2015 (I) ILR - CUT- 835

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

W.A. NO. 45 OF 2014

UPENDRANATH SAMANTASINGHAR & ANR. ……..Appellants

.Vrs.

BIKASH CHANDRA MOHAPATRA & ANR. ……..Respondents

CIVIL PROCEDURE CODE, 1908 – S. 146 & O-22, R-10 r/w O-9, R-9 CPC

Suit dismissed for default – Restoration Petition filed alongwith an application for condonation of delay – Both the petitions also dismissed for default – Prior thereto respondent No. 2 (Plaintiff) sold the suit land to respondent No. 1 – Respondent No. 2 and 1 filed joint application for restoration of the above applications – Maintainability – Held, respondent No. 1 though not joined in the suit, being the lis pendente transferre, is entitled in law to join respondent No. 2 to restore the application under Order 9, Rule 9 C.P.C. along with the application for condonation of delay. (Para 21)

For Appellants - Mr. A.R.Dash, A.C.Baral
For Respondents - Mr. R.C.Sarangi
Mr. Kishore Ku. Jena

Date of Judgment: 11.12.2014

JUDGMENT

AMITAVA ROY, C.J.

The instant appeal witnesses a challenge to the judgment/order dated 17.12.2013 rendered in W.P. (C) No.1754 of 2012 interfering with the order dated 21.01.2012 passed by the learned Civil Judge (Sr. Division), Bhubaneswar, in CMA No.1/12 arising out of C.S. No.42/95 directing the respondent no.2 herein (plaintiff) to delete the name of respondent no.1 from the said application (CMA No.1/12) filed to restore CMA Nos.250 and 251 of 2009.

2. We have heard Mr A.R. Dash, learned counsel for the appellant, Mr R.C. Sarangi, learned counsel for respondent no.2 and Mr K. Jena, learned counsel for respondent no.1.

3. The facts, in brief, would be necessary to outline the backdrop.

The respondent no.2 instituted C.S. No.42/95 against the appellants. The suit was dismissed for default on 18.7.2003. The respondent no.2 (plaintiff) sold the suit property to respondent no.1 on 3.5.2010. Prior thereto, he had filed an application under Order 9 Rule 9 read with Section 151 of the Code of Civil Procedure (for short, hereinafter referred to as "the CPC/Code") for restoration of the suit along with an application under Section 5 of the Indian Limitation Act, 1963 (hereinafter referred to as "the Act"). These applications were registered as CMA Nos. 250 and 251 of 2009. These petitions were also dismissed for default on 11.11.2010. Thereafter respondent nos.1 and 2 i.e. the transferor and the transferee jointly filed CMA No.1/12 seeking restoration of CMA Nos.250 and 251 of 2009.

4. By order dated 21.1.2012 CMA No.1/12 was disposed of by the learned trial Court by requiring respondent no.2 (plaintiff) to delete the name of respondent no.1 from the cause title of the application. As the text of the order dated 21.1.2012 would reveal, the learned trial court was of the view that in terms of the Code it was the plaintiff alone who could file an application for restoration of the suit dismissed for default under Order 9 Rule 9 CPC and that such application under the provisions of the Code by any one else was not maintainable. It was held as well that no other person could also to be joined with the plaintiff in such an application.

5. Being aggrieved, respondent no.1 (transferee) invoked the writ jurisdiction of this Court and by the judgment/order dated 17.12.2013 passed in W.P.(C) No.1754 of 2012 and impugned in the instant appeal, the learned Single Judge relying principally on Order 22 Rule 10 of the Code and the decision of the Apex Court in *Raj Kumar v. Sardari Lal and Ors, 2004 SAR (Civil) 181*, permitted the writ petitioner respondent no.1 herein to continue in CMA No.251/09 and the learned court below was directed to decide the suit on its own merits.

6. Mr A.R. Dash, learned counsel for the appellants, has emphatically argued that the transfer of the property involved not having been effected during the pendency of the suit, neither Section 52 of the Transfer of Property Act, 1882 (for short, hereinafter referred to as "the T.P. Act") nor Order 22 Rule 10 of the Code is attracted to the facts of the case and thus the impugned judgment and order is not sustainable in law and on facts. The decision of the Hon'ble Apex Court in *Raj Kumar* (supra) also on the same logic is not

applicable, he argued. Mr Dash has urged that even assuming that Section 52 of the T.P. Act and/or Order 22 of the Code had any application in the instant case, opp. party no.1 without being first impleaded in the suit cannot maintain an application with the original plaintiff to restore an application under Order 9 Rule 9 of the Code, dismissed for default. According to him, as under Order 22 Rule 10 CPC, in case of assignment, creation or devolution during the pendency of the suit, it by leave of this Court can be continued by/or against the person to or upon whom such interest has come or devolved, it was incumbent on the part of opp. party no.1 to first obtain such leave before joining the original plaintiff to file restoration application under Order 9 Rule 9, CPC earlier dismissed for default. Mr Dash has insisted that the direction contained in the Judgment and order to the learned trial court to decide the suit on merits inheres a mandate by this Court to recall the dismissal of the suit, which is impermissible as the application for restoration of the Misc. Case under Order 9 Rule 9 CPC is still pending to be considered by the learned trial court.

7. Mr Sarangi, per contra, has urged that as it is more than evident from Section 52 of the T.P. Act and Order 22 Rule 10 of the Code that a ransferee pendente lite in a suit has the locus to apply for restoration of the suit dismissed for non- prosecution, the plea to the contrary is misconceived. According to the learned counsel for respondent no.1 as in view of Section 146 of the Code, the respondent no.1 is entitled in law to further a proceeding arising out of the suit, as a representative of the original plaintiff claiming under him, the contention that he ought to have obtained prior leave of the Court to do so is obviously fallacious.

8. We have examined the foundational facts which are not in dispute. The rival arguments have been analyzed as well.

9. The joint application filed by respondent nos.1 and 2 registered as CMA No.1/12 discloses that the same came to be lodged on the receipt of summons in C.S. No.1865/2001 instituted by the appellant no.1 impleading both of them as defendants therein. It was stated in the said application that respondent no.2 herein had sold the suit land to respondent no.1 on 3.5.2010 and thus though the latter was not plaintiff in C.S. No.42/95 nor a petitioner in CMA No.251 of 2009, he had stepped into the shoes of the former by dint of such purchase and as respondent no.2 was bound to safeguard the interest of respondent no.1, the vendee, both of them had filed application for restoration of CMA No.251 of 2009. It was averred as well in the application

that the respondent no.2 (plaintiff) was ignorant about the dismissal of the suit and that he was dependant fully on his conducting counsel. It was stated too that because of wrong entry in the diary of his learned counsel, CMA No.251 of 2009 was dismissed for default and that it was in this backdrop that in the interest of justice the restoration application i.e. CMA No.1/12 had been filed.

10. Section 52 of the Transfer of the Property Act, 1882, Order 22 Rule 10 of the Code and Sections 141 and 146 of the CPC are quoted herein below being of formidable relevance.

> "52. Transfer of property pending suit relating thereto.—During the 1[pendency] in any Court having authority 2[3[within the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits] by 4[the Central Government] 5[* * *] of 6[any] suit or proceedings which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.
>
> ***Explanation*** - For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of anyperiod of limitation prescribed for the execution thereof by any law for the time being in force."
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> **"Order 22 Rule 10. Procedure in case of assignment before final order in suit**.-(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."
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> **"141. Miscellaneous proceedings** - The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction."

> **"146. Proceedings by or against representatives -**
> Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person then the proceeding may be taken or the application may be made by or against any person claiming under him."

11. It would be explicit from Section 52 of the T.P. Act that if during the pendency of any 'suit' or 'proceeding' which is not collusive and in which any right to immovable property is directly or specifically in question, such property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order, which may be made therein, except under the authority of the court and on such terms as may be imposed.

12. The explanation to section 52 clarifies that the pendency of a suit or proceedings shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction and would continue until the suit or proceeding is disposed of by a final decree or order and complete satisfaction of discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for execution thereof by any law for the time being in force.

13. It is thus patent that mere dismissal of a suit or proceeding for default would not oust the application of Section 52 of the T.P. Act and in terms of the explanation provided, the pendency thereof would continue till complete satisfaction or discharge of decree or order that may be obtained or would become unobtainable by reason of the expiration of any period prescribed for execution therefor.

14. Section 141 of the Code predicates that the procedure provided in CPC with regard to suit would be followed as far as can be made applicable in all proceedings in any court of civil jurisdiction. The explanation thereto clarifies that the expression "proceedings" would include one under Order 9 and Section 141 of the Code. A proceeding under Order 9 Rule 9 of the Code would thus come within the ambit of Section 52 of the T.P.Act and Order 22 Rule 10 CPC.

15. Section 146 conceives of furtherance of proceedings by or against representatives of any person claiming under his title and would have application unless excluded by any provision of the Code or by any law for the time being in force. This salutary provision thus recognizes a substantive right in favour of a representative of any person involved in any proceeding as contemplated to pursue the same on his/her behalf. A conjoint reading of Section 146 and Order 22 Rule 10 thus recognizes the right of a representative of a person claiming under him, amongst others by virtue of assignment, creation or devolution of any interest during the pendency of a suit or proceeding in any court of civil jurisdiction to continue with it on his behalf. Such a right is therefore fundamental and intrinsic for such a representative claiming under the person concerned.

16. In *Raj Kumar* (supra), their Lordships of the Apex Court did encounter a fact situation where the suit property had been purchased by respondent no.4 therein from the defendants being unaware of the pendency of a suit filed against his vendors. The suit was decreed ex parte on 27.11.1995 whereafter respondent no.4 filed an application under Order 9 Rule 13 of the CPC to set aside the decree and also made a prayer under Order 22 Rule 10 of the CPC for being brought on record. This application was allowed by the learned trial court after condoning the delay in filing the same and the ex parte decree was set aside. Before the Apex Court it was contended on behalf of the appellant-plaintiff that the application under Order 9 Rule 13, CPC should have been filed by the defendants and none else and that as respondent no.4, a transferee pendente lite had failed to take prompt steps under Order 22 Rule 10, CPC to be brought on record, he remained bound by the decree. 17. Their Lordships held that the doctrine of 'lis pendens' expressed in the maxim "ut lite pendente nihil innovetur" has been statutorily incorporated in Section 52 of the T.P. Act and that as the defendant could not by alienating the property, during the pendency of the litigation, venture into depriving the successful plaintiff of the fruits of the decree. It was propounded that a transferee pendente lite is treated in the eye of law as representative of the judgment debtor and is bound by the decree passed against the judgment debtor even if the defendant had chosen not to bring the transferee on record by apprising his opponent and the court of the transfer nor the transferee had come on record by taking recourse to order 22 Rule 10 of the CPC. While referring to Section 146 of the Code in this regard as well, their Lordships ruled that the decree was executable against respondent no.4 being a lis pendente transferee though not joined in the suit.

It was held as well that such a person could prefer an appeal being a person aggrieved and was also liable to be proceeded against in the execution of the decree. Their Lordships thus proclaimed that such a person does have locus standi to move an application for setting aside an ex parte decree passed against the person in whose shoes he had stepped in. It was thus enunciated that the word 'he' used in Order 9 Rule 13 of the Code could not be construed with such rigidity and constriction to exclude the person who had stepped into the shoes of the defendants from moving an application for setting aside the ex parte decree more particularly in view of Section146 of the Code. The plea of locus standi against opp. party no.4 to maintain the application under Order 13 of the Code was thus rejected.

18. The Hon'ble Apex Court clearly as a corollary upheld the locus standi of respondent no.4 acting on the principle of representation envisioned in Section 146 of the Code by departing from the literal construction of Order 9 Rule 13 CPC as if restricting an application there under only to the defendant in the suit.

19. In ***Krishnaji Pandharinath v. Anusayabai and another, AIR 1959 (Bom) 475*****,** their Lordships of the Bombay High Court with particular reference to the explanation to Section 52 of the T.P.Act held that after the disposal of the suit, the lis continues so as to prevent the defendants from transferring the property to the prejudice of the plaintiff.

20. This decision only fortifies the plea that even after the dismissal of the suit for default as in the instant case, for the purpose of Section 52 of the T.P.Act, the lis did continue and thus with the transfer of the suit property in favour of respondent no.1 herein he indeed had acquired a right as a representative of his vendor (respondent no.2) to pursue any proceeding contemplated by the court relatable thereto (suit) claiming under him.

21. Our attention has not been drawn to any provision of the Code barring the application of Section 146 of the Code to the facts of the case. There is no manner of doubt that on the date on which CMA No.1/12 had been filed, respondent no.1 had by dint of purchase of the suit property acquired interest therein. As contemplated in Section 146 and Order 22 Rule 10 of the Code he was thus entitled in law to pursue the same as the representative of respondent no. 2 by claiming under him. In that view of the matter, as respondent no.1 had joined respondent no.2, the original plaintiff in the application for restoration of CMA Nos. 250 and 251 of 2009, we are of the

unhesitant opinion that he could not have been excluded from the said pursuit on the ground that Order 9 Rule 9, CPC did not permit him to do so. As it is, law of procedure is handmaid of justice and has to be essentially interpreted to subserve this paramount objective. Any exposition of the procedural law defeating this salubrious imperative, has to be eschewed. The insistence for an application by respondent no.1 seeking leave of the Court to enable him to join defendant no.2 to get the earlier application under Order 9 Rule 9, CPC and that for condonation of delay restored, on a overall consideration of all relevant aspects as involved does not commend for acceptance. We find ourselves with respectful agreement with the conclusion reached in the impugned judgment and order visà- vis the maintainability of CMA 1/2012. However, as the said application awaits adjudication on merits, we hereby clarify that the suit if eventually revived will be disposed of as expeditiously as possible in accordance with law. The appeal thus fails with the marginal variation in the impugned judgment / order indicated herein above.

Appeal dismissed.

2015 (I) ILR - CUT- 842

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

W.A. NO. 360 OF 2014 & W.P.(C) NO.21758 OF 2014

SWETALINA MOHANTY & ORS. .....Appellants

.Vrs.

STATE OF ORISSA & ORS. .....Respondents

CONSTITUTION OF INDIA, 1950 – ART. 226

Education of minor child – Child was studying in DAV Public School, Chandra Sekharpur, Bhubaneswar when parents were at Bhubaneswar – Dissension between parents – Wife left the matrimonial home with the child and stayed at her parents house at Cuttack – She applied for the transfer certificate – Husband raised objection – Certificate could not be granted – Writ petition filed – Learned Single Judge asked the child to continue in the school by staying in a

separate accommodation provided by the husband – Hence the writ appeal – This Bench inter acted with the parents as well as the child – The minor child spontaneously expressed his desire to stay with the mother – The child wept while narrating his experience at Bhubaneswar – Their apprehension for the safety and security in a separate accommodation cannot be lightly brushed aside – The child did not appear to have been tutored – Welfare of the minor is paramount – Direction issued to parents to complete necessary formalities for issuance of transfer certificate by DAV public school, Chandra Sekharpur, Bhubaneswar and admission in DAV public school, Section 6, Cuttack – Respondent-husband/father would bear all necessary expenditure and continue to pay Rs.7,500/- P.M. as maintenance until further orders – Respondent/father can meet his son on prior information and arrangement on the basis of mutual concurrence of the parties. (Paras 17 to 20)

For Appellants - Mr. Gopal Kr. Mohanty, Sr. Advocate.
For Respondent - Mr. Devashis Panda,
Mr. Dinesh Kr. Panda.

Date of hearing : 27.01. 2015
Date of Judgment: 03. 02. 2015

JUDGMENT

AMITAVA ROY, C.J.

Whereas the order dated 30.9.2014 passed in W.P.(C) no. 12429 of 2014 instituted by the appellant herein is in assailment in W.A. No. 360 of 2014, the opposite party in the above writ petition seeks enforcement of this order in W.P.(C) No. 21758 of 2014.

2. As agreed to by the learned counsel for the parties, the appeal and W.P.(C) No. 21758 of 2014 have been analogously heard.

3. We have heard Mr. Gopal Kr. Mohanty, learned Senior Advocate for the appellant and Mr. Devashis Panda, learned counsel for the Respondent No.4.

4. A brief outline of the relevant facts would be essential to comprehend the rival orientations.

The appellant and the respondent no.4 are a married couple blessed with a male child, Swaymsidha. They were married on 5.7.2006 and set up

their matrimonial home at Shastri Nagar, Bhubaneswar. Due to some differences between them, they have estranged themselves since 30.5.2014. The minor boy aged about 7/8 years is in the company of the mother who is presently residing in her parental house at Tulsipur, Cuttack. As the records reveal, cross criminal cases are pending based on rival F.I.Rs, the appellant-wife alleging mental and physical cruelty on account of dowry. At the time of appellant-wife's departure from the nuptial home, the minor son was prosecuting his studies in Standard-II in D.A.V. Public School, Chandrasekharpur, Bhubaneswar. After shifting to Cuttack, the appellant applied to the said School for issuing the transfer certificate of her minor son to facilitate his admission in D.A.V. Public School, Sector-6, C.D.A., Cuttack. The Respondent-husband however by his letter dated 21.6.2014 addressed to the Principal, D.A.V.Public School, Chandrasekharpur, Bhubaneswar registered his protest to the grant of such transfer certificate. Situated thus, the appellant approached this Court in W.P.(C) No. 12429 of 2014 seeking a direction to the institution to grant the transfer certificate applied for.

5. The Respondent No.2, i.e. Principal, D.A.V. Public School, Chandrasekharpur, Bhubaneswar in his counter averred that though the appellant had deposited the application fees for taking the transfer certificate of her son and had collected the application form, the same had not been submitted thereafter. It was stated that to obtain a transfer certificate, not only the application therefor has to be applied in the supplied format on payment of requisite fee, it ought to be signed by both the parents. The letter of the respondent-husband requesting against the issuance of the transfer certificate was also referred to.

6. The Respondent No.4, the father of the minor boy in his counter in substance registered his serious objection to the proposed transfer of the child from D.A.V. Public School, Chandrasekharpur, Bhubaneswar and pleaded in particular that not only the said school was a premier institution of the State, the boy had been performing well in studies and was involved in extra-curricular activities at Bhubaneswar under his vigilant, care and support. While accusing the appellant of leaving the matrimonial home on trivial issues and claiming that all endeavors of reconciliation by him have failed for her adamant attitude, the answering respondent stoutly denied the allegation of mental and physical torture on account of dowry. He also averred that the appellant's remonstrance bearing on the non-issuance of transfer certificate

was patently untenable as no application in the required format containing the signature of the parents had been submitted to the school for such certificate. Further, there was no material on record to show that the minor boy can presently be admitted against a vacant seat at D.A.V. Public School, Sector-6, C.D.A., Cuttack. The prayer for the direction for issuance of the transfer certificate was thus repudiated to be misconceived and pre-matured.

7. By an additional affidavit, this opposite party undertook to make arrangement for a separate accommodation for the appellant and the minor son at Bhubaneswar so as to enable the latter to continue his studies at D.A.V. Public School, Chandrasekharpur, Bhubaneswar. He also assured not to threaten or coerce the appellant in any manner during her stay at Bhubaneswar with the minor boy as proposed.

8. Learned Single Judge by the order impugned in the appeal held that the primary ground for the appellant's departure from Bhubaneswar was allegedly the cruel attitude of the husband. It was recorded that the appellant was unemployed and unable to meet the day to day expenditure of the minor child. The undertaking of the opposite party-husband to meet the expenditure towards food and lodging of the appellant and her son and for the latter's studies at Bhubaneswar was taken note of. The opposite party-husband's undertaking not to threaten and coerce the appellant in any manner during her stay at Bhubaneswar with the minor son also did weigh with the learned Single Judge. It was thus concluded that it was for the welfare of the child that he should continue his studies at D.A.V. Public School, Chandrasekharpur, Bhubaneswar. The parents were directed to send the child to the school forthwith. The opposite party-husband was directed further that apart from meeting all the expenditure towards rent etc. for the accommodation of the wife and the minor child, he would continue to pay a sum of Rs. 7500/- per month for their maintenance. The authorities of the D.A.V. Public School, Chandrasekharpur, Bhubaneswar were directed to allow the father to meet the son in presence of a responsible teacher at least once in a week preferably on a Friday within the premises of the school.

9. As adverted to hereinabove, the appellant-wife being aggrieved is in appeal. The opposite party-husband on the other hand seeks enforcement of this order.

10. Learned counsel for the appellant has argued that in view of her (appellant) traumatic experiences of abuse and assault in her matrimonial

home, her stay at Bhubaneswar along with her minor child even in a separate accommodation arranged by the opposite party-husband, would be hazardously risky and thus they ought not to be compelled to reside there at Bhubaneswar. According to him, the sister-in-law of the appellant being a teacher in the D.A.V. Public School, Chandrasekharpur, Bhubaneswar and not in good terms with her, there was a possibility of the minor boy being harmed. Learned counsel has urged that the appellant and the child relatively would be much secured and comfortable at Cuttack and as the D.A.V.Public School, Sector-6, C.D.A., Cuttack is equally good, a direction to the D.A.V. Public School, Chandrasekharpur, Bhubaneswar ought to be made to issue transfer certificate as prayed for in the overall interest of the child.

11. As against this, Mr. Panda, learned counsel for the respondent no. 4 has argued that the apprehension of the appellant is wholly unfounded and that it would be in the welfare of the minor boy to allow him to continue his studies in D.A.V. Public School, Chandrasekharpur, Bhubaneswar. Learned counsel has insisted that in view of the undertaking given to the Court by respondent-husband, there is no justifiable reason to interfere with the impugned order and instead a direction ought to be issued for compliance thereof forthwith.

12. Having heard the learned counsel for the parties and on a consideration of the pleaded facts and documents on record, we, at the first instance decided to interact with the parents and the minor child to ascertain their view points on the issue of shifting of the situs of studies of the child. Accordingly, they being present, we deliberated with them in camera.

13. Noticeably, as on date, none of the spouses has initiated any proceeding either for dissolution of the marriage or for restitution of conjugal rights. From the records, as well as the interaction with them, it transpires that a couple of criminal proceedings initiated by the appellant alleging cruelty and domestic violence against the opposite party-husband and others are presently pending.

14. Be that as it may, the appellant reiterated before us the allegation of abuse and assault and exhibited her obdurate unwillingness against restoration of her matrimonial home. She also expressed serious apprehension against her safety and security along with her son if made to stay in Bhubaneswar even if in a separate accommodation. She also disclosed that she was a graduate and had also applied for assignments and was expecting a job shortly.

15. The opposite party-husband on being queried by us did disclose that he had a monthly income of Rs. 20,000/- and was prepared to take back his wife and son. He denied the allegation of abuse and torture and instead claimed to have made endeavours for reconciliation which failed for the rigid attitude of the appellant. While admitting that the appellant and the minor child were away from him from May, 2014 and that since then he had not taken any step to meet them, he insisted it would be in the overall wellbeing of the child, if he continued his studies at D.A.V. Public School, Chandrasekharpur, Bhubaneswar and pursued his extra curricular activities there. He reiterated his preparedness to provide for food, separate lodging of the appellant at Bhubaneswar at his cost and also to meet the expenditure for the studies and extra curricular activities of the child.

16. While talking to the minor boy in absence of the parents, we found him to be a smart and bright child. We were told by the mother that he is good at studies. His disclosures to us demonstrated his emphatic inclination to stay and study at Cuttack. The tender boy of seven years noticeably wept while narrating his unhappy experiences at Bhubaneswar.

17. Having regard to the fact that the issue seeking adjudication has to be approached bearing in mind the interest of the child, we are of the opinion, by balancing all relevant factors, that he ought to be permitted to pursue his studies at Cuttack. Noticeably, he has stopped going to school since 30.5.2014 being caught in the cross-fire of hostilities of his parents. There is nothing overwhelming on records to demonstrate that the academic prospects of the child would be jeopardized if he is allowed to study in the proposed school i.e. D.A.V. Public School, Sector-6, C.D.A., Cuttack. Having regard to the background in which the appellant and the minor child had shifted from the matrimonial home, the apprehension about their safety and security at Bhubaneswar, even if they stay in a separate accommodation cannot be lightly brushed aside to be a myth. In course of our interaction with the child, it did not appear to us that he had been tutored and instead was spontaneous in his replies and expression of his mind. He seemed to be apparently comfortable in the company of his mother and her relations at Cuttack. Needless to say the respondent as the husband and father of the appellant's son is obliged in law to maintain them to ensure a dignified life. Additionally as a father, duty is cast on him to secure his son's studies and rear him in a congenial atmosphere. The appellant is a graduate and is found to be keen to take up some assignment/job to be financially independent.

18. On a careful evaluation of the above factors and bearing in mind that the arrangement for the minor's studies ought to be guided by the paramount consideration of his well being, we are of the opinion that his welfare would be best addressed, if he is allowed to take admission in D.A.V. Public School, Sector-6, C.D.A., Cuttack and pursue his studies and extra curricular activities at Cuttack.

19. We, therefore, hereby direct the parents to complete the necessary formalities at the earliest for issuance of transfer certificate by the D.A.V. Public School, Chandrasekharpur, Bhubaneswar. Needless to say that once the required formalities are completed, the D.A.V. Public School, Chandrasekharpur, Bhubaneswar would issue transfer certificate in favour of the boy whereafter immediate steps would be taken for his admission in D.A.V. Public School, Sector-6, C.D.A., Cuttack. The exercise should be completed latest within a fortnight herefrom. The respondent-husband /father would bear the necessary expenditure of the process of issuance of the transfer certificate and continue to pay Rs.7500/- per month as maintenance until further order. The parties would also take necessary steps in accordance with law for amicable disposal of the pending criminal cases.

20. We make it clear that this arrangement has been made bearing in mind only the aspect of the welfare of the child involved and this would not have any bearing whatsoever vis-à-vis the right of his custody. However, as in terms of the order, the minor son would remain with the appellant, we hereby grant the opposite party-father visitation rights to enable him to meet his son on prior information and arrangement to be made to this effect on the basis of mutual concurrence of the parties.

21. The appeal is thus allowed. Consequently, the W.P.(C) No. 21758 of 2014 is dismissed.

Appeal allowed.

2015 (I) ILR - CUT- 849

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

A.H.O. NO. 34 OF 1999

SANATAN DAS & ORS. ……..Appellants

.Vrs.

AHALYA DEI & ORS. ……..Respondents

A. LETTERS PATENT APPEAL – Against judgment passed by learned Single Judge in First Appeal – Scope and jurisdiction of Letters Patent Bench – It is not exactly equivalent to a decision of a learned Single Judge in a Second appeal U/s. 100 C.P.C., So it can not be held that a Letters Patent Appeal can only lie on a question of law and not otherwise – Held, it is open to the High Court to review even findings of fact in a Letters Patent Appeal from a first appeal heard by a learned Single Judge. (Paras 13,14)

B. EVIDENCE ACT, 1872 – S.50

Relationship of one person to another – Proof of – Evidence of opinion expressed by conduct is relevant – The learned trial Court as well as the learned Single Judge on a threadbare analysis of the pleadings of the parties and evidence on record came to hold that the plaintiff and defendant No.1 are the daughters of Rambha – Finding of the learned single Judge in respect of Issue No.4 is affirmed.

