has held that the insurance of a trailer is not mandatory requirement under the provisions of Section 146 of the Motor Vehicles Act and if the prime mover/motor vehicle/tractor is insured and the negligence of the driver of the said motor vehicle is established, the compensation is payable by the owner of the tractor and the insurer, irrespective of the fact that whether the victim suffers injury with the tractor or with the trailer.

Learned counsel for the claimant has also relied upon a Division Bench decision of the Andhra Pradesh High Court in ***United India Insurance Co.Ltd., Kadapa District v. Koduru Bhagyamma and Others,*** 2008 (2) TAC 582 (A.P), where the Hon'ble Court, while approving the decision in *Gunti Devaiah* (supra), has held as under :-

> "So by the said definition, the Motor Vehicles are those vehicles which are mechanically propelled and adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source. Under sub-section (44) of Section 2 of the Act tractor is defined as a Motor Vehicle which is not itself constructed to carry any load. Tractor is a special type of Motor Vehicle which cannot by itself carry any load, but all the same it is a Motor Vehicle. Sub-section (46) of Section 2 of the Act defines trailer as a vehicle which is intended to be drawn by a Motor Vehicle. So if sub-sections (28), (44) and (46) of Section 2 of the Act are read together, it becomes clear that a trailer is not a Motor Vehicle, but becomes part of a Motor Vehicle when it is drawn by a Motor Vehicle because sub-section (28) of Section 2 of the Act makes a

special reference to a trailer and trailer cannot be moved on roads except by a propulsion transmitted thereto from a Motor Vehicle. Therefore, in our view, a trailer attached to a Motor Vehicle is a part of the Motor Vehicles itself."

On a perusal of the impugned award, it is seen that the learned Tribunal while taking note of the decision in *Gunti Devaiah* (supra) has come to hold as under :-

"xxx. The question arises whether the trailer is required to be insured separately for making Insurance Company liable. The trailer is a detachable container which does not have any independent driving system and is not driven by a separate driver holding a licence. The question of driving trailer in a rash and negligent manner would not arise. The trailer is only a vehicle not a motor vehicle. When the trailer is attached to the tractor, it becomes a tractor-trailer. There is no provision requiring the trailer to be separately insured to cover the third party risk. The reasons are obvious that it cannot be driven by the driver as in the case of motor vehicle or tractor. If the victim is hit by the trailer on account of the rash and negligent manner of the driver of the tractor, can it be said that the owner of the trailer will be liable for the compensation. But for the negligent driving of the prime mover or tractor or the motor vehicle, if the accident occurred, whether the trailer is insured or not, the owner of the motor vehicle will be alone responsible for causing accident and liable for compensation. If the trailer is insured, it can not be construed as insurance of a motor vehicle making the owner of the trailer liable for compensation under the principle of tortuous liability. The offending tractor was carrying the trailer along with employees and though trailer is not insured in as much the negligence is attributed to the driver of the tractor which was insured by the Insurance Company, it is liable for payment of compensation as it covers third party risk."

Coming to the question regarding the nature of injury sustained by the injured claimant and the extent of disability suffered by him for assessing the loss of his earning capacity, the learned Tribunal has come to hold as under:-

> "xxx. An unskilled labour derives his strength only if he possesses a good physic/strength. In the instant case, he has not filed any disability certificate from the competent authority, the Court goes with its observation that his earning capacity has been reduced due to disabled body which resulted on account of accident. When plentily able bodied persons are available in the employment market for hire to use their services, no employer will prefer to use the services/labour of unskilled labour who is unable to deliver any out-turn of an assigned job. So I am of the opinion that his labour in the employment market carries no value and hence, the loss of earning capacity of the applicant Bhaskar Khadia is 100%. xxx."

In the present case, under the insurance policy issued in respect of the offending tractor, the Insurance Company has collected premium of Rs.100/- towards its legal liability to a labourer or coolie. When the tractor is not constructed to carry any load, (other than equipment used for the purpose of propulsion), as defined under Section 2(44) of the M.V.Act, it is not understood as to how the Insurance Company had collected premium covering the risk of coolie. Moreover, as the provisions of the M.V.Act with regard to payment of compensation is a beneficial social legislation, it is incumbent that the same should be interpreted in the spirit in which it has been enacted, accompanied by an anxiety to ensure that the protection is not nullified by the backward looking interpretation, which serves to defeat the provision rather than to fulfill its life-aim. To do otherwise would amount to nullifying the benevolent provision by reading it with a non-benevolent eye and with a mind not tuned to the purpose and philosophy of the legislation, without being informed of the true goals sought to be achieved. When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependants on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view (See- **Skandia Insurance Co.Ltd. v. Kokilaben Chandravadan and others** (1987) 2 SCC 654).

For the reasons, as aforesaid, I do not find any infirmity in the impugned award fixing the liability on the Insurance Company to pay the awarded compensation amount so as to warrant any interference.

However, as regard the quantum of compensation amount awarded and the basis on which the same is arrived at, I feel, the interest of justice would be best served if the awarded compensation amount of Rs.2,19,156/- is modified and reduced to Rs.1,80,000/- which is payable to the claimant, on which no interest is payable.

The impugned award is modified to the said extent only.

The Commissioner for Employees Compensation, Sambalpur, is directed to disburse the modified compensation amount of Rs.1,80,000/- along with accrued interest thereon to the claimant on proper identification. The balance amount along with interest be refunded to the appellant insurance Company. FAO is accordingly disposed of.

Appeal disposed of.

2015 (I) ILR - CUT- 750

B. K. PATEL, J.

W.P.(C) NO. 20271 OF 2014

BABITA PADHY ……..Petitioner

.Vrs.

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

INDIAN STAMP ACT, 1899 – S.47-A

Sale deed executed in favour of the petitioner is void ab initio as the vendor had no valid title – Document does not create any right in favour of the petitioner – Proceeding initiated by Stamp Collector/Certificate Officer for deficit stamp duty and registration fee – Action challenged – Held, the petitioner is entitled under law to be protected against payment of stamp duty and registration fees on a document which is void from the beginning – The sale deed being a void document be treated as cancelled – Impugned proceedings are dropped. (Para 11)

Case Laws Referred to :-

1. (2008) 4 SCC 720 : Govt. of Andra Pradesh & Ors. -V- P.Laxmi Devi
2. AIR 1999 SC 22 : Whirlpool Corporation -V- Registrar of Trade Mark, Mumbai & Ors.
3. AIR 2006 SC 3608 : Prem Singh & Ors. -V- Birbal & Ors.

For Petitioner - M/s. Pradipta Ku. Mohanty, D.N.Mohapatra, J.Mohanty, P.K.Nayak, S.N.Dash & A.Das
For Opp. Parties - Addl. Govt. Advocate

Date of Hearing :18.11. 2014
Date of Judgment : 5.12. 2014

JUDGMENT

B.K. PATEL,J.

In this writ petition, the petitioner has made prayer to quash the proceeding in U.V.M.C. No.464 of 2008 and Certificate Case No.27 of 2014, and consequential notices at Annexures-2, 4 series and 6.

2. Petitioner's case is that on the basis of the claim to be the owner on the strength of Hat Patta alleged to have been granted by the ruler of Kanika Estate, one Rabindra Nath Lenka executed in favour of the petitioner registered sale deed no.5066 dated 24.8.2005 in respect of the land measuring an area of Ac.2.500 pertaining to plot no.321 under Khata No.619 of Mouza Chandrasekharpur recorded in the name of G.A. Department of the State of Orissa. At the time of registration, the petitioner was not aware of the fact that the above said land stands 2 corded in the name of the Government. In such circumstances, the sale deed executed in favour of the petitioner does not confer title over the land to the petitioner. The petitioner also never claimed title over the land nor possession of the land was delivered to the petitioner. The petitioner being aware that she has not derived any title on the strength of the aforesaid sale deed, never claimed any interest over the same. When the matter stood thus, the petitioner received notice at Annexure-2 from the Stamp Collector, Cuttack in U.V.M.C. No.464 of 2008 for payment of deficit stamp duty and registration fees payable under the Indian Stamp (Orissa Amendment) Act, 1962 purported to have been issued under Rule 25 (1) of the Orissa Stamp Rules, 1952. In response to such notice, the petitioner filed representation at Annexure-3 stating therein that the registered sale deed

executed in favour of the petitioner having not conferred any title, the petitioner is not liable to pay any stamp duty. It is specifically averred at paragraphs 6 and 8 of the representation that the petitioner is not at all interested to take advantage and benefit of the registered sale deed in question and that she does not accept and admit the registered sale deed and the property purported to have been conveyed therein. No opportunity of hearing was given to the petitioner on his representation. However, the petitioner received notice at Annexure-4 series in Misc. Case No.27 of 2014 from the Special Certificate Officer-Cum-Sub-Collector, Berhampur with regard to requisition for certificate received from the Stamp Collector-Cum-Deputy Inspector General of Registration, Cuttack for payment of deficit stamp duty and registration 3 fees. The petitioner filed application denying his liability at Annexure-5 stating, *inter alia*, at paragraph-6 as follows:

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

The Certificate Officer also without considering the petitioner's application at Annexure-5 has issued summon for payment at Annexure-6 in Certificate Case No.27 of 2014 to deposit the amount with a threat of taking further action against her. The petitioner has never claimed title, interest and possession over the land purported to have been conveyed on the strength of the registered sale deed and she has absolutely no right over such land. It has also been averred that the petitioner is not at all concerned with the registered sale deed and she has absolutely no objection if the sale deed is treated to be cancelled, inoperative, invalid and as a whole void for all purposes.

3. A counter affidavit has been filed on behalf of opposite party nos.1 to 4 by opposite party no.3-Deputy Inspector General of Registration, Odisha. It is averred that the stamp duty and registration fees having been detected to be undervalued, there is no infirmity in initiating proceeding under Section 47-A of the Indian Stamp Act, 1899 (for short, 'the Act') followed by certificate proceeding as provided under Section 48 of the said Act. Upon reference to Section 47-A read with Section 2(14) of the Act, it is averred that the sale deed executed in favour 4 of the petitioner is an 'instrument' of conveyance by way of sale and as such chargeable with duty. Provisions under

Registration Act, 1908 and the Act regulate procedure for registration of chargeable instruments. Sale deed executed in favour of the petitioner contains recital regarding payment of consideration amount. By executing the sale deed the vendor of the petitioner purported to transfer the right in favour of the petitioner. In view of non-payment of required stamp duty and registration fees, proceedings were initiated against the petitioner for realization of deficit stamp duty and registration fees in accordance with statutory provisions. The petitioner ought to have resorted to statutory provisions for redressal of her grievance. It is further averred that validity of document has no concern with the chargeability of stamp duty. Whether the person executing the instrument is authorized to execute is not material and relevant. The only thing which is relevant is that the document should be an instrument chargeable to stamp duty which is realizable on its execution. In the present case, the registering authority, while checking the valuation of the property purported to be sold to the petitioner, upon reference to other sale deeds concerning the similar nature of land, found the sale deed to have been undervalued and submitted report to the Stamp Collector. The Stamp Collector disposed of the matter by order dated 18.12.2013 at Annexure-A after complying with the requirements of Section 47-A of the Act. The petitioner was directed to deposit the deficit stamp duty and registration fees by issuing of notice at Annexure-B to the counter affidavit, copy of which is also at Annexure-2 to the writ petition. 5 As the petitioner did not deposit the dues, the matter was referred to Collector, Ganjam for collection of Government dues by resorting to provisions under the Orissa Public Demands Recovery Act vide requisition at Annexure-C. It is further averred that in view of provision under Section 55 of the Transfer of Property Act providing for rights and liabilities of the seller and buyer, the parties to the sale deed have executed the document after ascertaining the entire facts. Reiterating that the validity of the document has no concern with the chargeability of stamp duty, it is averred that unless the sale deed is declared null and void, the petitioner is liable to pay deficit stamp duty and registration fees. It is also averred that examining the status of land transacted through an instrument is beyond the purview of the Stamp Collector and moreover, the petitioner had never raised any objection before the Stamp Collector in the under valuation proceeding. Under valuation is no way related to the right, title, interest and status of the land. The petitioner ought to have participated in the under valuation proceeding or before appropriate fora against the

orders passed by Stamp Collector and Certificate Officer instead of filing the writ petition.

4. Learned counsel for the petitioner submitted that all non-testamentary instruments including a sale deed which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property are compulsorily registerable under Section 17(1)(b) of the 6 Registration Act, 1908 and all instruments chargeable with duty are required to be duly stamped in view of provision under Section 17 of the Act. However, in the present case, on the basis of false representation made by the vendor with regard to his right, title and interest over the land on the strength of Hat Patta issued by the ruler of Kanika Estate, the sale deed was executed and registered. The vendor failed to establish his title over the land and it was found that the land remained recorded in the name of the State Government. Petitioner's vendor has no title. Upon executing the instrument which purports to transfer title over land by way of sale, no right or liabilities was either created or extinguished. For all intent and purpose, registered sale deed executed in favour of the petitioner is void *ab initio*. The petitioner on receipt of notice dated 18.12.2013 at Annexure-2 of the Stamp Collector in U.V.M.C. No.464 of 2008 directing her to pay deficit stamp duty and registration fees, filed objection at Annexure-3 for giving an opportunity to her of being heard in the matter to contend that the sale deed was nothing but a void document. However, the Stamp Collector issued requisition to the Certificate Officer. Upon receipt of notice from the Certificate Officer, the petitioner filed objection at Annexure-5. However, the petitioner was not given an opportunity of being heard. Instead, notice at Annxure-6 was issued for taking further action. It is earnestly contended that the petitioner has already been put to loss and harassment for the conduct of her vendor. Registered sale deed executed in her favour is a sham document which does not create or extinguish any right. The petitioner 7 has availed no benefit out of it. The vendor never put the petitioner to possession over the land title of which he purported to have transferred to the petitioner. Though the sale deed has been stamped and registration fees have been paid on the same prior to registration, the document having been found to be void from the beginning, stamps used for execution of the sale deed are spoiled stamps. In such circumstances, the petitioner has approached this Court to avoid further harassment and loss. It is categorically contended that having come to know

that the registered sale deed is a void document, as petitioner's vendor has no title over the land purported to have been sold therein, the petitioner has never claimed title or possession over the land and also is not capable of advancing any such claim in future. The registered sale deed being a void document, is to be treated to have been cancelled, and demand on the same is without jurisdiction.

5. Reiterating the averments made in the counter affidavit filed on behalf of opposite party nos.1 to 4, learned Advocate General argued that sale deed executed in favour of the petitioner being an instrument purporting to convey title over the land by the vendor is chargeable to stamp duty in view of provisions under Sections 2(14), 3 and 17 and is subject to provisions under Section 47-A of the Act, to be dealt with when found to have been undervalued. In accordance with Section 47-A of the Act, the deed, after registration, was referred by the Registering Officer to the Collector for realization of deficit stamp duty and registration fees. The petitioner having not paid the stamp duty, 8 proceeding under the Orissa Public Demands Recovery Act has been rightly instituted for realization of the deficit stamp duty and registration fees. It is not disputed by the learned Advocate General that the land purported to be transferred under the sale deed is recorded in the name of the State Government and the petitioner's vendor neither had title over the land, nor has acquired title in the meanwhile. It is also not disputed that petitioner's vendor has no scope to acquire title over the land in future. However, it is argued that even if the sale deed does not create any right in favour of the petitioner, and for all intent and purpose, the sale deed is a void document, validity of document has no concern with chargeability of stamp duty. The petitioner is to bear the expenses for stamp duty and registration fees. In this connection, learned Advocate General sought to derive assistance from an unreported and unauthenticated xerox copy of judgment passed by a Single Judge of the Allahabad High Court in Civil Misc. Writ Petition No.17148 of 2010 (**M/S Aegis BPO Services Limited -vrs.- State of U.P. and others**). In course of argument, learned Advocate General also contended that the impugned orders of undervaluation under the Act as well as for realization of stamp duty and registration fees under the Orissa Public Demands Recovery Act ought to have been assailed by the petitioner by resorting to statutory remedies available under the said Acts.

6. So far as the contentions with regard to availing of alternative statutory remedy is concerned, from the rival averments and contentions

made on behalf of the parties, it is evident that this writ 9 petition involves resolution of legal issues only which can be decided on the basis of affidavits filed by the parties. There is no controversy with regard to factual assertions. In **Government of Andhra Pradesh and others –vrs.- P. Laxmi Devi (Smt)**: (2008) 4 SCC 720 while dealing with demand of deficiency of stamp duty Hon'ble Supreme Court opined that even where the demand is arbitrary and exorbitant, it is always open to the party to file a writ petition challenging such demand alleging that demand made is arbitrary and/or based on extraneous considerations, and in that case it is always open for the High Court to set aside an exorbitant demand made under Section 47-A of Act by declaring the demand arbitrary. It is well settled that arbitrariness violates Article 14 of the Constitution of India. It is also well settled that rule requiring the exhaustion of alternative remedies before the writ is granted is a rule of policy, convenience and discretion rather than a rule of law. In **Whirlpool Corporation -vrs.- Registrar of Trade Mark, Mumbai and others** : AIR 1999 SC 22 it has been held :

> "17. Specific and clear rule was laid down in State of U.P. v. Mohd.Nooh, 1958 SCR 595 : AIR 1958 SC 86, asunder(at P.93 of AIR):
>
> 'But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.'
>
> 18. This proposition was considered by a Constitution Bench of this Court in A.V.Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobharaj Wadhwani, AIR 1961 SC 1506 and was affirmed and followed in the following words(para 10):
>
> 'The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions 10 which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court

should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to law down in flexible rules which should be applied with rigidity in every case which comes up before the Court.'

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

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

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

7. In the present case, the crux of contention of the petitioner is that sale deed executed in her favour being a document which is void *ab initio*, the Stamp Collector as well as the Certificate Officer, on consideration of objection filed by the petitioner, ought to have held that the sale deed is not chargeable to stamp duty. The petitioner, 11 thus, has assailed the demand to be arbitrary and without jurisdiction. Moreover, the parties have filed all the pleadings required for adjudication of dispute raised by the petitioner. In such circumstances, in view of above referred settled principles it shall not be in

the interest of justice to direct the petitioner to approach this Court after exhausting available statutory remedies.

8. Now coming to the merit of the case it is not disputed that the sale deed executed in favour of the petitioner does not create any right in favour of the petitioner. The petitioner alleges that she has been swindled by the vendor by executing the sale deed in her favour on the false pretext of having title over the land on the basis of a Hat Patta. In **M/S Aegis BPO Services Limited -vrs.- State of U.P. and others** (supra), chargeability to stamp duty on a lease deed executed in favour of the petitioner was assailed. Referring to undisputed facts in the case it was pointed out that though the lessor had no right at the time of execution of the lease deed, subsequently, the lessor acquired right in the property in question with the due permission of the NOIDA and as such became entitled to let out the property to the writ petitioner. In such factual background, it was held that the lease deed having purported to create title in favour of the petitioner over the property and the lessor having acquired right over the property subsequent to the registration of the lease deed, the lease deed created right in favour of the petitioner and the petitioner was liable to pay stamp duty. Question of validity of lease deed at the time of execution lost its significance upon acquisition of right 12 in the property by the lessor. In the present case the petitioner's vendor who executed sale deed had no right or title at the time of execution of the sale deed, has not acquired right or title over the land in the meanwhile and it is not possible to acquire any right or title in future. Undoubtedly and undisputedly the sale deed is a void document. It is needless to observe that when a document is void *ab initio* , a decree for setting aside the same would not be necessary as the same is non-est in the eye of law, as it would be a nullity. (See **Prem Singh & Ors –vs- Birbal & Ors**.: AIR 2006 S.C.3608 at paragraph 16).