(Para 27)

Case laws Referred to:-

1.AIR 1959 SC 914 : (Dolagobinda Paricha-V- Nimai Charan Misra & Ors.)
2.AIR 1983 SC 684 : (State of Bihar & Ors.-V- Sri Radha Krishna Singh & Ors.)
3.AIR 1974 Orissa 120 : (Jagabandhu Senapati & Ors.-V- Bhagu Senapati & Ors.)

For Appellants - Mr. G. Mukharjee.
For Respondent - Mr.G.D. Kar.

Date of Hearing : 13 .01.2015
Date of Judgment : 28 .01.2015

JUDGMENT

DR.A.K.RATH, J.

This Letters Patent Appeal is directed against the judgment dated 24.3.1999 passed by the learned Single Judge in First Appeal No.267 of 1988

partly allowing the judgment and decree dated 17.8.1988 and 31.8.1988 respectively passed by the learned Subordinate Judge, Bhadrak in Title Suit No.131 of 1978-I in a suit for partition.

2. From the undisputed genealogy, it appears that one Champati Das had three sons, namely, Kalandi, Mali and Padan. Kalandi had two sons, namely, Bholanath and Binod. Jema wife of Bholanath died in the year 1962. Rambha was the daughter of Bholanath. Defendant no.2 was the son of Mali. He expired during pendency of the suit, whereafter his legal representatives have been impleaded as defendants 24 to 29. Padan had two sons, late Panchu and Gangadhar (defendant no.5). Defendant no.4 is the widow of Panchu and defendant no.3 is the son. From the evidence on record, it appears that Bholanath had two sisters, namely, Ajodhya and Hara. Defendants 6 and 23 are the sons of Ajodhya. Both of them claim in their separate written statement that defendant no.23 is the adopted son of Binod. Ajodhya had two other sons, who were not impleaded as parties in the trial court. An application for impleading them as parties has been filed by the plaintiff-respondent no.1 during pendency of first appeal. Similarly, Hara had three sons, who had not been impleaded as parties, but they have filed applications to be added as parties. Defendants 7 to 9, who are the sons of defendant no.23, are alienees from Binod in respect of certain properties. Defendant no.16 has been jointly recorded with Bholanath in respect of 'Gha' schedule property. The other defendants are the alienees from other parties. Plaintiff claims that she and defendant no.1 are the daughters of Rambha and they are entitled to succeed to the properties of Bholanath, who admittedly died in the year 1972.

3. Respondent no.1 as plaintiff laid a suit for partition in respect of"Ka, Kha, Ga, Gha, and Una" of the suit schedule properties in the court of the learned Subordinate Judge, Bhadrak, which was registered as T.S.No.131 of 1978-I. The case of the plaintiff is that Bholanath, Binod, Maguni, Panchu and Gangadhar became separated in the year 1942. 'Ka'schedule lands have been recorded in the names of Bholanath, Maguni, Panchu and Gangadhar. Binod had no interest in the said property. Thus, the plaintiff and defendant no.1 are entitled to 1/3rd interest of 'Ka' schedule property. 'Kha' schedule properties have been recorded in the names of Bholanath, Binod, Maguni, Panchu and Gangadhar. The three branches had equal share in the properties and as such, plaintiff and defendants 1 and 2 are entitled to a share of 1/12 in such property. 'Ga' schedule property is the exclusive property of Bholanath

and Binod and the other two branches did not have any interest in the same. Thus, the plaintiff and defendant no.1 are entitled to 1/4th share each in 'Ga' schedule property. 'Gha' schedule properties have been recorded in the names of Bholanath and Sashika (defendant no.16). The plaintiff and defendant no.1 are entitled to half share in the said property. Lot no.1 of schedule 'Una' property was purchased by Jema in 1945 out of her own funds and as such plaintiff and defendant no.1 are entitled to succeed to such property to the exclusion of others. Lot nos.2 to 7 of 'Una' schedule property are the self acquired property of Bholanath and the plaintiff and defendant no.1 claim the entire property. The alienations of Binod in favour of defendants 7 to 9 have been challenged.

4. Defendant no.2 expired during pendency of the suit and his heirs, defendants 24 to 29 made an application for impletion in the suit and the same was allowed. Defendant nos.3 to 5 and 24 to 29 filed a joint written statement. They do not deny the status of the plaintiff and defendant no.1. They claimed that plaintiff and defendant no.1 are not entitled to any share and all the properties purchased by Bholanath or Jema are the joint family properties. Their specific case is that Lot no.1 properties in 'Una' schedule had been purchased in the name of Jema from the joint family nucleus of the family property. The other properties were acquired with the aid of joint family nucleus in the name of Bholanath and the same were the joint family properties. While not disputing the genealogy, it is stated that since Rambha had expired in 1956, the plaintiff and defendant no.1 cannot succeed to the properties. Defendant no.6 filed a separate written statement. He did not dispute the genealogy, but then claimed the properties of Bholanath on the basis of a Will dated 9.6.1971. Be it noted that his application for grant of probate had been dismissed. Defendant nos. 7 to 9 claim the properties on the basis of alienations made by plaintiff and defendant no.1.

5. Defendant no.23 filed a separate written statement. The case of defendant no.23 is that the three branches had been separated in mess and property since 1940 and were in separate possession of various joint family properties. But then Bholanath and Binod were in joint mess and property. Bholanath was the Karta of the joint family. The properties purchased by Bholanath or Jema are the joint family properties having been purchased by utilizing the surplus from joint family nucleus. The specific case of defendant no.23 is that the plaintiff and defendant no.1 are not the daughters of Rambha, but the daughters of Ananta Nayak, the husband of Rambha through

his second wife Suma Dei. It is further stated that he is the adopted son of Binod and as such succeeded to the properties of Bholanath.

6. On the basis of *inter se* pleadings of the parties, the learned trial court struck seven issues, out of which, issue nos.3 and 4 are vital for deciding the lis, which are as follows:-

Issue No.3.

Is Sanatan Das adopted son of Binod Das and if so, whether it isvalid or not ?

Issue No.4.

Are plaintiff, Ahalya and defendant no.1, Padma the daughters of Rambha ?

7. The trial court, after marshalling on facts and scrutiny of evidence on record, concluded that defendant no.23 is not the adopted son of Binod and plaintiff and defendant no.1 are the daughters of Rambha.

8. Aggrieved by and dissatisfied with the judgment and decree passed by the trial court, defendant no.23 and defendant nos.7 to 9 filed F.A.No.267 of 1988 before this Court. The learned Single Judge confirmed the finding of the learned trial court to the effect that plaintiff and defendant no.1 are daughters of Rambha and are entitled to succeed to the properties of Bholanath and Jema, but reversed the finding of the trial court in respect of issue no.3 holding inter alia that Sanatana is the adopted son of Binod.. Still aggrieved, defendant nos.23 and 7 to 9 filed this Letters Patent Appeal.

10. We have heard Mr.G.Mukharjee, learned counsel for the appellants and Mr.G.D.Kar, learned counsel for the respondents.

11. In course of hearing, Mr.G.D.Kar, learned counsel for the respondents submitted that he does not challenge the finding of the learned Single Judge in respect of Issue No.3. Thus, the only issue, which survives for our consideration, is as to whether plaintiff and defendant no.1 are the daughters of Rambha.

12. Mr.Mukharjee, learned counsel for the appellants relying on the decision of the Supreme Court in the case of *Dolagobinda Paricha Vrs.Nimai Charan Misra and others, AIR 1959 SC 914* argued with vehemence that the oral evidence on record does not satisfy the requirements of Section 50 of the

Evidence Act and as such the evidence of P.Ws.1 and 4 is inadmissible. Once the evidence is inadmissible, corroboration of such evidence would not render them relevant and admissible. He further submitted that the learned Single Judge came to hold that most of the oral evidence on record falls short of the requirement of Section 50 of the Evidence Act. Having held so, the learned Single Judge committed wrong in relying on the evidence of witnesses to come to a conclusion that plaintiff and defendant no.1 are the daughters of Rambha. He further submitted that in the Probate case initiated by the defendant no.6, defendant no.23 did not appear. The probate case was filed during pendency of the suit, wherein defendant no.23 claimed to be the adopted son of Binod. Defendant no.6 is the brother of defendant no.23 and both are not pulling on well. Defendant no.23 had no knowledge about the Will propounded by defendant no.6 in respect of the properties of Bholanath genuine or not. Hence, defendant no.23 did not consider it proper to appear in the Probate case. The said case was dismissed. He further submitted that finding of the learned Single Judge that admission of defendant no.6 as well as defendant nos. 3 to 4 and defendant nos.24 to 26 in their respective written statement that plaintiff and defendant no.1 are the daughters of Rambha is wholly untenable in law and do not constitute admission of defendant no.23 in view of Section 18 of the Evidence Act. He further submitted that the learned Single Judge committed an error relying on the Record of Rights since the entry does not indicate the relationship of plaintiff and defendant no.1 with Rambha. He further submitted that the learned Single Judge was not right in coming to the conclusion that the observations made in the Probate Proceedings regarding the relationship are admissible under Section 13 of the Evidence Act. To buttress his submission, Mr.Mukharjee relied on the decision of the Supreme Court in the case of ***State of Bihar and others Vrs. Sri Radha Krishna Singh and others,*** AIR 1983 S.C. 684.

13. The law regarding the scope and ambit of the Letters Patent Appeal against the judgment of the learned Single Judge passed in a first appeal is no more integra. We may also mention that a five-judges Bench of the Supreme Court in *Alapati Kasi Viswanatham v. A Sivarama Krishnayya,* C.A.No.232 of 1961 D/-11-1-1963 (SC) an unreported judgment-had dealt directly with this question. Wanchoo, J., speaking for the Court observed:

> "The first contention urged before us on behalf of the appellant is that the Letters Patent Bench was not authorized in law to reverse the concurrent findings of fact of the Subordinate Judge and the learned

> Single Judge of the High Court. It is submitted that a Letters Patent Appeal stands on the same footing as a second appeal and it was therefore not open to the Letters Patent Bench to reverse the concurrent findings of fact of the two courts below. We are of opinion that this contention is not correct. A Letters Patent appeal from the judgment of a learned Single Judge in a first appeal to the High Court is not exactly equivalent to a second appeal under S.100 of the Code of Civil Procedure, and therefore it cannot be held that a Letters Patent Appeal of this kind can only lie on a question of law and not otherwise. The matter would have been different if the Letters Patent Appeal was from a decision of a learned Single Judge in a second appeal to the High Court. In these circumstances it will be open to the High Court to review even findings of fact in a Letters Patent Appeal from a first appeal heard by a learned Single Judge, though generally speaking the Letters Patent Bench would be slow to disturb concurrent findings of fact of the two courts below. But there is no doubt that in an appropriate case a Letters Patent Bench hearing an appeal from a learned Single Judge of the High Court in a first appeal heard by him is entitled to review even findings of fact. The contention of the appellant therefore that the Letters Patent Bench was not in law entitled to reverse the concurrent findings of fact must be negatived."

14. In ***Jagabandhu Senapati and others Vrs. Bhagu Senapati and others,*** AIR 1974 Orissa, 120, this Court held that sitting in appeal over the judgment of the learned Single Judge in First Appeal, the Division Bench is competent fully to go into the question of facts and law and the jurisdiction is not restricted in any manner.

15. Bearing in mind the enunciation of law laid down by the Supreme Court as well as this Court in the decisions cited supra, we have meticulously and carefully scanned the pleadings of the parties and evidence adduced by them.

16. Learned Single Judge relied on evidence of P.W.1, P.W.4 and .W.10 to come to a conclusion that plaintiff and defendant no.1 are the daughters of Rambha. According to Mr.Mukharjee, the evidence of D.W.10 falls short of requirement of Section 50 of the Evidence Act. Section 50 of the Evidence Act is quoted hereunder:-

> "**50. Opinion on relationship, when relevant**.- When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact".

17. The scope of Section 50 of the Evidence Act has been succinctly stated by the Supreme Court in ***Dolgobinda Paricha Vrs. Nimai Charan Misra and others*****,** AIR 1959 SC 914. Interpreting Section 50 of the Evidence Act, the Supreme Court held:-

> "On a plain reading of the section it is quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The two illustrations appended to the section clearly bring out the true scope and effect of the section. It appears to us that the essential requirements of the section are – (1) there must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in the other words, the person must fulfill the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one things on a particular question. Now, the "belief" or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant & may, therefore, be proved. We are of the view that the true scope and effect of section 50 of the Evidence Act has been correctly and succinctly put in the following observations made in Chandu Lal Agarwala v.

Khalilar Rahman, ILR (1942) 2 Cal 299 at p.309 (AIR 1943 Cal 76 at p.80)

"It is only 'opinion as expressed by conduct' which is made relevant. This is how the conduct comes in. The offered item of evidence is 'the conduct', but what is made admissible in evidence is 'the opinion', the opinion as expressed by such conduct. The offered item of evidence thus only moves the Court to an intermediate decision: its immediate effect is only to move the Court to see if this conduct establishes any 'opinion' of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer 'the opinion', the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the 'opinion'.

When the conduct is of such a tenor the Court only gets to a relevant piece of evidence, namely, 'the opinion of a person'. It still remains for the Court to weigh such evidence and come to its own opinion as to the 'factum probandum'-as to the relationship in question."

We also accept as correct the view that S.50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship: 'Lakshmi Reddi v. Venkata Reddi, AIR 1937 PC 201."

It was further held :-

"7…….If we remember that the offered item of evidence under Section 50 is conduct in the sense explained is conduct in the sense explained above, then there is no difficulty in holding that such conduct or outward behaviour must be proved in the manner laid down in Section 60; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it; and so on. The conduct must be of the person who fulfils the essential conditions of Section 50, and it must be proved in the manner laid down in the provisions relating to proof. It appears to us that that portion of Section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of Section 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, maybe proved either by the testimony of the person himself

> whose opinion is evidence under Section 50 or by some other person acquainted with such facts, the testimony is in each case direct within the meaning of Section 60. This, in our opinion, is the true inter-relation between Section 50 and Section 60 of the Evidence Act."

18. Applying the same tests, it can be safely concluded that evidence of D.W.10 is not admissible evidence being not in conformity with Section 50 of the evidence Act.

19. After discarding the evidence of D.W.2, we find that there is ample evidence on record to sustain the finding of the learned Single Judge regarding relationship of Ahalya and Padma with Rambha.

20. P.W.1 is the plaintiff. She claims that she and Padma are the daughters of Rambha. There is no dispute or denial to the fact that Ahalya and Padma are the daughters of Ananta, who is husband of Rambha. There is no dispute that Ananta married for the second time to Suma during the life time of Rambha. Defendant no.23 claims that Ahalya and Padma are not the daughters of Rambha, but they are the daughters of Suma, the second wife of Ananta. Suma has been examined as P.W.4. She stated that by the time of her marriage with Ananta, Ahalya and Padma were nine years and six years respectively. The evidence of P.W.4 is criticized on the ground that she is the mother of the Ahalya and Padma and as such she would gain, if Ahalya and Padma succeed to the property left by Bholanath. The evidence of plaintiff and P.W.4 has received ample corroboration from certain other facts and circumstances and documentary evidence on record.

21. Defendant no.6 is the own brother of defendant no.23. He filed an application for grant of probate of Will said to have been executed by Bholanath in his favour. In the said proceeding, Ahalya and Padma were impleaded as daughters of Rambha. Exhibit no.1 is the judgment in the probate proceeding. There is a finding that Ahalya and Padma are the daughters of Rambha. But then, Mr.Mukharjee submitted that defendant no. 23 was not a part to the said proceeding and as such not bound by the same.

22. It is settled principle of law that a judgment in rem like judgments passed in probate, insolvency, matrimonial or guardianship or other similar proceedings, is admissible in all cases whether such judgments are inter parties or not.

23. Further defendant no.23 claims to be the adopted son of Binod in the absence of any other heir of Bholanath. Defendant no.23 would have succeeded the property of Bholanath being the nearest legal representative in case the Will in favour of defendant no.6 failed and relationship of Ahalya and Padma with Bholanath was not accepted. Defendant no.23 could have appeared in the probate case when a general citation was issued, but he had chosen not to do so. The same is indicative of the fact that he was not claiming to be the nearest heir of Bholanath. Defendant no.6 in his written statement categorically admitted that Ahalya and Padma as daughters of Rambha. Similarly defendants 3 to 5 and 24 to 26 have not denied the relationship with plaintiff and defendant no.1. True it is, defendant no.6 was not examined in the suit, but then his previous statement in the probate proceeding, vide Annexure-10 can be considered to be an admission. The same is a substantive piece of evidence. Similarly the admission made by defendant no.24 in the probate case, vide Exhibit 12 that the plaintiff and defendant no.1 are the daughters of Rambha is also admissible.

24. The decision in the case of *Sri Radha Krishna Singh and others Supra)* does not support the contention of Mr.Mukharjee. In *Radha Krishna Singh,* there was a dispute of genealogy between the parties. The Supreme Court held that the plaint genealogy is the very fabric and foundation of the edifice on which is built the plaintiff's case. This is the starting point of the case of the plaintiff which has been hotly contested by the appellant. In such cases, as there is a tendency on the part of an interested person or a party in order to garb, establish or prove an alleged claim, to concoct, fabricate or procure false genealogy to suit their ends, the courts in relying on the genealogy put forward must guard themselves against failing into the trap laid by a series of documents or a labyrinth of seemingly old genealogies to support their rival claims.

25. Having held so, the Supreme Court in paragraph-19 of the report summarized the principles. The same are quoted hereunder:-

> "(1) Genealogies admitted or proved to be old and relied on in previous cases are doubtless relevant and in some cases may even be conclusive of the facts roved but there are several considerations which must be kept in mind by the courts before accepting or relying on the genealogies:

(a) Source of the genealogy and its dependability.

(b) Admissibility of the genealogy under the Evidence Act.

(c) A proper use of the said genealogies in decisions or judgments on which reliance is placed.

(d) Age of genealogies.

(e) Litigations where such genealogies have been accepted or rejected.

(2) On the question of admissibility the following tests must be adopted:

(a) the genealogies of the families concerned must fall within the four corners of S.32 (5) or S.13 of the Evidence Act.

(b) They must not be hit by the doctrine of post litem motam.

(c) The genealogies or the claims cannot be provided by recitals, depositions or facts narrated in the judgment which have been held by a long course of decisions to be inadmissible.

(d) where genealogy is proved by oral evidence, the said evidence must clearly show special means of knowledge disclosing the exact source, time and the circumstances under which the knowledge is acquired, and this must be clearly and conclusively proved."

26. It is further held that judgment in rem like judgment passed in probate is admissible in all cases where such judgments are inter partes or not. In view of the same, the learned Single Judge is right in relying on the judgment in probate case and admission of defendant nos.6 and 24 in probate case. The observation in the probate proceeding regarding relationship is admissible under Section 13 of the Evidence Act.

27. Except bald denial made by defendant no.23 in the written statement and evidence, there is no contrary material. The learned trial court as well as the learned Single Judge on a threadbare analysis of the pleadings of the parties and evidence on record came to hold that plaintiff and defendant no.1 are the daughters of Rambha. We affirm the finding of the learned Single Judge in respect of Issue No.4.

28. The learned Single Judge has decided the rights of the parties and issued directions so far as respective shares of the parties. We see no reason to differ with the same and concur with the said view.

29. On taking a holistic view of the matter, we are on ad idem that the appeal, sans any merit, is liable to be dismissed. Accordingly, the appeal is dismissed No Cost.

Appeal dismissed.

2015 (I) ILR - CUT- 860

PRADIP MOHANTY,J. & B. P. Ray, J.

JCRLA NO. 84 OF 2004

GURU CHARAN MALLIK @ BUDHA .....Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

CRIMIRNAL TRIAL – **Murder case – Appreciation of evidence – Evidence of I.O. shows that the accused while in custody was not only made disclosure statement before police but also laid them to the place of concealment and gave recovery of the weapon of offence, which cannot be believed as P.W.s. 5 and 6 in whose presence the tangia was said to have been seized have not whispered a single word in that regard – P.W.14 the postmortem doctor before whom the tangia was produced for opinion has no where stated that the injuries found on the dead body of the deceased were possible by the said taniga – Moreover the tangia which was sent for chemical examination dose not contain any blood stain – There is no other circumstance available against the accused except that soon after the incident he was absconded from his house which is not by itself sufficient to warrant a conviction – Held, the impugned Judgment of conviction and sentence is set-aside.** (paras-11,13)

For Appellant - Mr.Ramesh Mohanty, Advocate

For Respondent - Mr. Sk. Zafarulla,
Additional Standing Counsel

Date of hearing : 19.06.2014
Date of judgment : 19.06.2014

JUDGMENT

PRADIP MOHANTY, J.

This jail criminal appeal is directed against the judgment and order dated 03.07.2004 passed by the learned Additional Sessions Judge, Kendrapara in Sessions Trial No.11/78 of 2004 convicting the present appellant for commission of offence under Section 302, Indian Penal Code and sentencing him to undergo imprisonment for life.

2. The prosecution case, in brief, is that the deceased was the wife of the accused and sister of the informant. It is alleged that the accused used to assault the deceased frequently. So, four months prior to the incident, the deceased had gone away to her brother's house. But, however, one month prior to the incident, the deceased had joined with the accused. On 09.04.2003, the informant heard that the accused committed murder of the deceased. He immediately proceeded to the occurrence village and saw the dead body of his sister lying at the spot with injury. There, he came to know that the accused assaulted the deceased by means of a "tangia", as a result of which she died and, thereafter, the appellant fled away with the "tangia". He also came to know that on the day before the incident the accused was assaulting the deceased and was asking her to go away to her parents' house. Accordingly, he reported the matter to the police consequent upon which investigation commenced and after its due completion charge-sheet was submitted against the accused under section 302, IPC.

3. The plea of the defence is complete denial of the allegation.

4. In order to prove the charge, the prosecution examined as many as 15 witnesses including the doctor as P.W.14 and the I.O. as P.W.15 and exhibited ten documents. Defence examined none. The learned Additional Sessions Judge, who tried the case, convicted the appellant-accused for commission of the offence punishable under section 302, IPC basing upon the circumstantial evidence and sentenced him to undergo imprisonment for life.

5. Mr. Mohanty, learned counsel for the appellant submits that each of the circumstances has not been proved by the prosecution and the chain of

circumstances is also not complete. The child witness Kusa, who is a very material witness, has been withheld by the prosecution from being examined before the court, for which the prosecution case has to be viewed with suspicion and the evidence of P.W.9 in absence of any corroboration by Kusa has to be accepted with a pinch of salt. That apart, neither seizure of 'tangia' nor leading to discovery of it has been proved by the prosecution. Mr. Mohanty also submits that the trial court fell into grave error in convicting the appellant basing upon the only circumstance that the appellant was not available for ten days in the village. It is well settled in law that abscondance of the accused soon after the incident solely cannot form the basis of conviction in absence of any other corroborative evidence and there is also nothing on record to establish that at the time of incident the appellant was present in his house. P.W.9, who is the son of the deceased so also the appellant, has categorically admitted in his evidence that prior to the incident both the appellant and his deceased mother were living happily. Therefore, it is a fit case for acquittal.

6. Mr. Zafarulla, learned Additional Standing Counsel vehemently supports the impugned judgment of conviction and sentence. He contends that prior to the incident the deceased was being ill-treated by her husband and such fact is evident from the evidence of the informant (P.W.4) and co-villager (P.W.8). Seizure of the weapon of offence, i.e., 'tangia' and leading to its discovery have been proved by the Investigating Officer, who has specifically stated that in presence of police and the co-villagers, the appellant confessed his guilt, led them to the place of occurrence and gave recovery of the weapon of offence, which was seized by him under Ext.3. In Ext.9/1 the doctor (P.W.14), who conducted post mortem examination over the dead body of the deceased, opined that the injuries mentioned in the post mortem report were possible by the weapon of offence 'tangia'. All these circumstances coupled with the fact that the appellant was absconded for ten days soon after the occurrence amply prove that the appellant was the author of the crime. As such, the impugned judgment does not call for interference by this Court.

7. The doctor P.W.14, who conducted post-mortem examination and proved the post-mortem report (Ext.6), opined that all the injuries were ante mortem in nature and the death was due to the injury on the brain matter and intracranial haemorrhage. So, the trial court, in absence of any evidence to the contrary, has rightly come to the conclusion that the death of the deceased was homicidal.

8. Now, it is to be seen whether the appellant is the author of the crime. P.W.1 stated that hearing 'hullah' he reached at the spot and there, Kusa, the younger son of the deceased, told him that the appellant assaulted to his mother. He saw cut injury on the head from which blood was oozing. He proved the inquest report Ext.1 being a witness to the inquest. P.W.2 also stated that hearing 'hullah' he went to the spot and there Laba and Kusa, the sons of the accused, told him that accused assaulted the deceased. He saw the dead body lying inside the room. In cross-examination he, however, admitted that he had not stated to the Investigating Officer that he had heard about the incident from Laba and Kusa. P.W.3 simply stated when he heard the accused assaulted to the deceased, he went to the spot and saw the dead body. P.W.4 is the brother of the deceased and the informant of this case. In his examination-in-chief, he stated that the deceased was blessed with two children, namely, Laba and Kusa. The accused used to ill-treat her and also once threatened to burn her by pouring kerosene. On account of the same, two months prior to the date of occurrence the deceased had come to his house, but he left her in the house of the accused. P.W.4 further stated that on the date of occurrence he heard that the accused assaulted the deceased by means of a 'tangia' and committed her murder. Hearing that, he went to the spot and saw the deceased lying dead with head injury from which blood was oozing. Kusa, the younger son of the deceased, told him that by means of a 'tangia' accused assaulted the deceased and went away with the said 'tangia'. He proved the F.I.R (Ext.2), which was lodged by him getting it scribed through P.W.10. He also proved the inquest report (Ext.1) and his signature appearing thereon (Ext.1/2). In cross-examination, he admitted that he was not in good term with the present appellant and that he had not stated to the I.O. that accused had also tried to burn the deceased by pouring kerosene. P.W.5 stated that the deceased was killed on 09.04.2003. Kusa told to the villagers that accused assaulted to the deceased and committed her murdered. He went to the spot and saw the dead body at the house of the accused lying with bleeding injury on her head. He further stated that I.O. held inquest over the dead body in his presence and prepared inquest report, Ext.1/3 is his signature. He also stated that police seized one 'tangia' from 'Kiabuda' and prepared seizure list. Ext.3 is the said seizure list and Ext.3/1 is his signature. At this stage, he was declared hostile and cross-examined by the prosecution. He denied the suggestion made by the Public Prosecutor that he had stated to the I.O. that accused while in custody lead the police party, brought out the 'tangia' from 'Kiabuda' and produced it before the I.O. However, in the cross-examination by the defence, the said P.W.5 admitted that he cannot say

wherefrom the 'tangia' police brought and that he signed on the blank paper and that he had not seen any seizure of blood stained earth. P.W.6 in his examination-in-chief has stated that he heard about the incident and went to the spot where both the sons of accused and deceased told that accused went away after assault. They searched for the accused but failed to trace him out. He has further stated that police seized blood stained earth from the spot under Ext.4 whereon Ext.4/1 is his signature. Accused was arrested ten days after the occurrence. Police seized 'tangia' under Ext.3 whereon Ext.3/2 is his signature. But, he cannot say wherefrom police seized the said 'tangia'. P.W.7 is a hostile witness and on being cross-examined by the public prosecutor he denied to have stated to the I.O. that accused frequently used to assault Tapoi (deceased) for which Tapoi lived with her parents and she came to the accused one month prior to the occurrence and on the date of occurrence the accused assaulted Tapoi and asked her to go away and by hearing hullah he came and saw accused going away. P.W.8 deposed that he heard from Kusa that accused assaulted Tapoi to death by means of a 'tangia'. He saw the dead body with injury lying on the verandah and accused absconded. Prior to the occurrence accused used to assault the deceased. In cross-examination he admitted that he heard about the previous quarrel from the villagers and that Kusa had not told him anything. P.W.9, who is the elder son of accused and deceased, stated in his examination-in-chief that his mother was killed by the accused by means of a 'tangia'. He was not present when the assault took place, but Kusa was all along present with his father and mother. He had been to the market and on return found his mother lying with injury. His younger brother Kusa told him, as accused assaulted his mother, he made hullah and informed the villagers. In cross-examination, he, however, admitted that Kusa told him to tell the I.O. that his mother was assaulted by his father, but prior to that he had not told anything about the incident. He further admitted in cross-examination that the deceased and the accused were living happily. P.W.10 is the scribe of the FIR and proved his signature marked Ext.2/3. P.W.11 and P.W.12 have only stated that they heard about the incident, went to the spot and saw the dead body. P.W.13 is the police Havildar, who accompanied the IIC to the spot, and as per his direction took the dead body for post mortem. He proved Ext.5, the dead body challan.

9. P.W.14 is the doctor, who conducted autopsy over the dead body of the deceased and found three incised injuries. Injury Nos.1 and 2 of seize 3" x 1" x 1" and 3" x 1" x 1" were situated on left parietal region of head and

injury no.3 of size 3" x 1" x 1" was situated on the right parietal region of head. He also found that there was fracture below injury nos.1 and 2. He opined that all the injuries were ante-mortem in nature, and cause of death was due to injury on the brain and internal haemorrhage.

10. P.W.15 is the I.O., who in his examination-in-chief stated that during the course of investigation he visited the spot, conducted inquest over the dead body and dispatched it to the district headquarters hospital for postmortem. He collected sample earth and bloodstain earth from the spot, examined the witnesses and sent the dead body for post-mortem examination. He apprehended the accused ten days after the occurrence. While in custody accused made disclosure statement before police, led the police party and gave recovery of 'tangia', which was the weapon of offence. He seized the said 'tangia' under Ext-3 and sent the same for chemical examination. After completion of investigation he submitted charge-sheet against accused under Section 302 IPC. In cross-examination, he, however, admitted that the place wherefrom the 'tangia' was seized was accessible to all and it was an open place, and that although he had noticed bloodstains on the 'tangia', the chemical report Ext.10 did not reveal any bloodstain was containing in the 'tangia'.

11. The above discussion and analysis of evidence would show that the death of the deceased was homicidal. There was no eye witness to the occurrence and the prosecution case entirely rests on the circumstantial evidence. Most of the circumstances on which prosecution relied upon have not been conclusively established. P.Ws.4 and 8 although stated about the ill-treatment by the accused to the deceased and strained relation between them, in the cross-examination P.W.4 admitted that he had no good term with the accused and P.W.8 admitted that he heard about the same from the villagers. P.W.9, the son of the deceased also admitted in the cross-examination that his father (accused) and mother (deceased) were staying happily. This being the admission of P.Ws.4, 8 and 9, it cannot be unhesitatingly said that the deceased was ill-treated by accused and there was strained relationship between them prior to the occurrence. Therefore, from such a circumstance, which has not been conclusively proved by the prosecution, guilt of the accused cannot be inferred. The child witness P.W.9, who is the son of both accused and the deceased and on whose evidence much emphasis has been laid by the trial court, has categorically admitted in the cross-examination that Kusa (his younger brother) told him to tell the I.O. that their father

(accused) assaulted to the deceased, that prior to that he had not told him anything, that prior to the incident deceased and accused were living happily and that it was not a fact that his father (accused) assaulted to his mother. This admission of P.W.9 makes his statement in the examination-in-chief nugatory. Simultaneously, non-examination of Kusa makes the evidence of P.W.9 with regard to last seen theory unbelievable. As such, the evidence of P.W.9 in no way is helpful to the prosecution. The evidence of Investigating Officer (P.W.15), that while in custody accused made disclosure statement before police, led them to the place of concealment and gave recovery of the weapon of offence ('tangia'), cannot be believed under any stretch of imagination, as P.Ws.5 and 6, in whose presence the 'tangia' was said to have been seized, have not whispered a single word in that regard. Furthermore, the Investigation Officer in the cross-examination has categorically admitted that the place wherefrom the 'tangia' was seized was accessible to all and it was an open place. In the circumstance, seizure of 'tangia' cannot incriminate accused with the crime. The postmortem doctor P.W.14 before whom the 'tangia' was produced for opinion has nowhere stated in his evidence that the injuries found by him on the dead body of the deceased were possible by the said 'tangia', even though in Ext.9/1, which has been marked through the I.O., he has opined so. Furthermore, chemical examination report reveals that the 'tangia', which was sent for chemical examination, did not contain any bloodstain. Thus, there is no other circumstance available against the accused except that soon after the incident he was absent from his house for ten days. Even though the prosecution has been able to establish this circumstance, as is evident from the evidence adduced by the prosecution, in view of the settled principle of law absconding is not by itself sufficient to warrant a conviction. This apart, no plausible evidence has been adduced by the prosecution to prove that the accused was present in his house at the time of incident.

12. In view of the above, this Court holds that the circumstances, which are relied upon by the prosecution and taken into consideration by the trial court for holding the accused guilty, do not form a complete chain and each link of the chain has not been conclusively proved by the prosecution. As such, it is unsafe to convict the accused-appellant.

13. In the result therefore, the appeal is allowed by setting aside the impugned judgment dated 03.07.2004 passed by the learned Additional Sessions Judge, Kendrapara in S.T. Case No.11/78 of 2004 convicting the

appellant under section 302, IPC and sentencing him to undergo imprisonment for life.

It is stated at the Bar that the appellant is languishing in custody. If that be so, the appellant (Guru Charan Mallik @ Budha) be set at liberty forthwith, unless his detention is required otherwise.

Appeal allowed.

2015 (I) ILR - CUT- 867

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

JCRLA NO.139 OF 2005

PRAFULLA NAIK & ANR ……...Appellants

.Vrs

STATE OF ORISSA ……...Respondent

PENAL CODE, 1860 – S. 34

Common intention – Criminal Act of several persons – For anointing the charge of common intention, meeting of minds of accused persons must be proved without any ambiguity – Prior concert before the incident is important.

In this case appellant No 2 has been charged with offence of murder with the aid of Section 34 I.P.C. – To bring home such charge some unimpeachable additional evidence was required which is lacking – His presence at the incident spot is not probable – His cloths were not stained with blood and no recovery made at his instance and he was arrested four months after the occurrence – It seems that because of enmity and fencing of land his name was included in the F.I.R. in an omnibus manner – Moreover without participation of appellant No 2 the incident could have occurred – No change in sequence of annihilating the deceased if the assigned role of appellant No.2 is kept out – Case of appellant No 2 stands on a different footing from that of appellant No1 – Mere ipse dixit of the

witnesses is insufficient to bring the case of appellant No 2 within the fold of Section 34 I.P.C. – Held, appellant No 2 deserves to be conferred with benefit of doubt – His conviction and sentence through the impugned judgment is setaside. (paras-15,16)

For Appellants : Mr. Janmejaya Katikia,
For Respondent : Mr. A.K.Mishra, Standing Counsel

Date of hearing : 11.02.2015
Date of judgment: 23.02.2015

JUDGMENT

VINOD PRASAD, J.

The two sibling uterine brothers Prafulla Naik(A1) and Sania alias Sanyasi Naik(A2), who are appellants before us, were prosecuted for the charge of murder under Section 302/34 I.P.C. by Additional Sessions Judge (F.T.C.), Chhatrapur in Sessions Case No. 5/2005, State Vrs. Prafulla Naik and another and were adjudged guilty of that offence and resultantly were convicted for the said crime and sentenced to serve life imprisonment and to pay a fine of Rs.5000/- each, and in default in payment of fine to serve additional one year simple imprisonment vide impugned judgment and order dated 20.07.2005. Aggrieved by the aforesaid decision both the convicted accused have preferred instant appeal challenging the same.

2. Eschewing unnecessary details and describing briefly, prosecution story as put forth before the trial court revealed that the informant-Balaji Naik/P.W.4, his younger brother Kabi Naik (deceased) and both the appellants Prafulla Naik(A1) and Sania alias Sanyasi Naik(A2) are co-villagers and next door neigbours being resident of the same lane Dandasi Sahi, in village Ujalapally, under Police out post Beguniapada within local jurisdiction of Kodola Police Station, District Ganjam. Topographical spot map, Ext. 9, prepared by the I.O. Gangadhar Bhuyan/PW12 makes it evident that in the said village a north and south lane is bisected by a east –west lane and at 'T' junction of it is situated the house of the appellant Sania alias Sanyasi Naik(A2) and to west is the house of another appellant sibling brother Prafulla Naik(A1) followed by the houses of Kabi Naik (deceased) and thereafter of the informant Balaji Naik/PW4 towards further west adjoining each other. All the four houses adjoin each other on the southern

side of aforementioned bisecting east - west lane. On the eastern side of north-south lane at 'T' junction is situated the house of Kama Naik/PW5 with its back yard towards north.

It was further divulged that on 17.06.2004 at 10 a.m. accused appellants encroached upon deceased land and started erecting demarcating fence on which a verbal altercation ensued between them. Kabi Naik, the deceased, then approached other co-villagers Gantei Moharana /P.W.2, Ladu Sahu/P.W.3, Narayan Pradhan/P.W.9, Bhaskar Das and Bhagia Das to settle the dispute and at their intervention and mediation the dispute was settled at that time but not without infusing animus hostile feelings amongst the accused appellants. Rankled and motivated by the aforesaid dispute, on that very day (17.0.06.2004) at 7 p.m. the appellant Sania alias Sanyasi Naik(A2) is alleged to have caught hold of Kabi Naik(the deceased) in front of the house of the appellant Prafulla Naik(A1), when Kabi Naik(deceased) was going somewhere from his house and the latter appellant (A1) repeatedly stabbed him with a knife causing extensive injuries on his chest, left side belly, etc., and thereafter the said appellant(A1) also caused incised cut injuries on the mouth of the injured/deceased. As a result of inflicted injuries to the abdomen intestines of Kabi Naik(deceased) protruded out. Sustaining such grievous injuries injured Kabi Naik squatted on the ground at the backyard of the house of Kama Naik/PW5 at a distance of 20 feet from the house of appellant-Prafull Naik(A1) and lost his breath. This incident was witnessed by informant elder brother Balaji Naik/P.W.4, Abhimanyu Naik/P.W.10, Babu Naik, Kama Naik/P.W.5 and many others. After knifing the body of the injured/deceased, both the assailant/ appellants made their escape good from the incident spot.

3. Balaji Naik(P.W.4)/ the informant, and elder sibling brother of the deceased, got a F.I.R., Ext.2, slated through scribe Khandeswar Sahu and after verifying it's contents, put his left thumb impression and then carried it to the police out post Beguniapada, and lodged it. S.I. Gangadhar Bhuyan (P.W.12), S.I. police out post received Ext.2 and finding a cognizable offence being disclosed dispatched it to Kodala Police Station for registration of formal FIR, and consequently O.I.C., Kodala P.S. Prafulla Kumar Swain registered FIR No.119 of 2004, Ext. 2/3, under Section 302/34, I.P.C. the same day i.e., 17.06.2004 at 10.30 p.m. mentioning the distance of place of the incident to be 15 K.M.s. Both the appellants were named as the perpetrators of the murder.

4. Soon after receiving the FIR, S.I Gangadhar Bhuyan/ P.W.12, sprang into action by commencing immediate investigation, came to the incident village, examined the informant at 9.30 p.m. and deputed a constable to guard the cadaver of the deceased. Undertaken search of the accused during the night was in vain. On the following day (18.06.2004), the I.O./ P.W.12, at 6 a.m. revisited the spot and prepared the sketch map of the incident spot Ext.9. Other witnesses thereafter were examined and their statements under Section 161 Cr.P.C. were slated down. Inquest on the cadaver was performed at 7.30 a.m. after appointing inquest witnesses and the inquest report Ext. 3 was penned down. Dead body Challan is Ext.10. At 8 a.m. blood stained earth and sample earth were seized from the back side courtyard of Kama Naik (P.W.5), the seizure list of which is Ext. 6. On the next day (19.06.2004) at 8 a.m. blood stained attires of the deceased consisting of his old Dhoti, old Gamuchha, blue black lungi, one sealed packet blood sample and sealed gauge etc. were seized vide Ext.7. Post Mortem examination report produced by constable No. 648 L.N.Patra was also attached with the case diary. Appellant Prafulla Naik(A1) was arrested on 21.06.2004 at 2 p.m. from the house of his father-in-law Daitari Naik of village Rambha, who confessed his guilt and at his disclosure statement, the weapon of assault, which is a wooden handled knife of eight inches length with blood stains, was recovered from the thatched roof of his(A1's) house. Confessional statement of the appellant is Ext.11 and the knife is material Ext.1. On 23.06.2004 the seized knife with a requisition was sent to the Medical Officer, F.M.T., M.K.C.G. Medical College, Berhampur for seeking expert opinion. The report of the Medical Officer on query as per Ext.5 was subsequently received by the I.O. On 14.07.2004 at 6 p.m. a crowbar produced by the widow of the deceased was seized by the I.O. in the presence of the witnesses and the seizure memo thereto is Ext.8. Chemical examination report regarding the blood stained cloths etc. is Ext.13. Appellant-Sania alias Sanyasi Naik(A2) was arrested on 03.10.2004 at 12 noon from the house of his father-in-law at village Nimisola and at 1.30 p.m. he was forwarded to the court of JMFC, Kodala. Wrapping up the investigation, I.O./P.W.12 charge-sheeted both the accused-appellants under Section 302/34 I.P.C.

5. Autopsy on the cadaver of the deceased was conducted by Dr. Jyotin Kumar Dash, Associate Professor, F.M.T., MKCG Medical College, Berhampur/ P.W.8. on 18.06.2004 at 1.45 p.m. to whom the cadaver was produced by constable nos. 726 T.Sahu and 648 L.N. Patra along with one

Dinabandhu Naik, a relative of the deceased. During post mortem examination following sustained external injuries were found on the cadaver of the deceased:-

(i) A cut wound 5c.m x 0.75 cm x muscle deep on left side lower face extending down words from left angle of mouth.

(ii) Stab would 2 cm x 1 cm x chest cavity on the left side of upper chest.

(iii) Puncture wound 2 cm x 0.5 cm x muscle deep over left shoulder closed to the neck.

(iv) Stab would 4 cm x 1.5 cm x abdominal cavity 2.5cm above and 4 cm. outer to umbilicus through which a loose intestine was found protruded out.

(v) Stab wound 4 cm x 1.5 cm x chest cavity on the back just below the left scapula.

(vi) Stab wound 6 cm x 1 cm x chest cavity on the back of right side chest.

(vii) Cut wound 2 cm x 1 cm x muscle deep on the outer aspect of left arm.

(viii) Cut wound 2 cm x 1.5 cm x muscle deep on the outer aspect of right forearm 10cm above deep.

(ix) Cut wound 2 cm x 1 cm x muscle deep, 1 cm inner to injury no. viii.

(x) Cut wound 3 cm x 1.5 cm x muscle deep under outer aspect of left leg.

On dissection, autopsy doctor found all the internal structures beneath external injury no. (ii) perforated through and through up to the chest cavity causing a punctured wound of 1 cm x 0.5 cm x 0.25 cm on the left lung upper lobe. External injury no. (v) had also perforated all the corresponding internal organs of the chest wall causing puncture on the posterior aspect of lower lobe of left lung, measuring 1.25 cm x 0.75 cm x 1 cm. Likewise injury no. (vi) had also pierced the chest cavity after cutting all the internal organs on it's path to cause a puncture wound on the posterior aspect of right lung at its lower lobe measuring 2 cm x 1 cm x 1.5 cm. Similarly, external injury no. (iv) on the abdomen wall had cut all the internal organs and had

caused a cut injury on the mesentery 3 cm x 2 cm causing puncture wound of 1.5 cm x 0.5 cm on the wall of intestine. All the injuries were ante mortem in nature and were sufficient to cause death. They were inflicted by a cutting pointed weapon and the resultant cause of death was hemorrhage and shock caused by above injuries. Doctor's estimation was that singularly or cumulatively external injuries nos. (ii), (iv), (v) and (vi) were sufficient in ordinary course of nature to cause death, which had occurred 18 hours (+)(–) three hours. Autopsy examination report is Ext.4. The opinion of the doctor/ P.W.7 regarding the weapon of assault (knife) was that the injuries sustained by the deceased could have been inflicted by the said weapon. The Expert report is Ext.5.

6. Charge-sheeting of both the accused/appellants resulted in registration of the case against them in the concerned committal court of the Magistrate, which ultimately, after observing due committal procedure, was committed to the Court of Session for trial where learned trial judge charged both the appellants with offence under Section 302/34, IPC on 04.03.2005 and since both the accused-appellants refuted that charge, pleaded not guilty and claimed to be tried, that the sessions trial procedure was resorted to prosecute them and establish their guilt.

7. Prosecution during the Sessions trial examined in all twelve witnesses out of whom, Gatei Moharana/ P.W.2, Ladu Sahu/P.W.3, Narayann Pradhan/ P.W.9 are the witnesses of motive and morning brawl, fence dispute and settlement thereof. The informant Balaji Naik/P.W.4, Kama Naik/P.W.5, widow Bhanu Naik/P.W.6 and Abhimanyu Naik/P.W.10 are the fact witnesses and out of them P.W.10 had turned hostile and had not supported the prosecution case. Trinath Padhy/P.W.1 and Narayan Pradhan/P.W.9 are the seizure witnesses. P.W.8 is the autopsy Dr. Jyoti Kumar Dash whereas Bijaya Kumar Naik/ P.W.7 is the witness to the inquest. I.O. is P.W.12. Bijaya Das/ P.W.11 had turned hostile and had testified virtually nothing.

8. In their statements under section 313 Cr.P.C. both the accused refuted questioned incriminating circumstances and their defence plea is of false implication.

9. Vide impugned judgment and order dated 20.07.2005 learned trial judge/ Additional Sessions Judge (F.T.C.), Chhatrapur held that the prosecution case is established beyond all reasonable doubt and therefore

convicted both the appellants of the framed charge and sentenced them as noted above being dissatisfied with which judgment and order the instant appeal has been filed by the convicted accused appellants.

10. In the background of above narrated facts that we have heard Mr. Janmejaya Katikia, learned counsel for the appellants, Mr.A.K.Mishra, learned Standing Counsel for the State, vetted through oral and documentary evidences and scanned the trial court record.

11. Launching a scathing attack on the impugned judgment and order, Mr. Katikia submitted that the learned trial judge committed glaring mistakes in relying upon the prosecution evidence qua appellant Sania alias Sanyasi Naik(A2) as the prosecution has miserably failed to bringing forth unimpeachable credible evidence concerning his participation in the incident to substantiate the allegation that he had caught hold of the deceased and due to the animosity accepted by the prosecution, that his name was foisted in the crime as he is the real sibling brother of another appellant. It was then submitted that the cadaver of the deceased was found not at the incident spot mentioned in the FIR, but was found at the back yard of the house of Kama Naik/P.W.5 and therefore, the possibility that nobody was present nor they had witnessed the incident cannot be ruled out completely and hence both the appellants deserves conferment of benefit of doubt. The incident occurred in darkness and nobody was able to locate the real assailants is quite possible in the wake of I.O.s evidence that no bulb was fitted in the electricity poles near the incident spot. While articulating the submission it was harangued that it is because of this reason that there is discrepancy in mentioning place of the incident in the FIR and court depositions. Prosecution version of seeing the incident in the electric light is concocted and untrue. In the final outcome, it was submitted that the prosecution has not been able to successfully establish the guilt of the appellants, who are entitled to be conferred the benefits of doubt and therefore, their appeals may be allowed by setting aside their conviction and sentence and they be acquitted and set at liberty.

12. Submitting conversely learned Standing Counsel argued that the prosecution witnesses are truthful, reliable and their testimonies are cogent and unblemished. No animus could be brought out by the defence for them to falsely implicate the appellants. Neighbours could be identified even in fading or dim or feeble light and therefore, there was no difficulty for the eyewitnesses to identify both the appellants who were known to them since

many decades and were next door neighbours. Cross examination of the fact witnesses is perfunctory and does not demolish the main substratum of the prosecution story nor does it robe the prosecution out of the authenticity of its claim. Medical report being congruent and the doctor's opinion that the recovered knife could have caused the injuries sustained by the deceased further nails-in the appellants. The investigation had no pit falls, nor it was lopsided and perfunctory nor defense has been able to discredit I.O.'s depositions. Eye witness account of the incident is creditworthy and confidence inspiring and without admitting any other hypothesis it can be safely concluded that the appellants are the real perpetrators of the crime. Concluding the submissions, learned Standing Counsel urged that the impugned judgment is well merited and therefore it be concurred and the appeals being devoid of merits be dismissed in its entirety.

13. We have thoughtfully considered the rival contentions vis-à-vis the evidences on the record. What is evident is that the incident had occurred in between next door neighbours in the month of June, very close to the longest day of the year, at 7 p.m. Our heuristic experience informs us that at that time (7 p.m. on 17th June, 2004) some twilight must be available and possibly because of this reason the defense refrained itself from searchingly cross examine the witnesses on this score. Spot topography and site plan, not being disputed, leaves no manner of doubt that both the rival sides are next door neighbours and their houses are adjacent to each other. In such a view even fading light would have been enough to recognize and identify the next door neighbours by the real brother and widow of the deceased. Vetting of depositions of the informant/P.W.4, Kama Naik/ P.W.5 and widow-Bhanu Naik/P.W.6 makes it manifest that the defence had not made any endeavour to challenge the identification of the assailants and in absence of any credible evidence emerging through cross examination it is unwise to accept defence argument that assailants could not be identified. In such a view, the contention raised by the learned counsel for the appellants that the miscreants were unknown and could not be identified is an incipient contention without substance and hence is repelled ostensibly for the reason that specific and credible prosecution story and involvement of the main appellant(A1) in the crime is established convincing without any ambiguity. The defence has miserably failed to dislodge convincing eye witness account, especially of the informant/P.W.4, who was the real elder brother of the deceased relating to (A1) as informant/PW4 had no grouse and animus against (A1) to such an extent to spare the real assailant and implicate him

in a falsely cooked up case by fabricating a story. The defence, in fact, had not made any effort to discredit the prosecution story. The straight forward realistic answers given during cross examination authenticates rather than rob the prosecution version of its convincing nature and therefore, we are unable to accept the contention of Mr. Katikia. The informant had refuted the defence suggestion that after receiving the information regarding the incident, he had lodged the F.I.R. In this contest, the other submission of Mr. Katikia that the cadaver of the deceased was not found in front of the house of appellant no.1, but it was found at the back yard of the house of Kama Naik/PW5 is also unmerited for the reason that the assault incident is never static and twenty feet does not make any difference as during scuffle and after sustaining first stab injury the deceased can staggered to such a distance before becoming unconscious. Number of injuries sustained by the deceased is also indicative of the fact that the stabber and the victim must have moved few paces hither and thither and, therefore, merely because the dead body of the deceased was found at the backyard of the house of Kama Naik/PW5, it does not demolish the prosecution version in any manner. We do not find the contention of Mr.Katikia to be worthy of credence and resultantly we discard it as well.

14. The stabbing incident occurred at 7 p.m. and the FIR about it was lodged with Beguniapada Police outpost without any unexplained delay and infact the formal F.I.R. was registered at 10 p.m. Considering the distance, which is 15 K.Ms between the place of the incident and the police station, we are of the view that the FIR was lodged with promptness and the version contained therein inspires confidence qua the main assailant, appellant No.1 Prafulla Naik(A1) which seems to be authentic and without any embellishment. Appellant no.1 is named in the FIR as the main perpetrator of the crime and, therefore, we are of the view that so far Prafulla Naik(A1) is concerned his participation in the incident is well anointed and he cannot be absolved of the crime committed by him.

Inquest report, recovery of blood stained earth, recovery of blood stained attires of the deceased and all additional factors establishes the prosecution case against appellant no.1 Prafulla Naik beyond all reasonable doubt. In this respect we would like to point out that no challenge has been thrown to the date, time and place of the incident by the defence, which has resulted in cementing the depositions of the prosecution witnesses as authentic narrations. Thus, there remains no doubt that the deceased was

murdered on 17.06.2004 at 7 p.m. repeatedly being stabbed by appellant no.1 on and around his house and therefore, the appeal preferred by the appellant-Prafull Naik(A1) is wholly merit less and is liable to be dismissed.