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

> "**49. Allowance for spoiled stamps** – Subject to such rules as may be made by the State Government as to the evidence to be required or,

the enquiry to be made, the Collector may, on application made within the period prescribed in Sec.50, and if he is satisfied as to the facts, make allowance for impressed stamps spoiled in the cases xx xx xx xx xx:

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(d) the stamp used for an instrument executed by any party thereto which- 13 (1) has been afterwards found to be absolutely void in law from the beginning;

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

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

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

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

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

11 In the present case, the petitioner was purported to be conferred with the status of buyer on execution of a sale deed which is being found to be void *ab initio* inasmuch as right purported to have been created by execution of the sale deed is never capable of being enforced in law. In such circumstances, the petitioner is entitled under law to be protected against payment of stamp duty and registration fees on a document which is void from the beginning. The sale deed being a void document be treated as cancelled. The Stamp Collector and the Certificate Officer have utterly failed to consider the petitioner's contention that no liability arises for payment of stamp duty on an instrument which has been found to be void *ab initio*. Therefore, proceedings in U.V.M.C. No.464 of 2008 and Certificate Case No.27 of 2014 are liable to be dropped and are, accordingly, dropped. The writ petition is, accordingly, disposed of.

Writ petition disposed of.

2015 (I) ILR - CUT- 760

B.K. NAYAK, J.

W.P (C) No.1377 OF 2005

JAYASHREE SHARMA & ANR ……..Petitioners

.Vrs.

CHANDBAI SHARMA & ORS. ……...Opp.Parties

ODISHA CONSOLIDATION OF HOLDINGS & P.F.L. ACT, – Ss.4(4), 51

Consolidation authorities are vested with the power to decide the question of right, title and interest in Land and Civil Courts

Jurisdiction to decide such questions has been ousted by virtue of Section 51 and 4 (4) of the Act – The disputed questions of partition cannot be decided by the Revenue Officer in a ceiling proceeding under the OLR Act, unless partition is admitted by the parties concerned or it has already been adjudicated by a competent Court or Tribunal. (Para-7)

For Petitioners : M/s. S.N.Mohapatra, K.R.Mohapatra, S.Ghosh & A.P.Mishra
For Opp.party : M/s. N.K. Sahu, B. Swain & M. K. Nayak

Date of hearing : 07.11.2014
Date of judgment: 07. 11.2014

JUDGMENT

B.K.NAYAK, J.

Order dated 20.11.2004 (Annexue-4) passed by the Joint Commissioner, Settlement and Consolidation, Sambalpur in Consolidation Revision No.486 of 2004, has been challenged in this writ petition.

2. The disputed land measures Ac.9.36 in M.S. Holding No.308 corresponding to Chaka Holding No.757 in village-Barahaguda. Admittedly Ac.36.00 of land including the present disputed land was the self acquired property of one Manohar Sharma, who is the common ancestor of the petitioners and private opposite party nos.1 and 2. Manohar Sharma had three sons, namely, Harisankar, Ramkisan and Surya and two daughters, namely, Chandbai and Gitabai, who are opposite party nos.1 and 2 to the writ petition. Surya had died issueless. The writ petitioners are the daughters of late Harisankar. Manohar Sharma died in 1972 and prior to his death, he had already sold some of his lands. In 1976 a suo motu ceiling proceeding bearing OLR Case No.261 of 1976 was initiated against Manohar Sharma by the Tahasildar-cum-Revenue Officer, Baragarh under Section 42 of the OLR Act. On 19.05.1982 Harisankar, the father of the present petitioners appears in the said OLR proceeding and raised objection stating that some of the lands had already been sold by Manohar and the rest of the properties were partitioned between Manohara and his two sons, Harisankar and Ramakisan and that both the sons were possessing their shares separately. The Revenue Officer directed for preparing a draft statement showing the names of

Banibai, wife of late Surajmal, Harisankar, Ramkisan, Chandbai and Gitabai, showing Ac.24.96 as ceiling surplus since they as a body of individuals, were entitled to ten standard acres of land. The Tahasildar directed for service of the draft statement on all the parties interested in the property. However, no notice or draft statement was served on Chandbai and Gitabai (present opposite party nos.1 and 2). Harisankar and Ramakishan filed their objection to the draft statement. Because of their absence on the date of hearing the Revenue Officer confirmed the draft statement under Section 44(1) of the OLR Act. The confirmation order was challenged by Ramkisan and Harisankar before the Sub-Collector, Baragarh in OLR Appeal No.60 of 1982. The appeal was allowed and the ceiling proceeding was remanded to the Revenue Officer for fresh hearing by giving due opportunity to the appellants therein. After such remand, the Revenue Officer by his order dated 15.01.1985 accepted the contention of Harisankar and Ramkisan and disposed of the proceeding holding that both the brothers were living separately in mess and property for more than twenty years and they were married prior to the appointed date and that their father was dead and hence both were entitled to two separate ceilings and that having regard to the total extent of land, there was no ceiling surplus.

3. In the meantime, after the final order was passed by the Revenue Officer as aforesaid, consolidation operation started in the disputed village. Opposite party no.1 filed OLR Appeal No.2 of 2000 challenging the order of the Revenue Officer accepting plea of partition raised by Harisankar and Ramkisan and allotment of two separate ceilings in their favour. The appeal was filed on the ground that no notice at all of the OLR proceeding and the draft statement was issued to her. The appellant's contention was that there was no partition and allotment of shares in favour of Harisankar and Ramkisan and that she being the daughter of late Manohar Sharma, she has $1/4^{th}$ interest in the entire property left by Manohar Sharma. The appellate authority (Sub Collector) allowed the appeal, set aside the Revenue Officer's order and again remanded the ceiling case to the Revenue Officer for disposal after giving due opportunities to the appellant and other interested parties. The present writ petitioners challenged the said appellate order before the Additional District Magistrate, Baragarh in OLR Revision No.1 of 2000. The revision was allowed holding that Chandbai and Gitabai were major daughters and married prior to the appointed date and, therefore, they cannot claim any land allotted to their brothers. The said revisional order of the Additional District Magistrate was challenged by present opposite party no.1

before this Court in W.P.(C) No.6797 of 2002, which has been disposed of by judgment dated 21.01.2013 directing for fresh hearing and disposal of the ceiling case by the Revenue Officer after giving notice to all persons to whom, the draft statement relates.

4. It is stated that while the ceiling proceeding was pending before the Revenue Authorities, Consolidation R.O.R. in respect of the disputed land was published jointly in the names of legal representatives of late Manohar Sharma. Harisankar (father of the present petitioners) filed Consolidation Revision No.1066 of 1998 under Section 37(1) of the O.C.H. & P.F.L. Act praying to delete the names of Ramkisan, Chandbai and Gitabai from the R.O.R. The Joint Commissioner, Consolidation remanded the case to the Consolidation Officer-opposite party no.5 for disposal as per law. Similarly, Gitabai had filed R.P.Case No.554 of 2001 and 5800 of 2000 under Section 37(1) of the O.C.H. & P.F.L. Act challenging the permission granted by the Consolidation Officer to Harisankar under Section 4(2) of the Consolidation Act to alienate some properties. These two revisions were also remanded to the Consolidation Officer for disposal. Further, R.C. Case No.696 of 2002 was filed by the Secretary, Barahaguda High School under Section 37(1) of the Consolidation Act for recording Ac.0.40 dec. out of the disputed land in the name of the School on the ground that the same had been donated to the School by Harisankar vide Registered Gift Deed No.1918 dated 18.08.1998. That revision was also remanded to the Consolidation Officer. Thus, all the four remand revision cases were taken up together by the Consolidation Officer. On Harisankar's death the present petitioners were substituted in his place. At one point of time, the Consolidation Officer stayed the remand revision cases on the ground of pendency of W.P.(C) No.6797 of 2002 before this Court. On the application of present opposite party nos.1 and 2, the Consolidation Officer proceeded with the hearing of the remand revision cases and accordingly the cases were heard and disposed of by the common order dated 30.12.2003 (Annexure-1) holding that in the partition the disputed land was allotted to the share of Harisankar. It is submitted by the learned counsel for the petitioners that the finding of the partition was given on the basis of orders of the Revenue Officer passed in OLR ceiling proceeding and a decree passed by the Civil Judge (Junior Division), Baragarh in T.S. No.17 of 1994 and other materials on record in favour of the present petitioners. Challenging the order passed by the Consolidation Officer, present opposite party nos.1 and 2 filed Consolidation Appeal Nos.1 & 2 of 2004 and Ramkisan Sharma preferred Appeal No.3 of 2004. During

the course of hearing of the appeals, the present opposite party nos.1 and 2 filed an application before the appellate Court for stay of further proceeding of the appeals on the ground of pendency of W.P.(C) No.6797 of 2002 in the High Court. At the same time, opposite party nos.1 and 2 also filed Misc. Case No.6045 of 2004 in W.P.(C) No.6797 of 2002 praying for stay of the Consolidation appeals until disposal of the said writ petition. The said misc. case was disposed of by this Court on 22.06.2004 directing the appellate authority, i.e., the Deputy Director, Consolidation to hear the parties and pass appropriate orders on the petition for stay pending before the said appellate authority before proceeding with the hearing of the consolidation appeals. Before this Court's order could be communicated to the Deputy Director, Consolidation, on the very next day, i.e., on 23.06.2004, the Deputy Director dismissed all the appeals finally and thereby confirmed the order passed by the Consolidation Officer. Present opposite party nos.1 and 2 preferred Revision Case Nos.486 and 487 of 2004 challenging the appellate order passed by the Deputy Director, Consolidation. At the same time, they also filed an application for stay of further proceeding of the revision case on the ground of pendency of W.P.(C) No.6797 of 2002 before this Court. While considering such stay petition, the Joint Commissioner, Consolidation and Settlement-opposite party no.3, by the impugned order, disposed of the revision cases finally and set aside the original and appellate orders passed by the Consolidation Officer and Deputy Director, Consolidation holding that the orders passed by the Consolidation Officer as well as the Deputy Director, Consolidation are nullity inasmuch they were passed during the pendency of W.P.(C) No.6797 of 2002 and in violation of the High Court's stay order.

5. In assailing the impugned order, the learned counsel for the petitioners submits that this Court has never passed orders of stay of the Consolidation cases or the appeals in W.P.(C) No.6797 of 2002 and that mere pendency of that writ petition, which arose out of the OLR ceiling proceeding, the Consolidation Officer and the Deputy Director, Consolidation were not bound to stay the proceedings pending before them. It is his further contention that since the Consolidation Officer and the Deputy Director passed orders on merits taking into consideration various evidences with regard to partition of the properties of Manohar Sharma and the allotment of the present disputed properties in favour of petitioner's father, Harisankar, the Joint Commissioner, Consolidation could not have disposed

of the revision holding the orders of the Consolidation Officer and the Deputy Director as nullity, without considering the revision on merits.

6. Learned counsel for opposite party nos.1 and 2, on the other hand, contends that the finding of the Consolidation Officer and the Deputy Director with regard to partition and allotment of shares in relation to the properties of Manohar Sharma was based mainly on the order passed in the ceiling proceeding by the Revenue Officer and the trial court in T.S. No.17 of 1994. But in the meantime, the orders of the Revenue Officer in the ceiling proceeding has been set aside by this Court in W.P.(C) No.6797 of 2002, which was disposed of on 21.01.2013, and that the decree passed in favour of the present writ petitioner by the Civil Judge (Junior Division) Baragarh in T.S. No.17 of 1994 has been set aside by the court of the learned Additional District Judge (Fast Track) Court, Baragarh in Title Appeal No.12 of 1996 vide order dated 24.09.2003 and the same being remanded is still pending before the trial court. Therefore, the basis of the finding of partition given by the Consolidation Officer being totally nonexistent the matter may be remanded back to the Consolidation Officer for fresh disposal.

7. The Consolidation authorities are vested with the power under O.C.H. & P.F.L. Act to decide the question of right, title and interest in land and civil court's jurisdiction to decide such questions has been ousted by virtue of Section 51 and 4(4) of the O.C.H. & P.F.L. Act. The disputed questions of partition cannot be decided by the Revenue Officer in a ceiling proceeding under the OLR Act, unless partition is admitted by the parties concerned or it has already been adjudicated by a competent court or Tribunal. The Consolidation Authorities being competent to either partition or decide the question of title on the basis of previous partition their findings will be binding on the Revenue Officer deciding the ceiling proceeding and not vice-versa. Admittedly, two main documentary evidences with regard to partition of the properties of late Manohar Sharma were the order of the Revenue Officer in the ceiling proceeding and the decree passed by the learned Civil Judge (Junior Division), Baragarh in T.S. No.17 of 1997, which were taken into consideration by the Consolidation Officer and the Deputy Director, Consolidation to hold that the disputed land had fallen to the share of the petitioners' father in the partition. Those two orders having lost their force, the first one being set aside in W.P.(C) No.6797 of 2002 and the second one in Title Appeal No.12 of 1996, those have to be taken out of consideration and the question of partition now remains to be decided only on the basis of

other evidence on record. Since, this Court had never passed any order for staying the proceedings of the remand Consolidation revisions before the Consolidation Officer or the Consolidation appeals before the Deputy Director, Consolidation, those authorities were not bound to stay the proceedings, merely because W.P.(C) No.6797 of 2002 was pending before this Court. Even the order dated 22.6.2004 passed by this Court in Misc. Case No.6045 of 2004 (In W.P.(C) No.6797 of 2002) directing the Deputy Director, Consolidation to consider the stay petition filed before him could not be communicated to the Deputy Director, Consolidation before he finally disposed of the appeals. Therefore, the orders passed by the Consolidation Officer and the Deputy Director cannot be said to be a nullity as held by the Joint Commissioner, Consolidation and Settlement.

8. In the aforesaid circumstances, the impugned order is quashed and Consolidation Revision Nos.486 of 2004 and 487 of 2004 are remanded back to the Joint Commissioner, Consolidation and Settlement, Sambalpur-opposite party no.3 for fresh disposal after giving opportunity of hearing to the parties. The revisions are directed to be disposed of within a period of three months from the date of communication of this order. The writ petition is accordingly allowed.

Writ petition allowed.

2015 (I) ILR - CUT- 766

S. K. MISHRA, J.

BLAPL NO. 15052 OF 2014

RASANANDA ROUT & ORS ……..Petitioners

.Vrs.

STATE OF ORISSA ……..Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.438

Petitioners apprehending arrest for commission of offence U/s. 498-A I.P.C. – F.I.R. has not yet lodged – Demand made to the

petitioners for payment of money lest F.I.R. will be lodged against them in Mahila police Station Cuttack for their arrest – Petitioner No. 1 is an ex-serviceman and suffering from cancer – Held, direction issued that in the event of arrest of the petitioners by the officer of Mahila P.S. Cuttack U/s. 498-A of I.P.C., they shall be released on bail by the arresting officer.

Case Laws Relied on :-

1. (2011) 48 OCR (SC)1 : Siddharam Setlingappa Mhetre-V-State of Maharashtra & Ors.
2. (1980) 2 SCC 565 : Gurbaksh Singh Sibbia & Ors.-V- State of Punjab

For Petitioners - M/s. Pramod Ch. Sejpada, B.C.Sahoo-1

For Opp. Party - Addl. Govt. Advocate

Date of Order: 10.09.2014

ORDER

S. K. MISHRA, J.

Heard learned counsel for the petitioner and the learned Addl. Government Advocate.

The Petitioner is apprehending arrest for the alleged commission of offence under Section 498-A of the I.P.C. As yet no F.I.R. has been lodged. Learned counsel for the petitioner relies upon the reported case of ***Siddharam Setlingappa Mhetre V. State of Maharashtra & others*** (2011) 48 OCR (SC) 1 ; wherein the Supreme Court has taken into consideration the case of ***Gurbaksh Singh Sibbia & others V. State of Punjab***; (1980) 2 SCC 565 and held that filing of an F.I.R. is not a condition precedent to the exercise of power under Section 438, Cr. P.C. Learned Counsel for the petitioner brings attention of the Court that at paragraph 4 of the petition, the petitioner has stated that on 28.04.2014 Kabita Nayak with her boy friend and some other hired goondas had been to the quarter of petitioner no.1 and demanded cash of Rs.5,00,000/- lest a F.I.R. will be lodged in Mahila Police Station to arrest all the family members. It is contended by the learned counsel for the petitioners that petitioner no.1 is an ex-serviceman and is suffering from Cancer at this moment.

Keeping in view the aforesaid consideration, the application for bail is allowed. It is directed that in the event of arrest of the petitioners by the

officers of the Mahila Police Station, Cuttack in connection with any F.I.R. lodged by said Kabita Naik or by any of her relations under Section 498-A of the I.P.C. and allied offences, the petitioners shall be released on bail on such terms and conditions as deemed just and proper by the Arresting Officer. The Bail Application is accordingly disposed.

Application allowed.

2015 (I) ILR - CUT- 768

S. K. MISHRA, J.

RPFAM NO. 105 OF 2011

GYASUDDIN KHAN @ GAYASUDDIN KHAN ……..Petitioner

.Vrs.

KAHKASHAN KHAN & ANR. ……Opp. Parties

FAMILY COURTS ACT, 1984 – S.7

Divorced muslim woman – Magistrate allowed maintenance to her and her son U/s. 3(2) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 – Application for enhancement – On transfer of the case learned Judge Family Court allowed enhancement – Order challenged on the ground that the Judge Family Court is not competent to decide the matter – Held, as per explanation (f) to sub-section (1) of Section 7 of the Family Courts Act 1984 any suit or proceeding for maintenance can be taken up and disposed of by the Family Court and since application to seek enhancement of maintenance is a proceeding for maintenance the Judge, Family Court has jurisdiction to decide the same U/s. 3 of the 1986 Act – So far as the child is concerned there is no specific provision for maintenance of child under this Act, hence section 125 Cr.P.C. shall apply and a child is entitled to maintenance till he attained the age of majority. (Paras 9,15)

Case laws Referred to:-

1.1995 CRL.L.J. 228 : (Sk. Allauddin-V- Shamima Akhtari & Anr.)
2.(2010) 1 SCC 666 : (Shabana Bano-V- Imran Khan)
3.AIR 2001 SC 3958 : (Danial Latifi & Anr.-V- Union of India)
4.(2007) 6 SCC 785 : (Iqbal Bano-V- State of U.P. & Anr.)

For Petitioner - M/s. S.P.Mishra, S.Nanda, S.K.Mohanty, A.K.Dash, S.K.Sahoo & J.K.Mohapatra

For Opp. Parties - M/s.Ashok Ku. Mohapatra, A.K.Mohapatra, & N.C. Rout M/s. S.K.Padhi (Amucus curie)

Date of Judgment. 25.02.2015

JUDGMENT

S.K.MISHRA,J.

In this revision application, against the order of the Judge, Family Court, Bhubaneswar, the petitioner (husband), who was the opposite party in C.R.P. No.36/2011(Crl. Misc. Case No.141/2009) has assailed the order dated 5.8.2011 passed by the learned Judge enhancing the maintenance of opposite party no.1-wife and opposite party no.2-child from Rs.1500/- to Rs.3000/- each per month.

2. The facts are not in dispute. Both parties belong to Muslim community. Opposite party no.-1 is the petitioner's divorced wife. Opposite party no.2 is their son. The petitioner is working as a Administrative Officer with Oriental Insurance Company Ltd. After divorcing opposite party no.1 he has remarried. It is not disputed that the marriage between the petitioner and opposite party no.1 took place on 11.4.1993. At the time of marriage some dowry articles were given. Later on the petitioner demanded more. There are tussle between the parties. It is further alleged that the petitioner developed illicit relationship with another woman and demanded Rs.2.5 lakhs from opposite party no.1's father. Thereafter the petitioner tortured opposite party no.1 both physically and mentally. On 27.10.2003 the petitioner drove opposite party no.1 out. At that time opposite party no.2 was studying in D.A.V. School,Chandrasekharpur. Thereafter the opposite parties filed an application under Section 3(2) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the "Act" for brevity) which was registered as C.M.C. No.61/2004. After hearing both the parties, the

learned S.D.J.M., Bhubaneswar allowed the application and directed the petitioner to pay maintenance to the present opposite parties @ Rs.1500/- each per month.

3. The petitioner carried the matter to this Court. The matter came up for disposal before a Single Judge in Crl. Revision No.751/2006. As per judgment dated 3.2.2009 the Crl. Revision was dismissed and the order passed by the learned S.D.J.M., Bhubaneswar was upheld.

4. While matter stood thus, the opposite parties filed an application before the learned S.D.J.M., Bhubaneswar, which was registered as Crl. Misc. Case No.141/2009 for enhancement of maintenance. However, after establishment of the Family Court, as per the general order passed by the learned District Judge, Khurda at Bhubaneswar the case was transferred from the court of learned S.D.J.M., Bhubaneswar to the court of learned Judge, Family Court, Bhubaneswar. On 4.1.2011 the petitioner was noticed, but he did not appear on the date fixed i.e. on 7.2.2011. Hence he was set exparte and the case was adjourned to 24.2.2011 for exparte hearing. On that date exparte hearing was taken up. On 25.2.2011 final order was passed on the said petition whereby the learned Judge, Family Court allowed the petition filed by opposite party nos.1 and 2(who were petitioners before the trial court) and directed the present petitioner (who was opposite party before the trial court) to pay maintenance @ Rs.3,000/- per month to each of the opposite parties w.e.f. 9.4.2009.

5. The petitioner thereafter filed an application to set aside the order. However, in a detailed and speaking order dated 5.8.2011 the said application to set aside the order was rejected by the learned Judge, Family Court, Bhubaneswar on the ground that the petitioner, who had received notice well before 7.2.2011, could not show any sufficient cause for his non-appearance on date the case was taken up for hearing.

6. In this case in essence two legal questions arise for determination. The first contention (as per the submission of the petitioner's counsel) is that since this is a proceeding under the Act, the Judge, Family Court is not competent to decide the matter. The second contention is that there being no provision of enhancement of maintenance in the Act, the impugned order is illegal.

7. As far as the first contention is concerned, the learned counsel for the petitioner relying upon the case of ***Sk.Allauddin V. Shamima Akhtari and another***; 1995 CRL.L.J. 228 contends that an application 3 of the Act cannot be said to be covered by Section 7 as Sub-section (1) of the provision has application only when a suit or proceeding is of the nature envisaged in clauses (a) to (g) of the Explanation, and the matter was adjudiciable by the District Court or any sub-ordinate civil court. In the said decision, this Court has held that an application under Section 3 of the Act is neither a suit nor a proceeding, nor is a matter adjudiciable by the civil court. This Court has further held that there is no provision in the Act which was enacted subsequent to Family Courts Act which would lend support to the plea that jurisdiction can be deemed to have been conferred by Section 3. It was, therefore, held by this Court that application under Section 3 of the Act cannot be transferred to and proceeded with by Family Court and the order passed by Family Court would be without jurisdiction.

8. In this case Mr. S.K.Padhi, learned Senior Advocate who was appointed as amicus curie to help the Court, brought to the notice of the Court to the reported case of ***SHABANA BANO V. IMRAN KHAN;*** (2010) 1 Supreme Court Cases 666. In the reported case the question arose whether the Judge, Family Court can entertain the application under Section 125 of the Code and award maintenance in view of the provisions of the Act. The Hon'ble Supreme Court has taken note of various provisions of the Family Courts Act and has held has follows:

> "The Family Act was enacted w.e.f. 14.9.1984 with a view to "promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith". The purpose of enactment was essentially to set up Family Courts for the settlement of family disputes, emphasizing on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. In other words, the purpose was for early settlement of family disputes. The Act, inter alia, seeks to exclusively provide within jurisdiction of the Family Courts the matters relating to maintenance including proceedings under Chapter IX CrPC.
>
> Section 7 appearing in Chapter III of the Family Act deals with a jurisdiction. The relevant provisions thereof read as under:

"7. Jurisdiction – (1) Subject to the other provisions of this Act, a Family Court shall –

(a) have and exercise all the jurisdiction exercisable by any District Court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a District Court or, as the case may be such subordinate civil court for the area to which the jurisdiction of Family Court extends.

Explanation.- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely –

(a)-(e) * * *

(f) a suit or proceeding for maintenance;

(g) * * *"

Section 20 of the Family Act appearing in Chapter VI deals with overriding effect of the provisions of the Act. The said section reads as under:-

"20. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any law other than this Act."

A bare perusal of Section of the Family Act makes it crystal clear that the provisions of this Act shall have overriding effect on all other enactments in force dealing with this issue.

Thus, from the above mentioned provisions it is quite discernible that a Family Court established under the Family Act shall exclusively have jurisdiction to adjudicate upon the application filed under Section 125 CrPC.

In the light of the aforesaid contentions and in view of the pronouncement of judgments detailing the said issue, learned counsel for the appellant submits that the matter stands finally settled but the

learned Single Judge wholly misconstrued the various provisions of the different Acts as mentioned hereinabove, thus, committed a grave error in rejecting the appellant's prayer."

9. Thus, as per Clause (f) Explanation to Sub-Section (1) of Section 7 of the Family Courts Act any suit or proceeding for maintenance can be taken up and dispose of by the Family Court. Since in essence an application to seek enhancement of maintenance, is a proceeding for maintenance and hence this Court is of the opinion that as per the ruling given in the case of ***SHABANA BANO V. IMRAN KHAN*** *(supra)* the Judge, Family Court has jurisdiction to decide cases under Section 3 of the Act.

10. As far as the second contention is concerned, it is seen that a constitutional validity of this Act was challenged in the case of ***Danial Latifi and another V. Union of India***; AIR 2001 SUPREME COURT 3958, which was disposed of Five Judge Bench of the Supreme Court. The Supreme Court after taking of various aspects of the case held as follows:-

"(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

(2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance."

11. Thus, the constitution bench of the Supreme Court has held that it is the duty of the husband to make reasonable and fair provision for the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be

made by the husband within the iddat period in terms of Section 3(1)(a) of the Act. The Supreme Court further held that Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

12. Giving purposive interpretation to the provision, the Supreme Court in the case of ***IQBAL BANO V. STATE OF U.P. AND ANOTHER***; (2007) 6 Supreme Court Cases 785 held that a Muslim husband is liable to make reasonable and fair provision for the futute of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1) (a) of the Act. Now, the question, therefore, remains whether the Court has also jurisdiction to enhance the said amount of maintenance.

13. The Act was enacted to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husband and to provide for matters connected therewith or incidental thereto. Thus, it can be said that this is a progressive legislation aimed at protecting the rights of divorced Muslim women. It is apparent from the statement of objects and reasons of the Act that a divorced Muslim woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. Thus, from the expression "such reasonable provision and maintenance" should be fixed taking into consideration the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman.

14. Thus, it is clear that while awarding maintenance, the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband is to be taken into consideration. Now the time changes and in the mean time the need of the divorced woman becomes more because of rise in prices and other related factors as well as the education of her children and to maintain the standard of life she was enjoying before her marriage and the growth in the income of her former husband. This Court is of the opinion that a purposive interpretation of the

Act would also include the power of the Magistrate or Judge, Family Court to enhance the maintenance granted to a divorced Muslim woman after lapse of some time of passing of the final order under Section 3 of the Act. Accordingly, this issue is answered.

15. As far as the child is concerned there is no specific provision for maintenance of child under this Act. Hence Section 125 of the Code shall apply and in that Section a child is entitled to maintenance till he attained the age of majority i.e. eighteen years.

16. In that view of the matter, if it is shown by opposite party no.1 before the executing court that opposite party no.2 has become major in the mean time, then the executing court shall pass appropriate orders excluding opposite party no.2 from receipt of maintenance from the date of his attending the majority. With the aforesaid observations, the RPFAM is disposed of. L.C.R. be sent back.

Application disposed of.

2015 (I) ILR - CUT- 775

R.DASH, J.

F.A.O. NO. 151 OF 2009

MADHUSUDAN HOTA …….Appellant

.Vrs.

RATNAKAR HOTA ……..Respondent

A. CIVIL PROCEDURE CODE, 1908 – O-39, R-2A

Order passed Under Order - 39, Rule - 2A C.P.C. by the learned District Judge in Misc. Appeal – Order challenged before this Court in F.A.O. – Maintainability questioned – Proceeding Under Order-39, Rule-2A C.P.C. is separate and independent which is appellable Under Order 43, Rule 1 (r) C.P.C. – It is in the nature of an original order even though passed in a proceeding arising out of an appeal – It cannot be said to be an order passed in appeal U/s. 104 (1) C.P.C. so as to

attract Section 104 (2) of the Code – Held, the present appeal is maintainable. (Paras 5,6)

B. CIVIL PROCEDURE CODE, 1908 – O-39, R-2A

Violation of injunction order – It requires stricter proof than civil actions – In order to hold that the appellant violated the order of status quo in respect of Plot No.572, R-1 must prove that as on the date of the interim order the parties were aware of as to in respect of which specific portion of the land in dispute the status quo is to be maintained – Since the same is lacking in this case the appellant cannot be said to have disobeyed the interim order of status quo – Held, the impugned order is set aside. (Para 12)

Case laws Referred to:-

1.AIR 1976 Madras 63 : (Ramaswamy Reddiar & Ors.-V- Chinna Sithammal & Ors.)
2.AIR 1982 A.P. 284 : (K. Gangulappa Naidu & Ors.-V- K. Gangi Naidu)

For Appellant - M/s. Susanta Kumar Dash, Mrs. A. Dhalasamant, B.P. Dhal.S.K.Das, A.K.Otta, & S.K. Mishra,

For Respondent - M/s. A.K. Mishra, A.K. Sharma, M.K. Dash, P.K. Dash, S. Mishra.

Date of Hearing : 31.03. 2014
Date of Judgment : 11.04. 2014

JUDGMENT

R.DASH, J.

This appeal is against the order dated 18.3.2009 passed by the learned District Judge, Bhadrak, Balasore in Misc. Case No.4 of 2002 registered on an application under Order 39 Rule 2 A C.P.C.

2. Facts leading to the filing of the present appeal may be stated in brief.

Appellant herein is defendant No.1 and Respondent No.1 is the plaintiff in T.S. No.452 of 2000 on the file of learned Civil Judge (Junior Division), Balasore. On the plaintiff's petition under Order 39 Rule 1 & 2 C.P.C, Misc. Case No 287 of 2000 was registered in which the prayer for interim injunction was rejected. Being aggrieved, he preferred Misc. Appeal

No.123 of 2001 wherein direction to maintain status quo in respect of M.S. plot No.572 and 577/2235 was passed on 7.1.2002 on the consent of the parties which was made absolute vide judgment dated 23.1.2002 passed in the Misc. Appeal. After final disposal of that Misc. Appeal, R-1 filed a petition under Order 39 Rule 2 A C.P.C. alleging that the appellant and his sons disturbed the status quo by digging earth and putting cement pillars for construction of a house over the land in respect of which the parties were directed to maintain status quo. After giving opportunity to the defendant to file show cause and allowing the parties to adduce evidence and upon assessment of the materials placed before him, the learned District Judge passed the impugned order observing that Appellant having violated the order of status quo, his property i.e., the land pertaining to Plot No.577 be attached for a period of one year.

3. This order has been challenged on the grounds that the learned District Judge should not have entertained the application under Order 39 Rule 2 A CPC after the disposal of the Misc. Appeal; that when the learned District Judge concluded that there is no evidence as to when the appellant encroached any portion of a joint passage in respect of which the direction to maintain status quo was passed, he could not have held that the appellant had violated the order to maintain status quo; that the finding that the order of status quo has been violated is not supported by any materials; and, in absence of proof of alleged violation beyond reasonable doubt, the impugned order should not have been passed.

4. Respondent No.1, Ratnakar Hota, filing objection to the appeal memo has contended that since the impugned order has been passed by the learned District Judge in Miscellaneous Appeal No.123 of 2001, the present appeal is not at all maintainable in view of Section 104(2) of the Code; that the appeal has otherwise become infructuous because the period of attachment prescribed in the impugned order has already expired in the meantime; and, that the impugned order is otherwise justified.

5. On the maintainability of the present appeal, learned counsels for both the parties have taken me through the provisions contained in Sections 96 and 104 (2) along with Order 41 Rule 19 and Order 43 Rule 1 of C.P.C. R-1 has not submitted any memo of citation whereas the appellant has cited judgments reported in AIR 1976 Madras 63 **(Ramaswamy Reddiar and others–v- Chinna Sithammal and others)** and AIR 1982 A.P. 284 **(K.Gangulappa Naidu and others –v- K. Gangi Naidu).** On behalf of the

appellant, it is submitted that the proceeding initiated before the learned District Judge under Order 39 Rule 2A C.P.C. being an independent proceeding and the impugned order having not been passed in an appeal under Section 104(1) C.P.C, the present appeal against the said order is not hit under Section 104(2) C.P.C. In Ramaswamy Reddiar (supra), it has been explained that in order to attract sub-section (2) of Section 104 C.P.C., the appeal should be one falling under Section 104 C.P.C. whereas if the appeal is one under section 96 read with Order 41 Rule 1 C.P.C., Section 104(2) is not applicable. In K. Gangullapa Naidu (supra), it has been explained that in a regular appeal pending before the appellate court, if an order is passed under Order 39 Rule 1 and 2 then the appeal is maintainable under Order 43 Rule 1 C.P.C. In that case, during pendency of an appeal preferred against the judgment and decree passed in a suit an application under Order 39 Rule 1 and 2 was filed and that application was disposed by the appellate court. Against the order passed on the application under Order 39 Rule 1 and 2, the matter was carried to the High Court. Before the High Court, it was submitted that no appeal lay against that order. The learned Single Judge observed that the case before the High Court was not a case in which as against an order under Order 39 Rules 1 and 2 made by the trial court an appeal was preferred to the District Court and then as against the order of the District Court the matter was carried to the High Court. Therefore, it was observed, the case did not come under the mischief of Section 104(2) C.P.C. but squarely fell under Order 43 Rule 1.

6. The appeal in hand is one against an order passed by the learned District Judge on an application filed before him for the first time under Order 39 Rule 2 A C.P.C. alleging violation of order of status quo which was passed by the learned District Judge in the Misc. Appeal. It is argued by the learned counsel for the appellant that since the learned District Judge had passed the order of status quo, any application alleging violation of that order was required to be filed before the same court and, accordingly, R-1 filed the petition under Order 39 Rule 2 A C.P.C. Therefore, it is submitted that the petition under Order 39 Rule 2 A C.P.C. is an independent proceeding initiated for the first time before the learned District Judge and the impugned order passed on that petition can not be said to be an order passed in an appeal under Section 104 C.P.C.

In the present case the impugned order has been passed on an application under Order 39 Rule 2A C.P.C. which is appellable under Order

43 Rule 1 (r) C.P.C. In Choorakadam –v- Antony, AIR 1991 Kerala 44 it is held that the proceeding under Order 39 Rule 2A for breach of injunction is separate and independent. In Ratnakar Swain –v- Orissa Forest Corporation Ltd., 75 (1993) CLT 476 it is observed by this Court that an order passed by a Single Judge under Order 39 Rule-2A for violating order of injunction passed by him pertakes the nature of an original order even though passed in a proceeding arising out of an appeal.

In view of the discussion made above, this Court is of the considered view that the present appeal against the impugned order is maintainable.

7. Now, it is to be examined as to whether the allegation of violation of the order of status quo has been substantiated or not.

There is no dispute that initially an order was passed on 7.1.2002 on the consent of both the parties directing them to maintain status quo over the suit land which was subsequently made final vide order dated 23.1.2002. The specific allegation made by R-1 in his petition alleging violation of the interim order is that the appellant and his sons (proforma respondents) violated the order on 12.1.2002 and 13.1.2002 by digging earth from the suit land and putting cement pillars for construction of a house, with further specific allegation that on 23.1.2012, the appellant and his sons put bamboos for construction of a wall. Though the alleged violation occurred during pendency of the Misc. Appeal in which the interim order was passed, R-1 did not approach the learned appellate court during pendency of the Misc. Appeal but presented the application under Order 39 Rule 2 A C.P.C. after disposal of the Misc. Appeal.

8. In the show cause filed by the appellant, it was contended that in fact he was constructing a house over the ancestral land but it was not over any portion of the common passage. His specific stand was that the construction was on his land excluding the suit land. The learned court below observed that since the appellant-opposite party had admitted in his show cause that construction of the house was “going on” and, because the Amin Commissioner Report indicated that the construction was over a portion of suit plot No.572, the appellant had definitely violated the order of status quo even though there is no evidence as to when a portion of the common passage appertaining to plot No.572 was encroached and amalgamated with the adjoining land of the appellant.

9. Impugned order reflects that there is a common passage in North-South direction adjoining to the eastern side boundary of the plots in dispute. It also reveals that the common passage is used not only by the parties to the suit but also by many of their co-villagers. The passage is in existence since 1953. P.W-2, a co-villager, appears to have stated in his deposition that the common passage is a piece of joint property of the parties but the villagers also, including he himself, have been using the passage since long. He claims to have seen the passage since his childhood. According to him, the passage in existence at present is as it was before. It implies that there was no change of status quo of the passage till P.W.2 gave his statements. It appears during pendency of the Misc. Appeal a Survey Knowing Person was deputed to the spot for inspection and report. The Survey Knowing Commissioner has reported that a portion of the road has been encroached by the appellant and it stands amalgamated with the appellant's adjoining plot no.577. The learned court below has held that there is no evidence as to when such encroachment was made.

10. It is not shown that by the time the order of status quo in respect of the suit land was passed, the encroached portion of the common passage appertaining to plot No.572 was ascertained/identified. Had it been so, the court should not have deputed a Survey Knowing Commissioner to identify the encroached portion of the common passage. Evidence of the appellant, read with that of P.W.2, reveals that long before the institution of the suit, the alleged encroached portion of the common passage has remained within the enclosure of R-1. So, it is to be concluded that till demarcation by the Commissioner R-1 was under impression that the encroached portion was a part of his homestead land appertaining to plot No.577.

11. The order of status quo was in respect of plot nos.572 and 577/2235. As already stated, the encroached portion of plot no.572 was not demarcated and specified before the order of status quo was passed. It was demarcated only after the alleged violation of the interim order. Thus, R-1 approached the court for deputing a Civil Court Commissioner and solely on the basis of the Commissioner's report, the learned court below has concluded that the appellant has violated the order of status quo by raising a part of his house over a portion of suit plot no.577.

12. Learned counsel for the appellant submits that there is no clinching evidence showing that the appellant disturbed the status quo in respect of

plot nos.572 and 577/2235 after the order of status quo was passed on 7.1.2002 with the consent of both parties. It is submitted that since the appellant had given consent to maintain status quo it is not believable that soon after giving the consent, he would proceed to disturb the status quo**.** In this regard it is to be noted that the Survey Knowing Commissioner made spot visit on 7.1.2003 which is about one year after the alleged violation. At that time he noticed one incomplete house with "thatched roof, walls and bamboo twigs and cement pillars having no door and window fittings" standing on appellant's plot covering some portion of suit plot no.572 which is the joint passage. It implies that after R-1 had alleged violation of the order of status quo, there was no further construction of the house and the appellant left the construction work mid-way. It also implies that when the order of status quo was passed in respect of plot no.572, the alleged encroachment from out of that plot and the extent of such encroachment was not known to the parties. The appellant was of the impression that the portion allegedly encroached was a part of plot no.577. The order of status quo was in respect of the passage then in existence. Evidence of P.W. 2 shows that either before or after passing of the order of status quo there was no physical change of the common passage in existence. Therefore, it cannot be said that the order of status quo was disobeyed by the appellant. Violation of injunction requires stricter prov than Civil actions. Therefore, in order to hold that the appellant violated the order of status quo in respect of plot No.572 R-1 must prove that as on the date of the interim order the parties were aware of as to in respect of which specific portion of the land in dispute the status quo is to be maintained. That is lacking in this case. Therefore, the appellant can not be said to have disobeyed the interim order of status quo.