15. Now we advert to the appeal of another appellant no.2 Sania alias Sanyasi Naik(A2) and in his respect, we find the contention of appellant's counsel having worthwhile substance in it. Prosecution has not assigned any weapon to Sania alias Sanyasi Naik(A2). The theory put forth by the prosecution regarding complicity of this appellant does not appeal to reason and it does not seems probable as well. The nature and number of injuries and the parts of the body on which they have been inflicted, do not indicate that the deceased was caught hold of by anybody either from the front or from the back. On the contrary, it seems that he had tried to save himself as he had sustained injuries on both of his hands. Repeated stabbing blows by appellant no.1 on the deceased and his staggering up to the back- yard of the house of Kama Naik/PW5 is indicative of the fact that in fact the incident involved only two persons, the deceased and the appellant-Prafulla Naik(A1). Had the deceased been caught hold of and made immobile, he could not have moved to the backyard of the house of Kama Naik/PW5. No pivotal role has been assigned to appellant-Sania alias Sanyasi Naik(A2). It seems that because of the enmity and fencing of the land, his name was also included in the FIR in an omnibus manner with a palliative role of catching hold without any further allegation. His presence at the incident spot does not seems to be probable. This appellant has been charged with offence of murder with the aid of section 34 I.P.C. but to bring his case within the purview of section 34 I.P.C., common intention, some unimpeachable additional evidence was required which is lacking in the present case. For adopting and relying upon the decades old view 'that those also serve who stand and wait', it must be established that standing and waiting was incriminating in nature and was a conscious wait. For anointing charge of common intention '*census id idum'* (meeting of minds) must be proved without any ambiguity which has not been done in the present appeal. Prior concert since before the incident must exits. Without participation of appellant no.2, the incident could have occurred in the same way in which it had occurred. No change in sequence of annihilating the deceased surfaces if the assigned role of appellant no.2 is kept out. Case of second appellant stands on a different footing from that of appellant no.1. Mere ipse dixit of the witnesses is insufficient to bring the case of (A2) within the fold of section 34 I.P.C. His clothes were not stained with blood, which in normal

circumstances should have been had the prosecution story been true concerning his participation in the incident nor any recovery had been made at his instance. This appellant(A2) was arrested after an inordinate delay on 3.10.2004 after a gap of four months and there is no evidence to the effect that during this period any proceeding of attachment u/s 82/83 Cr.P.C. or NBW was taken nor the I.O. stated as such during the trial. No confessional statement of this appellant was also deposed to be recorded as it seems that I.O./PW12 was also not satisfied regarding his participation in the incident. Our summation and discussions lead us to conclude that prosecution has miserably failed to establish guilt qua appellant no.2, Sania alias Sanyasi Naik (A2) and therefore, we are of the opinion that the said appellant Sania alias Sanyasi Naik(A2) deserves to be conferred with benefit of doubt.

16. In the net result, the appeal preferred by appellant Sania alias Sanyasi Naik(A2) stands allowed. His conviction and sentence through the impugned judgment and order are hereby set aside and he is acquitted of the framed charge. Sania alias Sanyasi Naik(A2) is in jail. He be set at liberty forthwith unless he is wanted in any other case.

17. As concluded herein before appeal preferred by the appellant-Prafulla Naik (A1), being bereft of merits is dismissed and his conviction and sentence through the impugned judgment and order is hereby affirmed. The said appellant (A1) is in jail and he shall remain in jail to serve out remaining part of his sentence.

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

Appeal of (A2) allowed
Appeal of (A1)dismissed.

2015 (I) ILR - CUT- 878

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

MATA NOs. 14 & 26 OF 2013 AND
RPFAM NOs. 127 OF 2011 & 97 OF 2012

DIPAK BASH ……..Appellant

.Vrs.

SMITARANI BASH ……..Respondent

HINDU MARRIAGE ACT, 1955 – S.25

Permanent alimony – No written law on the subject – Alimony is no alms – It is entitlement of a wife for a decent living – Wisdom lies in deciding each case on its peculiar facts and surrounding circumstances without attempting to fix any formula of universal application – Factors to be considered includes length of marriage, time since the spouses are living separately, age and relative income of both the spouses, financial prospects and health of the parties and fault of the parties in breaking down of the marriage – Actual earning has to be reckoned but not the home take salary – Even savings made by the husband for securing his future life is also significant – All essential future expenses of all kinds have to be considered – The amount of money received at the time of marriage has to be counted – Wife's capacity to earn after separation is also relevant to be kept in mind – Similarly the responsibility which the wife would have bourne had the relationship continued is also a relevant aspect to be considered – Moreover residence, future possibility of maintaining oneself alone, clothing, fooding, biological requirements of a female and many further aspects are other significant points which have to be kept in mind – As a matter of fact wife does not require only two morsels a day but she requires a reasonable amount to meet her basic needs for a life which she would have enjoyed had the marital tie would have continued – Held, divorce granted by the judge, family Court is affirmed – Direction issued to the husband to pay Rs. 25 lakhs to the wife as one time alimony. (Paras 13 to 19)

For Appellant - M/s. Amit Prasad Bose, R.K.Mahanta, N.Hota, V.Kar, D.Sahoo, S.S.Routray
M/s. Balaram Nayak
M/s. B.K.Routray, K.C.Rath, A.Routray, S.K.Nayak, R.P.Mohapatra

For Respondent -M/s. Dharanidhar Nayak, U.R.Jena,
S.K.Dash & B.Naya
M/s. S.Mohanty, S.Behera, S.C.Mohanty, B.Biswal

Date of hearing : 12.12.2014
Date of Judgment : 16.03.2015

JUDGMENT

S.K.SAHOO, J.

The appellant-husband in MATA No.14 of 2013 namely Dipak Bash (hereafter for short "the husband") has challenged the quantum of permanent alimony of Rs.16 lakhs (Rupees sixteen lakhs) awarded in favour of the respondent-wife Smitarani Bash (hereafter for short "the wife") by the learned Judge, Family Court, Bhubaneswar vide impugned judgment and order dated 21.1.2013 in Civil Proceeding No.436 of 2010 while passing the decree of divorce and dissolving the marriage between the parties with effect from the date of decree.

In MATA No.26 of 2013 the wife has challenged the very same impugned judgment and order dated 21.1.2013 of the learned Judge, Family Court, Bhubaneswar in Civil Proceeding No.436 of 2010 and prayed for enhancement of the permanent alimony from Rs.16 lakhs to 55 lakhs (Rupees fifty five lakhs) and also for a direction to the husband to return the dowry articles, ornament and cash to her.

In RPFAM No.127 of 2011 the wife has challenged the quantum of maintenance fixed by the learned Judge, Family Court, Bhubaneswar passed in Criminal Proceeding No.91 of 2010 in an application under section 125 Cr.P.C. vide impugned judgment and order dated 29.9.2011 and prayed to enhance the monthly maintenance from Rs.10,000/- to Rs.75,000/-. She has also prayed for a direction for payment of cost of Rs.10,000/- to her by the husband as directed by the learned Judge, Family Court, Bhubaneswar in the said Criminal Proceeding No.91 of 2010 vide judgment and order dated 22.2.2011.

In RPFAM No.97 of 2012 the husband has also challenged the very same impugned judgment and order dated 29.9.2011 passed by the learned Judge, Family Court, Bhubaneswar in the said Criminal Proceeding No.91 of

2010 wherein he was directed to pay monthly maintenance of Rs.10,000/- to the wife.

Since in all these four matters the parties are common and the questions of law and facts involved are identical and the quantum of permanent alimony/maintenance fixed by the learned Judge, Family Court, Bhubaneswar is under challenge, all these matters were heard analogously and a common judgment is being passed.

2. The husband Dipak Bash filed a petition under Section 13(1) of Hindu Marriage Act, 1955 before the learned Civil Judge (Sr.Divn.),Bhubaneswar vide MAT Case No. 550 of 2009 against the wife Smt. Smitarani Bash praying for a decree of divorce and thereby dissolving the marriage between the parties solemnized on 1.6.2006. The matter was transferred to the learned Judge, Family Court, Bhubaneswar for disposal in accordance with law and accordingly Civil Proceeding No. 436 of 2010 was registered.

It is the case of the husband that the marriage between the parties was solemnized on 1.6.2006 as per Hindu rites and customs at Magurugadia in the district of Keonjhar in presence of the parents, relatives and well-wishers. It is the further case of the husband that he is a handicapped person working in private Software Company at Gurgaon and managing his entire family. It is his further case that at the time of marriage there was no demand of dowry and from the next day of the marriage the wife displayed cruel attitude towards him and his family members and criticized her in-laws. She did not perform the household works and used abusive language against her in-laws causing mental agony and torture to them. She also threatened to commit suicide and in spite of advice of her in-laws, she did not change her attitude. After two weeks of marriage, she accompanied her husband to his service place at Gurgaon but there also she repeated similar behavior with her husband. She fell ill while staying at Gurgaon and taken to Apollo Hospital, New Delhi where during treatment it was found that she was suffering from Polycystic Ovarian Syndrome (PCOS). She insisted her husband not to keep any kind of contact with his parents rather demanded rich gifts for her sister for which there was serious misunderstanding between the couple. When the husband visited USA, he left the wife in the company of his parents but the wife only stayed for three to four days and then went away to her parents' house where she stayed about five months till the husband returned from USA. After returning from USA, the husband took the wife to his service

place in the mid of December 2006 and they stayed together till April 2009. During her stay with her husband, most of the time she used to spend her time with the neighbours and blaming her husband and her in-laws before them. Most of the time the husband even cooked food for the wife. Being misguided by her parents and brother, she was exhibiting cruel behaviour to her husband and made his life miserable. In spite of treatment provided to her by the husband, there was no improvement and she lost all hope of having a child and sometimes contemplating to commit suicide. Due to suffering from such disease, she was avoiding sexual cohabitation with her husband. Due to abnormal and cruel behavior of the wife towards the husband, on frequent occasions there used to be meeting between the family members of both the parties to sort out the dispute and she used to promise not to repeat such behavior in future but in vain. The couple came to Bhubaneswar to the father's place of the wife on 24.5.2009 and on 25.5.2009 leaving the wife at her father's place, the husband came back. On 28.5.2009 in the absence of the husband at his house, the wife came to her in-laws house in a violent mood, abused her in-laws, broke her bangles and washed off her vermaillion from her forehead and behaved like an insane person. The father of the wife took away all the dress materials from the house of the husband and went away. This incident was reported by the father of the husband before Inspector-in-charge, Ghasipura Police Station and accordingly a station diary entry was made. On 27.6.2009 the husband received a legal notice from the wife wherein false allegation of demand of dowry and torture was made against the husband and the in-laws.

3. The wife filed her written statement denying the allegations made by the husband in the petition for divorce. She stated that the income her husband is Rs.1,50,000/- (Rupees One lakh fifty thousand) per month and there was demand of dowry at the time of marriage and accordingly cash of Rs. 2 lakhs, gold ornaments, household articles, electronics items etc. were given as per the demand of her husband and her family members. It is further stated that after marriage there was further demand of more money and a Santro Car and as the demand was not fulfilled, she was subjected to physical and mental torture by her in-laws. She has further stated that her father is a School teacher and financially weak person and she has also no source of income. She expressed her willingness to go back to her husband.

4. During course of trial, the husband examined himself as P.W.1 and his father Chakradhar Bash was examined as P.W. 2, he also proved the

letter written by the wife to him vide Ext. 1, letter written by the wife addressed to her father vide Ext. 2, diary note of the wife vide Ext. 3, complaint written by his mother to State Women Commission vide Ext. 4, written undertaking furnished by the family members of the husband vide Ext. 5, receipt of the father of the husband in respect of dress, ornaments and certificates, prescription showing the treatment of the wife vide Ext. 7, discharge report of the wife from Apollo Hospital vide Ext. 8, prescription of illness of the wife vide Ext. 9, Ultra sound report of the wife vide Ext. 10.

From the side of the wife, she examined herself as R.W.1. No document was proved on her behalf.

5. The learned Judge, Family Court vide impugned judgment and order dated order 21.1.2013 framed the following issues for adjudication:-

(I) Whether the respondent is the legally married wife of the petitioner?

(II) Whether the respondent treated the petitioner with cruelty?

(III) Whether the petitioner is entitled to the relief of dissolution of marriage as sought for in the plaint?

(IV) Whether the respondent is entitled to permanent alimony and if so, what would be the quantum?

6. So far as issue no.1 is concerned, the learned Judge held that the respondent is the legally married wife of the petitioner.

So far as issue no. 2 is concerned, the learned Judge held that the documents Exts. 1 to 4 and Exts. 7 to 10 taken together established that the petitioner was taking utmost care of the respondent but the later was treating him and his family members with cruelty. It is further held that the petitioner had established that the respondent treated him with cruelty frequently and the issue was answered in favour of the petitioner and against the respondent.

So far as issue no. III is concerned, the learned Judge held that the marriage between the parties has been broken down irretrievably and there is remote chance of their reunion and if the parties live together, it would be injurious and harmful for both of them and accordingly held that the petitioner is entitled to the relief of dissolution of marriage as sought for in the plaint.

So far as the issue No. IV is concerned, the learned Judge held that considering the social status of the parties, their income and present price index, permanent alimony of the respondent would be fixed and accordingly directed the husband to pay a sum of Rs.16 lakhs to the wife towards her permanent alimony.

7. During hearing of the matter, on 19.2.2014 the wife expressed that she is not interested for mediation for which the personal appearance of both the parties was dispensed with. During subsequent stages of hearing also, the parties concentrated only on the quantum of permanent alimony.

So far as the order of divorce is concerned, none of the parties challenged the same before us. However the learned counsel for the wife challenged the findings of Judge, Family Court on issue no.2 and submitted that the evidence on record have not been properly assessed to come to a conclusion that wife was treating the husband with cruelty frequently. He placed the evidence affidavit of the respondent-wife in C.P. No.436 of 2010 which indicates that even after fulfillment of all the dowry demands raised at the time of marriage, she was physically and mentally tortured after marriage for further demand of money and a Santro Car. There was also attempt to kill her on two occasions. The wife lodged an FIR against her husband and in-laws family members before Mahila Police Station, Bhubaneswar for commission of offences punishable under sections 498(A)/323/294/506/34 IPC and section 4 of the D.P. Act in which charge sheet has been placed. The evidence given by the wife has not at all been shaken in the cross-examination. We have also gone through Exts. 1 to 4 and Exts.7 to 10 relied upon by the Family Court but we find these documents no way falsify the evidence of the respondent-wife. Ext.1 is stated to be a letter written by the respondent-wife to the petitioner-husband. No date is mentioned in Ext.1. The envelope through which Ext.1 has been sent has not been proved. Exts.2 and 3 are stated to be the diary noting of the respondent–wife but the concerned diary has not been proved. All these documents have not been confronted to wife at the time of her examination. Ext.4 is the letter/complaint written by the mother of the petitioner-husband to State Women Commission. Exts.7 to 10 are stated to be the medical papers of the wife. The wife has challenged the medical prescriptions and reports. In view of such evidence, we are not inclined to accept the observations of the learned Judge, Family Court that the petitioner-husband was taking utmost

care of the respondent but the respondent was treating the petitioner and his family members with cruelty frequently.

8. We have also gone through the evidence on record and the findings of the learned Judge, Family Court and we find that the marriage between the parties has been irretrievably broken down and it had remained for name sake. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up, there is hardly any chance of their springing back to life on account of artificial reunion created by the Court's decree. Therefore we find no infirmity in the order of divorce.

9. So far as the order of permanent alimony is concerned, the learned Family Court has held that the contention of the husband that the wife has floated an advertisement in social network sites showing her income to be Rs. 2 lakhs to Rs.3 lakhs per annum is not acceptable in as much as anybody might float an advertisement in the name of another. The learned Family Court has further held that the husband has not produced the salary certificate of the wife and that considering the social status of the parties, their income and present price index, the permanent alimony of the wife is to be fixed.

10. The learned counsel for the husband Mr. Amit Prasad Bose, challenging the quantum of permanent alimony submitted that the wife is not only guilty of cruelty but also of desertion without any reasonable cause and therefore the award of permanent alimony in her favour is uncalled for and it is unreasonably high. He further submitted that the home take salary of the husband is Rs. 28,474/- (Rupees twenty eight thousand four hundred seventy four) and the husband has already paid Rs. 2,90,000/- in the 125 Cr.P.C. proceeding filed by the wife vide Criminal Proceeding No. 91 of 2010. He further submitted that the wife’s appeal for enhancement is based on no grounds and she wants to take the permanent alimony in order to get married again. He further submitted that the wife has already received Rs. 3,50,000/- (Rupees Three lakhs fifty thousand) during pendency of appeals and also got Rs. 3,50,000/- during pendency of proceeding in the Family Court and hence a sum of Rs. 7,00000/- has already been paid to the wife. The learned counsel further argued that Ext. 6 would indicate that the wife has already taken the ornaments along with her clothes. The learned counsel further submitted that the wife has subjected the husband to physical and mental

torture and deprived him of sex and put the husband along with his parents behind the bars on false allegations and since she has already received Rs. 7 lakhs, the permanent alimony fixed by the learned Judge, Family Court should be reduced to Rs.7 lakhs which she has already taken and therefore, the appeal filed by the wife for enhancement of the permanent alimony should be dismissed.

The learned counsel for the wife Mr. Dharanidhar Nayak, Senior Advocate submitted that the husband has not disclosed his salary correctly and taken contradictory stands from time to time. In the show cause of the maintenance proceeding, he has stated that he has left the job and passing in miserable conditions but in the very same maintenance proceeding, in his evidence affidavit the husband has stated that his monthly income is about Rs. 12,000/- but subsequently he filed the salary certificate which shows that he had never left his job and getting Rs. 46,304/-. The learned counsel further submitted that the wife was subjected to torture severely for which she lodged an F.I.R. against her husband and in-laws which was registered as Bhubaneswar Mahila P.S. Case No. 75 of 2009 corresponding to G.R. Case No. 1769 of 2009 pending before the learned S.D.J.M., Bhubaneswar for commission of offence under Sections 498(A)/294/506/406/109/34 of IPC read with Section 4 of D.P. Act. The learned counsel further submitted that the learned Judge, Family Court, Bhubaneswar in its judgment dated 22.2.2011 in Crl. P. No. 91 of 2010 directed the husband to pay a monthly maintenance of Rs. 20,000/- to the wife from the date of the petition so also the cost of the proceeding was assessed at Rs.10,000/-. The matter was challenged by the appellant–husband before this Court in RPFAM No. 23 of 2011 and while setting aside the judgment of the learned Judge, Family Court, it was directed to pay interim maintenance to the wife @ Rs. 20,000/- per month starting from the month of March 2011 till the end of the proceeding. The husband filed a petition for modification of the order dated 25.3.2011 which was dismissed. The learned Judge, Family Court vide judgment and order dated 29.10.2011 in Crl.P. No. 91 of 2010 directed for payment of maintenance to the wife at the rate of Rs. 10,000/- per month which was challenged by the wife in RPFAM No. 127 of 2011. According to the learned counsel for the wife, the husband is holding the post of Senior Engineering Project Manager and he is getting more than Rs. 1,50,000/- per month though he has filed salary certificate showing that he is getting Rs. 67,612/- only per month. The learned counsel submitted that the quantum of permanent alimony should be enhanced from Rs. 16 lakhs to Rs. 55 lakhs

11. The learned counsel for the wife placed reliance on a decision of the Hon'ble Supreme Court in case of **U. Sree -Vrs.- U. Srinivas reported in AIR 2013 SC 415** wherein it was held that it is duty of the Court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The Court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man-made misfortune. Regard being to status of the husband, the social strata to which the parties belong, the Hon'ble Court fixed the permanent alimony at Rs. 50 lakhs.

The learned counsel for the wife further relied upon the decision in case of **Biswajit Dash -Vrs.- Smt. Milan Dash reported in 2014 (Vol.2) Current Legal Reports 319** wherein it was directed to pay sum of RS. 17 lakhs towards permanent alimony to the wife.

The learned counsel for the wife further relied upon the decision of Hon'ble Supreme Court in case of **V.K.Vasantha Kumari -Vrs.- R.Sudhakar reported in 2014 (Vol.2) Current Legal Reports 726** wherein the Hon'ble Court directed the husband to pay a sum of Rs.15 lakhs to the appellant-wife towards permanent alimony in addition to Rs. 40 lakhs which was directed to be paid by the Family Court.

12. In case of **Rameshchandra Rampratapji Daga -Vrs. Rameshwari Rameshchandra Daga reported in AIR 2005 SC 422,** it is held as follows:-

> "18……the expression used in the opening part of Section 25 of Hindu Marriage Act enabling the 'Court exercising jurisdiction under the Act' 'at the time of passing any decree or at any time subsequent thereto' to grant alimony or maintenance cannot be restricted only to, as contended, decree of judicial separation under Section 10 or divorce under Section 13. When the legislature has used such wide expression as 'at the time of passing of any decree,' it encompasses within the expression all kinds of decrees such as restitution of conjugal rights under Section 9, judicial separation under Section 10, declaring marriage as null and void under Section 11, annulment of marriage as voidable under Section 12 and Divorce under Section 13.

In case of **Vinny Parmvir Parmar Vrs. Parmvir Parmar reported in AIR 2011 SC 2748,** it is held as follows:-

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

13. During hearing of the case, the learned counsel for the husband filed an affidavit of the husband and his income certificate wherein it is indicated that the husband is serving in Aricent Group, Gurgaon since 28.8.2000 and the salary certificate indicates that for the month of July 2014, his total salary was Rs.67,612/- and after deduction his home take salary is Rs.26,897/-. The income tax return of the husband for the assessment year 2014-15 indicates that the gross income of the husband is Rs.7,56,583/-. The learned counsel for the wife seriously disputed the documents filed by the husband and submitted that the husband being in a position of senior Engineering Project Manager is getting more than Rs.1,50,000/- per month.

Considering the economic status of the parties, their respective needs, the capacity of the husband to pay and taking note of the fact that the amount of permanent alimony fixed for the wife should be such that she can live in reasonable comfort and simultaneously it should not be excessive and affect the living condition of the husband and considering the young age of the wife, we are of the view that in the facts and circumstances of the case, a

direction to the husband to pay Rs. 25 lakhs (Rupees twenty five lakhs only) as one time alimony to the wife, would meet the ends of justice. Though in MATA No.26 of 2013, the wife prayed for return of the dowry articles, ornaments and cash to her but we find that in Ext.6, the father of the wife has received the dress, ornaments and certificates and therefore we are not inclined to pass any order in that respect.

14. Accordingly, we dispose of all the four cases affirming the decree of divorce granted by the Judge, Family Court, Bhubaneswar in Civil Proceeding No. 436 of 2010 dissolving the marriage between the parties namely Dipak Bash and Smitarani Bash, with further direction under Section 25 of the Hindu Marriage Act, 1955 that the husband Dipak Bash shall pay to the wife Smitarani Bash Rs. 25 lakhs (Rupees twenty five lakhs only) as a lump sum amount of permanent alimony in addition to what he has already paid in different proceedings to the wife, within a period of six months from the date of this judgment failing which the wife shall be at liberty to realize the same from the husband through due process of law. The amount that has already been paid to the wife towards alimony is to be ignored as the same had been paid by virtue of the interim orders passed by the Courts and it is not expected that the wife has sustained herself without spending the said money. In the event of payment of the aforesaid amount of Rs. 25 lakhs, the criminal proceeding initiated by the wife or any other proceedings between the parties in connection therewith shall be dropped.

15. With the aforesaid observation and direction, all the four cases are disposed of. No order as to costs.

VINOD PRASAD, J.

16. I have the occasion and benefit of having the opinion of my esteemed brother Hon'ble Sahoo J. and am albeit in full agreement with His lordship's view, I would like to add and say a few words on the core issue concerning alimony to be paid to the wife. In a *lis*, where marriage has been broken down irretrievably with extinct possibility of any reconciliation and both the spouses hanker final snapping of marital relationships, the only maiden and most viciously contested issue is the amount of alimony to be paid to the wife while not challenging the decree of divorce. Every single aspect of life is touched with most vociferously hankered contentions to deny each penny by the husband who is duty bound to pay alimony whereas the wife resorts, with

the same vigour, to all submissions for a bullish amount. This, in nut shell, is the synopsis of this cluster of cases being adjudicated now.

17. Life is not a straight jacket formula of incidents to be calculable through mathematical precisions. It is too complex and collection of unthinkable innumerable unforeseen circumstances. What is destined and what will be future life is impossible to predict and therefore to determine amount of alimony to be paid so that the entitled spouse lives a dignified life according to the standard of the other side is an upheaval and arduous task left with the courts to decide more especially because there is no written Law on the subject and this makes the decision making process even more complex since the balancing act consists of unperceivable circumstances. Therefore the wisdom lies in deciding each case on it's peculiar facts and surrounding circumstances without even attempting to fix any formula of universal application and I propose to follow the same course.

18. Alimony having its roots and imprint in Ecclesiastical decisions is designed primarily for maintenance and is based upon continuing duty to support and can be of various types such as temporary alimony, rehabilitative alimony, permanent alimony, reimbursement alimony, etc, but, at present, I am concerned only with permanent alimony and in this respect since decades the courts have evolved some factors having bearing on the same. To register some of them, it includes length of marriage, time since the spouses are living separately, age of the parties, relative income of both the spouses, financial prospects of the parties, health of the parties, and fault in breaking down of the marriage. Weighing the present cases with such and other significant factors, it becomes evident in the first place that the wife is suffering from a serious ailment Polycystic Ovarian Syndrome(PCOS) and was treated in Apollo hospital. It is the case of the husband that in spite of treatment, her anatomical condition did not improve and she was unable to attain motherhood. It is also evident that she is unemployed and having no fixed source of income to forester herself and meet her medical expenses and her father is also a school teacher having a meager income. It also surfaces that the husband is gainfully employed and is a Soft ware engineer in a private Firm, and in fact, is the head of a project. Wife was subjected to torture by the husband for which she had even registered FIR with Mahila Police Station, Bhubaneshwar wherein husband has been charge sheeted also. At this stage, I am also of the opinion that the learned trial Judge committed manifest error in disbelieving wife's evidence and has wrongly concluded

that she was at fault and has done cruelty to her husband. The documentary evidences relied upon by him in no way supports his conclusions. It will but be appropriate to register here that during course of argument learned counsel for the wife has also assailed that finding by the learned Family Court to articulate the submission that just to fix lesser amount that learned Family Court has slated those findings. I also note here that it is only for purposes of determining the quantum of amount of alimony that I have scrutinized those findings and for no other purposes and have found it to be incongruent vis-a-vis evidence on record. Viewed in proper perspective and scanned deeply, it becomes apparent that it was only after the ailment of the wife surfaced that their nuptial relationships ran in turbulent weather and all hopes of reunion was lost for all times to come. With such background facts how much should be the amount of alimony keeping in consideration the income of the husband?

19. Alimony is no alms. It is entitlement of a wife for a decent living. All relevant factors affecting fiscal expenses have to be considered. It is not the home take salary alone which is of significance. Capacity to earn and actual earning has also to be reckoned with. Savings made by the husband for securing his future life is also significant and has to be counted while determining the amount of alimony. Wife does not require only two morsels a day but she requires a reasonable amount to meet all her basic needs for a life which she would have enjoyed had the marital tie would have continued. The amount of money received at the time of marriage has also to be counted. While fixing alimony, all essential future expenses of all kinds have to be considered. The contention that take home salary of the husband is the only relevant criterion is illogical and faulty. Wife's capacity to earn after separation is also a relevant factor to be kept in mind. Similarly the responsibility which the wife would have bourne had the relationship continued is also a relevant aspect to be kept in mind. Residence, future possibility of maintaining oneself alone, clothing, fooding, biological requirements of a female and many further aspects are other significant points which have to be kept in mind. In considering all these aspects and also bearing in mind that probably, providentially, she will be a caste away soul to look after herself for everything in her future life, I concur with escalation of the amount of alimony as is mentioned in the order of my esteemed brother.