In the result, the FAO is allowed but in the facts and circumstances, without cost. The impugned order is set aside. The Misc. Case under Order 39 Rule 2A C.P.C. stands dismissed.

Appeal allowed.

2015 (I) ILR - CUT- 782

DR. B. R. SARANGI, J.

O.J.C. NO.16992 OF 2001

PANCHUNATH SAMAL …….Petitioner

.Vrs.

UNION OF INDIA & ORS. … ….Opp.Parties

SERVICE LAW – Punishment for Misconduct – Proportionality – Delinquent had slept during duty hours and while caught he man handled the patrolling officer – For this sole incident he could not have been imposed major penalty of removal from service – Disciplinary authority as well as the appellate authority ought to have given opportunity to the delinquent-Petitioner to amend his conduct and behaviour – Held, for a single triffle incident punishment is disproportionate to the nature of misconduct alleged which is set aside and the matter is remitted back to the revisional authority for fresh adjudication. (Paras 24,15)

Case laws Referred to:-

1.2010 (I) OLR 742 : (Sudarsan Giri -V- Union of India & Ors.)
2.2013 (I) OLR 410 : (Sri Akshaya Kumar Satpathy-V- The Union of India & Ors.)
3.AIR 2013 SC 2908 : (Jai Bhagwan-V- Commr. Of Police & Ors.)
4.AIR 1999 SC 1552 : (U.P. State Road Transport Corpn. & Ors.-V- A.K. Parul)
5.AIR 2000 SC 1163 : (U.P. State Road Transport Corporation-V- Subhash Chandra Sharma & Ors.)
6.AIR 2007 SC 2954 : (You One Maharia-JV through You One Engineering and Construction Co.Ltd. & Anr .-V- N.H. Authority of India)
7.AIR 1983 SC 454 : (Bhagat Ram-V- State of Himachal Paredesh & Ors.)
8.AIR 1987 SC 2386 : (Ranjit Thakur-V- Union of India & Ors.)
9.AIR 1994 SC 215 : (Union of India & Ors.-V- Giriraj Sharma)
10.AIR 1996 SC 484 : (B.C. Chaturvedi-V- Union of India & Ors.)
11.AIR 1997 SC 3387 : (Union of India & Ors.-V- G.Ganayutham)

For Petitioner - Mr. B.B. Mohapatra

For Opp.Parties - Mr. S.K. Das,
Addl. S.C. (Central Govt.)

Date of hearing : 29.10.2014
Date of judgment: 11.11. 2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who was working as a Constable under the Central Industrial Security Force (C.I.S.F.) has filed this application assailing the order passed by the Disciplinary Authority imposing on him major penalty of removal from service, vide order dated 10.01.2001, Annexure-4 and confirmation thereof in appeal by the appellate authority, vide order dated 29.09.2001, Annexure-5 and the revisional order dismissing the cause of the petitioner on the ground of limitation vide order dated 06.01.2006, Annexure-6.

2. The factual matrix of the case in hand is that the petitioner was appointed as a Constable which post he joined on 27.06.1990 at the CISF Training Centre, Sidhabari of West Bengal. After being transferred from place to place while he was posted at NALCO, Angul in July, 2000 and was discharging his service, he was placed under suspension on 28.09.2000 by opposite party no.3-Commandant, CISF, NALCO Unit, in exercise of power under sub-rule (1) of Rule-30 of CISF Rules, 1969 (hereinafter referred to '1969 Rules'), vide Annexure-1, in contemplation of a disciplinary proceeding against him. Charge-sheet was then submitted on 2.10.2000, vide Annexure-2, which reads as follows :

> "Gross misconduct, carelessness and dereliction of duty in that No.904650569 Const. P.N. Samal of CISF Unit Nalco, Angul while detailed for 'B' shift duty on 26.09.2000 from 1300 hrs to 2100 hrs at Watch Tower No.1 when checked by S.I./Ext. P.R. Sharma, the patrolling officer at about 1345 hrs. He was latter found sleeping on the 1st floor of a quarter under construction at IAPL by SI/Exe R.P. Shrama, patrolling officer.
>
> **ANNEXURE-II**

> Gross misconduct, insubordinate behaviour and assault on senior in that No. 904650569 Constable P.N. Samal of 'B' Coy. CISF Unit Nalco Angul misbehaved with SI/Exe R.P. Sharma, the patrolling officer, when found sleeping at a quarter under construction at IAPL on 26.09.2000 at about 1350 hrs and later assaulted SI/Exe R.P. Sharma for which SI/Exe R.P. Sharma sustained injury below to his left eye lid."

3. On being served charge-sheet the petitioner submitted his written submission to the charges on 5.10.2000 denying all the allegations. As per sub-rule (4) of Rule-34 of the 1969 Rules, the Inspector/Exe. Sri Arun Kumar was appointed as the inquiry officer, who conducted the inquiry and submited his report, vide Annexure-3 dated 30.12.2000, to the disciplinary authority. Copy of the inquiry report was supplied to the petitioner who submitted his submission on 03.01.2001. The disciplinary authority on 05.01.2001 after going through the written submission of the petitioner, in exercise of power confers under Rule-29 of schedule-11 read with Rule-31 (b) of the 1969 Rules, imposed major penalty of petitioner's removal from service, vide order dated 10.01.2001, Annexure-4. Assailing the said order of punishment of removal from service vide Annexure-4, the petitioner preferred an appeal before the appellate authority but the appellate authority confirmed the order of punishment imposed by the disciplinary authority on 29.9.2001. Thereafter assailing the order of punishment passed by the disciplinary as well as the appellate authority, the petitioner filed the present writ application. During pendency of the writ application, the petitioner approached the revisional authority and his revision petition was rejected on the ground of limitation, vide order dated 6.1.2006, Annexure-6.

4. Mr. B.B. Mohapatra, learned counsel for the petitioner, strenuously urged that the inquiry officer conducted a preliminary inquiry during which the petitioner disputed the charge against him having manhandled one S.I./Exe, R.P. Singh by giving him blow and causing injury to him. He has submitted that the inquiry was conducted in a most perfunctory manner with malice and bias against him. Therefore, he alleges that the action taken by the disciplinary authority as well as the appellate authority basing on a perfunctory inquiry report cannot be sustained in the eye of law and therefore seeks interference of this Court. It is further urged that the punishment imposed is shockingly disproportionate to the allegation made against the

petitioner. Therefore by judicial review, this Court should reduce the quantum of punishment and allow the petitioner to join the service.

To substantiate his contention, Mr. Mohapatra, learned counsel, relied upon the judgments in ***Sudarsan Giri v. Union of India and others***, 2010 (I) OLR 742, ***Sri Akshaya Kumar Satpathy v. The Union of India and four others***, 2013 (I) OLR 410 and ***Jai Bhagwan v. Commr. of Police and others***, AIR 2013 SC 2908.

5. Mr. S.K. Das, learned Standing Counsel for the Central Government, vehemently opposed the contention raised by the learned counsel for the petitioner and stated that CISF is a discipline organization and as such the petitioner having adhered to such service ought to have maintained the discipline. He further submitted that when the petitioner was discharging his duty at a particular place in duty hour, he could not have slept and more so when his lapses were pointed out by the patrolling officer, instead of admitting his guilt, the petitioner assaulted the officer concerned causing injury on his person and that itself indicates the misconduct on his part and at the same time his insubordination. Therefore, after conducting the inquiry in conformity with the 1969 Rules and compliance with due procedure if the disciplinary authority imposed punishment which was affirmed by the appellate authority, this Court should not interfere with the same as both the fact finding authority and appellate authorities came to a definite concurrent finding. It is further stated that the revisional authority has dismissed the revision on the ground of limitation.

To substantiate his contention, Mr. Das, learned counsel relied upon the judgments in ***U.P. State Road Transport Corpn. and others v. A.K. Parul***, AIR 1999 SC 1552, ***U.P. State Road Transport Corporation v. Subhash Chandra Sharma and others***, AIR 2000 SC 1163 and unreported judgment of this Court in ***Srikanta Das v. Inspector General of Police, CRPF*** (OJC No. 2655 of 1997, disposed of on24.04.2006).

6. The Parliament has enacted an Act to provide for the constitution and regulation of an Armed Forces for the better protection and security of industrial undertakings owned by the Central Government, certain industrial undertakings, employees of all such undertakings and to provide technical consultancy services to industrial establishments in the private sector and for matters connected therewith called "Central Industrial Security Force Act,

1969". To give effect to the provisions of the Act, in exercise of power conferred on CISF Act, 1968, the Central Government framed rules, called the 'CISF Rules, 1969' and the 1969 Rules have been replaced by an another set of Rules called 'CISF Rule, 2001' which have been given effect to from 5.11.2001. Since the cause of action so far as the petitioner is concerned was prior to commencement of the aforesaid 2001 Rules, the proceeding was initiated and conducted as per the provisions contained in 1969 Rules. Under Chapter-10 of the 1969 Rules, procedure for penalty has been prescribed. Rule-34 deals with the nature of penalties where the penalty has been classified in two categories, namely, major and minor penalties. Removal from service has been classified as major penalty under sub-rule (2) of Rule-34. To impose major penalty, procedure has been envisaged under Rule-36 of 1969 Rules.

7. In course of hearing, to the query by this Court confronting Mr. Mohapatra, learned counsel for the petitioner, whether he was assailing imposition of the major penalty alleging any infraction of procedural irregularities committed by the authorities by not complying with the provisions contemplated under Rule-36 or not, fairly he submitted that he does not assail the procedure as envisaged under Rule-36 while imposing punishment of removal of the petitioner from service and rather, he confines his contention with regard to imposition of such major penalty the same being disproportionate to offence alleged against the petitioner. He further argued with vehemence that only on a single occasion if any lapse was notified against the petitioner as he was taking rest in a nearby place during his duty hours, this trivial mistake, he should not have been removed from service. By removing the petitioner from service, he has sustained mental, physical, physiological and financial hardship, which cannot be compensated in any manner whatsoever and for a petty offence major penalty of removal from service could not have been inflicted by the authorities.

8. Mr. S.K. Das, learned counsel for the opposite party, in reply to the contention raised by learned counsel for the petitioner submitted that not only the petitioner remained absent from duty, but he had shifted to some other place during his duty hours. The CISF is a discipline organization and such lapses will have deep root into the matter leaving bad impact in the event no punishment would be inflicted on the delinquent employee. At the same time, it is urged that the petitioner misconducted himself by assaulting

the patrolling officer, who found him sleeping and that itself amounted to serious misconduct. Therefore, considering the matter from any angle, if the disciplinary authority imposed punishment of removal from service, that cannot be said to be disproportionate to the charge levelled against the petitioner and the Court should refrain from interfering with the concurrent findings of the inquiry officer, concluded the same by the disciplinary authority and the appellate authority.

9. There is no dispute that the petitioner was never earlier punished for any misconduct prior to the alleged incident and it is the admitted case of both the parties that the petitioner lacked in duty during duty hours by sleeping at a place other than the place allotted to him for duty. So far as assaulting the higher authority is concerned, there is dispute and this Court expresses no opinion with regard to that. But on the basis of the inquiry caused by the inquiry officer, oral evidence was considered and the finding of the inquiry officer was upheld by the disciplinary authority as well as the appellate authority. Mr. Sharma, the patrolling officer had sustained minor injury and therefore the allegation made against the petitioner basing upon which inquiry was conducted and finding was recorded was triffle in nature. Rather being a model employer, the opposite party ought to have imposed such a penalty so that the petitioner would have rectified himself, but without giving such opportunity for his rectification, imposing harsh punishment of removal from service will grossly dislocate the entire family set up of the petitioner causing great prejudice to him.

10. In ***U.P. State Road Transport Corporation and others v. A.K. Parul,*** AIR 1999 SC 1552, the apex Court in paragraph-3 held as follows:-

> "3. …… This Court consistently has taken the view that while exercising judicial review the Courts shall not normally interfere with the punishment imposed by the authorities and this will be more so when the Court finds the charges were proved. The interference with the punishment on the facts of this case cannot be sustained. In ***State Bank of India v. Samarendra Kishore Endow*** (1994) 2 SCC 537 : (1994 AIR SCW 1465), this Court held that imposition of proper punishment is within the discretion and judgment of the disciplinary authority. It may be open to the appellate authority to interfere with it, but not to the High Court or to the

Administrative Tribunal for the reasons that the jurisdiction of the Tribunal is similar to the powers of the High Court under Article 226."

11. Reference was made to an unreported judgment of this Court in ***Srikanta Das v. Inspector General of Police, CRPF*** (OJC No. 2655 of 1997 disposed of on 24.04.2006). That case related to a 'more heinous offence' while here is a case where it cannot be construed that the allegation made against the petitioner was within the purview of 'more heinous'. This decision is therefore not applicable to the present case.

12. The reference made to ***U.P. State Road Transport Corporation v. Subash Chandra Sharma and others***, AIR 2000 SC 1163 by learned counsel for the opposite party is yet disputed as the principle settled therein related to punishment awarded in a way shockingly disproportionate to the nature of the charge found proved against the delinquent in which event the High Court should not exercise its power under article 226 of the Constitution of India.

13. In view of the decision referred above, there is no iota of doubt that while exercising power of judicial review under Article 226 and judicial review, this Court shall not normally interfere with the punishment imposed by the authority nor shall interfere with the quantum of punishment imposed by the authority. It is within the domain of the authority to interfere with such quantum of punishment in a court or tribunal.

14. The scope of judicial review in the matter of imposition of penalty as a result of disciplinary proceeding is very limited. This Court can interfere with the punishment only if it finds the same to be shockingly disproportionate to the charges proved. In such a case, the Court is to remit the matter back to the disciplinary authority for reconsideration of punishment. Of course in appropriate cases, in order to avoid delay the Court can itself impose lesser punishment. (See AIR 2007 SC 2954: ***You One Maharia-JV through You One Engineering and Construction Company Ltd. and another v. National Highways Authority of India***).

15. The question of interference with the quantum of punishment has been considered by the Supreme Court in catena of judgments, and it was held that if the punishment awarded is disproportionate to the charge of

misconduct, it would be arbitrary and thus, would violate the mandate of Article 14 of the Constitution (See- ***Bhagat Ram v. State of Himachal Pradesh & others***, AIR 1983 SC 454, ***Ranjit Thakur v. Union of India and others***, AIR 1987 SC 2386, ***Union of India and others v. Giriraj Sharma***, AIR 1994 SC 215, ***B.C. Chaturvedi v. Union of India and others***, AIR 1996 SC 484.

16. In the case of ***Ranjit Thakur*** (supra), the Apex Court observed as under:-

> "But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect, which is otherwise, within the exclusive province of the Court Martial, if the decision of the Court even as to sentence is an out ranges defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review."

17. In the case of ***B.C. Chaturvedi*** (supra), after examining earlier decisions, the Supreme Court observed that in exercise of the powers of judicial review, the Court cannot "normally" substitute its own conclusion or penalty. However, if the penalty imposed by an authority "shocks the conscience" of the Court, it would appropriately mould the relief either directing the authority to reconsider the penalty imposed and in exceptional and rare cases, in order to shorten the litigation, itself impose appropriate punishment with cogent reasons in support thereof.

18. In the case of ***Union of India and others v. G. Ganayutham***, AIR 1997 SC 3387, the Supreme Court considered the entire law on the subject and observed:

> "In such association, unless the Court/Tribunal opines in its secondary role, that the administrator was, on the material before him, irrational according to Wednesbury or CCSU then, the matter has to be remitted back to the appropriate authority for reconsideration. It is only in very rare cases as pointed out in B.C.

> Chaturvedi's case that the Court might, to shorten litigation think of substituting its own view as to the quantum of punishment in the place of the punishment awarded by the competent authority.

19. What is the appropriate quantum of punishment to be awarded to a delinquent is a matter that primarily rests at the discretion of the disciplinary authority. An authority sitting in appeal over any such order of punishment is by all means entitled to examine the issue regarding the quantum of punishment inasmuch as it is entitled to examine whether the charges have been satisfactorily proved. But when any such order is challenged before a Service Tribunal or the High Court the exercise of discretion by the competent authority in determining and awarding punishment is generally respected except where the same is found to be so outrageously disproportionate to the charge of misconduct and the Court considers it to be arbitrary and wholly unreasonable. The superior Courts and the Tribunal invoke the doctrine of proportionality which has been gradually accepted as one of the facets of judicial review. Where punishment is excessive or disproportionate to the offence so as to shock the conscience of the Court and is unacceptable even then Courts should be slow and generally reluctant to interfere with the quantum of punishment. The law on the subject is well settled by a series of decisions rendered by this Court. We remain content with reference to only some of them.

20. In ***Ranjit Thakur v. Union of India*** (1987) 4 SCC 611 : (AIR 1987 SC 2386), the apex Court held that the doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision even as to the sentence is in defiance of logic, then the quantum of sentence would not be immune from correction. Irrationality and perversity, observed this Court, are recognized grounds of judicial review. The following passage is apposite in this regard:

> "the doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision even as to sentence is an in defiance of logic, then the quantum of sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review".

21. Similarly, in ***Dev Singh v. Punjab Tourism Development Corporation Limited*** (2003) 8 SCC 9 : (AIR 2003 SC 3712 : 2003 AIR SCW 4222), the Supreme Court, following ***Ranjit Thakur's*** case (supra) held:

> ...a court sitting in an appeal against a punishment imposed in the disciplinary proceedings will not normally substitute its own conclusion on penalty. However, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court then the court would appropriately mould the relief either by directing the disciplinary/ appropriate authority to reconsider the penalty imposed or to shorten the litigation it may make an exception in rare cases and impose appropriate punishment with cogent reasons in support thereof. It is also clear from the above noted judgments of this court, if the punishment imposed by the disciplinary authority is totally disproportionate to the misconduct proved against the delinquent officer, then the court would interfere in such a case."

22. Reference may also be made to the decisions of the Supreme Court in ***Union of India v. Ganayutham*** (1997) 7 SCC 463 : (AIR 1997 SC 3387 : 1997 AIR SCW 3464), ***Ex-Naik Sardar Singh v. Union of India*** (1991) 3 SCC 213 : (AIR 1992 SC 417 : 1992 AIR SCW 4) and ***Om Kumar v. Union of India*** (2001) 2 SCC 386 : (AIR 2000 SC 3689 : 2000 AIR SCW 4361), which reiterate the same proposition.

23. The above view of the apex Court was referred to by this Court in ***Sudarsan Giri*** case (supra) and by the apex Court in ***Jai Bhagwan*** case mentioned (supra).

24. Coming to the case in hand, this Court is of the view that punishment of removal from service for the kind of misconduct proved against the petitioner appears to be grossly disproportionate. There is no dispute that during duty hours the petitioner had slept and having been caught, he manhandled the patrolling officer. For this sole occasion, he could not have been imposed major penalty from removal from service and the disciplinary authority as well as appellate authority ought to have given opportunity to the petitioner to amend his conduct and behaviour. If any further incident would have been there then the delinquent would have been liable for

harshest punishment like removal from service but for a single triffle incident, this Court finds the punishment to be disproportionate to the nature of misconduct of the petitioner.

25. Therefore, taking the totality of the circumstances into account, this Court is of the view that punishment of removal of the petitioner from service is a harsh punishment and the said punishment could be substituted by an order of reduction in rank or any other suitable punishment as contemplated under Rule-34 of the 1969 Rules. Therefore, the matter is remitted back to the revisional authority with direction to him to consider and dispose of the same within a period of four months from the date of communication of this order by complying with the principles of natural justice.

26. With the above observation and direction, the writ petition stands disposed of.

Writ petition disposed of.

2015 (I) ILR - CUT- 792

DR. B. R. SARANGI, J.

CONTC NO.1187 OF 2014

DHABALA PRASAD PRADHAN … …..Petitioner

.Vrs.

RAMESH CHANDRA PANDA …….Opp.Party

A. CONTEMPT OF COURTS ACT, 1971 – Ss. 15, 23

Contempt proceedings – Violation of Court's order – Contemnor is a Government official – Government exchequer will not be burdened to bear the expenses to defend the errant officers by the State Counsel where violation of the order is willful and deliberate.

(Para 23)

B. CONTEMPT OF COURTS ACT,1971 – S.12

Contempt Proceeding – Against Government official – Willful and deliberate violation of Court's order – Court does not want to award any punishment as the contemnor tendered unqualified apology and undertaking not to repeat the same in future – Proceeding is dropped. (Paras 16,24)

Case laws Referred to:-

1.AIR 1994 SC 1496 : (1993) Supp 3 SCC 754 : (Navalshankar Ishwarlal Dave -V- State of Gujarat)
2.AIR 1975 SC 1807 : (Gopal Mandal-V- State of West Bengal)
3.AIR 1972 SC 2466 : (1973) 1 SCC 446 : (Baradakanta Mishra Ex-Commissioner of Endowments -V- Shri Bhimsen Dixit)
4.AIR 1990 SC 968 : (Haryana State Adhyapak Sangh & Ors.-V- State of Haryana & Ors.)

For Petitioner - M/s. Susanta Kumar Dash, A.K. Otta, A.Dhalsamanta & S. Das.
For Opp.Party - Mr. A.K. Mishra, Addl. Govt. Advocate.

Date of hearing : 28.11.2014
Date of judgment : 04.12.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner files this petition under Section 15 read with Section 12 of the Contempt of Courts Act, 1971 for initiation of contempt proceeding against the contemnor-opposite party for non-compliance of the direction issued by this Court vide order dated 21.10.2014 passed in W.P.(C) No. 9997 of 2014.

2. The short facts of the case in hand is that the petitioner had purchased a piece of land comprising of an area of Ac.0.22 out of Plot No.1708 in mouza-Gopalpur in the district of Cuttack pertaining to Khata No. 285 through registered sale deed dated 08.02.2013/ 11.02.2013. In order to meet the expenses for treatment of his ischemic heart disease or cardiac ailments, the petitioner wanted to sale the land and get the consideration money. The

intending purchaser disclosed that there is no chance of registration of the sale deed since the name of the petitioner does not find place in the Record of Rights. Therefore, the petitioner filed W.P.(C) No. 9997 of 2014 before this Court. While entertaining such application, this Court passed an interim order on 6.8.2014 directing that on presentation of sale deed along with the Record of Rights pertaining to the said land proposed to be sold along with any other documents indicating the petitioner's title over the land, the registering authority shall proceed to consider registration in accordance with law forthwith, but the opposite party refused to register the sale deed only on the ground that the name of the transferor is not reflected in the Record of Rights in respect of the land proposed to be alienated.

3. Pursuant to the notice, opposite party no.4 in the writ petition (present contemnor herein) filed counter affidavit stating that the registering authority is not the authority to decide the title of the property of the vendee or vendor who are approaching for registration of the sale deeds.

4. After hearing the parties, this Court allowed the writ petition with the following orders:

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

5. In compliance to the order passed by this Court dated 21.10.2014, the petitioner presented the sale deed on 28.10.2014 along with the certified copy of the order passed in W.P.(C) No. 9997 of 2014 before the District Sub-Registrar, Cuttack. Instead of registering the sale deed in compliance to the order dated 21.10.2014 passed by this Court, the opposite party

deliberately and willfully caused harassment to the petitioner. Hence, the present contempt petition.

6. This Court issued notice by special messenger to the opposite party calling upon him to show cause as to why a contempt proceeding shall not be initiated against him for violation of the order dated 21.10.2014 passed by this Court. Though such notice was received by opposite party through his Head Clerk on 19.11.2014, he did not choose to appear on the date fixed, i.e. 25.11.2014. Since notice has been made sufficient as against the opposite party and none entered appearance on behalf of the opposite party, this Court passed order on 25.11.2014 directing personal appearance of the opposite party on 28.11.2014 at 10.30 A.M. and to file show cause as to why contempt proceeding shall not be initiated against him for violation of the order dated 21.10.2014 passed in W.P.(C) No. 9997 of 2014.

7. In response to the order dated 25.11.2014, the contemnor-opposite party, Ramesh Chandra Panda, District Sub- Registrar, Cuttack appeared in person and filed an affidavit admitting the fact that notice was issued by the office of the Orissa High Court on 19.11.2014 requiring him to file show cause before this Court on 21.11.2014 and that the said notice was received by the Head Clerk of his office on 19.11.2014 at about 4.30 P.M. It is stated that on 20.11.2014 para-wise comments have been submitted to the office of the learned Advocate General, Odisha through his Jr.Clerk, Goura Mohan Das. On 26.11.2014 the opposite party was busy in the review meeting of all the District Sub-Registrars of the State and therefore, he enquired about the delivery of the letter on 24.11.2014 on which date the Jr.Clerk informed that the letter has been delivered in the Issue Section of the office of the Advocate General on 24.11.2014, but the same was sent to the concerned Section of Advocate General dealing with contempt matter on 25.11.2014 for which the instruction submitted by the deponent could not be brought to the notice of the Court on 25.11.2014 by the time the order was passed for personal appearance of the opposite party. It is stated that it is a mistake on the part of the opposite party who undertakes not to commit such type of mistake in future and he has also tendered unqualified apology for the delay in imparting instruction and undertaken not to repeat the same in future.

8. So far as compliance of the impugned order dated 21.10.2014 is concerned, it is stated that the opposite party had only received the letter from the petitioner on 31.10.2014. On receipt of the same, he intimated the Deputy Secretary (Registration), Board of Revenue, Orissa, Cuttack

regarding registration of the said documents as per the direction of this Court in W.P.(C) No. 9997 of 2014 and sought for instruction at an early date. It is stated that on 11.11.2014 the petitioner was intimated by the opposite party-contemnor that his document has been accepted for registration and he awaits instruction from the higher authorities whereafter the petitioner would be intimated regarding registration of the document. The opposite party received a clarification from the State Government on 17.11.2014 regarding registration of the document in compliance to the order passed by this Court in W.P.(C) No. 9997 of 2014 and on receipt of such intimation, the opposite party informed the petitioner on 19.11.2014 to appear and to deposit the requisite registration fees to effectuate registration of sale deed presented on 28.10.2014, thereby it is stated by the opposite party that there is no willful or deliberate violation of the Court's order and for the lapses caused by him, he having tendered unqualified apology, seeks to drop the contempt proceeding initiated against him.

9. Mr.S.K.Dash, learned counsel for the petitioner strenuously urged before this Court that by way of affidavit filed by the opposite party, he is trying to justify his conduct and by that time he has already violated the order dated 21.10.2014 passed in W.P.(C) No. 9997 of 2014 and further it is stated that this Court has while quashing the order of refusal to register the sale deed, directed by order dated 21.10.2014 to opposite party no.4, the present opposite party-contemnor to effect registration of the sale deed at Annexure-3 executed by the petitioner forthwith on presentation. Therefore, the intention of the Court is to effect registration 'forthwith' on presentation of the sale deed. So, nothing remains to be considered by the opposite party except to effect registration of the sale deed in compliance to the order passed by this Court dated 21.10.2014. Further, it is urged that in a contempt proceeding, learned counsel for the State has no authority to defend a contemnor, who is a Government servant. Therefore, it is submitted that the Additional Government Advocate being a public prosecutor should not defend the contemnor before this Court in a contempt proceeding.

10. Mr.A.K.Mishra, learned Addl.Govt. Advocate states that since steps have already been taken and the petitioner has already been called upon to execute the sale deed in compliance to the order dated 21.10.2014, the contempt proceeding so initiated against the opposite party-contemnor may be dropped on consideration of the facts and circumstances narrated in the affidavit filed by the opposite party-contemnor.

11. From the facts pleaded, it appears that this Court vide order dated 21.10.2014 while quashing the order refusing to register the sale deed, directed the opposite party no.4, the present contemnor herein, to effect registration of the sale deed executed by the petitioner forthwith on presentation.

12. The meaning of 'forthwith' as given in Black's Law Dictionary, 7th Edn. at page 664 is "Immediately, without delay". In **Navalshankar Ishwarlal Dave v. State of Gujarat**, AIR 1994 SC 1496: (1993) Supp 3 SCC 754, the apex Court held as follows :

> "The expression 'forthwith' would mean 'as soon as may be', that the action should be performed by the authority with reasonable speed and expedition with a sense of urgency without any unavoidable delay. No hard and fast rule could be laid nor a particular period is prescribed. There should not be any indifference or callousness in consideration and disposal of the representation. It depends on the facts and circumstances of each case.

In **Gopal Mondal v. State of West Bengal**, AIR 1975 SC 1807, the apex Court has held as follows:

> "The word 'forthwith' has been interpreted to mean "as soon as possible; without any delay."

13. This Court after due adjudication having quashed the order of refusal for registration of sale deed by directing the opposite party-contemnor to effect registration of sale deed executed by the petitioner forthwith on presentation, the opposite party has to simply register the same in accordance with law immediately. It is admitted by the opposite party that he received the sale deed on 28.10.2014 and called upon the petitioner to appear before him on 29.10.2014 and though on that date the petitioner appeared, the formal registration of the sale deed has not been done in compliance to the order passed by this Court. The reasons for non-registration has also not been communicated to the petitioner, but in the affidavit filed pursuant to the notice issued by this Court in this proceeding, the opposite party-contemnor is trying to justify his action stating that he has received the letter from the petitioner on 31.10.2014 and on receipt of the same, he intimated the Deputy Secretary (Registration), Board of Revenue, Orissa, Cuttack about the

direction of this Court for registration of such document and requested him to impart necessary instruction regarding the same. It is stated that the opposite party intimated the petitioner on 11.11.2014 that though he accepted the document for registration, he awaited the instruction from the higher authorities and the petitioner would be duly intimated regarding registration of the document. Though the clarification was issued by the higher authority vide letter dated 17.11.2014, the same was received by the opposite party-contemnor on 18.11.2014. On receiving the clarification, the opposite party intimated the petitioner on 19.11.2014 to appear before him to deposit the requisite registration fee and to admit the execution of the registration of sale deed presented on 28.10.2014. The normal practice for registration of sale deed is that on presentation itself, either the Sub-Registrar will register it or reject the same on the very same day. In spite of the order passed by this Court on 21.10.2014, the opposite party deliberately and willfully delayed the matter without understanding the meaning of 'forthwith' and caused harassment to the petitioner. The affidavit itself indicates that there is deliberate delay in registration of sale deed, which amounts to over-reaching the order passed by this Court. After the order was passed by this Court, nothing further remains to be clarified by any authority as they are not sitting as an appellate authority over the orders passed by this Court save and except only to execute registration in compliance to the said direction of this Court. Therefore, the conduct of the opposite party is contemptuous one for not complying with the order passed by this Court.

14. In **Baradakanta Mishra Ex-Commissioner Of Endowments *v.* Shri Bhimsen Dixit**, AIR 1972 SC 2466 =(1973) 1 SCC 446, the apex Court has held as follows :

> "Contempt of Court is disobedience to the court, by acting in opposition to the authority, justice and dignity thereof. It signifies a wilful disregard or disobedience of the court's order; it also signifies such conduct as tends to bring the authority of the court and the administration of law into disrepute."

15. In **Haryana State Adhyapak Sangh and others, v. State of Haryana and others**, AIR 1990 SC 968, the apex Court has held that violation of order or direction of the Court constitute contempt of Court provided such violation is willful.

16. Taking into consideration the proposition of law laid down by the apex Court and examining the contentions raised by the opposite party, it appears that there is deliberate and willful violation of the Court's order. Therefore, the opposite party is to be prosecuted under the provisions of the Contempt of Courts Act. But considering the unqualified apology tendered by him and also the undertaking furnished by him that he would not repeat the same in future, this Court does not want to award any punishment for violation of the Court's order dated 21.10.2014 while deprecating the conduct of the contemnor.

17. Let us now consider the contention that the State Counsel should not represent a Government employee in a contempt proceeding, in this connection, it is necessary to know the meaning of "Public Prosecutor". "Public Prosecutor" has been defined under sub-Section (u) of Section 2 of the Code of Criminal Procedure as under:

> "Public Prosecutor" means any person appointed under Section 24 and includes any person acting under the directions of a Public Prosecutor."

Section 24 of the Cr.P.C. deals with "Public Prosecutor". Sub-section (1) of Section 24 states as follows :

> "24. Public Prosecutors-(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be."

18. The Additional Government Advocates, who have been appointed by the State Govt. to conduct the case before this Court on behalf of the State, are being declared as Public Prosecutors for conducting the cases on behalf of the State Govt. Therefore, the Additional Govt. Advocate being a Public Prosecutor within the meaning of sub-section (u) of Section 2 read with Section 24 of the Code of Criminal Procedure, he is authorized to prosecute the case on behalf of the State.

19. The General Administration Department of the State of Orissa had issued Letter No.14537/Gen. dated 26.5.1992 laying down the procedure to be followed for defending Government servants in legal proceedings. Paragraph 11 of the said letter which deals with defence of Government

servants on whom the contempt of Court charges have been served, provided that the Government servant concerned may be defended at Government cost, if the Administrative Department after careful consideration, have satisfied themselves that the Government servant was not personally responsible for non-implementation of the Court orders. It has also been provided therein that where the Administrative Departments are not satisfied as above, on the basis of the facts available with them, the defence of the Government servant should be left to himself.

20. The apex Court in **Commissioner, Agra and others, v. Rohtas Singh and others**, AIR 1998 SC 685 laid down the following principles of law:

(i) It is open to the State to nominate its Advocates to appear for its officials in contempt proceedings.

(ii) The State is entitled to authorize a Law Officer to appear in cases where the contempt consists of disobedience of an order of the Court by an Officer or employee of the State.

(iii) Where the conduct of the concerned official is contumacious the Court can direct him to pay costs personally."

21. Keeping in view the law laid down by the apex Court, the Chief Secretary of the State of Orissa issued a letter on 6.121.2000 laying down the guidelines to defend officers/ employees of the State Government in contempt proceeding.

22. If the terms of engagement of the Additional Government Advocate indicates that they have been appointed as Public Prosecutor, they cannot appear in a contempt proceeding for or on behalf of the contemnor, who may be a Government Servant for his willful and deliberate violation of the Court's order and the State exchequer will not be burdened for the errant act of the officer, who has got scanty regards to the orders passed by this Court, all expenses have to be borne by the contemnor himself and he should defend the case on his own.

23. In view of the aforesaid facts and circumstances, while dropping the proceeding initiated against the contemnor pursuant to the unqualified apology tendered by opposite party-contemnor, this Court directs the Chief Secretary, Odisha to intimate all concerned that Government exchequer will

not be burdened to bear the expenses to defend the errant officers in contempt proceedings by the State Counsel where violation of the order is willful and deliberate.

11. With the aforesaid observation and direction, the contempt proceeding is dropped.

Proceeding dropped.

2015 (I) ILR - CUT- 801

DR. B. R. SARANGI, J.

MISC. APPEAL NO. 786 OF 2001

PALLAB KUMAR RAY ……..Appellant

.Vrs.

RATIKANTA SENAPATI & ANR. ……..Respondents

MOTOR VEHICLES ACT, 1988 – Ss. 166, 169 (2)

Motor accident case – Case dismissed as the name of the claimant does not find place in the F.I.R. / Charge sheet and claimant failed to call for the out door patient Register from the concerned hospital – Order challenged – The tribunal is vested with power U/s. 169 (2) of the Act to call for records to ascertain the truth – Held, impugned award rejecting the claim petition is set aside – Case remitted back to the Tribunal for fresh disposal.

(Paras 14 & 15)

Case laws Referred to:-

1.AIR 1980 SC 1354 : (N.K.V. Bros. (P) Ltd.-V- M. Karunamai Ammal & Ors.)
2.2011 (I) TAC 867 (SC) : (Ravi-V- Badrinarayan & Ors.)
3.1994 (I) TAC 413 (Ori.) : (Mataji Bewa & Ors.-V- Hemanta Kumar Jena)
4.1997 (I) TAC 840 (Ori.) : (Smt. Anita Jena & Ors.-V- Sarat Chandra Pattnaik)
5.1997 (I) RAC 106 (Raj.) : (Chotu Lal & Ors.-V- Chameli Bai)

6.2002 (I) RAC 253 (A.P.): (Pidigala Linnga Reddy & Ors.-V- Satla Srinivas)
7.1994(I) RAC 475 (Ori.) : (National Insurance Co.Ltd.-V- Asha Lata Rout)
8.1999(I) TAC 345 (Ori.) : (D.M., New India Assurance Co.Ltd.-V- Smt. Ahalya Bai & Ors.)
9.1990 (I) TAC 339 : (Brestu Ram -V- Anant Ram & Ors.)
10.AIR 1957 SC 49 : (Sree Meenakshi Mills Ltd.-V- Commissioner of Income Tax, Madras)
11.(2012) 8 SCC 148 : (Union of India -V- Abrahim Uddin).
12.2006 ACJ 803 : (Nanhu Singh- V- Jaheer)
13.III (2006) SCC 622 : (Oriental Insurance Co.Ltd.-V- Raghunath Srichandan)
14.2008 (I) TAC 643 (A.P.): (B.M. United Insurance Co.Ltd.-V- Mayakala Sulochana & Ors.)

15.AIR 2009 SC 1819 : (Bimala Devi & Ors. -V- Himachal Road Transport Corpn.& Ors.)
16.AIR 2008 SC 2143 : (Om Prakash Bartis -V- Ranjit @ Ranbir Kaur & Ors.)
17.2011 (II) TAC 1 (SC) : (Kusumlata & Ors.-V- Satbir & Ors.)

For Petitioner - M/s. A.K. Choudhury, T. Dash & K.K.Das.
For Opp.Parties - M/s. N.K. Mishra, D.Mishra, D.K. Pani, P.K. Sahoo & A.K. Ray.

Date of hearing : 08.01.2014
Date of judgment : 11.02.2014

JUDGMENT

Dr. B.R. SARANGI, J.

This appeal is directed against the award dated 23.08.2001 passed by 3rd Motor Accident Claims Tribunal, Balasore in M.A.C.T. Case No.51/237(c) of 2000-1997 dismissing the claim application of the claimant-appellant.

2. The fact of the case in nut-shell is that the appellant being the claimant, filed an application under Section 166 of the Motor Vehicles Act claiming compensation of Rs.50,000/- contending, inter alia, that while he was travelling in a bus bearing Registration No.ORB-5471 on 29.08.1997, the said vehicle met with an accident as a result of which he sustained bodily injuries on his person along with several other passengers. Accordingly,

Bhadrak Rural P.S. Case No.162/1997 was registered under Sections 279/337/304-A IPC and charge-sheet was submitted.

3. Pursuant to notice issued by the 3rd M.A.C.T., Balasore, the owner of the offending bus, respondent no.1 did not appear and he was set ex-parte. Respondent no.2-the Insurance Company entered appearance, filed its written statement denying the contentions raised in the claim application, and called upon the claimant-appellant to prove his case by adducing cogent evidence, but did not adduce any oral or documentary evidence in support of the plea taken by it in its written statement.

4. The claimant-appellant examined himself as P.W.1 and relied upon the documents marked as Exts.1 to 5 in support of his contention whereas neither anybody has been examined nor any document has been exhibited on behalf of the respondent no.2-Insurance Company.