Appeals disposed of

2015 (I) ILR - CUT- 891

I. MAHANTY, J.

W.P.(C) NO.13248 OF 2004

SURENDRANATH BISWAL .....Petitioner

.Vrs.

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

ODISHA CONSOLIDATION OF HOLDINGS & P.F.L. ACT, 1972 – Ss.4(4) , 51

Question of adoption – Consolidation authorities have no jurisdiction to decide – Only the Civil Court has jurisdiction to decide the status of the parties. (Para-9)

Case law Referred to

1. 1996 (1) OLR 17 : Panchei Bewa v. Iswar Ch. Sahoo and others
1. 57 (1984) CLT 65 : Pranabandhu @ Panu Ojha v. Bhikari Moharana @ Ojha,
3. 61 (1986) CLT 564 : Krushna Chandra Nayak @ Mohanty and others v. Nishamani Bewa,

For Petitioner : M/s. Bhagaban Mohanty, C.Choudhury, S.Mohanty & B.Maharana.

For Opp. Parties : Addl. Government Advocate M/s. P.K.Routray, B.G.Mishra, N.K.Deo, R.K.Rout, A.Routray

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Date of judgment :18.06.2014

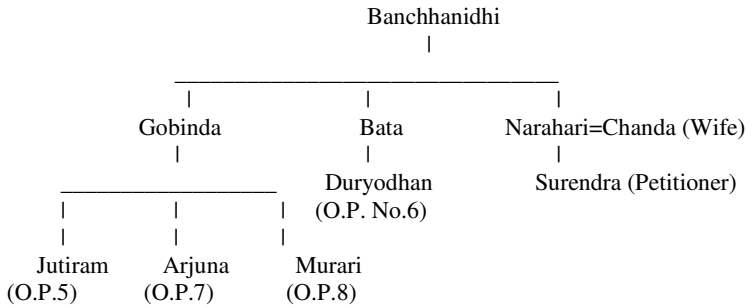
JUDGMENT

I. MAHANTY, J.

In the present writ application, the petitioner-Surendranath Biswal has sought to challenge the order dated 25.08.1997 passed by the commissioner, Consolidation, Orissa, Cuttack (O.P.2) allowing Consolidation R.C. No.78 of 995 and setting aside the order dated 9.12.1994 passed by the appellate authority (Deputy Director Consolidation, Kendrapara) in Appeal Case No.70

of 1994 directing to record the disputed land in favour of the petitioner as well as the opposite parties jointly each having 1/5th interest after verification of R.S.D. No.6137 dated 31.12.84 and sabik-hal records/maps etc.

2. The genealogy of the parties in the present case is noted as hereunder:



In the light of the genealogy as noted hereinabove, it appears that Banchhanidhi is the common ancestor of the parties. He had three sons, namely, Govinda, Bata and Narahari. It further appears that while Gobinda had five sons, namely, Jutiram (O.P.5), Arjuna (O.P.7), Murari (O.P.8), Duryodhan (O.P.6) and Surendra (Petitioner), his other two brothers, namely, Bata and Narahari were childless.

3. It is stated on behalf of the petitioner that since both Bata and Narahari (brothers of Gobinda) were childless, Bata adopted Duryodhan (son of Gobinda) and Narahari, who married to Chanda (wife) had adopted the petitioner-Surendra (son of Gobinda) in the year 1954. Learned counsel for the petitioner further contends that the adoption of the petitioner has been accepted by Chanda (adopted mother) during the settlement operation in the year 1965-66 while the Yadast was published which would be evident from Annexure-1. It is further submitted that there was an amicable partition between three brothers, namely, Gobinda, Bata and Narahari and all of them had possessed 1/3rd share of their ancestral property. The petitioner further stated that on 31.7.1978 (RSD No.6001 dated 31.7.1978), a portion of the ancestral property was sold by registered sale-deed in favour of one Ratnakar Sahu and the said sale-deed had been signed by Gobinda (natural father of the petitioner), Duryodhan as son of Bata (O.P.6) and the petitioner as son of Narahari. It is also the admitted fact that the petitioner's adoption by Narahari had came to be accepted and had been acted upon. The petitioner also placed reliance on the voter's list published in the year 1984 where the petitioner's

name had been recorded as the son of Narahari while Duryodhan's name had been recorded as the son of Batakrushna.

4. Admittedly, in the present case, the consolidation proceeding had commenced on 20.3.91 and the suit unit Bagadia was finally published under Section 22(2) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (in short 'the Act, 1972') on 12.2.1992 declaring that the petitioner had 1/3rd interest in the suit land. It appears that the private opposite parties thereafter initiated RP Case No.656/1991 purportedly under Section 37(2) of the Act, 1972 before the Consolidation Officer, Marshaghai. So, therefore, after final publication of the map and record-of-rights, the opposite parties moved before the Consolidation Officer. The issue before the consolidation Officer was, as to whether such an objection could be entertained by him at such stage. The Consolidation Officer in his order dated 15.3.1994 came to dismiss the said RP case purportedly under Section 37(2) of the Act, 1972, inter alia, on the ground that it was not possible for him to consider the claim of the objectors at such a belated stage i.e. after final publication of the map & record-of-rights under Section 22(2) of the Act, 1972. Admittedly, the opposite parties who initiated the R.P. Case purportedly under Section 37(2) of the Act, 1972 raised a question of "adoption" of the present petitioner- Surendranath Biswal by Narahari Biswal for the first time in such proceeding. It would be relevant to note herein that under the Act, 1972, Section 20 provides for an appeal against the order of a Consolidation Officer within 30 days from the date of the order under Section 19 by way of filing of an appeal before the Director of Consolidation. Admittedly, the opposite parties did not file any appeal under section 20 of the Act, 1972 as provided for after the publication of the Provisional Consolidation Scheme under Section 18 nor did they file any objection pursuant to such publication for consideration. Consequently, the Provisional Consolidation Scheme was confirmed under Section 21 of the Act, 1972 and thereafter, the final publication of the final map and record-of-rights came to be issued under Section 22(2) of the Act, 1972 on 12.2.1992.

5. This order of the Consolidation Officer came to be challenged by the opposite parties before the Deputy Director of Consolidation in Appeal Case No.70/1994, purportedly under Section 12 of the Act, 1972. For better appreciation, Section 12 of the Act, 1972 is quoted here in below:

"**12. Appeal** – Any person aggrieved by an order of the Assistant Consolidation Officer or the Consolidation Officer under Section 10 or 11 may, within thirty days from the date of the order file an appeal in the prescribed manner before the Director of Consolidation whose decision shall, except as otherwise provided by or under this Act, be final."

The relevant Sections 10 & 11 of the said appeal clause are also quoted here in below:

10. Disposal of objection by the Assistant Consolidation Officer – (1) Such objections relating to right, title and interest in land as can, in conformity with the laws in force, be disposed of by conciliating among the parties concerned, shall be disposed of by the Assistant Consolidation Officer: Provided that where any party does not appear before the Assistant Consolidation Officer on the date fixed after due service of notice in that behalf, he shall set him *ex parte* and proceed with the conciliation among the parties appearing before him and orders passed on such conciliation shall, subject to the orders in an appeal or revision, if any, be binding on the parties who are set *ex parte*. (2) All objections which cannot be disposed of by conciliation under Sub-section (1) and all other objections including those relating to valuation or the Statement of Principles or the rent or cess settled under this Act shall be forwarded by the Assistant Consolidation Officer to the Consolidation Officer for disposal."

11. Disposal of objection by the Consolidation Officer

– (1) The Consolidation Officer shall dispose of objections forwarded to him under Sub-section (2) of Section 10 after giving the parties concerned a reasonable opportunity of being heard and after such local inspection as he deems necessary:

Provided that in disposing of objections relating to valuation and the Statements of Principles, he shall consult the Consolidation Committee.

(2) For the purpose of disposing of objections, the Consolidation Officer shall hold his sittings at the headquarters of the Grama Panchayat constituted under the Orissa Grama Panchayat Act, 1964 (Orissa Act 1 of 1965) within whose jurisdiction the land is situated."

6. In the present case, the nature of the objection filed by the opposite parties does not fall within the category of either Sections 10 or 11 as noted hereinabove nor the same was after the initial publication of records and issue of extracts and notices as contemplated under Sections 8 and 9 of the Act, 1972 and consequently, no objection thereto have been filed.

7. In any event the Deputy Director of Consolidation, Kendrapara dismissed Appeal Case No.70 of 1994 with categoric finding of fact in favour of the present petitioner and his adoption by Narahari. The said appellate order would also indicate that, the respondent therein i.e. the present writ-petitioner had also raised the contention that since the record-of-rights had been finally published and the consolidation operation was over, if the appellants therein (present opposite parties) have any claim, ought to have filed a civil suit and no objection on the consolidation proceeding ought to have been entertained. Although such objections were recorded by the lower appellate authority, on consideration of the documentary evidence produced by the writ petitioner, came to hold that the writ petitioner- Surendranath Biswal was the adopted son of Narahari Biswal and that, the hal record and record-of-rights had been prepared in that manner and the consolidation authorities had rightly decided the issue which did not require any interference by this Court.

8. The opposite parties preferred Consolidation Revision Case No.78/95 before the court of the Commissioner Consolidation and the revisional authority vide order dated 25th August 1997 allowed the revision setting aside the order passed in appeal and directing recording of the disputed land in favour of the petitioner as well as the private opposite parties jointly each having 1/5th interest.

9. Although various contentions have been advanced by the learned counsel for the respective parties both in support and in challenge to the order passed by the revisional authority, yet, it would be clear that from the aforesaid facts that the opposite parties had not filed any objection either at the stage where notices were issued under Sections 8 and 9 of the Act, 1972 nor after publication of Provisional Consolidation Scheme under Section 18 thereof. The procedure in the statute would indicate that after Section 18 stage, the Director of Consolidation passed an order of confirmation of Provisional Consolidation Scheme under Section 21 and it is only thereafter, under Section 22, the preparation and publication of final map and record-of-

rights is directed. It is only at such stage i.e. Section 22(2), which is prior to final publication of map and record-of-rights, the present opposite parties for the first time raised an objection before the Consolidation Officer.

On perusal of the scheme of the statute, it is clear that the statute does not conceive of entertaining any objection at such a stage and this court is of the considered view that the order under Annexure-1 passed by the Consolidation Officer is absolutely in order and appropriate. Although the opposite parties filed an appeal and even though the appellate authority entertained the appeal under Section 12 of the Act, 1972, this Court is of the considered view that the appeal itself was not maintainable since the order impugned was not objectionable, which ought to have been raised after publication either under Section 8 or 9 of the statute but, came to be raised only after Section 22 stage.

Insofar as the revisional authority is concerned, the power of the revisional authority under Section 37 of the Act, 1972 in the present case ought not to have been exercised since the Director of Consolidation had already confirmed Provisional Consolidation Scheme and the objectors (opposite parties herein) had never raised any objection at the appropriate stage as contemplated under the Act, 1972. Apart from the reasons noted hereinabove, the real issue raised with a prayer for declaration to the effect that the petitioner- Surendranath Biswal is not to be recognized as the adopted son of Narahari Biswal but to recognize him as the son of Govinda Biswal. This issue regarding competence or otherwise of the consolidation authorities to deal with such a declaration, is no more *res integra*. The said issue has been decided by this Court in the judgment rendered by a Division Bench in the case of **Panchei Bewa v. Iswar Ch. Sahoo and others**, 1996 (1) OLR 17. By referring the earlier judgments of this Court, the Division Bench observed that while the consolidation authorities exercised special jurisdiction conferred upon them by the statute and were competent to adjudicate upon the question of right, title and interest in the land, yet, the question of status of a person does not relate to any right or interest in land and consequently, the consolidation authorities had no jurisdiction to decide the question of adoption. On the similar issue, the petitioner has placed reliance on the judgment of this Court in the case of **Pranabandhu @ Panu Ojha v. Bhikari Moharana @ Ojha**, 57 (1984) CLT 65. Reliance was also placed on the judgment of this Court in the case of **Krushna Chandra Nayak @ Mohanty and others v. Nishamani Bewa**, 61 (1986) CLT 564

wherein it is observed that where the question of status is involved in the suit, Consolidation authorities could not have granted the relief claimed since the authorities under the Act, have no jurisdiction to decide the status.

10. In view of the aforesaid facts, this Court directs quashing of the impugned order dated 25th August, 1997 passed by the Commissioner, Consolidation, Orissa, Cuttack in Consolidation R.C. No.78 of 1995 under Annexure-4 as well as the order dated 9.12.1994 passed by the lower appellate court (Deputy Director, Consolidation, Kendrapara) in Appeal Case No.70 of 1994 under Annexure-3 holding that the said orders were passed without necessary judicial competence and confirms the order passed by the Consolidation Officer under Annexure-1.

11. Accordingly, the writ application is allowed with the aforesaid observations and directions. Liberty is granted to the parties to approach the Civil court concerned, if they so inclined.

Writ petition allowed.

2015 (I) ILR - CUT- 897

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

W.P.(C) NO.25531 OF 2013

NIRANJAN MEKAP & ORS. .....Petitioners

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226

Writ Petition – Suit property belongs to Lord Lingaraj – Petitioners are the legal heirs of a Sevayat of the deity – They have filed suit for declaration of their right, title and interest in respect of the suit property – They have also filed writ petition challenging the action at Government level to alienate the suit property in favour of private party – Maintainability of writ petition – Writ petition filed to protect deity's property where in the ultimate beneficiary is the deity, a

perpetual minor – Relief sought in the writ petition is completely different from the relief prayed in the suit – No parallel proceeding for the selfsame relief – Held, the writ petition is maintainable at the instance of the petitioners. (Paras 25 to 40)

ODISHA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 – S. 19

Land belongs to Lord Lingaraj – Deity being a perpetual minor its land cannot be sold without prior sanction of the Commissioner of Endowments – Held, impugned decision taken in the joint meeting Dt. 3.5.2013 to transfer deity's property in favour of O.P. 6 without complying with the mandatory provisions U/s. 19 of the act is void.

(para-78)

ODISHA ESTATES ABOLITION ACT, 1951– Ss. 2(OO), 6& 7

Land belongs to Lord Lingaraj – Governmental in its Order /Notification acknowledged right, title and interest of Lord Lingaraj over the property in question as "Trust Estate" – Lord Lingaraj being not an intermediary U/s. 2 (h) of the Act, the provisions of Sections 6 & 7 of the Act. have no application to the land belongs to Lord Lingaraja – No need to make application U/ss. 6 & 7 of the Act for the Settlement of the Land in the name of Lord Lingaraj Consequentially Section 8-A (3) & 5 (h) of the Act have no application to the above Land of the deity – Held, even after vesting of the property in question by the Government Notification Dated 18.3.74 the ownership remains with the deity in the absence of any application U/ss. 6 & 7 of the O.E.A Act and it can not become the property of the State Government.

(paras-53 to 63)

PROMISSORY ESTOPPEL – Applicability – property in question belongs to Lord Lingaraja – Opposite party authorities took a decision dated 3.5.13 to transfer the deity's property in favour of O.P.6 – Acting on such decision O.P.6 incurred huge expenses to the tune of sixty crores – It is held that Oppositeparty-authorities can not transfer deity's property without complying the provisions U/s. 19 of the O.H.R.E Act, 1951 – O.P. 6 took the plea of promissory estoppel against the said authorities – Held, principle of promissory estoppel would not apply in the present case.

(paras-87, 88, 89)

CONSTITION OF INDIA, 1950 – ART. 226

Sevayat Land – Lord Lingaraja is the owner – Sevayats cultivated such Land –They have only right to possess the land as long

as they render specific services – They can not transfer any right, title and interest of the said land – They have no alienable right in the Seva land – Held, transfer made by Sevayats to their vendees and subsequent transfer made by their vendees to other purchasers is illegal. (para-60)

Case laws Referred to:-

1. AIR 2002 SC 629 : (A.A.Karnataka State Road Transport Corporation v. Ashrafulla Khan & Ors.)
2 AIR 2007 SC 3162. : (Gopalakrishnan vs. Cochin Devaswom Board & Ors)
3. 1983) 3 SCC 379 : (The Gujarat State Financial Corporation vs. M/s Lotus Hotels Pvt. Ltd., Motilal)
4. 1979) 2 SCC 409 : (Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh and Ors.
5. (1981) 1 SCC *11* (Jit Ram Siv Kumar vs. State of Haryana.*)*

For Petitioners : M/s. Iswar Ch. Dash, D.Nanda & T.R. Mohanty.

For opp. parties : Mr. B. Bhuyan, Addl. Govt. Advocate
M/s S.P. Das & A.K.Nath
M/s A.R. Das, N.Swain, S.K.Nanda, B.Mohapatra, K.S.Sahu & L.D.Achari, Mr. A.Saran, Sr. Advocate
Mr. R.K. Rath, Sr. Advocate
M/s T.Roy & S.Roy

Date of Judgment : 30.03.2015

JUDGMENT

B.N. MAHAPATRA, J.

This writ petition has been filed with a prayer for quashing Annexure-10 series which inter alia contain the letter dated 22.6.2013 issued by the Director of Estates & Ex-Officio Addl. Secretary, Government of Odisha to the Executive Officer, Lingaraj Temple Trust Board, Bhubaneswar and Director, M/s Assotech Milan Resorts (P) Ltd. Lewis Road, Lewis Plaza, Bhubaneswar for submission of Tripartite Deed along with the documents in support of withdrawal of all the cases filed before different courts pursuant to second meeting dated 3.5.2013 under the Chairmanship of Special Secretary, G.A. Department for Settlement of dispute on Ac.2.865 decimals of land in

Bhimpur. The further prayer of the petitioners is to issue a direction prohibiting the attempt /liaisoning of the Government high officials with the statutory authorities for closure of the pending cases in compliance of decision made in joint meeting under the Chairmanship of Special Secretary, G.A. Department and for a further direction to dispose of the cases pending before the Revenue Authorities, Civil Authorities and Authorities under the Special Statute within a stipulated period without being influenced by the illegal, arbitrary and unauthorized dictates of the higher officials in the hierarchy of the State Government.

2. Petitioners' case in a nut-shell is that the land in question belongs to Lord Lingaraj Mahaprabhu Marfat Trust Board under Khewat No.1B Register No.14830, Khata No. 1874, which has been declared as "trust estate" burdened with incidence of service in favour of Sebayat late Govinda Mekap. The vernacular terminology of "Seva" is "Deba Mausuphankanra Bhandara Jagiba Bartana Sakase Paichanti". The said property of the deity was declared as a Trust Estate under Section 13-D of Orissa Estates Abolition Act, 1951 (for short, "the OEA Act") by designated Tribunal. Thus, the property remained protected from vesting. In 1965, the Sebayat, late Govinda Mekap, executed one unregistered lease deed in favour of D. Ananda Rao Dora and his brothers. On 30.06.1980, one deed of agreement for sale bearing Registered Deed No.4630 dated 30.06.1980 was executed by Sebayat, late Govinda Mekap in favour of D. Ananda Rao Dora and others. The registered sale deeds nos.5072, 5073, 5074 and 5308 dated 30.03.2009 were executed by the successors of late Gobinda Mekap in favour of Smt. Rutupurna Dhirsamanta. One Joint venture agreement has been entered into by the purchaser Rutupurna Dhirsamanta with M/s. Assotech Millan Resorts Pvt. Ltd. for construction of Hotel/Resort on the land in question.

3. Further, case of the petitioners is that though on 18.03.1974 vesting notification was notified, the property in question did not vest with the State Government in view of proviso to Section 8(3) of the OEA Act. The State Government in Revenue Department prohibited settlement of Jagir land of deity-intermediary, vide notification No.25283-EA-II 17/76 R dated 11.6.1976. On 14.03.1991, the State Government issued instruction regarding modalities of settlement of rent in respect of Bebandobasta status of the landed property of the intermediaries excluding deity's land in respect of personal service. Notification dated 11.01.1995 was issued in respect of settlement of land relating to Lord Lingaraj Mahaprabhu empowering the

Board of Revenue to remedy the irregularities or illegalities committed by Sub-ordinate Officials. On 06.12.2000, the State Government issued another instruction in respect of rent settlement of lands recorded in Bebandabosta Status in the record of rights. The Board of Revenue was endowed with extensive powers, even *suo motu* power to remedy the wrongs, illegality and irregularity committed by subordinate authorities.

4. According to the petitioners, several cases were filed before the Revenue, Appellate and Revisional Authorities, Civil Courts and in this Court by the petitioners and some of the opposite parties claiming right, title and interest over the properties in question, some of which have already been disposed of and others are pending. In the writ petition, the petitioners have furnished particulars of those cases. There is no need to refer to those cases in detail in this judgment as they have no relevance so far as the present dispute is concerned. 5. In January 2011, Bhubaneswar Development Authority (in short, "B.D.A.") has sanctioned construction of Hotel plan of M/s. Assotech Milan Heritage Resorts (P) Ltd. In October, 2011, the State Government in G.A. Department wrote to the B.D.A. that since the title of land now stands recorded in the name of G.A. Department, the construction should be stopped. On 1.10.2011, B.D.A. passed an order directing to stop construction work. Rutupurna Dhir Samanta, the Director of M/s. Milan Heritage Resort Private Limited, Bhubaneswar (O.P. No.7) filed W.P.(C) No.33403 of 2011 challenging the show cause notice issued by opposite party No.5 (OSD) therein under Orissa Development Authorities Act, 1982 (in short, "O.D.A. Act"), and opposite party No.6 (Planning Member of BDA, Bhubaneswar) therein to the petitioners as to why building plan shall not be cancelled. In that case, as an interim measure, this Court prohibited further construction. Thereafter, this Court vide order dated 30.05.2013 dismissed the writ petition as withdrawn on the basis of the memo filed by the petitioners seeking withdrawal of the writ petition. Misc. Case No.12790 of 2013 was filed by Chittaranjan Mekap and others to recall the order dated 30.5.2013 passed in W.P.(C) No.33403 of 2011. The said misc. case is pending.

6. Further case of the petitioners is that while the litigations are pending before different courts/authorities, the Government came forward to make liaisoning with different courts/authorities and suggested amicable out of court settlement on the basis of a representation filed on 18.01.2012 by M/s Assotech Milan Heritage Resorts (P) Ltd. stating their hardship. On 15.12.2012, Government convened a joint meeting presided by Special

Secretary, G.A. Department-cum-Liaison Officer to mediate with Law Department and Commissioner of Endowment. On 3.4.2013, meeting under the Chairmanship of Special Secretary, G.A. Department with Secretary, Law, Endowment Commissioner, and Executive Officer of Lord Lingaraj Temple Trust Board was held. On 3.5.2013, in the meeting presided by the Special Secretary, G.A. Department with Endowment Commissioner, Lord Lingaraj Temple Trust Board, Secretary, G.A. Department and Secretary, Law Department some suggestions were agreed upon as per which a tripartite agreement would be made with certain stipulations to lease out the property in question in favour of opposite party No.6. Pursuant to such suggestion dated 03.05.2013, Annexure-10 series have been issued. Hence, the present writ petition.

7. Mr. Iswar Chandra Dash, learned counsel appearing for the petitioners submitted that the Commissioner of Endowment and B.D.A. being the statutory authorities are seisin of the matter within their specified statutory jurisdictions. At this stage, the action of the Government calling for a joint meeting of the statutory authorities for tripartite settlement keeping in mind the purported hardship of one party, i.e., Hotel Radiation, is against the judicial spirit. The Special Secretary, G.A. Department has been authorized to liaison with Law Department and Commissioner of Endowment. This attempt of the Government is nothing but a colourable exercise of power to do away with the judicial system by influencing /pressurizing the statutory authorities which cannot be accepted. The Government is a party to a good number of litigations in different Courts and those litigations are continuing for years together. The Government is not taking any step to do away with the hardship of large number of citizens involved. The undue haste and anxiety exhibited for mediating execution of the tripartite agreement in the case at hand has resulted in creating pressure on the statutory authorities and its subordinate authorities to do away with the case in order to benefit one of the parties who has no legal right or interest over the property in question. The petitioners' right still continues. The petitioners are continuing as Sebaks of Lord Lingaraj. This property has been endowed on them in lieu of their seva puja to the deity. The property involves no alienable interest. Placing reliance on the copy of RoR (Annexure-11) to the rejoinder, Mr. Dash submitted that originally the suit land belonged to Lord Lingaraj Mahaprabhu Marfat Trust Board under Khewat No.1B Register No.14830, Khata No.1874, which has been declared as Trust Estate, burdened with incidence of service in favour of Sevayats, late Govinda Mekap. Mr. Dash, further

submitted that vide notification dated 24.06.1990, the Government has framed regulations as to how the lands are to be recorded after vesting and Clause 44 relates to recording of the land of the estate of the deity endowed/burdened with services for the deity. Section 19 of the Orissa Hindu Religious Endowment Act, 1951 (in short, "OHRE Act") bars any transfer of the property of the deity except with prior sanction of the Commissioner of Endowments. The proposed tripartite agreement is without legal sanction and amounts to a wrongful gain by a person claiming right, title, interest and possession over the property of Lord Lingaraj, which has been given to the petitioners in lieu of their service. Because crores of rupees are involved, the higher officials in hierarchy of the State Government have been influenced and it is understood that there is under-table transaction with some of them. Deity's property should not have been dealt with in such clandestine manner. Concluding his argument, Mr. Dash submitted to allow the writ petition.

8. Mr. Bhuyan, learned Additional Government Advocate for the State appearing on behalf of opposite party Nos.1 and 2 submitted that the petitioners have no *locus standi* or cause of action to file the present petition challenging the decision taken at the Government level on 03.05.2013 for out of Court settlement of disputes involving G.A. Department, the Trust Board of Lord Lingaraj Mahaprabhu and opposite party Nos. 6 and 7, especially when petitioners have admitted that their predecessors had transferred the case land to the vendor of opposite party No.7, through an unregistered lease deed in 1965 extensively confirmed by execution of regular lease on 30.06.1980 and 25.08.1983. Mr. Bhuyan further submitted that the land in question was recorded in the name of Lord Lingaraj Mahaprabhu Marfat Trust Board, in the intermediary trust estate of Bhubaneswar vide Sabik Khata No.1874 and Sabik Plot Nos.174, 190 and 190/4724. One Madhab Mekap was the rent free service tenure holder under Khewat No.1 of Lord Lingaraj Mahaprabhu in respect of the said land who was given the said Jagir for guarding the store of the said deity as per one Sabik RoR finally published in the year 1974. Thus, father of the present petitioners, late Govinda Mekap, who claimed to be the successor of said Madhab Mekap, had only heritable but not transferable right of enjoyment of said service tenure land. Thus, Govinda Mekap had no authority to alienate the land in question to D. Ananda Rao Dora and others by an unregistered sale deed executed in the year 1965. Further the said deed is hit by Section 49 of the Indian Registration Act read with Section 91 of the Indian Evidence Act, and therefore, cannot be cited as evidence due to want of registration. Moreover,

in view of Section 35 of the Indian Stamps Act, the said un-registered deed also cannot be considered by any Court of Law for any purpose. It is only the Trust Board of Lord Lingaraj, who with prior approval of the Endowment Commissioner under Section 19 of the OHRE Act, can transfer by exchange, sale or mortgage or lease out the land in question in favour of another person in case of any lease exceeding 5 years. Therefore, the registered sale deed executed by late Govinda Mekap in favour of D. Ananda Rao Dora and others is *void ab initio*.