5. Learned 3rd M.A.C.T., Balasore on consideration of the materials available on record dismissed the claim application vide judgment dated 23.08.2001 holding that the appellant has not been cited as a witness by the Police in the charge-sheet filed against the driver, the FI.R. does not disclose that the appellant received injury in the road accident while travelling in the offending bus and the claimant has not called for Outdoor Patient Register of the District Headquarter Hospital, Bhadrak. Apart from the same, the claimant-appellant has not been able to say the name of the doctor who gave him medical treatment.

6. Mr. A.K. Choudhury, learned counsel for the appellant submits that as per the provisions of law, the strict rules of pleadings should not be made applicable to the claim case filed under Section 166 M.V. Act. The statute being a beneficial legislation and the proceeding being summary in nature, the learned Tribunal is to ascertain whether the person is injured due to the motor vehicle accident and the claimant is required to establish his case on preponderance of probability and the standard of proof beyond reasonable doubt could not have been applied. He relies upon the judgment of the apex Court in the case of ***N.K.V Bros. (P) Ltd. V. M. Karunamai Ammal and others***, ***AIR 1980 SC 1354*** and states that strict rules of pleadings should not be made applicable to the accident claim cases and the Tribunal must take special care to see that the innocent victims do not suffer and the court should not succumb to the niceties, technicalities etc. Further Mr. A.K. Choudhury, learned counsel for the claimant-appellant relying upon the judgment of the

apex Court in the case of ***Ravi v. Badrinarayan and others***, 2011(I) TAC 867 (SC) states that FIR is not an encyclopedia of the incident. While dealing with the question with regard to the scope of delay in lodging the F.I.R. regarding the accident, the apex Court held that the purpose of lodging the F.I.R. in such type of cases is primarily to intimate the police to initiate investigation of criminal offences. Lodging of F.I.R. certainly proves factum of accident so that the victim would be able to lodge a case for compensation but delay in doing so cannot be the main ground for rejecting the claim petition. Apart from the same the F.I.R., contents of the charge sheet and the statements recorded under Section 161 Cr.P.C. are not substantive piece of evidence and cannot possibly be treated as an evidence in a claim proceeding as has been held in the cases of ***Mataji Bewa and others v. Hemanta Kumar Jena***, 1994 (I) TAC 413 (Orissa), ***Smt. Anita Jena and others v. Sarat Chandra Pattnaik***, 1997 (I) TAC 840 (Orissa), ***Chotu Lal and others v. Chameli Bai***, 1997(I) TAC 106 (Raj), ***Pidigala Linga Reddy and others v. Satla Srinivas***, 2002 (I) TAC 253 (Andhra Pradesh), ***National Insurance Co. Ltd. V. Asha Lata Rout***, 1994 (I) TAC 475 (Orissa), ***D.M., New India Assurance C. Ltd. V. Smt. Ahalya Bai and others***, 1999 (I) TAC 345 (Orissa), ***Brestu Ram v. Anant Ram and others***, 1990(I) TAC 339.

7. Mr. N.K. Mishra, learned Senior counsel appearing for the Respondent-Insurance Company states that no finding of fact can be challenged in an appeal unless it constitutes a question of law or is patently perverse. He further states that it is a well settled law that a judgment based on pure finding of fact is not liable to be reviewed or reversed in any appeal. He relies upon the cases of ***Sree Meenakshi Mills Ltd. V. Commissioner of Income Tax, Madras***, AIR 1957 SC 49 and ***Union of India v. Abrahim Uddin***, (2012) 8 SCC 148. While refuting the submission made by Mr. A.K. Choudhury, learned counsel for the appellant, he submits that the learned Tribunal in paras 9 and 10 of the award has elaborately dealt with consideration of the evidence laid by the claimant appellant which reveals that the claimant failed to prove and justify his claim in any manner whatsoever and the said finding of fact does not call for interference due to lack of perversity.

8. In view of the aforesaid fact and circumstances, the following questions arise for consideration:

(1) whether the learned Tribunal is correct or justified in dismissing the claim application as because the claimant did not call for the Outdoor

Patient Register of the District Headquarters Hospital, Bhadrak when the learned Tribunal is empowered under Section 169 of the M.V. Act, 1988 read with Rules 10 and 12 of the Motor Vehicle (Accident Claims Tribunal) Rules, 1960 to call for the records or documents,

(2) whether the F.I.R., charge sheet and the statement recorded under Section 161 Cr.P.C. are substantive pieces of evidence and can be treated as evidence in a claim proceeding and

(3) whether the strict rules of pleadings and Evidence Act is applicable to the proceedings relating to accident claim cases and the standard of proof beyond reasonable doubt could be applicable.

9. Question nos.1 and 3 are interlinked to each other. In the present case the learned Tribunal dismissed the claim application on the ground that the claimant did not call for the Outdoor Patient Register of the District Headquarters Hospital, Bhadrak and that the claimant was unable to say the name of the doctors, who gave medical treatment. The learned Tribunal should have called for the "Outdoor Patient Register" of the District Headquarters Hospital, Bhadrak and other relevant records/documents/papers by exercising power under Section 169(2) of the M.V. Act, 1988 read with Rules 10 and 12 of the Orissa Motor Vehicle (Accidents Claims Tribunal) Rules, 1960 keeping in view the benevolent statute. If the claim case is not dismissed under Rule 5 of the Orissa Motor Vehicles (Accidents Claims Tribunal) Rules, 1960, the learned Tribunal is required to issue notice under Rule-6 to the parties involved in the proceeding. During course of hearing, the learned Tribunal, under Rule-10 may visit the site for local inspection or examine any person likely to give information relevant to the proceeding and during the local inspection the learned Tribunal under Rule-12 may examine summarily any person likely to give information. Apart from the provisions contained in Orissa Motor Vehicles (Accident Claims Tribunal) Rules, 1960 and Section 169 (2) of the M.V. Act, 1988, learned Tribunal having been vested with the power of a civil court for the purpose of taking evidence, enforcing the attendance of witnesses compelling the discovery and production of documents/material objects, it could have called for the Outdoor records from the District Headquarters Hospital. Instead of doing so and without application of mind, dismissal of the claim petition by the Tribunal is a misconceived one.

10. The learned Tribunal has become so technical that without exercising its power under Section 169(2) read with Rules-10 and 12 of the Orissa Motor Vehicle (Accidents Claims Tribunal) Rules, 1960 by not calling for Outdoor Patient Register of District Headquarters Hospital, Bhadrak and other relevant documents/papers it has come to finding that the claimant did not call for the outdoor patient register of District Headquarter Hospital, Bradrak to prove that he had received treatment at the said hospital on the fateful day. While answering question no.3, it is found that the learned Tribunal has doubted the case of the injured claimant-appellant about his travelling in the Bus and sustaining of injuries as his name did not appear in the F.I.R. and he has not been cited as witness in the charge-sheet.

11. It is not disputed that there was no accident. Only because the name of the claimant is not mentioned in the F.I.R. or in the charge-sheet that by itself does not disentitle him to the claim benefit and on that basis court cannot come to a conclusion that he has not sustained injuries. Further non-examination of the claimant-appellant medically on police requisition or non-examination of any eye-witnesses, cannot ipso facto disentitle the claimant to get the compensation. On the other hand, the Insurance Company having not produced any documents in support of its contention, the finding so arrived at by the learned Tribunal on a misconceived notion that the name of the claimant-appellant having not been found in the F.I.R. he is not entitled to get the benefit, cannot be sustained.

12. In the cases of ***Nanhu Singh v. Jaheer***, 2006, ACJ 803, ***Oriental Insurance Co. Ltd. V. Raghunath Srichandan***, III (2006) SCC 622 and ***B.M., United Insurance Co. Ltd. V. Mayakala Sulochana and others***, 2008(I) TAC 643 (A.P.) it has been held that the version as per FI.R. should not be given preference over the testimony of the witnesses recorded before the learned Tribunal. But on perusal of the impugned judgment, it is found that the learned Tribunal has proceeded with the claim application like conducting a criminal trial without keeping in mind the law enunciated by the apex Court as it is borne out from the award so passed. In ***Bimala Devi and others v. Himachal Road Transport Corporation and others***, AIR 2009 SC 2819, while dealing with a claim application it is necessary to be borne in mind that the strict proof of an accident cause by a particular bus in a particular manner may not be possible to be done by the claimants. Claimants are merely to establish their case on the touchstone of preponderance of probability. The apex Court in the case of ***Om Prakash Bartis v. Ranjit @***

Ranbir Kaur and others, AIR 2008 SC 2143 has held that the claim application filed under the Motor Vehicle Act is summary in nature and the provisions of Civil Procedure Code or Evidence Act are not strictly applicable to such proceeding. The Tribunal must take care to see that the innocent victims should not suffer and the Court should not succumb to the niceties.

13. In view of the principle of law laid down by the apex Court, the Tribunal should not have gone into the technicalities of the law to hold that since the petitioner's name does not find place in the F.I.R. nor in the charge-sheet, he is not entitled to compensation which is an outcome of non-application of mind. This opinion is fortified in view of the judgment of the apex Court in ***Kusumlata and others v. Satbir and others,*** 2011(II) TAC 1(SC), wherein both the Tribunal and the High Court refused to accept the presence of one of the witnesses as his name was not disclosed in the F.I.R., the apex Court expressed displeasure with regard to approach of the learned Tribunal as well as the High Court relying upon Bimala Devi and others (supra) and held that in a case relating to Motor Accident Claims, the claimants are not required to prove the case as it is required to be done in a criminal trial. The Court must keep this distinction in mind. In case of ***Parameswari v. Amirchand and others***, 2011 (II) TAC 737, the apex Court has held that in case of road accident, strict principles of proof in criminal case are not attracted. Similarly, in ***Dulcina Fernandes v. J. Cruz***, 2013(7) Supreme 287 the Supreme Court has held that the plea set up by the claimants was required to be decided by the learned Tribunal on the touchstone of preponderance of probability and certainly not on the basis of proof beyond reasonable doubt.

14. In considering question No.2, the contention raised on behalf of Mr. N.K. Mishra, learned Senior Advocate for the Insurance-Company that the claimant appellant having not produced any additional evidence under Order 41 Rule-27 CPC, the Court should not entertain the appeal and dismiss the same. But as per the analysis made in the foregoing paragraphs, it appears that the learned Tribunal has not passed the award in consonance with the provisions of law and on the basis of materials available on record, rather it has decided the claim application like conducting a criminal trial though in a case of road accident the strict principles of proof in a criminal case are not attracted. In view of such position, it cannot be said that claimant did not prove that he had sustained injury due to accident caused by the offending

bus and the finding of the learned Tribunal that the name of the claimant-appellant being not there in the F.I.R. and having not been shown as a witness to the charge-sheet, is absolutely perverse as it is held by the apex Court time again that the F.I.R. and charge-sheet are not substantive piece of evidence. But, factually the respondent-Insurance Company having not adduced any rebuttal evidence, disputing the plea of the claimant, the learned Tribunal should not have dismissed the claim of the claimant.

15. Thus, the impugned award passed by the learned Tribunal rejecting the claim application filed by the claimant-appellant being an outcome of non-application of mind and a misconceived one, the same is hereby set aside. The matter is remitted back to the learned Tribunal for fresh adjudication by giving opportunity of hearing to the parties on the basis of the materials available on the record. With the above observation and direction, the Misc. Appeal is disposed of.

Appeal disposed of.

2015 (I) ILR - CUT- 808

D. DASH, J.

F. A. NO. 82 OF 1999

ZONE OFFICER, U.I.P.
KUSUMKHUNTI, KALAHANDI .....Appellant

.Vrs.

ABHIMANYU SENAPATI & ORS. .....Respondents

LAND ACQUISITION ACT, 1894 – S.18

Reference for higher compensation – Market value of the acquired land – A dwelling house stands on a portion of that land and vegetables grown in another portion and Rs. 20,000/- per annum earned out of the same – Land is fit to be converted to homestead – Land Acquisition Collector has lost sight of all these aspects – Similar kissam of land to an extent of 29 decimals in the vicinity had been sold

for a consideration of Rs. 6,200/- – Held, determination of market value of the land in question at Rs. 300/- per decimal is just and proper.

(Para 6)

For Appellant - Mr. A.K. Mishra, Standing Counsel
For Respondents - M/s. Manas Chand, D.R.Parida

Date of hearing : 22.10.2014
Date of judgment : 30.10.2014

JUDGMENT

D. DASH, J.

In this appeal challenge has been made to the award passed by the referral court i.e. Civil Judge, (Senior Division), Dharamgarh in the district of Kalahandi in M.J.C. No. 06 of 1996 in the matter of a reference under section 18 of the Land Acquisition Act, 1894 (hereinafter in short called as 'the Act')

2. Facts necessary for disposal of this appeal are as under:-

Land measuring Ac.3.36 decimal under Khata No.27 and Plot No.34 with recorded kissam as "Ata Unhari" situated at mouza Golamunda under the jurisdiction of Junagarh P.S., in the district of Kalahandi was acquired for the purpose of construction of right main canal under Upper Indravati Project by virtue of the Government Notification dated 06.10.1993. It may be mentioned here that total extent of land under that plot as stated above was Ac.9.85 decimals. The Land Acquisition Collector basing on the sale statistics and taking into consideration the other factors offered the market price of the land at Rs.7000/- per acre and accordingly the total compensation amount was assessed at Rs. 34,310/-. The respondent no.1 while receiving the said compensation on protest advanced his claim for higher compensation. This is how the reference has been made under section 18 of the Act.

3. In the said referral proceeding from the side Land Acquisition Collector it was asserted that the market price of the land has been assessed in consonance with the sale statistics and the work sheets prepared in the office that it should be paid at the rate of Rs.7000/- per acre and the claim of higher compensation by the respondents was seriously refuted. The respondents on the other hand asserted the assessment of said compensation, particularly the market value of the land as grossly low.

4. Before the referral court, the respondents have examined two witnesses on their behalf, when the appellant has also not lagged behind having examined one witness, besides proving the work sheet Ext-A and sale statistics Ext-B. The respondents have also proved the true copy of the sale deed, Ext.1 in support of their claim of higher compensation.

The referral court on analysis of evidence and as it appears being alive to the settled position of law that it is for the claimant seeking the higher compensation by adducing necessary evidence has to justify his entitlement to higher compensation, has finally determined the market value of the acquired land payable at the rate of Rs.300/- per decimal as on date of publication of notification under Section 4(1) of the Act.

5. Learned counsel for the State submits that there was no justification on the part of the referral court to determine the market value of the land in any way more than what had been made by the Land Acquisition Collector in the present case, when the said assessment was made looking to the sale statistics and the consideration paid in respect of said transaction of the land of nearby locality as available. It is also her submission that the determination of the market value of the acquired land at the rate of Rs.300/- per decimal by the referral court is not based upon the evidence on record and, therefore, she submits that the same is not sustainable. According to her said evidence is not to be taken into consideration for the purpose of determination of just and proper compensation payable to the respondents in respect of the acquired land.

Learned counsel for the respondents on the contrary submits that the referral court has examined the evidence adduced from both the side, in great detail and upon their proper appreciation, the market value of the acquired land has been fixed. Therefore, according to him, there arises no reason to interfere with the same term to be on a higher side.

6. On such rival submission, this Court is called upon to examine the correctness of the determination of the market value of the acquired land as done by the referral court to conclude as to if the same is tenable as it is or otherwise. Admittedly, the area of acquired land is Ac.3.36 decimal and it was of kissam “Ata Unhari”. P.W.1 is the respondent no.1, while attacking the assessment of the market value of the acquired land as done by the Land Acquisition Collector to be grossly low, has further stated that there was a katchha house over the acquired land with tile roofing and that was being

used for dwelling purpose and although the kisam of land in that record of right was not that but it was actually fit for being used as homestead and was so used in past and actually was available as such. He has further deposed that they were raising vegetable in some portion of that land and a sum of Rs.20,000/- per annum was coming to their purse by way of sale of the produces. Of course, he has not led any documentary evidence on the above score which in the facts and circumstances are not expected also. Next comes the evidence of P.W.2 who is a neighbouring tenant. His evidence corroborates the evidence of P.W.1 that there was a dwelling house on a portion of the land. Both P.Ws. 1 and 2 have deposed that the market value of the land at the time of acquisition was Rs.1000/- per decimal. This P.W.2 has also stated about the income derived by sale of vegetables grown over there by P.W.1. But his evidence with regard to the said income appears to be highly exaggerated i.e. even more than three times what has been stated by P.W.1. The referral court as it appears has rightly discarded his evidence with regard to the income from out of the land. But, taking into account the evidence of O.P.W.1 who is none other than the Land Acquisition Collector, that vegetables were being grown over the land has been accepted. Similarly the evidence of O.P.W.1 running in support of the evidence of P.Ws.1 and 2 that the land in question was fit for being converted to homestead, the referral court has held that the said aspect as well as the income that was being fetched from that acquired land have been lost sight of by the Land Acquisition Collector while assessing the market value of the acquired land. At this stage, the sale deed proved from the side of the respondents Ext.1 needs due consideration. It is seen therefrom that the land of similar kissam in the vicinity to an extent of 29 decimals had been sold for a consideration of Rs.6,200/-. It is true that the acquired land is a larger patch and thus the sale consideration in respect of land of small patches of land are not the proper guide, but, then in the present case the evidence stands that the land in question was used for the purpose of growing vegetable crops and over and above, it was fit for being used as homestead. Cumulatively viewing all these evidence on record, the determination of the market value of the land in question as done by the referral court at Rs.3000/- per decimal is found to be just and proper and no such infirmity is noticed. Therefore, said award is not liable to be interfered with.

7. In the result, the appeal stands dismissed with cost throughout.

Appeal dismissed.

2015 (I) ILR - CUT- 812

D. DASH, J.

JCRLA NO.44 OF 2002

GURU CHARAN MOHANTA .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

PENAL CODE, 1860 – S. 376 (1)

Rape – Victim's testimony found to be truthful – Her evidence gets support from other witnesses – No reason for the victim woman to implicate the appellant at the cost of her own dignity – Had it been with consent the victim would not have disclosed the incident on her own when nobody had seen the incident or doubted about the relationship – Nothing to cast any doubt on the veracity of the victim – Held, impugned judgment of conviction and sentence are confirmed.

(Paras 7,8)

For Appellant - M/s. Pramod K. Tripathy-1,
T.K. Mohanty, S. Tripathy, A.K. Dei.
For Respondent - Mr. A.K. Mishra, Standing Counsel.

Date of hearing : 20.11. 2014
Date of judgment : 28 .11.2014

JUDGMENT

D. DASH, J.

The appellant from inside the jail has preferred this appeal challenging the judgment of conviction and order of sentence passed by the learned Sessions Judge, Mayurbhanj, Baripada in G.R. Case No.100/99 (T.C. No.40/99) convicting him for offence under section 376 (I), I.P.C. and sentencing him to undergo rigorous imprisonment for a period of seven years.

2. Prosecution case is that on 16.03.1999 the victim was suffering from fever and she in the absence of her husband at home went to the Anganbadi

centre of their village where medicines were being distributed. The victim did not find the lady Anganbadi worker in-charge of that centre but her husband, the appellant, was found to be there. When the victim asked for medicines, the appellant called her inside and gave the medicines with instruction about its intake. It is stated that at that time she caught hold the hands of the victim, dragged her and then closed the door of the room from inside. The victim was then carrying her baby who being snatched away by the appellant was made to sit on the floor. It is stated that thereafter the appellant committed sexual intercourse upon the victim forcibly.

The victim after the incident on Thursday came crying to her house and when her husband came on Saturday, she narrated the incident before him who in turn reported the matter to co-villagers and then as per the instruction further reported the matter to Sarpanch. A village meeting was then convened by the Sarpanch and several villagers gathered. The appellant being called remained present. There the victim narrated the incident and the appellant denied such allegations. The victim and her husband being annoyed, assaulted the respondent. Thereafter report in writing was made to the police by the husband of the victim. The said report was treated as F.I.R. and it was written by one Ghanashyam Paleya under the instruction of the husband of the victim. On the basis of the said information, case being registered, investigation commenced.

In course of investigation, the victim, her husband and other witnesses were examined. The respondent was apprehended. The victim as well the appellant were medically examined and upon seizure of their wearing apparels, those were sent for chemical examination. On completion of investigation, charge-sheet being submitted the appellant faced the trial.

3. The defence plea is one of complete denial. In the statement the appellant has stated that as he declined to give illegal subscription as per the demand of the villagers, this case has been foisted against him.

During trial from the side of the prosecution thirteen witnesses have been examined whereas the defence has examined none. Besides the oral evidence the prosecution has proved the F.I.R. as Ext.1, medical examination reports as Exts.2 and 6 and the report of the chemical examiner as Ext.10. It may be mentioned that the victim has been examined as P.W.2 and P.W.1 is her husband. P.Ws.2,3 and 7 are other witnesses. The doctors have been examined as P.Ws.9 and 11. The Investigating Officers are P.Ws.12 and 13.

4. The trial court on examination of evidence and upon their evaluation has found the appellant guilty for commission of offence under section 376, I.P.C. and accordingly he has been convicted and sentenced.

5. Learned counsel for the appellant submits that in this case the solitary testimony of P.W.2, the victim, ought not to have been relied upon by the trial court. According to her, P.W.2's evidence is wholly unreliable and unsafe to fasten the criminal liability upon the respondent for the offence of rape. She further submits that the evidence of P.W.2 when read in its entirety with definiteness leads to show that she was having the consent and was a party to the said sexual activity voluntarily. It is also her submission that the appreciation of evidence as done by the trial court is not just and proper and, therefore, the finding based upon the same cannot sustain in the eye of law.

6. Learned counsel for the State submits that the finding leading to the conviction of the appellant is a well merited one and there remains no reason as to why the evidence of P.W.2 would not be accepted. According to him, she has stated in a natural manner and her conduct that she disclosed the incident immediately on arrival of her husband and then in the meeting rather negates a case of consent when it is considered with her back ground and starta. Therefore, he contends that the trial court did commit no mistake in convicting the appellant for the above offences.

7. Keeping the above submission in mind, this Court is now called upon to examine the evidence on record in order to judge the defensibility of the finding rendered by the trial court.

When the evidence of the victim (P.W.2) is seen, it is found that she has stated to have gone to the house of the appellant on that day with her child and at that time the wife of the appellant was absent. She has stated her purpose of visit was to bring medicine for her ailment. It is also in the evidence that her husband was not present in the house then and had been to Salaibeda, and he came on Saturday afternoon. She has specifically stated that on arrival the respondent snatched away her child and by closing the door committed rape upon her forcibly. In a natural manner, she has stated to have disclosed the incident to her husband on his arrival and then both to have gone to the Sarpanch as per the advice of the Ward Member. It is also her evidence that there was a meeting in the village where the appellant though remained present did not confess and after that only, the F.I.R. was lodged. Thus, here the victim herself explains the delay and that in the facts

and circumstances of the case is found to be quite acceptable. It is expected from a rustic rural woman with child in the absence of her husband being raped in such mental condition at that moment would remain in a fix and completely disturbed thinking what to do and what not. So for her to maintain silence is just but natural. It further appears that on arrival of her husband, the matter got triggered. In cross-examination she has further stated that at that point of time, nobody was there in the house of the appellant. When she has stated that they assaulted the appellants, she meant that it was in the meeting and that has found support from the evidence of the doctor (P.W.9), who noticed during examination of the appellant on 30.03.1999 as against the incident taking place on 19.03.1999 that there were two old healed wounds on the top of the scars and another in the right ear lobule. The evidence of this doctor is to the effect that the age of the injury was more than seven days. This exposes the truthfulness of evidence of P.W.2. The victim's evidence with regard to the forcible sexual intercourse upon her by the appellant has not in any way been shaken. No such other circumstance also emanates from her evidence so as to infer even for a moment that the probability factor is out of tune. Therefore, the victim is found to be a witness of sterling quality and her solitary testimony in this case is found to be truthful and there exists nothing to cast any doubt on her veracity. Moreover, there strikes no reason as to why this rustic woman belonging to scheduled tribe community hailing from rural area would go to implicate this appellant stating on oath that she was raped by him at the risk of her marital life, earning social stigma and at the cost of her own dignity. If it was with consent, when nobody had seen it or even doubted about the relationship either prior to that date or on that date, there was no reason for this victim to disclose on her own. Over and above, it is seen from the evidence of P.W.1 that the husband of P.W.2 that he came to know from her that when she had been to the centre, the appellant called her into the room and as soon as she entered, she was asked to keep the baby on a place and then was raped. It is also stated that he was told by P.W.2 that at that time the wife of the appellant was absent in the house. Follow up actions taken at his instance as has further been deposed to. It has further been deposed by P.W.4, the Ward Member that P.W.1 had complained before him about the incident implicating the appellant and for that there was a meeting in the village. As regards that meeting, it has also been stated by P.W.5. The evidence of P.W.6 again run on the line that he was informed by P.W.1 about the rape being committed upon her wife by the appellant and he being the Sarpanch had called the meeting, where P.W.2 described the details of the happenings.

The same is the evidence of P.Ws.7 and 8. Though a plea has been taken by the appellant that the case has been falsely foisted as he did not pay the subscription surrendering to the illegal demand of the villagers, no such evidence has either been let in by the appellant nor any such material has surfaced in the evidence of the prosecution witnesses giving any indication in that direction. Therefore, on independent evaluation of evidence, this Court find that the prosecution has established the charge of rape against the appellant beyond reasonable doubt.

8. For the aforesaid discussion and reason, I do not find any such justification to arrive at a conclusion other than that of the trial court. Accordingly, the judgment of conviction and the sentence imposed which is the prescribed minimum are hereby confirmed.

9. In the result, the appeal stands dismissed. The appellant is directed to forthwith surrender to custody for serving out the remaining sentence. The trial court is also directed to take necessary steps as per law in that regard.

Appeal dismissed.

2015 (I) ILR - CUT- 816

BISWANATH RATH, J.

O.J.C. NO. 2816 OF 2000

BIJAYA KRUSHNA DAS, PRESIDENT, HOTEL ASSOCIATION OF PURI ……Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opposite Parties

CONSTITUTION OF INDIA, 1950 – ART.226

Construction of Building in Puri town – Notification bringing Puri Municipality under Coastal Regulation Zone II – Puri-Konark Development Authority (PKDA) has no jurisdiction to interfere in the

matter – PKDA is only an implementing agency under the Environment (Protection) Act, 1986 and it is to act within the provisions of the Coastal Regulation Zone notifications and the Law applicable there in such as Odisha Municipal Act, 1950 and Odisha Municipal Rules, 1953 and it has noting to do with the Odisha Development Authorities Act 1982 – Held, impugned order under Annexure-14 being an action contemplated under sub-section 3 of Section 16 of the Odisha Development Authorities Act is quashed – The Coastal Zone Regulating Authority being competent in this regard the impugned notifications / press notes issued by the Government of Odisha in its H & U D department under Annexures 24 & 25 are set aside.

(Paras 32,33,34)

Case laws Referred to:-

1.(2007) 14 SCC 439 : (Suresh Estates (P) Ltd.-V- Municipal Corporation, Mumbai)
2.AIR 1983 (SC) 150 : (T. Barai -V- Henry Ah Hoe)
3.(2011) 3 SCC 139 : (Offshore Holding Pvt. Ltd.-V- Bangalore Dev Authority)
4.AIR 2010 KAR 124 : (Pushpalatha -V- V. Padma)
5.AIR 2012 (BOM 89 : (Mohan Sudame-V- State of Maharashtra)

For Petitioner - M/s. Ashok Mohanty, Sr. Advocate,
M/s. Sanjeet Mohanty, Sr. Advocate.
For Opp.Parties - M/s. Surya Prasad Mishra, A.G.
M/s. A. Bose, Asst. Solicitor General,
M/s. S.K. Padhi, Sr. Advocate,
Gautam Mishra.

Date of hearing : 20.01.2015
Date of Judgment : 20.02.2015

JUDGMENT

BISWANATH RATH, J.

This is a writ petition filed by the Hotel Association of Puri represented through its President one Bijaykrushna Das challenging the inaction of the State Government and Puri-Konark Development Authority in not allowing the construction activities within the prescribed norms of Coastal Regulation Zone -II hereinafter in short called as CRZ-II in the town of Puri after the Puri town has been declared to have come under the CRZ-II. The petitioner also assails the jurisdiction of the Puri-Konark Development

Authority in so far as the provisions contained in Odisha Development Authorities Act, 1982 (in short hereinafter referred to "the ODA Act, 1982") in view of the 74th Amendment to the Constitution of India which has taken away the powers of the development authorities, so far it relates to the provisions contained in the ODA Act. The case of the petitioner is that the members of petitioner have constructed their buildings as per the existing rules and guidelines at the relevant time as provided in Orissa Municipal Act, 1950 and Orissa Municipal Rules, 1953, Rule 531 (2) of the Orissa Municipal Rules 1953 which provides for height of ground floor and seven upper floors for non-residential buildings and ground floor and five upper floors for residential buildings whereas Rule 534-B(I) of Orissa Municipal Rules, 1953 allows for a plinth area up to three fourth i.e. a floor area ratio of 75% for the buildings in Bazar areas.

(2) The further case of the petitioner is that in course of time the Government of India in the Ministry of Environment and Forest Department vide Notification dtd.19.02.1991 in exercise of powers U/s.-3(1) & Section 3 (2) (V) of the Environment (Protection) Act, 1986 and Rule 5 (3) (d) of Environment (Protection) Rules 1986 declared Coastal stretches regulation zone and regulating the activities in the CRZ. Clause (II) of the said notification stipulates that within the framework of such approved plans, development and activities within the CRZ other than those covered in paragraph-2 and paragraph 3(2) of the above notification shall be regulated by the State Government, Union Territory Administration or the Local Authority as the case may be in accordance with the guidelines given in Annexures-I & II of the said notification.

(3) Classification of the CRZ has been made in Annexure-I and CRZ-II has been defined as the areas that have already been developed up to or close to the shoreline and for this purpose developed areas are referred to as that area within the Municipal limits or in other legally designated urban areas which is substantially built up and which has been provided within the drainage and approach road over the infrastructural facilities such as water supply, sewerage, drains. The norms of regulation of activities 6 (II) defines that the building shall be permitted neither on the seaward side of the existing road or roads purposed in the approved Coastal Zone Management plans of the area nor on seaward side of the existing authorized structures and the buildings permitted on the landward side of the existing and proposed road

i.e. existing authorized structures shall be subject to the existing local town and country planning regulation including the existing norms of FSI / FAR.

(4) It is further contended by the petitioner that the above notification was further amended by Government of India Notification dtd.9.07.1997 in clause 4 (2). The following has been substituted namely:

> "Buildings shall be permitted only on the landward side of the existing road (or roads proposed in the approval coastal Zone Management plan of the area) on the landward side of existing authorized structures Buildings permitted on the landward side of the existing and proposed road / existing authorized structures shall be subject to the existing local Town and Country Planning Regulations including the existing norms of Floor space Index/ Floor Area Ratio.
>
> Provided that no permission for buildings shall be given on landward side of new roads (except roads proposed in the approved Coastal Zone Management Plan) which constructed on the seaward side of an existing road."

(5) It is next contended that when the matter stood thus the Government of Odisha in Forest & Environment Development Department notified the Puri Municipal area to come under CRZ (II) (Annexure-3). Consequent upon a direction of the Hon'ble Minister of Urban & Development Department, the Puri-Konark Development Authority after making some researches brought out a notification on 22.09.1998 in the Orissa Gazette in exercise of powers U/s.124 & 125 of the Orissa Development Authorities Act thereby prescribing the construction activities within 200 meters of High Tide Line requires a maximum height of 15 meters within 200 meters and maximum 22 meters within 200 and 500 meters of High Tide Line (Annexure-5).

In the meanwhile, the Government of India published a notification dtd.16.11.1998 constituting the Orissa Coastal Zone Management Authority and such authority was vested with all powers for examination of proposals for changes / modification in classification of the Coastal Plan received from the Orissa State Government and making specific recommendations to the National Coastal Zone Management Authority.

(6) It is contended by the petitioner that after publication of the notification dtd.22.09.1998, the Puri-Konark Development Authority without

any apparent reason published another notice on 19.06.1999 for cancellation of the notification dtd.22.09.1998 (Annexure-6).

(7) It is next contended by the petitioner that while the matter stood as above the Director H & UD Department by issuing a letter to the Vice Chairman-cum-Collector requested him to cancel the notification dtd.22.09.1998 and 19.06.1999 and from the pleadings made in the writ petition thereafter, it appears that both the Notifications have been recalled / cancelled. In the meanwhile a clarification was sought for from the Law Department about the competency of the Puri-Konark Development Authority to amend the existing planning norms and in the process Government of India in the Ministry of Environment and forest Department by letter dtd.9.12.1999 addressed to the Chairman, Orissa State Coastal Zone Management authority regarding construction of building in the Coastal Regulation Zone-II area of Puri-Konark Development Authority stating therein the norms laid down by the State Government are contrary to the Coastal Regulation Zone Notification 1991 and categorically indicating therein that the FSI / FAR norms should be followed as existed on February, 1991.

(8) On the plea that there is no height restriction for construction of any structures / buildings towards landward side of the areas covered under the CRZ-II throughout India and particularly in view of the existing local town and country planning regulations including the height and floor area ratio, the restrictions on the height of the building as imposed by the Puri-Konark Development Authority runs contra the provision of the Orissa Municipal Act 1951 and Orissa Municipal rules 1953 regulating the permissible built up area which is also a claim consistent to the plea of the Puri-Konark Development Authority even in the Court of Appellate Authority as at Annexure-12& 13. The petitioner further claimed that the provisions governing field in this particular matter is Orissa Municipal Act, 1950 and Rules 1953 as prescribed under Chapter 17 of the Act, 1950 and chapter 14 of rules 1953.

(9) The petitioner next contended that the buildings of the members of petitioner's Association which were constructed prior to publication of the CRZ notification were approved as per the Rules in part 14 of the Municipal Rules 1953 i.e. Rules 531 (1) (2) & 534-B (1) & (2) and also had been approved by the 9th Trust Board in its meeting held on 8.10.1984 and the buildings which were constructed after the CRZ notification, the plans were approved / recommended by the State Level Committee as per the same rules

referred to hereinabove. The petitioner also further referring to a decision of the Appellate Authority dtd.26.04.2014 as appearing at Annexure-17 contended that the Appellate Court in deciding a matter has also expressed that the restriction imposed in the matter of height of the building is without any basis and norm should be fixed in connection with the CRZ-II area following the provisions contained in part 14 of the Municipal Rules taking the cue, from the letter of the PKDA as appearing at Annexure-18 obtained applying the RTI Act.

(10) Petitioner further contended that the Puri-Konark Development Authority intimates the parties following the norms of nine meters height and 33% floor area ratio (FAR) for the buildings within the CRZ II as a matter of practice, which is not permissible in the eyes of Law.

(11) The petitioner further took reliance of the letter dtd.19.12.1999 issued by the Ministry of the Environment and Forest, Government of India addressed to Orissa State Coastal Zone Management Authority and the Principal Secretary, Forest & Development Department, Orissa directed the Puri-Konark Development Authority to be strictly abided by the existing rules of building constructions (Annexure-19).

(12) Taking support of the provisions contained in the Article 234ZF of the Constitution of India following 74th Amendment Act, 1992, the petitioners submitted that the provisions contained in the Municipal Act being consistent, shall govern the field and the restrictions imposed by the Puri-Konark Development Authority in exercise of powers in Orissa Development Authority Act is inconsistent with the constitutional mandate relating to planning regulation as provided in the Article 243 W, Article 243ZF and the 12th Schedule of the Constitution. The powers vested in Puri-Konark Development Authority under the Orissa Development Authority Act is no more available to be exercised by the Puri-Konark Development Authority. Relying on a further CRZ Notification by the Ministry of Environment and Forest, Department of Environment Forest and Wild-life dtd.6.1.2011 clearly indicating that the Rules for regulation within CRZ-II will apply as it prevailed at the time of original CRZ Notification dtd.19.02.1991. The petitioner thus claimed the action of the Puri-Konark Development Authority as also otherwise bad in law.

(13) It is on these premises the petitioner claims that the action of the opposite party No.4 i.e. the Puri-Konark Development Authority in the matter

of issuing notice for demolition to the members of the petitioners'-Association is not only without jurisdiction but also is in violation of the provisions contained in the Constitution of India and Municipal Act as well as rules therein.

(14) The impugned action of the Puri-Konark Development Authority is challenged mainly on two counts. First count is that the Puri-Konark Development Authority has no jurisdiction to interfere in the matter of construction and development of buildings may be for residential or non-residential areas in exercise of powers under the Orissa Development Authority Act secondly, even if the Puri-Konark Development Authority had jurisdiction in the above matter being an authority under the CRZ Regulation yet it had no authority to deviate building and construction norms as stipulated under the Municipal Act and Rules therein. In establishing the same Mr. Mohanty, learned Senior Counsel appearing for the petitioner's Association placed reliance on Section273 A, 263 & 264, 531 as well as 534 of the Municipal Act, 1950, provision at Article 243W, 243ZF of the Constitution of India and Section 15 & 16 of the Orissa Development Authorities Act. Besides the above, Mr. Mohanty, learned Senior Counsel appearing for the petitioner's Association also made reference to certain documents such as CRZ Notification dtd.19.02.1991, 9th Trust Board Meeting of the PKRIT on 08.10.1984. Notification dtd.01.04.1997 bringing in Puri-Konark Development Authority to force, notification dtd.27.09.1997 by which the Puri-Konark Development Authority adopted Bhubaneswar Development Authority Regulation, 1993. Notification dtd.21.07.1997 bringing Puri Municipality under CRZ-II, the letter dtd.09.12.1999, a letter from MOEF to the Chairman OSCZMA and the Government of Odisha indicating that FSI/FAR norms should be followed as existed on 19.02.1991, Puri-Konark Development Authority in response to a query of the Senior Scientist of Forest and Environment Department, Government of Odisha on existing the local town and country planning regulations by letter dtd.13.09.2006 and the reply in response to the above query dtd.09.03.2007, a letter dtd.28.10.2009 from the Department of Forest & Environment, Government of Odisha to Puri-Konark Development Authority clarifying to abide by rules and norms prevalent in 19.02.1991. Mr. Mohanty, learned Senior Counsel also referred to specific stand taken by the Puri-Konark Development Authority in Appeal Case No.78 of 2003 vide an order dtd.26.04.2014 passed by the Appellate Authority in the above appeal.

(15) During course of argument Mr. Mohanty, learned Senior Counsel also referred to citations as follows:

2007 (14) SCC 439, 1983 (3) SCC 579, 1992 AIR (SC) 711, 2007 ITR 322, 2010 (7) SCC 129 and finally relying on the Gazette Notification at 30th March of 2010. Based on the above submission and reliance. Mr. Mohanty, learned Senior Counsel submitted that Puri-Konark Development Authority is not only bereft of jurisdiction in the particular issue but has also exceeded in its power in dealing with particular issue.