As per Section 3 (xii) of OHRE Act, any Jagir or Inam granted to an Archaka or Sebak or service tenure holder or other employee shall not be deemed to be personal gift to the said Archaka/Sebaka/service tenure holder or employee, which shall deem to be a religious endowment. The land in question granted to Madhab Mekap for rendering certain services is thus a religious endowment.

9. Mr. Bhuyan further submitted that the intermediary trust of Lord Lingaraj Mahaprabhu vested in the State Government is free from all encumbrances vide Revenue Department Notification No.13699E.A dated 18.03.1974 under sub-Section (1) of Section 3A of the OEA Act. Since, Govinda Mekap illegally transferred the land in question in violation of the terms and conditions of the Jagir and handed over possession to D. Ananda Rao and others, he was not a subsisting jagir holder or service tenure holder on the aforesaid date of vesting. The Trust Board of Lingaraj Temple has not filed any application for settlement of land in favour of Lord Lingaraj in terms of Sections 6 and 7 of the OEA Act. The Trust Board of Lord Lingaraj Mahaprabhu, who are not in khas possession of the land in question have also not filed their claim under Section 8A of the OEA Act before the OEA Collector; therefore, in view of Section 8A(3) which provides that on failure to file claim within the prescribed period under the said section, the provisions of clause (h) of Section 5 shall, notwithstanding anything contrary to Sections 6, 7 and 8 shall apply as if the right to possession of lands and buildings or structures, as the case may be, has been vested in the State Government by operation of the said Act and thereafter the right to make any such claim as aforesaid shall stand extinguished. In view of the aforesaid provisions of law, the land in question is absolutely vested in the State Government. Thus, the original transfer made in favour of the vendor of opposite party No.7 is *ab initio void* and the subsequent transfer of the said property is *non-est* in the eye of law.

10. The Revenue Court has no authority to settle the land in question in favour of the petitioners in Bebandobasta Case No.362 of 1991 by mis-interpreting the Revenue Department Circular No.11782/R dated 14.03.1991, wherein, it was categorically mentioned that the service tenure land of the Trust Estates cannot be settled. Section 8A of the Orissa Land Reforms Act, 1960 (in short, "OLR Act") provides that only a "Raiyat" can file an application to the Authorized Officer for conversion of his agricultural land to non-agriculture status. Since opposite party No.7 is not coming within the meaning of the term "Raiyat" as defined in Section 2(26) of the OLR Act read with Section 4(1) of the said Act, she is not entitled to file any application before the Tahasildar, Bhubaneswar under Section 8-A of the said Act. Further, the Revenue Officer is not competent to entertain such prayers. Therefore, the order dated 26.05.2009 of the Revenue Officer-cum-Tahasildar, Bhubaneswar is *ab initio void*.

11. It was further submitted that the Government has not come forward to liaison with different courts and authorities as alleged by the petitioners. A high level meeting under the Chairmanship of the Chief Secretary, Odisha was conducted on 15.12.2012. The said meeting was attended by the Principal Secretary, Revenue (opposite party No.1), the Legal Remembrancer, Collector, Khurda, opposite party No.4 as well as opposite party No.2 and Land Officer G.A. Department. Further, two meetings under the Chairmanship of opposite party No.1 were held with opposite party No.5-Law Department, opposite party Nos.3 and 4 on 03.04.2013 and 03.05.2013 and decision thereof as minuted vide proceedings dated 03.05.2013 under Annexure-10 series was taken. After taking the Government orders into consideration in relation to the said course of the action, the same was communicated to opposite party No.4- Executive Officer, Lord Lingaraj Temple Trust and opposite party No.6- Director, M/s Assotech Milan Resorts (P) Ltd. by opposite party No.2- Director of Estates & Ex-Officio Additional Secretary to Government with a direction to submit tripartite deed along with documents in support of withdrawal of all cases filed before different courts/authorities. It was further submitted that the decision taken by the Government after due deliberation in the meetings held on 15.12.2012, 03.04.2013 and 03.05.2013 cannot be said to be colourable exercise of power to do away with judicial system and/or interfering with the same. The Government while taking the decision to transfer the land in question in favour of opposite party No.6 has kept in view the Industrial Policy Resolution of the Industry Department which recommends grant of land for

promoting Hotel Industry. Since, a decision has been taken in a most transparent and fair manner keeping in view the interest of the deity as well as the Government and the existing policy of the Government to promote hotel industry, the petitioner is not correct in saying that the proposed tripartite agreement has resulted in wrongful gain to any person.

12. Mr. S.P. Das, learned counsel for opposite party No.3- Commissioner of Endowments, Odisha submitted that the land in question belongs to Lord Lingaraj Mahaprabhu Trust Board and the properties remained under the possession of one Madhab Mekap, the sevayat of the deity for rendering permanent service. Therefore, the land in question is meant for rendering permanent service to the deity by the sevayat and is inseparable from the deity. As per Section 3(xii) of the OHRE Act, the property granted to late Govinda Mekap shall be deemed to be a religious endowment. Any transaction made in contravention of Section 19 of the said Act is *ab initio void* and can confer no title to the vendee in any manner. The Estate of Lord Lingaraj Mahaprabhu was declared as a Trust Estate in pursuance of the reference of the then Collector, Puri vide Orissa Gazette Notification dated 04.09.1963. The reference of the Collector was allowed by the designated Tribunal, Sub-Judge, Bhubanewar vide order dated 04.11.1967 and the land in question was part of the Trust Estate, which remained as such till the Trust Estate vested in the Government on 18.03.1974.

13. After vesting, since the land in question does not come under the purview of Sections 6 and 7 of the OEA Act, there is no scope for intermediary to apply for settlement. The land also does not come under Sections 8(2) and 8(3) of the OEA Act so as to make the person in possession of the land eligible to apply under the provisions of Section 8(A) of the OEA Act seeking fixation of fair and equitable rent. Since the land in question comes under Section 8(3) of the OEA Act, thus there is no scope for either intermediary or sevayat to apply for settlement of the land for which in pursuance of Clause 44 of the Government circular dated 26.04.1990, the land was recorded in 'Bebandobasta' status in the settlement operation during the year 1990. Thus, the land in question of Lord Lingaraj remained as such till 11.01.1995, when the Government of Odisha directed the Revenue authorities to record the seva lands of Lord Lingaraj in the name of the deity. Therefore, the plea of the Government that since the intermediary has not applied for settlement of the property of the deity vested in the Government as per section 5(h) of the OEA Act is misconceived.

14. It was submitted by Mr. S.P. Das that opposite party No.4- Executive Officer, Lord Lingaraj Temple Trust Board has filed O.A. No.7 of 2010 before the Commissioner of Endowments, Odisha under Section 25 of the OHRE Act to get back possession of the property in question from the vendees which is still pending adjudication. The alleged tripartite agreement cannot override the statutory provisions made under the OHRE Act and any action in violation of the said provisions is a nullity in the eye of law. The Endowment Commissioner, being one of the Government functionaries, is required to attend any meeting called by the State Government. It is undisputed that the learned Commissioner of Endowments has always submitted its views in accordance with law without being influenced or biased by anybody in any manner. Opposite party No.3-Commissioner of Endowments, Odisha vide letter dated 2241 dated 20.03.2013 (Annexure-A/3) and letter No.4957 dated 28.05.2013 (Annexure-B/3) has submitted its independent views to the Addl. Secretary to Government, Law Department, Odisha, Bhubaneswar in respect of the land of Lord Lingaraj in question. Since the deity is a perpetual minor, it is the primary duty of the State and its functionaries to protect the interest of the deity. In case of failure to do so by the State and/or any of its instrumentalities, this Court has to protect the interest of the deity, a perpetual minor.

15. Mr. A.R. Dash, learned counsel appearing for opposite party No.4-Executive Officer of Lord Lingaraj Temple Trust Board submitted that no agreement of the parties can either take away or vest jurisdiction on any legal entity or authority. Any agreement worthy of being enforceable ought to comply with the basic requirements of law as contained in the Indian Contract Act, 1872 (in short, "Contract Act") and any contract between the parties in order to be enforceable ought to be legal. Further, any action forand on behalf of the deity if in law does not enure to the benefit of the deity, such action through whomsoever it may be, cannot stand the test in any court of law. Lord Lingaraj at Bhubaneswar is one of the ancient public religious institutions having religious Endowment of its own from time immemorial and now governed under the law enshrined under the OHRE Act. The State Government or any other authority including the Trust Board of Lord Lingaraj Mahaprabhu cannot take any action which ultimately is not in the interest of the deity. The property involved in the present proceeding has been declared as a Trust Estate vide Gazette Notification dated 04.09.1963. The property of Lord Lingaraj is a religious endowment and immovable

property, besides being a seva land it continuesto remain as such of Lord Lingaraj after vesting of all trust estates. Such status of the land involved in the present proceeding remains unaffected by any other proceeding so far taken up or to be taken up. The ultimate say over the property in question remains with Lord Lingaraj. Any transaction relating to the property in question has to be strictly in accordance with the provisions contained under Section 19 of the OHRE Act and the corresponding Rules. Any action or transaction bereft of the said Act and Rules is *non-est* in the eye of law. Therefore, any proposal, agreement or contemplated contract before compliance of the said provisions of law, is not only beyond the permissible limit under the Contract Act and therefore, does not stand the test of legality and not specifically enforceable but also is not in the interest of the deity and on the other hand is destructive of such interest.

16. Opposite party No.4 has been instructed by the Commissioner of Endowment in the context of the tripartite deed and withdrawal of all the cases pending in different courts for settlement of dispute in respect of the land in question have to be in consonance with provisions of Section 19 of the OHRE Act. Accordingly, opposite party No.4 by his letter dated 10.08.2013 informed the Director of Estates and Ex-Officio Additional Secretary to Government, G.A. Department, Odisha. Opposite party No.4 has been intimated by the Under Secretary to Government in the G.A. Department by letter dated 25.09.2013 to emphasize more on the steps already taken at the Government level without any reference to the legal recourse available in the matter. Any transaction of whatever nature and by whomsoever in relation to the property of Lord Lingaraj, if found to be not in accordance with the legal procedure provided should be considered as *void ab initio* and therefore, the same can not affect the right, title, interest and possession of the deity while at the same time does not give any benefit to anybody through such transaction. The property in question of Lord Lingaraj continues to be his seva land without being affected by any such transaction or dealings and would continue as such till the requirement of Section 19 is complied with. The deity-Lord Lingaraj has different seva and sevaks are enjoying land in lieu of seva. Any settlement affecting the seva will hamper the seva puja of the deity. Therefore, any settlement or any action in relation to the land of deity-Lord Lingaraj and the Endowment attached thereto ought to be without affecting the seva and the sevaks of the deity. In the temple of Lord Lingaraj in respect of each seva, the sevak through succession has been continuing to discharge seva to the deity. Likewise, the seva land in question

allotted to the sevaks in lieu of their seva is being continued by them. The Board takes necessary steps to recover temple lands by appropriate legal action after obtaining previous sanction of the Commissioner.

17. Mr. Saran and Mr. R.K. Rath, learned Senior Advocates appearing for opposite party No.6-Director, M/s Assotech Milan Resorts (P) Ltd. and opposite party No.7-Smt. Rutupurna Dhirsamanta submitted that as the title suit for declaration filed by the petitioners is pending before the Civil Court since 2000, the writ petition under Articles 226 and 227 of the Constitution at the behest of the petitioners is not maintainable. The question of title cannot be adjudicated/determined under Article 226 of the Constitution of India. In course of hearing, opposite party No.6 filed a memo along with a copy of C.S. No.1851 of 2010 filed before the Civil Judge (Senior Division), Bhubaneswar and copy of the order sheet maintained in the said Civil Suit. Referring to the prayer made in the said Civil Suit and order dated 10.11.2014 passed therein and various averments made in the writ petition, Mr.R.K.Rath, learned Senior Advocate appearing for opposite party No.6 submitted that the present writ petition is not maintainable since the petitioners are pursuing two parallel proceedings seeking self-same relief, i.e., one by way of filing Civil Suit and the other by means of present writ petition. In support of his contention, Mr.Rath relied upon the judgment of the Hon'ble Supreme Court in the case of *Orissa Power Transmission Corporation Limited and others Vs. Asian School of Business Management Trust and others*, reported in (2013) 8 SCC 738.

18. It was also submitted that the petitioners have no *locus standi* or cause of action to file the present writ petition as admittedly their father, late Govinda Mekap, a sevayat to Lord Lingaraj Mahaprabhu had executed an un-registered lease deed on 03.02.1965 and subsequently, a registered sale deed on 25.08.1983 in favour of one D. Ananda Rao Dora and others. Therefore, the petitioners have no right, title and interest over the property in question. The petitioners have also failed to make out a case as to whether they themselves have inherited the title of the sevayats of their late father and still render the service being recognized by the Trust Board of Lord Lingaraj.

19. It was submitted that the opposite parties though not asserting their title over the land in question but the said land is in physical possession of opposite party No.6 from 2009 and was in possession of the vendor of opposite party No.6 since 1965. Originally, the land was purchased from one

Mr. D. Ananda Rao Dora by Smt. Rutupurna Dhirsamanta, Director M/s. Assotech Milan Heritage Resorts (P) Ltd. Vide Regd. Sale Deed Nos.5420, 5422 & 5423 dated 30.03.2009. For legal necessity and Bank finance requirement of the Company Smt. Rutupurna Dhirsamant sold the land to M/s. Assotech Milan Resorts (P) Ltd. in the year 2011, which is evident from the Regd. Sale Deed vide Deed No.11081116037 dated 04.07.2011 and also Smt. Rutupurna Dhirsamant was a Director in M/s Assotech Milan Resorts (P) Ltd. earlier known as M/s. Milan Heritage Resorts (P) Ltd. M/s. Assotech Hotels (P) Ltd., a Company registered at New Delhi and M/s. Milan Developers & Builders (P) Ltd. (opposite party No.8), a company registered in Odisha invested as share holders in "Assotech Milan Resorts Pvt. Ltd. Assotech Milan Resorts Pvt. Ltd. entered an agreement with "Radisson Hotels International Inc" vide MOU/Agreement dated 11.07.2009 for construction of a Five Star Hotel over Plot Nos.930, 931, 932, 933, 934, 935 and 980 in Mz : Bhimpur. Subsequent to this purchase, the land was converted from agricultural to homestead and so also mutation was allowed recording the name of the opposite party No.6 in the record of rights (RoR) by the Government Authorities in compliance of the procedure and law for the time being in force. The land in question was in intermediary estate of Lord Lingaraj prior to its vesting under the OEA Act. In 1962 RoR, the land in question was recorded in the name of Lord Lingaraj Mahaprabhu and in the remarks column, the name of the sevayats rendering service was recorded. The sevayat-Govinda Mekap transferred the land in 1965 vide un-registered Hatta Patta to one G. Ananda Rao Dora, which was registered in 1983. In the RoR of 1989, the land in question was recorded in the name of the Doras in Bebandobasta status. In 1990, the Commissioner, Settlement ordered that this is a Government land of G.A. Department but the RoR was not corrected as per the orders of the Commissioner of Settlement.

20. In a deliberation dated 03.04.2013, it was unanimously decided by opposite party Nos.1 to 5 that the views of the Law Department may be obtained on three different issues/points. The Law Department after examining the matter opined that to resolve the issues, the matter should be dealt with jointly, but prior to such endeavour, the parties should withdraw all the pending cases/suits and writs from the respective judicial forums including this Court. Lord Lingaraj Temple by its Trust Board on 31.01.2013 resolved and decided that keeping in view the interest of deity, which should not be ignored while disposing/leasing of the land in question by Government in G.A. Department, Odisha, the Government should pay lion share out of the

sale proceeds on the deity's land which would be deposited in the corpus fund of Lord Lingaraj for smooth management of Nitikanti of the deity. The resolution by the Trust Board was communicated to the Commissioner of Endowments, Odisha vide its letter dated 27.02.2013. Opposite party No.6 gave its consent to purchase the land in question as per the Benchmark valuation and had no objections for sharing of the sale proceeds by the Temple Trust Board or the Government under G.A. Department to which both agreed to share in the ratio of 60:40 as the temple asked for 60% of the sale proceeds. The Government in all its wisdom also agreed because in any case the management of Lord Lingaraj Mahaprabhu Temple is also done by a Board appointed by the Commissioner of Endowments, Odisha under the provisions of the OHRE Act.

21. It was submitted that whether the property belongs to the State or Lord Lingaraj Mahaprabhu, it is a public interest. It was decided that an amicable settlement out of Court needs to be worked out without prejudice to the interest of the Temple and Government keeping in view the need of utilization of the resources and web of litigations. During the course of the sanction of plan by the B.D.A. Authorities a question with regard to the security (as the land is in a neighbouring plot to that of the residence of the present Chief Minister of Odisha) by the D.G. Intelligence was raised and no approval was given and after series of deliberations by the Home Department, the sanctioning authority approved the plan with certain terms and conditions keeping in view the security aspect. Thereafter, the building plan for hotel construction was approved on 14.12.2010 vide letter No.21024/BP of B.D.A. Opposite party No.6 started its construction by availing loan from the Nationalized Bank. An approval for a loan amount of Rs.53 crores was sanctioned out of which almost Rs.20 crores have been availed and utilized as the Hotel is almost complete with regard to the structures. Opposite party No.6 has made a huge investment from its own source to a tune of Rs.40 crores and due to the non maintainable dispute, its construction has been stalled for almost two years and only to save the account to slip into NPA, the interest is being paid to the Banks as once the account is termed NPA it will seriously affect the company and its other group of companies and will have an impact on the goodwill of the company.

22. It was further submitted that when the parties have agreed for an amicable settlement in an utmost sacrosanct manner and the Temple Trust Board having no inhibition/reservation volunteered for such a settlement,

now for that matter no one should stand on its way to defeat the settlement process which has attained finality keeping in view the larger interest of the deity, for which the State is also obliged to. Opposite party No.6 in compliance to the settlement process by the parties and further to their direction took immediate steps for withdrawal of all its pending cases filed on its behalf from this Court.

23. It was submitted that acting on the representation of the respondent-authorities, opposite party No.6 had altered its position to its disadvantage and had incurred huge expenses and liabilities for setting up the hotel. It had also withdrawn cases pending in relation to the properties in question from various courts and forums. Therefore, the opposite party authorities are estopped from acting to the contrary and to the disadvantage of opposite party No.6. The Commissioner of Endowments was very well apprised of the fact viz. letter dated 27.02.2013 of the Temple Trust Board to him and his presence in the subsequent meeting that the interest of the deity will be protected if the pending litigations in relation to the property in question are withdrawn by the parties and if the land in question is disposed of/leased out, lion share (60%) will be deposited in the corpus fund of Lord Lingaraj Temple Trust Board for smooth management of Nitikanti of the deity. It was further submitted that no law prohibits the parties to enter into compromise and settle their dispute amicably among themselves. Further contention of opposite party No.6 is that bona fide efforts to establish the present hotel would not only encourage the religious tourism in the State but also for the Temple Trust Board. While concluding argument, Mr. Rath submitted to dismiss the writ petition.

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

(i) Whether the present writ petition at the instance of the writ petitioners who are legal heirs of the Sevayat late Govinda Mekap is maintainable?

(ii) Whether Lord Lingaraj has right, title and interest over the properties declared as Trust Estate of Lord Lingaraj even after vesting of said properties in Government by notification dated 18.03.1974?

(iii) Whether in absence of any application under Section 6 and Section 7 of the OEA Act to settle the land in question in the name of Lord

Lingaraj Mahaprabhu, the said land becomes absolute property of the State Government?

(iv) Whether Sevayats had/have any alienable right in deity's land in question which form part of Trust Estate and lease/sale of the said property by the Sevayat Madhaba Mekap and his family members/legal heirs in favour of D. Anand Rao Dora and subsequent sale of the said property by D. Ananda Rao Dora in favour of Rutupurna Dhirsamanta and further sale of the said property by Rutupurna to M/s. Assotech Milan Resorts Pvt. Ltd. and agreement between M/s. Assotech Milan Resorts Pvt. Ltd. with Radisson Hotels International, Inc for construction of a Five Star Hotel over the land in question are valid in law?

(v) Whether actions/steps taken by the State Government through Special Secretary to G.A. Department, Bhubaneswar to sale the land in question in favour of opposite party No.6- Assotech Milan Resorts Pvt. Ltd. and to share the sale proceeds in 60:40 ratio (60% for temple Trust and 40% for G.A. Department) and the proposed tripartite agreement are permissible/valid in law?

(vi) What order?

25. Question No.(i) is whether the present writ petition at the instance of the writ petitioners, who are legal heirs of the Sevayat late Govinda Mekap is maintainable. A preliminary objection has been raised by opposite party Nos. 1, 2 and 6 to the maintainability of the writ petition, basically on two grounds viz., (i) the petitioners having filed a consolidated Civil Suit No.1851 of 2010 in Civil Court pertaining to the property in question under Bhimpur mouza and as the same is pending since 2000, they cannot maintain parallel proceeding seeking selfsame relief by way of filing the present writ petition. In support of the contention that petitioners seek selfsame relief both in the civil suit and the writ petition, Mr. Rath drew our attention to the prayer made in the Civil Suit and various averments made in the writ petition. It was also contended that under Articles 226 and 227 of the Constitution, the right, title and interest of the petitioners over such property cannot be decided; (ii) the predecessor of the present petitioners having sold the land in question in favour of D. Ananda Rao Dora and others, the petitioners have no right, title and interest over the property in question. Moreover, the petitioners have failed to make out a case as to whether they still render the service to Lord

Lingaraj Mahaprabhu being recognized by the Trust Board of Lord Lingaraj. Therefore, they do not have any right to file this writ petition.

26. The above grounds taken by opposite party Nos.1, 2 and 6 challenging maintainability of the present writ petition are fallacious for the reasons stated hereinafter.

27. So far the first ground with regard to pursuing parallel proceedings for selfsame relief is concerned; we find the civil suit has been filed for declaration of right, title and interest etc. of the petitioners over the property in question. Paragraph 15 of the plaint contains the prayer of the plaintiffs. The reliefs sought for in the prayer are as follows:

"15. Therefore, the plaintiffs, pray for the following reliefs:

(a) To declare the plaintiff have the right to enjoy the suit property as Savayat of Lord Lingaraj till date;

(b) Let the possession of the plaintiffs over the suit land be confirmed, in alternative and possession of the plaintiffs over the suit land be recovered to them, if they found to be dispossessed from the suit land during the pendency of the suit;

(c) Let the defendants No.6 and 7 be directed to correct the Hal R.O.R. in respect of the suit properties inserting the names of the plaintiffs after deleting the name of the defendants;

(d) Let the Chirastave deed bearing no.8523 dt.12.10.83 executed in favour of defendants No.1 to 4 and the order of O.E.A. Collector in suomoto Bebandobasta Case No.355/91, 356/91 and 362/91 be declared as void and in operatives.

(e) Let a decree for permanent injunction be issued in favour of the plaintiffs and against the defendants directing them, their men/agents/servants not to interfere in the peaceful possession of the plaintiffs over the suit land in any manner whatsoever;

(f) Let the costs of the suit be decreed in favour of the plaintiffs and against the defendants;

(g) Let any other relief/s be granted in favour of the plaintiffs as the Hon'ble court think fit and proper under circumstances of the suit."

Thus, in the suit, the ultimate beneficiary is the plaintiff petitioner.

28. It is pertinent to mention here that no such prayer is made in the present writ petition filed under Articles 226 and 227 of the Constitution of India. The main prayer in the writ petition as noted in the first paragraph of this judgment is to protect the deity's property by quashing Annexure-10 series attached to the writ petition by which, it is alleged that attempts are being made at Government level to alienate the properties of Lord Lingaraj illegally in favour of private party. In the present writ petition, the ultimate beneficiary is the deity, which is a perpetual minor and not the petitioners. Thus, the relief sought for in the present writ petition is completely different from the relief prayed in the Civil Suit filed at the instance of the petitioners.

Further, in order to decide whether a party invokes the jurisdiction of Civil Court as well as Writ Court for selfsame relief what is relevant is the relief claimed in both the proceedings and not the averments made in the plaint or petition.

Hence, the contention of opposite party No.6 that by means of the present writ petition the petitioners invoke the jurisdiction of this Court to decide their right, title and interest over the land in question is not correct and thus fails.

29. The decision of the Hon'ble Supreme Court in the case of ***Orissa Power Transmission Corporation Limited (supra)*** is of no assistance to opposite party No.6 as in that case the writ petition was dismissed by the learned Single Judge which was upheld by the Hon'ble Supreme Court holding that the respondent had availed parallel remedies and gave up its pursuits before the Civil Court only after the Division Bench of the High Court indicated its willingness to hear the writ appeal on merit.

30. As regards second ground of challenge to maintainability of the writ petition, we find, petitioners' assertion in the writ petition is that they have been performing seva to Lord Lingaraj like their predecessors. In paragraph 15 of the writ petition, the petitioners have taken a specific stand that their right continues and they are continuing as sevaks of Lord Lingaraj. Opposite party No.4-Executive Officer, Lord Lingaraj Temple Trust Board, Bhubaneswar in paragraph 13 of the counter affidavit has stated that "in the temple of Lord Lingaraj in respect of each seva, the sevaks through succession have been discharging seva to the deity. Likewise, the seva land in

question under Bhimpur Mouza allotted to the sevaks in lieu of their seva is being continued by them." Thus, according to opposite party No.4-Executive Officer, Lord Lingaraj Temple Trust Board, the seva land in question under Bhimpur Mouza was allotted to the sevak, who was predecessor of the petitioners and the petitioners are rendering their continuous seva to Lord Lingaraj uninterruptedly.

31. There can also be no dispute to the settled legal proposition that the deity is a juristic perpetual minor/disabled person, and the property belonging to a minor and/or a person incapable to cultivate the holding by reason of physical disability or infirmity requires protection. A deity is covered under both the classes. The manager/trustee/pujari and ultimately the State authorities are under obligation to protect the interest of such a minor or physically disabled person. The deity cannot be divested of any title or rights of immovable property in violation of the statutory provisions. The object is laudable and based on public policy. In order to protect deity's interest even a worshiper/sebayat having no interest in the property may approach the authority or Court. In the instant case, the petitioners being sebayats, whether they have any interest in the deity's property or not they are competent to approach any authority or Court to protect the deity's property.