(16) Petitioner further contended that in view of the provisions contained in the Municipal Act and Rules, the provisions under the Central Legislation under the CRZ Notification and in view of the above series of correspondences indicating that the provision contained as on 19.02.1991 submitted that even though the Puri-Konark Development Authority became an instrumental of the Orissa Development Authority Act its role was to function as an implementing agency and implementing the provisions contained in the Municipal Act and Rules therein. It has no authority of creating its own norms and further after the Gazette Notification dtd.30th March, 2010, it has totally lost its independent existence in the particular area. The impugned action under Annexure-14 is all contrary to the statutory provision contained in Municipal Act, Rules therein and the restrictions imposed in the CRZ Notification. Thus, submitted that the impugned actions are not only without jurisdiction but also contrary to law.

(17) Petitioner has strongly placed reliance on the Constitutional provision under Article 243 W and 243 ZF vis-a-vis the provisions contained in the 12th scheduled of the Constitution of India and submitted that in view of 74th amendment of the Constitution and bringing in provisions as contained in Article 243 W and 243 ZF, the State has endowed the power particularly the performance, functions and the implementation of scheme as may be entrusted to them including those in relation to the matters listed in the twelfth schedule of the Constitution. Since dealing with Urban Planning including Town Planning the provisions contained in the Municipal Act as well as the Municipal Rules is maintained in the circumstances P.K.D.A. is not authorized to act in accordance with the provisions as contained in ODA Act.

(18) The opposite party No. 4 on its appearance filed a counter affidavit inter alia contending therein that the allegation leveled against the P.K.D.A.

are incorrect. The role of the P.K.D.A is to curve the unauthorized construction in implementation of the Coastal Regulatory Zone norms. The allegation that the State Govt. as well as P.K.D.A. is not permitting construction activities within the prescribed norms of CRZ-II is not correct. P.K.D.A. was directed by the competent Authority to visit some coastal cities of India to compare and give report relating to norms/ stipulation regarding construction activities followed by different authorities. It is as a consequence of which P.K.D.A. published a notification in Odisha Gazette under Sections 124 and 125 of Odisha Development Authorities Act modifying norms for construction activities within 200 meters of high tide line from 200 meters to 500 meters of high tide line. The notification published on 22.09.1998 was superseded by another Notification dated 19.06.1999 on technical ground as there was mistake in the earlier notification. It is a fact that the P.K.D.A. was directed to cancel the Notification made calling for changes in the parameters of development in CRZ-II in pursuance of request of Ministry of Environment and Forests (MOEF). P.K.D.A admitted that the power to frame, modify and amend norms with CRZ is vested with Coastal Regulation Management Authority of Odisha as well as with the Govt. of India. P.K.D.A. also admitted that it is permitting construction in pursuance to the provisions introduced by Ministry of Environment and Forests (in short' the MOEF') and Notification No.SO-114(E) dated 19.02.1991 and subsequent amendments thereafter. P.K.D.A. contended that the maximum ground coverage permissible is 33% of Plot area with Height restriction of 9 meters of FAR-I. Though the P.K.D.A. has formulated its own building regulation under the provisions of the Act but the same is in draft stage. Similarly, a Draft Sea Beach Development Plan was also prepared and the same also remained not finalised. P.K.D.A. contended that the prescription of 33% of ground coverage and 9 meters of high FAR-I in CRZ-II of Puri has been made to maintain low density development thereby reducing the pressure on existing infrastructure such as drainage, sewerage, electricity, water supply etc. Before hearing of the writ petition taken place, the P.K.D.A. filed another counter affidavit claiming it to be a counter affidavit in connection with W.P.(C) No.20958 of 2014 a writ petition from amongst another batch of writ petitions filed challenging the action of the P.K.D.A. after bringing out a Gazette Notification under Section 111 of Odisha Development Authorities Act thereby taking out the authority of the Development Authorities Act in the matter of building plan developments and putting back the said authority on the Municipalities. In view of the facts and circumstances of the present

case, I do not feel that the said notification has anything to do with the P.K.D.A. as it remains as an implementing agency under the Coastal Zone Regulation-II. Hence, I do not want to refer this counter in the present case, as I am of the view that the said Gazette Notification has nothing to do with the case at hand and it has nothing to with P.K.D.A. which no more remains as an Agency / Instrumentality under the O.D.A. Act.

(19) Similarly, opposite party no.5 representing the Forests and Environment Department, Government of Odisha filed a counter affidavit inter alia contending therein that the Ministry of Environment and Forests, Government of India in exercise of powers conferred under Sections 3(1) and 3(2)(v) of the Environment (Protection) Act, 1986 issued a notification vide S.O.114(E) dated 19.02.1991 imposing restriction on certain activities in the Coastal Regulation Zone. As per the said notification, the Coastal States were required to prepare Coastal Zone Management Plans (CZMP) identifying and classifying CRZ Areas within their respective territories and obtained approval of the Central Government in the Ministry of Environment and Forests and in this connection all Coastal States were directed to submit their CZMPs to the MOEF by 30.06.1996 following a direction of the Hon'ble Supreme Court dated 18.04.1996 in W.P.(C) No.664 of 1993. It also submitted that the Government of India in the MOEF had also constituted Task Force to examine the CZMP of Coastal States. The CZMP of Odisha was discussed by the Task Force in the MOEF on 3rd and 4th of July, 1996. In the meeting the Commissioner-cum-Secretary of HUD Department and Director, Town Planning, Odisha suggested that the area from Mangala river to Balukhanda Reserve Forests of Puri Municipality to be designated as CRZ-II under the Master Plan of Puri. After lot of consultation the MOEF conveyed its approval to the CZMP of Odisha, subject to incorporating contains/modification vide their letter No.J-17011/11/92-IA-III dated 27.09.1996. As a consequence of which a committee has been constituted under the Chairmanship of Chief Secretary to identify and demarcate CRZ-II thus within the proposed CRZ-II areas. Considering the suggestions and recommendations of the committee, the State Government in the Forests and Environment Department in their letter dated 21.07.1997 (Annexure-3) to the writ petition designated certain Coastal Zone of the State of Odisha CRZ-II areas including Puri Municipality Area pending clarification from Government of India. Following a notification dated 19.02.1991, the committee has already identified and demarcated the CRZ-II area of Puri. It is next contended by the opposite party no.5 that the illegal notification by

the P.K.D.A. was cancelled being contrary to the provisions contained in notification dated 19.02.1991. The opposite party no.5 further submitted that as per the norms for regulation of the activities of CRZ-II there is no provision for giving any permission for construction of the area within 200 meters and between 200 – 500 meters of the high tide line, on the other hand, the said provision meant for CRZ-III and contended that the Puri Urban Area has been designated under CRZ-II and claimed that the contention of the petitioner in Paragraphs-21 to 26 in this regard are confusing. The opposite party no.5 further submitted that pursuance of sub-clause (2) of Clause-6 of Annexure-I to the Notification issued under S.O. No.114 (E) dated 19.02.1991 of the Government of India, the State Government in Forests and Environment Department vide their Resolution No.3849 dated 26.09.2000 declared the P.K.D.A. as the Regulatory Authority for granting permission for regulating construction activities and according clearance of CRZ areas of Puri as demarcated by MOEF and the Committee constituted by the State Government.

(20) The opposite party no.5 further contended that as Puri Urban Area is categorized as CRZ-II, the existing Local Town Planning Regulations including the existing norms of floor space indicator (FSI)/Floor Area Ratio (FAR) are applicable for buildings permitted on the land ward site on the existing and proposed road / existing forest structures and contended that the allegations of the petitioners in this regard are not correct. The opposite party no.5 also submitted that following the provisions contained in the notification dated 19.02.1991 of MOEF and approved CZMP building construction shall be permitted only on the landward site of the existing road or proposed roads in the approved CZMP subject to the existing Local Town Planning Regulation including the existing norms of FSI/FAR comparison of existing building regulations of Chennai, Mumbai etc. with Puri may not be justified in view of Notification of Government of India dated 19.02.1991. In paragraph 15 at Page 8 of their counter it has categorically submitted that following the stipulation in the MOEF Notification dated 19.02.1991 P.K.D.A./State Government has no power to modify/alter the CRZ norms/CZM plan as construction within 200 meters from H.T.L and within 200 meters to 500 meters from H.T.L and modification of FSI/FAR as on 19.02.1991 is not permissible under CRZ. Consequently, the opposite party no.5 also claimed that the notices issued vide Annexures-5 and 6 to the writ petition by the P.K.D.A are irregular and unlawful. While concluding its objection, it is submitted that the MOEF and the State Government shall be

responsible for monitoring enforcement of the provisions of CRZ Notification and CZM Plan and that Odisha State Coastal Zone Management Authority has been constituted by the Central Government in the MOEF empowering for proposal for changes or modification in the CZM Plan received from the State Government and making specific recommendation to the National Coastal Zone Management Authority thereafter.

(21) For better appreciation of the case, it is relevant to take note of Article 243W and 12th Schedule of the Constitution of India which runs as follows:-

"**243-W. Powers, authority and responsibilities of Municipalities, etc-** Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow-

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to-

(i) the preparation of plans for economic development and social justice;

(ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule."

[76][TWELFTH SCHEDULE
(Article 243-W)

1. Urban planning including town planning.
2. Regulation of land-use and construction of buildings.
3. Planning for economic and social development.
4. Roads and bridges.
5. Water supply for domestic, industrial and commercial purpose.
6. Public health, sanitation conservancy and solid waste management.
7. Fire services.

8. Urban forestry, protection of the environment and promotion of ecological aspects.

9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.

10. Slum improvement and upgradation.

11. Urban poverty alleviation.

12. Provision of urban amenities and facilities such as parks, gardens, play-grounds.

13. Promotion of cultural, educational and aesthetic aspects.

14. Burials and burial grounds; cremations, cremation grounds and electric crematoriums.

15. Cattle ponds; prevention of cruelty to animals.

16. Vital statistics including registration of births and deaths.

17. Public amenities including street lighting, parking lots, bus stops and public conveniences.

18. Regulation of slaughter houses and tanneries.]"

It is under the above provision of the Constitution, Municipal Act, 1959 has come into existence and followed with the Municipal Rules and upon creation of Municipalities, it functions in the matter of Buildings Regulation etc. following Rules 531 and 534 of the Municipal Rules, 1953.

(22) In view of 74th Amendment of the Constitution of India there is no doubt that for purpose of Urban Planning including Town Planning needs to be done following the provisions contained in Municipal Act and Rules therein. Further even after the Puri Municipal area is brought under Coastal Regulation Zone the Notification vide Annexure-1 also makes it clear that Law as existed in February, 1991 will be the law for all purposes i.e. law to be followed as prevailing in the field will be Municipal Act and Rules therein.

Similarly, from the point of view of 243 ZF which reads as follows:-

"**243-ZF. Continuance of existing laws and Municipalities-** Notwithstanding anything in this Part, any provision of any law relating to Municipalities in force in a State immediately before the commencement of the Constitution (Seventy-fourth Amendment)

> Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier.
>
> Provided that all the Municipalities existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in the case of a State having a Legislative Council, by each House of the Legislature of that State.

The opposite parties are unable to focus on any inconsistency in the prevailing Law under the Municipal Act or Rules therein in this particular matter. Further even if there existed any inconsistency, it is for the P.K.D.A. framed therein to bring any such inconsistency to the notice of the competent authority like Coastal Zone Authority Management for bringing any amendment in the existing law. I do not feel any such exigency in the present case. Under the circumstances, I do not feel attraction of Article 243 ZF of the Constitution to the present case under any circumstances.

(23) From the above, it is amply clear that P.K.D.A. is merely an Agency or body to function under the Coastal Regulation Zone and will have to work following the provision contained in the Coastal Regulation Zone as admissible vide notification dtd.19.02.1991 at Annexure-1.

(24) There is no dispute at the Bar that by notification dtd.19.02.1991, the Government of India has already declared the Coastal stretches as the Coastal Regulation Zone (CRZ). There is also no denial to the fact that under clause 3 (II) of the said notification, it has already been stipulated that within the framework of such approved plans and development activities within the CRZ covered in para-2 & para-3 (2) shall be regulated by the State Government, Union Territory Administration or the local authority as the case may be in accordance with the guidelines given in Annexure-I & II of the notification.

(25) Further there is also no denial to the fact that the Government of India by notification dtd.9.07.1997 has brought out an amendment as quoted hereinabove in para-4. Further there is no denial to the fact that the Government of Odisha in the Forest & Environment Department already

notified the Puri Municipal area to have already come under the CRZ-II as available under Annexure-3. It is under these premises after the Puri town has been brought under CRZ-II and after the PKDA being treated as an authority under the notification dtd.9.07.1997 having jurisdiction to decide over the buildings planning particularly in respect of the Puri town coming under the Puri Municipality, it became an authority under the Environment (Protection) Act, 1986 and it has to act following the provisions contained in the Environment (Protection) Act 1986, the Environment (Protection) Rules 1986 and the provisions as contained in the Orissa Municipal Act and the Rules therein in view of the specific provision as contained in Annexure I and Annexure II as available at page 32 of the brief in relation to the CRZ-II. Its activities on the buildings shall be subject to the existing local towns and country planning regulations including the existing norms of FSI / FAR. Being an authority under the Central Act hereinafter called as E.P. Act so far as its action relates to Puri town coming under the Puri Municipality are to be covered under the above provision and it has no role to play taking the help of provisions from the Odisha Development Authority Act consequently any action undertaken by the Puri-Konark Development Authority under the provisions of Section 15, Section 16 or Section 91 & 92 of the Odisha Development Authority Act are per se illegal and such action cannot be sustained in the eye of law.

(26) From reading of the Annexure-10 a letter from the Government of India, Ministry of Environment & Forest addressed to the Chairman, Odisha State Coastal Zone Management Authority regarding construction of the buildings in the Coastal Regulation Zone-II area of Puri-Konark stretches, it has been made clear that as per the CRZ-II the FSI/FAR norms should be followed as existed on February, 1991.

It is under these circumstances any action undertaken by the Puri-Konark Development Authority in the matter of any illegality or deviation in the building planning either residential or non-residential ought to be as per the FSI/FAR norms as existed on February, 1991. Therefore it is incumbent upon the Puri-Konark Development Authority to exercise their power in the matter of deviation in the planning either in the residential construction or non-residential construction following the provisions as available on 19th February, 1991. As such there is no application of either Orissa Development Authorities Act or the circulars issued in that connection from time to time.

(27) Further in view of Hon'ble Apex Court judgment as reported in AIR 1995 (SC) 2252, all the Coastal States of India is required to meticulously follow the CRZ Notification dt.19.02.1991, which includes the powers of approval of plans for the construction of the buildings in the CRZ areas.

(28) A decision as reported in (2007) 14 SCC 439, between Suresh Estates (P.) Ltd. Vs. Municipal Corporation, Mumbai the Hon'ble Apex Court in paragraph-19 held as follows:

> "the word "existing" as employed in the CRZ notification means the town and country planning regulations in force as on 19-02-1991. If it had been the intention that the town and country planning regulations as in force on the date of the grant of permission for building would apply to the building activity, it would have been so specified. It is well to remember that CRZ notification refers also to structures which were in existence on the date of the notification. What is stressed by the notification is that irrespective of what local town and country planning regulations may provide in future the building activity permitted under the notification shall be frozen to the laws and norms existing on the date of the notification.

It is therefore amply clear that Law for all practical purposes shall be the Law as existed on the date of Notification dtd.19.02.1991.

(29) The CRZ Notification vide Sl.19 (E) Ministry of Environment & Forest, MOEF, Department of Environment Forest and Wildlife dtd.6.01.2011 at clause 8(i) reads as follows :

> "Norms for regulation of activities permissible under this notification,-
>
> (i) The development or construction activities in different categories of CRZ shall be regulated by the concerned CZMA in accordance with the following norms, namely:-

Note:- The word existing use hereinafter in relation to existence of various features or existence of regularization or norms shall mean existence of these features or regularization or norms as on 19.02.1991 wherein CRZ notification, was notified."

Above provision made it clear that the development or construction activities shall be regulated by Coastal Zone Management Authority and in this context the P.K.D.A. is only to act as an implementing agency.

(30) In view of any finding hereinabove particularly holding that Puri Municipal Area having been brought within the CRZ-II as per letter dtd.21.07.1997 issued by the Forest and Environment Department, Government of Orissa vide Annexure-3 of the writ petition, further in view of CRZ notification dtd.19.02.1991 vide Annexure-1 specifically indicating following of the Law relating Town and Country planning as existed on 19.02.1991 including existing norms on FSI / FAR in force as on 19.02.1991, further P.K.D.A. being appointed as an implementing Agency of the CRZ II became a creature of Environmental Protection Act and looking to Law as existed on 19.02.1991 was the Orissa Municipal Act, 1950 and Municipal Rules, 1953 therein. Norms with regards to FSI and FAR for building in such Municipal Area are governed by Rule 531 and Rule 534-B of the Municipal Rules, 1953 and under the circumstances, I find the approval vide Annexure-14 runs contrary to the above.

(31) Law is well settled that Law made by Central Legislation shall prevail over the State Legislation. In this case P.K.D.A. being an instrumentality of Environment Protection Act being a Central Legislation cannot be overridden by the Orissa Development Authority Act which is a State Legislation. Law as referred to herein below has settled this position.

AIR 1983 (SC) 150 in the case of T. Barai v. Henry Ah Hoe
(2011) 3 SCC 139 Offshore Holdings Pvt. Ltd. v. Bangalore Dev Authority
AIR 2010 KAR 124 Pushpalatha v. V. Padma.
AIR 2012 BOM 89 Mohan Sudame v. State of Maharashtra

(32) Consequently, I find the impugned order vide Annexure-14 being an action contemplated under Sub-section 3 of Section 16 of the Odisha Development Authority Act, the same is illegal being without competency and thus the same is hereby quashed. It is hereby made clear that in view of my findings that the Puri-Konark Development Authority being an implementing agency under the E.P. Act, 1986 needs to act following the provisions under the CRZ Notifications.

In the event any dispute exists, it is open to the Puri-Konark Development Authority to take up the issues involving the members of petitioner-association in strict terms of the CRZ notification and the particular Act and Rules referred to therein. In view of the fact that Annexure-14 is set-aside it is open to the Puri-Konark Development Authority to restart the proceeding and to decide the particular case strictly following the CRZ Notification and the provision of Law as referred to therein and after providing opportunity of showing cause and hearing.

(33) On the submission of the petitioner that the action of the opposite party No.4 in the matter of notice of demolition to the members of the petitioner Association being contrary to the provisions set in the Constitution of India and also in the Municipal Act and Rules therein, I am of the view that since no such order has been impugned in the present writ petition, this Court cannot enter into any such arena. However, since I have already held that the Puri-Konark Development Authority is to act under the CRZ Notification and following the provisions as contained in the Municipal Act and Rules therein, this Court expects that P.K.D.A. will act strictly in terms of the Municipal Act as well as Municipal Rules therein and in strict terms of the CRZ Notification and the amended notifications thereon.

(34) Similarly coming to the relief as claimed by the petitioner so far it relates to challenge concerning Annexure-24 & 25, the document vide Annexure-24 is a press note dtd.24.05.2000 released through Gazattee notifying the people in general regarding the demarcation / reservation of about 705 Acre of land at Chakratirtha and Baliapanda located at two opposite ends of the town and thereby warned the local persons from dealing the particular lands in any manner and by further notifying that the construction over this area shall be treated as illegal. Similarly Annexure 25 is a press note in Orissa Gazettee identifying the plots involved in the reservation of 705.00 Acre and as published on 27.11.2000. These two notifications appear to have been made by the Housing and Urban Development Department. In view of my detailed observations made hereinabove, I am to hold that the State Government in its H&UD Department has absolutely no jurisdiction in such matters and that the Coastal Zone Regulating Authority is competent in this regard. Therefore the notifications / press notes vide Annexures-24 & 25 basing on the decision of H&UD Department of Government of Odisha are passed without authority and hence both the notifications / press notes are hereby set-aside.

(35) The writ petition succeeds to extent directed hereinabove. However, there shall be no order as to cost.

Writ petition disposed of.