32. For the reasons stated above, the writ petition is maintainable at the instance of the present petitioners.

33. Otherwise also, for the reasons stated hereinafter, the present writ petition is maintainable.

34. The issue involved in the present case is the interest of the deity. Deity being a perpetual minor, it is the primary duty of the State and its authorities to protect the interest of the deity. In case of any allegation of failure on the part of the State and its instrumentalities to do so, finally, the Court has to protect the interest of the deity, who is a perpetual minor.

The Hon'ble Supreme Court in the case of *A.A. Gopalakrishnan vs. Cochin Devaswom Board & Ors., AIR 2007 SC 3162,* held as under:

> "10. The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees/archakas/ shebaits/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples,

> deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned. Such acts of "fences eating the crops" should be dealt with sternly. The Government, members or trustees of boards/trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."
>
> *(Emphasis supplied)*

35. Further, it may also be relevant to note here that at the instance of opposite party No.7-Ritupurna Dhirsamanta, writ petition bearing W.P.(C) No.33403 of 2011 was filed challenging the show cause notice issued by the Bhubaneswar Development Authority under the Orissa Development Authorities Act for cancellation of building plan. In the said Writ Petition, vide order dated 12.01.2012, a Division Bench of this Court allowed two intervention petitions, i.e. Misc. Case No.486 of 2012 filed by the Additional Land Officer, G.A. Department and Misc. Case No.345 of 2012 filed by Chitaranjan Mekap and others (petitioners in the present writ petition) and they were impleaded as opposite party No.7 and opposite party Nos.8 to 11 respectively. In that case, in Misc. Case No.485 of 2012 filed by the State for vacation of the interim stay, the Division Bench of this Court vide its order No.9 of the even date directed the parties to maintain status quo as on that date with regard to construction and possession of the land in question. While the matter stood thus, during Vacation, opposite party No.7 filed a memo before the Vacation Bench seeking withdrawal of the said writ petition. Vide its order dated 30.05.2013, the Vacation Bench allowed withdrawal of the writ petition on the basis of such memo. Chitaranjan Mekap and others, who are petitioners in the present case filed Misc. Case No.12790 of 2013 to recall the said order dated 30.05.2013 passed in W.P.(C) No.33403 of 2011 allowing withdrawal of the writ petition and the said Misc. Case is pending.

36. There is no dispute that petitioner in a writ petition is the master of his own case but conduct of a party sometimes casts suspicion in the mind of others. In W.P.(C) No.33403 of 2011, while the regular assigned Division Bench of this Court was in seisin of the matter and the interim order was operating against the petitioner, she (petitioner) who is opposite party No.7 in the present writ petition, did not choose to make a prayer for withdrawal of

the writ petition before the regular assigned Division Bench. For the reasons best known to opposite party No.7, she preferred to file a memo before the Vacation Bench during vacation for withdrawal of the writ petition and on the basis of such memo the said writ petition was allowed to be withdrawn.

37. Needless to say that only the matters which are urgent in nature and cannot wait till functioning of the regular assigned Bench petitions are moved before the Vacation Bench for some urgent relief. From the aforesaid facts, it does not reveal that there was any such urgency to move the vacation Bench during vacation seeking withdrawal of the writ petition assigned to a different Division Bench which was in seisin of the matter and the said assigned Division Bench passed interim order dated 12.01.2012 to maintain *status quo* as on that date over the land in question. As it appears, the petitioner in that case moved a memo before the Vacation Bench seeking withdrawal of the writ petition to get rid of the interim order passed by the assigned Division Bench to maintain status quo by which she was prohibited to make further construction over the land. This does not appear to be a bona fide act of opposite party No.7.

38. Law is well-settled that writ jurisdiction is discretionary in nature and must be exercised in furtherance of justice. The Court has to keep in mind that its order should not defeat the interest of justice nor it should permit an order to secure dishonest advantage or perpetuate an unjust gain nor approve an order which has been passed in contravention of the statutory provisions. (See *Champalal Binani Vs. CIT, West Bengal & others*, AIR 1970 SC 645; *K.D.Sharma Vs. Steel Authority of India Ltd. & Ors.,* (2008) 12 SCC 481, 2008 AIR SCW 6654).

39. The Hon'ble Supreme Court in *Karnataka State Road Transport Corporation v. Ashrafulla Khan & others, AIR 2002 SC 629*, held that the High Court under Article 226 of the Constitution is required to enforce rule of law and not pass an order or direction which is contrary to what has been injuncted by law.

40. Considering from any angle, we are of the view that the present writ petition is maintainable at the instance of the present petitioners. 41. Question Nos.(ii), (iii) and (iv) being interlinked, they are dealt with together.

42. The issues involved in these three questions are whether Lord Lingaraj or sevayats of Lord Lingaraj or the State Government has right, title

and interest over the property declared as "Trust Estate" of Lord Lingaraj, i.e, whether after vesting of the "Trust Estate" in Government by notification dated 18.03.1974 and in absence of any application under Sections 6 and 7 of the OEA Act to settle the land in question in the name of Lord Lingaraj Mahaprabhu, the said land becomes absolute property of the State Government or the said property still remains the property of Lord Lingaraj after vesting in the Government and whether sebayats had/have any alienable right in the property of Lord Lingaraj.

43. The stand of the State Government is that the property of Lord Lingaraj has passed to and become vested in the State free from all encumbrances vide Revenue Department Notification dated 18.03.1974 and in absence of any application under Sections 6 and 7 of the OEA Act to settle the land in question in the name of Lord Lingaraj Mahaprabhu, the said land became the absolute property of the State Government. This stand of the State is not correct for the following reasons:

44. Under the OEA Act, "Trust Estate" of deity has been dealt with in different footing. It is very pertinent to note that even after repeal of Chapter II-A which contains special provision for public Trust, by Act 33/70 of 21.12.1970, the State recognizes the existence of the Trust Estate by the selfsame Act by inserting '**proviso**' to Section 8(3) of the OEA Act.

45. Now, it is necessary to know what is provided in Section 8(3) and proviso to Section 8(3) of the OEA Act. Section 8(3) provides that "any person who immediately before the date of vesting held land under an Intermediary on favourable terms for personal service rendered by him to such Intermediary shall, from the date of vesting, be discharged from the conditions of such service and the land may be settled with him in such manner and under such terms and conditions as may be prescribed**."**

Proviso to Section 8(3) of the OEA Act contemplates that nothing in sub-section (3) shall apply to a Trust Estate which is vested in the State on or after the date of coming into force of the Orissa Estate Abolition (Amendment) Act, 1970.

Therefore, in view of **proviso** to Section 8(3), the sevayats are not discharged from rendering their seva to Lord Lingaraj even after vesting of the land of Lord Lingaraj in the State and the status of sevayat lands belonging to Lord

Lingaraj which form part of the "Trust Estate" remains unaffected even after vesting of trust estate. Otherwise, any kind of settlement of seva land will hamper the seva puja of the deity. 46. Further the provisions of Section 7(d) of the OEA Act speaks about deemed settlement of waste land and tank forming part of the Trust Estate. Section 7-A of the OEA Act also empowers the State Government to settle all other lands forming part of the Trust Estate with the intermediary. As it appears, pursuant to power vested under Section 7-A of the OEA Act, government orders/guidelines/circulars/notifications were issued from time to time for settlement of the land which form part of the Trust Estate with Lord Lingaraj. It may be appropriate to refer to some of such government orders/guidelines/circulars/notifications relevant for our purpose.

47. It may be noted that the Secretary to Government, Department of Revenue, Odisha vide G.O. No.45283-E.A.-11-17/70-R dated 11th June, 1976 intimated to the Land Reforms Commissioner, Odisha, Cuttack that service jagirs have irregularly been settled with service jagir holders in some Tahasils in spite of clear provision under the proviso to sub-section (3) of Section 8 of the OEA Act not to settle such lands with them. As a result of such settlement, the Seva Puja of the deities suffers to a great extent. Therefore, he requested to issue necessary instruction to all concerned not to settle service jagir of the deity-intermediaries with jagir holders.

48. The relevant portions of the Government circular/ clarification dated 11.01.1995 issued by the Joint Secretary to Government in Revenue and Excise Department to Collector, Khurda on the subject 'Problem of irregular settlement of land belonging to Lord Lingaraj' are extracted below:

> "1. **SEVAYAT LAND**: The provision of sub-section (3) of Sec.8 of OEA Act is not applicable in respect of Sevayat Lands under the Trust Estate according to the proviso under the said sub-section. So the status of Sevayat land belonging to the Trust Estate of Lord Lingaraj remains unaffected even after vesting of Trust Estates. The land granted for rendering various categories of service to the deity will continue to be recorded under the same status under the management of the Trust board. When the Sevayat lands have been recorded under Stitiban status in favour of the Sevayats during survey and settlement operation such recordings are illegal.....

2. BEBANDOBASTEE CASES:

> Notwithstanding instructions contained in Revenue Department G.O. No.11782 dated 14.3.1991 the lands of Lord Lingaraj with Bebandobasta status may be settled with the deity Lord Lingaraj Mahaprabhu Bije, Bhubaneswar and in the remarks column of the record-of-right it should be mentioned that when the said Sebayat/tenant will cease to render services to the Deity his tenancy will cease and the proprietor will be at liberty to settle it in the name of another tenant on similar condition." *(underlined for emphasis)*

49. Thus, as per the above Government circular/clarification dated 11.1.1995 in which reference has been made to G.O. No.11782 dated 14.3.1991 the status of sevayat lands belonging to Trust Estate of Lord Lingaraj Mahaprabhu remains unaffected even after vesting of "Trust Estate" in Government and the said lands were directed to be settled with deity Lord Lingaraj Mohaprabhu Bije Bhubaneswar and in the remarks column of the record-of-rights it is to be mentioned that when the said Sevayat/tenant will cease to render services to the deity his services will cease and the proprietor will be at liberty to settle the land in the name of another tenant on similar condition.

50. Further, Clause (XVIII) of the Government Order dated 06.12.2000 issued by the Revenue Department *inter alia* provides that the land belonging to public deity after settlement shall be recorded in Stitiban status in the name of the deity Marfat Endowment Commissioner.

51. It would be pertinent to mention here that the circulars/notifications/orders/guidelines issued by the Government from time to time hereinbefore referred to have not yet been withdrawn by the State Government.

52. It may also be noted here that the provisions of Section 8-A(3) of the OEA Act does not override Section 7-A which have been specifically excluded from Section 8-A(3) by the Legislature in its wisdom. Therefore, Section 7-A cannot be read into Section 8-A(3) of the OEA Act by the State.

53. By virtue of proviso to Section 8(3) and Section 7-A read with above noted Government orders/notifications/circulars/guidelines, the State Government has acknowledged the right, title and interest of Lord Lingaraj over the properties declared as "Trust Estate" which includes the properties in

question even after vesting of the said property in Government by notification dated 18.03.1974 and therefore, there is no need to make any application under Sections 6 and 7 of the OEA Act for settlement of the land forming part of the Trust Estate in the name of Lord Lingaraj and consequentially Section 8-A(3) and provisions of Clause (h) of Section 5 have no application so far as properties declared as Trust Estate of Lord Lingaraj are concerned.

54. The matter can be looked at from a different angle. The expression "Religious Endowment" or "Endowment" has been defined in Section 3(xii) of the OHRE Act, 1951 as follows:

> "3.(xii) "religious endowment" or "endowment", means all property belonging to or given or endowed for the support of maths or temples or given or endowed for the performance of any service or charity connected therewith or of any other religious charity and includes the institution concerned and premises thereof and also all properties used for the purposes or benefit of the institution and includes all properties acquired from the income of the endowed property.
>
> xx xx xx

Explanation I – Any jagir or inam granted to an archaka, sevaka, service-holder or other employee of a religious institution for the performance of any service or charity in or connected with a religious institution shall not be deemed to be a personal gift to the said archaka, service-holder or employee but shall be deemed to be a religious endowment;

xx xx xx

55. According to the above definition, all property belonging, given or endowed to Lord Lingaraj and any Jagir or Inam granted to an Archak, Sevak, Service Holder or other employees' of a religious institution for the purpose of any service or charity or in connection with a religious institution and properties acquired from the income of the endowed property shall be deemed to be a religious endowment. The expression "religious endowment" was also defined in Section 6(12) of the Orissa Hindu Religious Endowment Act, 1939.

56. Section 2(h) of the OEA Act, 1951 defines the term "intermediary" which reads as follows:

> "2(h) 'Intermediary' with reference to any estate means a proprietor, sub-proprietor, landlord, land holder, malguzar, thikadar, gaontia, tenure-holder, under-tenure holder and includes an inamdar, a jagirdar, Zamindar, Illaquedar, Khorposhdar, Pargnadadar, Sarbarakar and Maufidar including the ruler of an Indian State merged with the State of Orissa and all other holders or owners of interest in land between the raiyat and the State."

57. Thus, in Section 2(h), "religious endowment" has not been included. It may be relevant to note here that while enacting the OEA Act, 1951 the Legislature were fully aware about existence of 'religious endowment' as the same dealt with under the OHRE Act, 1939 which subsequently dealt with in OHRE Act, 1951, but the legislature in its wisdom excluded the expression 'religious endowment' from Section 2(h) of the OEA Act which defines 'intermediary'. Therefore, the expression 'religious endowment' cannot be read into Section 2(h) of the OEA Act, 1951 by the State. Apart from that Lord Lingaraj is not a holder or owner of any interest in land between the raiyats and the State as required under Section 2(h) of the OEA Act, 1951 which defines 'Intermediary'. Therefore, Lord Lingaraj being not an intermediary as defined in Section 2(h) of the OEA Act, the provisions of Sections 6 and 7 of the OEA Act have no application to Lord Lingaraj. 58. Further, it may be noted here that since the lands in question form part of the "religious endowment" of Lord Lingaraj, Lord Lingaraj is the absolute owner of such property and its administration shall be governed by the provision of the OHRE Act, 1951.

59. A coherent reading of proviso to sub-section (3) of Section 8 and Section 7(d) and Section 7-A of the OEA Act read with Government Orders/notifications referred to above and Section 3(xii) of OHRE Act which defines "religious endowment", Section 2(h) of the OEA Act, which defines the term 'intermediary' makes it amply clear that nobody has any right, title and interest over the property of Lord Lingaraj except the deity. 60. The Sevayats have only right to possess the land as long as they render specific services. The sevayats, therefore had/have no alienable right in the seva land. Therefore, the Sevayats could not have transferred any right, title and interest on the property belonging to Lord Lingaraj to any of their Vendees and the said Vendees could not have made transfer to the subsequent purchaser(s).

61. Apart from the above, under Section 19 of OHRE Act, without prior sanction by the Commissioner of Endowment, sale of the land belonging to

the deity is expressly barred. Such sanction can be accorded when such sale is necessary or beneficial to the institution.

62. In the instant case, deity's lands in question were sold by Sevayats even without complying with the statutory requirement of Section 19 of the OHRE Act, which starts with a non-obstante clause.

63. In view of the above, we are of the considered view that Lord Lingaraj has right, title and interest over the property declared "Trust Estate" of Lord Lingaraj even after vesting of the said property by Government notification dated 18.03.1974 and in absence of any application under Sections 6 and 7 of the OEA Act, the ownership of the Trust Estate of Lord Lingaraj remains unaffected and it cannot become the property of the State Government. The Sevayats had/have no alienable right in the land in question and sale/lease of the said land by them in favour of D. Ananda Rao Dora and others and all subsequent sales/transfers are not valid in law. Needless to say that the vendees cannot acquire better title than their vendors. Consequentially, D.Ananda Rao Dora and others, Rutupurna Dhirsamant and opposite party No.6 have not acquired any right, title and interest in the lands in question which they purchased through registered sale deed from sevayats or their vendor(s) who purchased the lands in question from Sevayats or their legal heirs.

64. Question No.(v) whether action of the State Government through Special Secretary to G.A. Department, Bhubaneswar to sale the land in question in favour of opposite party No.6-Assotech Milan Resorts Pvt. Ltd. and to share the sale proceeds in 60:40 ratio (60 for temple Trust and 40 for G.A. Department) are permissible/valid in law.

65. In the instant case, the reasons given by the opposite party-Government to sell the property in question in favour of opposite party No.6, which find place in the draft tripartite agreement (Annexure-10 series), are as follows:-

> "Let not State govt. fight out the matter with Lord Lingaraj Mahaprabhu, as in any case management of Lord Lingaraj Temple is also done by a Board appointed by Commissioner of endowment (the Collector being the Ex-Officio Chairman of the Trust Board) under OHRE Act and as to whether the property belongs to State Government or Lord Lingaraj Mahaprabhu is a public interest. That in the said meeting it was also decided that an amicable out of court

settlement need be worked out without prejudice to the interest of temple and government keeping in view of the continuance of Hotel to have been called and the land be utilized for earning state resources without indefinitely waiting for disposal of cases finally. That party of the first part asked the law Department to let have its views on the said matter and the Law Department opined for execution of Tripartite Agreement. That on dt. 3.05.2013 in the said meeting held under the Chairmanship of Special Secretary, General Administration Department (Party of first part), it was considered expedient to arrive at a Tripartite Agreement between Govt. in General Administration Department, Temple Trust Board, Lingaraj Temple and Hotel. That the State or Temple get its dues without affecting the interest of the land owner. The Govt. in General Administration Department and the Temple Trust Board, Endowment Commissioner, the Law Department while arriving at such decision took paramount consideration not only the public interest but the public policy as protracted litigations would not be beneficial to any of the parties rather than to settle the matter amicably so that the State Exchequer or the Temple Trust continue to run their respective chores without hampering any public policy at large."

66. Now, it is very much necessary to know what are the suggestions of the joint meeting held on 03.05.2013 under the Chairmanship of Special Secretary, G.A. Department. The various suggestions of the joint meeting are as follows:

"1. All cases filed by Lingaraj Temple Trust Board and Hotel Radisson [Assotech Milan Resorts (P) Ltd.] will be withdrawn.

2. Tripartite Deed of transfer of land will be executed between Lingaraj Temple Trust Board as first party, General Administration Department as second party and Hotel Radisson as third party after vetting by Law Department.

3. The suit land will be leased out on payment of premium at the prevailing rate of General Administration Department. Lingaraj Temple Trust Board shall not be part of the lease agreement as lessor.

4. The premium amount received by General Administration Department will be shared with the Temple Trust Board and General

Administration Department in 60:40 ratio (60 for Temple Trust Board and 40 for General Administration Department).

5. Concurrence of Finance Department will be obtained on the sharing of land premium in 60:40 ratio between Temple Trust Board and General Administration Department.

6. Orders of Government will be obtained on the proposed action taken to resolve the issue which is entangled in the web of litigation."

67. Thereafter on dt. 18.06.2013 the Government Order was also obtained.

68. At this stage, the Director of Estate and Ex-Officio Additional Secretary to Government issued letter dated 22.06.2013 (Annexure-10 series) to Lord Lingaraj Temple Trust Board and Director, M/s Assotech Milan Resorts (Pvt.) Ltd. for submission of tripartite deed along with the documents in support of withdrawal of all cases filed before different Courts pursuant to the meeting dated 03.05.2013 for settlement of dispute on Ac 2.865 decimals of Government land. 69. Now, the question arises whether issuance of above letter dated 22.06.2013 (Annexure-10 series) is sustainable in law. 70. While answering question Nos.(ii), (iii) and (iv) in the preceding paragraphs, for the reasons stated therein, we have already held that Lord Lingaraj has right, title and interest over the property, which was declared as Trust Estate of the deity and the said property is also religious endowment and its administration shall be governed by the provisions of OHRE Act. Therefore, State Government has no right to sell properties of Lord Lingaraj to any party including opposite party No.6.

71. It may be relevant to mention here that perusal of the tripartite agreement reveals that in the tripartite agreement the G.A. Department, Government of Odisha represented by its Special Secretary has been referred to as the Seller of the First Part and also Lord Lingaraj Temple Trust Board, Old Town, Bhubaneswar was represented by its Executive Officer as Seller of the Party of the Second Part and M/s Assotech Milan Resorts (P) Ltd. represented by its Director Sri Sanjeev Srivastava as Purchaser of the party of the Third Part. Thus, the tripartite agreement is for sale of the property in question which forms part of the Trust Estate of Lord Lingaraj Mahaprabhu and not an agreement to transfer the land in question in favour of opposite party o.6 by way of lease as suggested in the joint meeting held on

03.05.2013. 72. As a general proposition of law, if any person claims to have acquired any kind of right in the property belonging to the deity, the transaction is required to be ignored being illegal and the deity becomes entitled to recover the possession as well as the right, title and interest inthe property.

73. Otherwise also, the action of the State Government to sell the property in question to opposite party No.6 is not sustainable in law for the following reasons.

74. It may be noted that in the definition of "Religious Endowment" or "Endowment" under Section 3 (xii) of the OHRE Act, the lands held by Sevayats and Jagirdars are also included. The Trust Board is the only custodian of deity's property.

75. Further Section 19 of the OHRE Act, 1951 reads as follows:-

> "19. Alienation of immovable trust property – (1) Notwithstanding anything contained in any law for the time being in force no transfer by exchange, sale or mortgage and no lease for a term exceeding five years of any immovable property belonging to, or given or endowed for the purpose of, any religious institution, shall be made unless it is sanctioned by the Commissioner as being necessary or beneficial to the institution and no such transfer shall be valid or operative unless it is so sanctioned."

Thus, without prior sanction by the Commissioner of Endowment, sale/lease exceeding five years of the land belonging to the deity is expressly barred under Section 19 of OHRE Act.

76. On a plain reading of the statutory provisions contained in Section 19 of the OHRE Act, it is manifest that the provisions are mandatory in nature and any alienation made in contravention of the provisions is void. (*See Basanti Kumari Sahoo vs. State of Orissa, 81 (1996) CLT 571 (Full Bench*).

77. The lands belonging to the deity cannot be subjected to alienation in violation of statutory requirement. (See *Temple of Thakurji vs. State of Rajasthan, AIR 1998 Raj. 85).*

78. Under Section 19 of the OHRE Act, the deity's property can be transferred by sale, exchange, or mortgage etc. with prior permission of the

Endowment Commissioner only when such transfer is necessary or beneficial to the institution. Therefore, before transferring the deity's property by any means either of two conditions is to be satisfied, i.e., (i) there must be necessity to sell the deity's property, or (ii) such sale must be beneficial to the deity. In the present case, no case is made out by any of the opposite parties that sale of deity's property in question is necessary or beneficial to Lord Lingaraj. Admittedly, the sanction of the Commissioner as required under Section 19 of the OHRE Act has not been obtained to sell the property in question belonging to Lord Lingaraj. Therefore, without satisfying the conditions stipulated in Section 19 of the OHRE Act the decision taken in the joint meeting dated 03.05.2013 to transfer by lease the deity's property in question in favour of opposite party No.6 and all actions taken pursuant to such decision dated 03.05.2013 by any authority/party including the attempts made/steps taken to sell the property of Lord Lingaraj in question are void *ab initio*.

79. It is also the admitted case of State-opposite party Nos.1 and 2 that only trust Board of Lord Lingaraj with prior approval of the Endowment Commissioner under Section 19 of the OHRE Act can transfer by exchange, sale or mortgage or lease for a term exceeding five years the land in favour of another person.

80. Opposite party No.6 in its written submission contended that in the meeting dated 03.05.2013, suggestions were agreed upon to amicably settle the matter in between the parties, which of course would be subject to the permission of Endowment Commissioner under section 19 of the OHRE Act.

81. Further since the property in question is Lord Lingaraj's property, giving 60% of the sale proceeds to Lord Lingaraj is certainly not beneficial to the deity. Moreover, the property in question is situated in posh area of the capital city with better locational advantages being back to the residence of the Hon'ble Chief Minister, near to Airport, Odisha Legislative Assembly, Secretariat, Lord Lingaraj Temple, Hospital etc. It is common knowledge that the actual cost of the land located in posh area of the capital city with better locational advantage is much more than the Bench mark value determined by the Government for a particular area as a whole. Therefore, even if, it is accepted that there was any necessity to sell the land in question, the same should have been put to public auction to fetch the best market price which would be beneficial to Lord Lingaraj as in that way the interest of the deity would be protected. The Hon'ble Supreme Court has in many cases stressed

on the desirability of adopting transparent methods while dealing with properties of public interest. The stand of opposite party No.6 that transparent process was adopted gets demolished when one looks at the complete set of actions which patently show collusion, deceit and more than suspicious circumstances.

82. It may be pertinent to mention here that both the Endowment Commissioner and Shree Lingaraj Temple Trust Board, i.e., opposite party Nos.3 and 4 respectively strongly oppose the proposed transfer by sale of the deity's property in question. It is very much shocking that in spite of the letter dated 10.08.2013 (Annexure-B/4) of the Executive Officer, Lord Lingaraj Temple addressed to Director of Estates & Ex-Officio Addl. Secretary, Government of Odisha intimating that with reference to submission of tripartite deed and withdrawal of all cases pending in different courts, clarification was sought for from the Commissioner of Endowment and in response to such letter, the Deputy Commissioner of Endowments vide his letter No.7316 dated 31.07.2013 (Annexure-C/4) has instructed to strictly follow Section 19 of the OHRE Act before entering into any agreement for transaction of the deity's property, the Under Secretary to Government, G.A. Department vide his letter dated 25.09.2013 (Annexure-D/4) informed the Executive Officer, Lord Lingaraj Temple to emphasize more on the steps already taken at the Government level without reiterating the matter with reference to Section 19 of the OHRE Act. In any event, any decision/action taken by any authority/party which is not for the best interest or necessity of deity and/or detrimental to the interest of the deity which is a perpetual minor lacks legal sanction and therefore *void ab initio*.

83. Supporting the action of the State Government in taking steps at the instance of opposite party No.6 to sell the land in its favour, it was submitted by opposite party No.6 that there is no statutory bar against the parties to enter into compromise or settle their dispute amicably amongst themselves. Needless to say that any compromise made by the parties contrary to or without fulfilling the requirement of law is *void ab initio*. In the instant case, as stated above, steps are being taken to sell the property of Lord Lingaraj in favour of opposite party No.6 without complying with the conditions stipulated in Section 19 of the OHRE Act and the Endowment Commissioner and the Temple Trust Board (opposite party Nos.3 and 4 respectively) strongly oppose the proposal to sell out the deity's property in question.

84. Mr.A.R.Dash, learned counsel appearing on behalf of Lingaraj Temple submitted that Lord Lingaraj Mahaprabhu has filed O.A. No.7 of 2010 before the Commissioner Endowment, Bhubaneswar under Section 25 of the O.H.R.E. Act for appropriate order and to execute the said order for recovery of possession of the land in question from opposite party Nos.1 to 5 in O.A. No.7 of 2010 who are Smt. Rutupurna Dhirsamant, M/s Milan Developers & Builders Pvt. Ltd., D.Anand Rao Dora, D.Jagannath Dora and D.Papa Rao Dora. Mr. S.P. Das, learned counsel for Endowment Commissioner also submitted that the petition made under Section 25 of the OHRE Act to get back possession of the property in question from the vendees is still pending adjudication.

85. It is therefore, clearly established that the actions of the State Government are not in the interest of the deity and/or beneficial to it. Therefore, the so-called compromise/decision on the basis of joint meeting dated 03.05.2013 lacks sanctity as well as legal sanction. Consequentially, letter dated 22.06.2013 (Annexure-10 series) is not sustainable in law. 86. It goes without saying that the State Executive Bodies, quasijudicial authorities/judicial authorities cannot act contrary to statutory provisions and executive instructions should be subservient to statutory provisions.

87. Taking the plea of promissory estoppel, opposite party No.6 vehemently argued that acting on the representation of the opposite party authorities, it had altered its position to its disadvantage by incurring huge expenses and liability to the tune of Rs.60 crores for setting up the hotel. It had also withdrawn cases pending in relation to suit property from various courts/forums. Therefore, the opposite party authorities are estopped from acting to the contrary and to the disadvantage of the present opposite parties. In support of its contention, reliance was placed upon the decision of the Hon'ble Supreme Court in the case of *The Gujarat State Financial Corporation vs. M/s Lotus Hotels Pvt. Ltd*., (1983) 3 SCC 379, *Motilal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh and others,* (1979) 2 SCC 409 and *Jit Ram Siv Kumar vs. State of Haryana, (1981) 1 SCC 11.*

88. In the instant case, there is no promise made by any authority to opposite party No.6. On 03.05.2013 a discussion took place and some suggestions were made. Before all the authorities present in the said meeting, acted upon the suggestions and tripartite agreement was executed and vetted by the Law Department, opposite party No.6 claims that it altered its position

to its disadvantage by incurring huge expenses and has withdrawn the pending case relating to the property in question. Such a plea is ridiculous in view of the said party's own contention in the written submission that only suggestions were agreed upon to amicably settle the matter in between the parties which of course would be subject to the permission of the Endowment Commissioner under Section 19 of the OHRE Act and that pursuant to the said meeting, no lease/sale of the suit land had taken place. Therefore, by no stretch of imagination the principle of promissory estoppel would come into play in the fact of present case. Hence, the plea of promissory estoppel fails.

89. The judgment of the Hon'ble Supreme Court in the case of *M/s Lotus Hotels Pvt. Ltd.* (supra) is of no assistance to opposite party No.6 because in that case the Corporation by its letter dated 24.07.1978 and the subsequent agreement dated 01.02.1979 entered into agreement in performance of statutory duty to advance Rs.30 lakhs loan to the defendant. On Corporation's promise evidenced by above two documents the defendant acted upon. In that circumstance, it was held that principles of promissory estoppel apply. In the present case, there is even no concluded contract between the competent parties. Hence, principle of promissory estoppel would not apply.

90. In *Motilal Padampat Sugar Mills Co. Ltd. (supra),* the principle decided by the Hon'ble Supreme Court is that if one party by his words or conduct made to the other party a clear and unequivocal promise which is intended to create legal relation or affect a legal relationship in future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted by other party, the promise would be binding on the party making it and he would not be entitled to go back. But the fact situation in the present case is otherwise. Nobody competent legally made any promise to opposite party No.6. On the other hand, on 03.05.2013 a joint meeting was held and some suggestions were given which have not yet been acted upon. Therefore, this case is of no help to opposite party No.6.

91. For the reasons stated in the foregoing paragraphs and more particularly, in absence of any concluded contract among the parties, the decision of the Hon'ble Supreme Court in the case of *Jit Ram Siv Kumar (supra)* is also of no assistance to the petitioners.

92. The other contention of opposite party No.6 that establishment of a Five Star Hotel by it on the land in question would not only encourage religious tourism in the State but also would generate good revenue for the State as well as the Temple Trust Board. Such contention of opposite party No.6 is fallacious because construction of a Five Star Hotel by opposite party No.6 without legal sanction cannot be allowed because of the supposed boost to tourism or generating revenue. Such action on the part of opposite party No.6 would not confer legitimacy on a transaction which has no legal foundation.

93. For the reason stated in the foregoing paragraphs, the actions/steps taken by the State Government through Special Secretary to G.A. Department, Bhubaneswar to sell the land in question belonging to Lord Shri Shri Lingaraj Mahaprabhu in favour of opposite party No.6-M/s Assotech Milan Resorts (P) Ltd., Lewis Road, Lewis Plaza, Bhubaneswar and to share the sale proceeds in 60:40 ratio (60% for Temple Trust and 40% for G.A. Department), letter of the Director of Estate Ex-Officio Additional Secretary, Government of Odisha dated 22.06.2013 and the proposed tripartite agreement are impermissible as not sustainable in law having no legal foundation. Accordingly, Annexure-10 series are quashed. Consequentially, no action can be taken by opposite party No.6 on the basis of the suggestions made in the meeting dated 03.05.2013 pursuant to which Annexure-10 series were issued.

94. Needless to say that the Civil Courts and authorities under the statute shall dispose of the matters pending before them in accordance with law.

95. In the result, the writ petition is allowed with the aforesaid observations and directions, but without any order as to costs.

Writ petition alllowed.

2015 (I) ILR - CUT- 933

S. PANDA, J.

W. P. (C) NO.2930 OF 2011

BHAGYALATA DAS @ LENKA …….Petitioner

.Vrs.

EAST COAST RAILWAY & ORS. ……..Opp.Parties

ARBITRATION & CONCILIATION ACT, 1996 – S. 8

Suit for recovery of money – Belated application by defendants to refer the matter to arbitration – Failure of the applicants to file original arbitration agreement or duly certified copy there of – Non-compliance of the mandatory provision in Sub-section 2 of Section 8 of the Act – Held, impugned order to stay the suit and directing the parties to implement Clause 29 of the agreement by referring the matter to the Arbitrator is set aside. (Paras 7 to 9)

Case law Referred to:-

AIR 2008 SC 1016 : (Atul Singh & Ors.-V- Sunil Kumar Singh)

For Petitioner - M/s. A.R. Dash, S.K. Nanda, B. Mohapatra, S.N. Sahoo, M.C. Swain, N. Swain, P.K. Behera & K.S. Sahu.

For Opp.Parties - M/s. A.K. Mishra, H.M. Das & A.K. Sahoo.

Date of Judgment:13.03.2015

JUDGMENT

S.PANDA, J.

Petitioner in this application has challenged the order dated 9.12.2010 passed by learned Addl. Civil Judge (Sr.Divn.), Puri in C.S. No. 32/226 of 2002/2005 allowing an applications filed by the defendants to stay the suit and to direct the parties to implement Clause-29 of the agreement by referring the matter to the Arbitrator in compliance of the agreement entered into by the parties.

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

Pursuant to the tender floated by the South Eastern Railway the present petitioner entered with an agreement with opposite party No.2 on 14.8.2000 for mechanical washing, cleaning, drying, pressing and dressing of bed rolls of the South Eastern Railways and South Eastern Hotel, Puri for three years for a consideration amount of Rs.53,11,440/-. As per the said agreement petitioner deposited the security amount for a sum of Rs.2,32,836/- and bank guarantee for a sum of Rs.6,80,000/-. As per the terms of the agreement the bill amount is to be paid to the plaintiff every month after petitioner performed the work. The bill prepared by the contractor was certified by the Station Manager, Puri. While the matter stood thus the dispute arose as the opposite parties failed to pay the washing charges to the petitioner in every month as per the terms and conditions of the agreement. Though the petitioner has submitted the bills regularly in each month and the Station Manager, Puri has given his certificate on the bills without indicating any deficiency of service or any objection on the work the opposite parties failed to pay the bill amount regularly. Before expiry of the agreement period, petitioner made investment towards installation of machine etc. As per the terms of the agreement petitioner requested opposite party No.3 for extension of the said contract period. She was verbally allowed to perform the work after the expiry of the agreement period. Opposite parties failed to pay her dues despite presentation of bills.

3. Before expiry of the contract i.e. 13.8.2003 petitioner has filed W.P.(C) No. 5325 of 2003 against the opposite parties to allow her to complete five years term instead of three years. In the said writ petition she has filed Misc. Case No. 5013 of 2003 to stay issuance of fresh tender call notice for a period of beyond 13.8.2003 wherein this Court has directed to maintain status quo as on date. Thereafter she continued the work beyond the contract period. This Court while disposing of the writ petition on 2.8.2004 directed that what-so-ever the bills are submitted for the work discharged from 14th August, 2003 till the date of disposal of the writ petition shall be considered by the opposite parties and if the petitioner is found to be entitled to any payment there under the same shall be paid to her within a period of two months from the date of communication of the order. Pursuant to the said direction of this Court the bills of the petitioner has been considered after deduction as per the agreement.

4. Being not satisfied with the sanction bill the present petitioner as plaintiff has filed C.S. No. 32/226 of 2002/2005 for recovery of money with other consequential relief. The present opposite parties appeared in the suit and prayed for time to file the written statement. Subsequently defendants were set ex parte and suit was posted to 9.2.2007 for ex parte hearing. On 9.2.2007 defendants have filed a petition to set aside the ex parte order and to accept the written statement filed by the defendants. A separate petition also filed by the defendants to stay the suit and to direct the parties to implement the arbitration clause of the agreement. On the same date defendants have also filed an application to drop the suit as the same is not maintainable in view of Clause 29 of the agreement executed by the parties and the provisions of the Arbitration and Conciliation Act, 1996. Objection was filed by the plaintiff to the aforesaid applications taking a stand that defendants have appeared in the suit and availed several adjournments for filing the written statement. Defendants have not filed the original agreement or its certified copy not being accompanied with the petitions. The other ground of objection of the plaintiff was that the cause of action of the suit arose within the jurisdiction of the court. The Arbitration and Conciliation Act, 1996 will not ousted the jurisdiction of the court. It is also contended that plaintiff has not sought for any relief relying on the Arbitration Clause and the alleged Arbitration Clause is illegal, inoperative, inequitable, fraudulent and void which is not binding to the plaintiff.

5. The court below by order dated 9.1.2008 while setting the ex parte order directed for acceptance of the written statement subject to payment of cost of Rs.500/-. The court below considering the petitions filed by the defendants and its objection allowed the applications filed by the defendants and directed to implement Clause-29 of the agreement regarding to dissolve the dispute by arbitration.

6. Learned counsel for the petitioner submits that the defendants after receiving summons have not choose to appear nor they have filed application to refer the matter at the first instance rather the defendants were set ex parte. Thereafter they have filed an application to set aside the order of ex parte, to accept the written statement and to implement the arbitration clause of the agreement after availing several adjournments for filing the written statement. Therefore the application filed by the defendants for reference as per the arbitration clause is liable to be rejected. In support of his contention he has cited the decision reported in ***Atul Singh and others V. Sunil Kumar Singh*** reported in ***AIR 2008 SC 1016.***

Learned counsel appearing for the opposite parties however supports the impugned order and submitted that the petitioner has entered into an agreement knowing fully aware about the arbitration clause and the application was filed by the defendants to drop the suit. In view of the said arbitration clause the court has rightly referred the dispute to the named arbitrator therefore the impugned order need not be interfered with.

7. In view of the contention raised by the learned counsel for the parties and after going through the materials available on record the facts narrated in the above paragraphs are not disputed. Admittedly the application was filed at a belated stage by the defendants to refer the dispute as per the arbitration clause. It is also not disputed that the defendants are in a dominant position and they cannot take advantage of such position and force the plaintiff to go to the arbitration proceeding where the arbitrator is to be nominated by the General Manager taking service from the plaintiff.

8. The Apex Court in the case of ***Atul Singh(supra)*** held that an application under Section 8(1) 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.

9. In view of the above settled position the court below without considering the same passed the impugned order which is an error apparent on the face of the record. Accordingly this Court sets aside the impugned order in exercising the jurisdiction under Article 227 of the Constitution of India and directs the court below to dispose of the suit as expeditiously as possible preferably by end of July, 2015 since pleadings of the parties completed. Parties shall cooperate with the trial court for early disposal of the suit. Accordingly the writ petition is disposed of.

Writ petition disposed of.

2015 (I) ILR - CUT- 937

S. PANDA, J.

C.M.P. NO.731 OF 2014

ALEKH SAHOO & ORS. …… Petitioners

.Vrs.

SUDHANSU MOHAN MISHRA & ORS. …… Opp. Parties

CIVIL PROCEDURE CODE , 1908 – O- 6,R-16

Strikeout pleadings – Pleadings, which are necessary being matters on record need not be interfered with in the absence of any material that such pleadings are unnecessary and vexatious and may prejudice the other side.

In the present case the defendants in their written statement have taken a specific plea that the plaintiffs are powerful and taking law into their hands they have created hindrances in the right of the defendants and such pleadings are necessary for effective adjudication of the dispute between the parties and in support of their plea they have furnished particulars which are matters of record – The Court below having not considered the same has passed the impugned order which is an error apparent on the face of the record – Held, impugned order is setaside. (paras -6,7)

For Petitioners : M/s. B.Pattnaik, P.B.Rath, S.K.Swain, B.Rath & A.Pattnaik.

For Opp. Parties : M/s. S.Moharana, S.P.Moharana, S.Rath.

Date of Judgment : 26.09.2014

JUDGMENT

S.PANDA, J.

Petitioners in this petition have challenged the order dated 3.2.2014 passed by learned Civil Judge (Sr.Divn.), Athgarh in C.S.(I) 44 of 2009 allowing an application under Order, 6 Rule, 16 of the Code of Civil Procedure filed by the plaintiffs to strikeout the pleadings made by the defendants in the written statement.

2. The defendants are the petitioners. The opposite parties are the plaintiffs filed the suit for declaration of right, title and interest and for recovery of possession. They also claimed mandatory injunction along with other reliefs. The plaintiffs pleaded inter alia that they are the successor in interest of one Lingaraj Khadenga. In O.L.R. Case No. 1 of 1997 the defendants were evicted from the suit land and delivery of possession was given to the plaintiffs on 18.12.2006 by the R.I. Sadar, Athgarh. From the said date they are in possession of the land uninterruptedly and constructed two rooms at the Western side of the suit land and construction was raised up to lintel level. Their construction was objected by defendant No.7 on the guise of ownership over the suit land. She claimed that she has purchased part of the property by Registered Sale Deed dated 19.5.2006 from the defendant Nos. 2 to 6 who have no right over the property they being evicted from the suit land in O.L.R. Case No. 1 of 1997. In the plaint they have also disclosed I.C.C. No. 92 of 2008. As the defendants create cloud to the entitlement of the plaintiffs the suit was filed with the aforesaid relief. The defendant Nos. 1 to 6 filed their written statement jointly traversing the plaint allegation. They have taken a stand that due to death of Golekh Sahoo on 20.10.2001 the O.L.R. Case was abated for non-prosecution of his legal heirs. They have not received any notice for delivery of possession as claimed by the plaintiffs through R.I. and as the O.L.R. case was abated the order passed in said case was not binding on them. While they are continuing in possession of the property, they have executed a sale deed in favour of defendant No.7 and the purchaser is in possession of the property from the date of sale deed. She has constructed two pucca rooms over her purchased land. They also averred that plaintiff No.2 is a notorious and mischievous person in the locality and plaintiff No.3 in his accused statement in Sessions Case (S.T. Case No. 685 of 2002) stated so and created disturbance in the possession of defendants. They have filed O.L.R. Appeal No. 1 of 2009 which was pending therefore, the plaintiffs are not entitled to any relief in the case and is liable to be dismissed. After receiving the copy of the written statement the plaintiffs have filed an application under Order, 6 Rule, 16 of the C.P.C. to strikeout the pleadings of the defendants regarding plaintiff No.2 as a notorious and mischievous person in the locality and plaintiff No.3's accused statement in the aforesaid Sessions case as those pleadings are unnecessary, irrelevant and scandalous and no connection with the present dispute. The defendants have filed their objection denying the allegation made by the plaintiffs and reiterated the said facts which was

necessary for proper determination of the dispute between the parties. The criminal case is matter of record to show the conduct of the plaintiffs to grab the property and those pleadings are necessary to ascertain the real intention of the plaintiffs as such the pleadings need not be strikeout.

3. Learned counsel for the petitioners submitted that as those pleadings are necessary and those are the matter of records there is no materials on record to come to a conclusion that the said pleadings are unnecessary and vexatious or may prejudice the plaintiffs therefore the impugned order need be interfered with and defendants are relying on those documents for their defence. In support of his contention he has relied on the decisions reported in ***A.I.R. 1976 S.C. 744, Udhav Singh V. Madhav Rao Scindia, 1989(I) OLR 165, S.M.N. Abdi V. Bennett Coleman and Co. Limited and Others***.

In the case of ***Udhav Singh(supra)*** the Apex Court held that pleading to be read as a whole and pleading to be read as such to ascertain its true import and it is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. This Court while considering the provision of Order, 6 Rule, 16 in the case of ***S.M.N. Abdi(supra)*** held that it is a serious matter and recourse should not be taken unless there are compelling reasons and the particulars which are necessary to be furnished and in absence of which the plea taken by the defendants in the written statement cannot be allowed to be sustained. If the defendants deliberately do not comply with the said direction of the Court to furnish the particulars, in such situation Court may strikeout those pleadings.

4. Learned counsel appearing for the opposite parties submitted that the defendants are no way connected with the Sessions case therefore the accused statement made by the plaintiff No.3 in the said Sessions case has no relevancy to the present case. Therefore the pleadings of the defendants in that respect are scandalous in nature and unnecessary hence rightly the court below directed to strikeout the said pleadings. In support of his contention he has relied on the decisions reported in ***A.I.R. 2007 Orissa 9, Sk. Illias V. Co-operative for American Relief Everywhere, India and Others (CARE), A.I.R. 1997 Orissa 115, Prasanna Kumar Patasani V. Janaki Ballav Pattnaik***.

5. In the case of ***Sk. Illias(supra)*** this Court considered the application to strikeout the pleadings in a suit challenging the order of termination of service and the plaintiff made scandalous allegation against the officers who

were not parties to the suit and as the averments are unnecessary after reading the plaint as a whole if the allegations are struck out from the plaint plaintiff can still raise the question of mala fide on the basis of other averments made.

6. Considering the aforesaid position of law and as the defendants in their written statement taking a specific plea that the plaintiffs are powerful and taking law into their hands. They have created hindrances in the right of the defendants and those pleadings are necessary for effective adjudication of the dispute between the parties. In support of their plea they have also furnished the particulars which are matter of records. The court below has not considered the same and allowed the application striking out the pleadings of the defendants which is an error apparent on the face of the record.

7. In view of the above discussion this Court sets aside the impugned order in exercising the jurisdiction under Article 227 of the Constitution of India and directs the trial court to proceed with the matter in accordance with law. Accordingly the Civil Miscellaneous Petition is disposed of.

Petition disposed of.

2015 (I) ILR - CUT- 940

B. P. RAY, J.

CRLA NO. 302 OF 1995

MEGHANAD NAYAK ……..Appellant

.Vrs.

REPUBLIC OF INDIA ……..Respondent

PREVENTION OF CORRUPTION ACT, 1947 – Ss.5(1) (e),5(2)

Income of the appellant during the check period was Rs. 4, 60, 419/- and expenditure was Rs. 72,000/- leaving the savings amounting to Rs. 3, 88, 419/- – The property in his possession was Rs. 3,85, 552/- so during the check period the appellant had not amassed any property disproportionate to his known sources of income – Findings of the

learned trial Court leading to conviction of the appellant not being based upon Correct appreciation of evidence, can not be sustained – Held, impugned judgment of conviction and sentence is setaside.

(Para -17)

Date of Judgment: 02.03.2015

JUDGMENT

B.P. RAY, J.

This appeal is directed against the judgment dated 4.11.1995 passed by the learned Special Judge, Bhubaneswar in T.R. Case No. 34 of 1989 convicting the accused-appellant under section 5(2) of the Prevention of Corruption Act, 1947 read with section 5(1)(e) of the said Act and sentencing him to undergo R.I. for two years and to pay a fine of Rs. 1,00,000/- in default to undergo simple imprisonment for a further period of eighteen months.

2. Prosecution case, in brief, is that the accused-appellant while working in different capacities in the office of the Accountant General during the check period from 17.7.1971 to 16.4.1988 acquired property to the tune of Rs.3,21,300/-, which was disproportionate to his known sources of income. According to the prosecution, during the aforesaid period of time, while the income of the appellant was Rs. 3,28,321.95 paise and his expenditure was Rs. 2,00, 325.89 paise, his assets were found to be to the tune of Rs. 4,49,206.36 paise. Mr. P.N. Parida, the then Inspector of Police, Special Police Establishment, Orissa, Bhubaneswar on receiving reliable information lodged an F.I.R. on 15.4.1988 and on completion of investigation, the appellant was charge sheeted leading to the trial for the offence indicated above. Learned Special Judge framed charge against the appellant under section 5(1)(e) read with section 5(2) of the Prevention of Corruption Act, 1947 (for short, 'the Act') on 18.4.1991 and as the appellant pleaded not guilty, trial was taken up . In course of the trial, the prosecution examined as many as 33 witnesses and got admitted into the evidence, documents marked as Exts. 1 to 70. In support of his defence plea, the appellant also produced oral as well as documentary evidence.

3. On evaluation of the evidence adduced by both the sides, learned trial court arrived at the finding that during the check period, the income of the appellant from the known sources was Rs.3,51, 671.95 paise inclusive of Rs. 22,840/- which had not been taken into account by the Investigating Agency

and that the appellant had spent Rs. 2,00, 325.89 paise on himself and family members with a saving of Rs. 1,51,346.06 paise, whereas, the property in his possession during the check period was estimated at Rs. 4,49, 206.36 paise . The learned trial court deducted a sum of Rs. 50,000/- on account of the gift received by the appellant from Rs. 2,97,860.30 paise (Rs.4,49,206.36 paise - Rs.1,51,346.06 paise) and ultimately, held that the property valued at Rs. 2,47,860.30 paise in possession of the appellant was disproportionate to the known sources of his income.

4. In course of argument, learned counsel for the appellant, while assailing the findings and conclusion arrived at by the learned court below, submitted, inter alia, that the court below for no valid reason disbelieved the evidence adduced by the defence and also failed to appreciate the prosecution evidence in right perspective inasmuch as the material discrepancies have not been taken into account and the elicitations in the cross-examination of the prosecution witnesses affecting their credibility has not been given due weightage. He has taken me through the evidence of the prosecution witnesses vis-à-vis the defence evidence concerning the individual items purportedly constituting the income, expenditure and assets of the appellant. According to the learned counsel, the court below got unduly influenced by the prosecution version, while making assessment of the income, expenditure and assets relating to the check period.

On the other hand, Mr. Narasingha, learned counsel appearing for the C.B.I. sided with the findings arrived at by the learned trial court. According to him, the learned trial court has scrutinized the evidence meticulously and the conclusion leading to the verdict of conviction and sentence against the appellant warrants no interference in appeal.

5. Having regards to the rival contentions, at the outset, I embark upon the materials on record as regards the income of the appellant during the check period. Relying on the version of the prosecution, the learned trial court assessed the net salary of the appellant at Rs. 95,801.95 paisa and while making such assessment, the bonus amounting to Rs.3397/-, LTC advance amounting to Rs.3725/- and the over time allowance of Rs.1625.40 paisa received by the appellant during the check period has not been taken into account, although D.W.7, the Assistant Accounts Officer in the Office of the Accountant General, has proved the aforesaid fact. Similarly, as revealed from the evidence of P.W.19 and the documents vide Exts.30 series, the appellant had drawn a sum of Rs.12,900/- towards G.P.F. advance which

ought to have been added to his income. There is no dispute on record that the appellant had some landed property in his share and although there is no specific evidence from the side of the prosecution to controvert the defence plea that the land was being cultivated not on bhag basis but by the appellant himself, the learned trial court assessed the agricultural income of the appellant at a reduced rate treating the land being under bhag tenant. Learned counsel for the appellant urged that on that count a sum of Rs.23,100/- is to be added towards the income of the appellant. Having gone through the evidence on record in this behalf, this Court feels it to be reasonable to add Rs.10,000/- to the income already assessed by the trial court.

6 It would reveal from the evidence of the D.Ws. 13 and 17 coupled with the relevant cheque, bank ledger, etc. vide Exts. T/24 and T/25, that the appellant had incurred a loan of Rs.30,000/- from one, Jagamalla Singh on 16.01.1985. Similarly, P.W.31, the Bank Officer, has proved that a loan of Rs.5,000/- was availed by the wife of the appellant for the Drug House. Since the net income of the said Drug House has been taken into account by the prosecution while assessing the income of the appellant, the aforesaid amount of Rs.5,000/- ought to have been added to his income.

7. Learned trial court has deducted a sum of Rs.100/- per month towards the salary of the salesman of the Drug House, although the net profit from that business has been estimated after excluding all the expenditures in respect of the Drug House. This Court agrees with the contention of the learned counsel for the appellant that on this count, a sum of Rs.5,100/- has to be added to the income of the appellant.

8. The appellant in course of the trial adduced evidence through D.W.1 that the furniture of the Drug House were sold at Rs.15,000/-. But on the ground of absence of any documentary evidence to the above effect, the learned trial court did not accept the defence plea in this regard. The D.W.1 came to the witness box in the year, 1994 to speak about the sale of the furniture which took place in the year 1981. In normal course, the documents regarding the said transaction were not supposed to be preserved for a period of about 15 years. Since the closure of the Drug House is not in dispute, this Court is inclined to add Rs.5,000/- to the income of the appellant on account of sale of the furniture of the Drug House.

9. P.W.9 has deposed that pursuant to the request made by the appellant, he had lent a sum of Rs.25,000/- to the appellant to defray the expenses on construction of his house. Although this witness was subjected to cross-examination by the prosecution on being declared hostile, I do not find anything substantial to disbelieve the evidence of this prosecution witness in so far as his lending of a sum of Rs.25,000/- to the appellant during the check period, is concerned. Similarly, Gadadhara Nayak, another brother of the appellant, gave evidence that he had given Rs.7,000/- to the appellant by Money Order in April, 1977 for the purpose of Medicine Shop of the appellant. The Money Order coupons entered into evidence as Exts. M-series afford corroboration to this version of the D.W.2. Regard being had to the evidence of the P.W.9 and D.W.2, a sum of Rs.32,000/- has to be added to the income of the appellant.

In toto, a sum of Rs.1,08,747/- has to be added to the amount of Rs.3,51,671/- raising the income of the appellant to Rs.4,60,419/- during the check period.

10. Next comes the question of expenditure incurred by the appellant towards himself and his family members on different counts. In this context, the evidence of P.W.29, the then Statistical Investigator in the Office of the Director of Economics and Statistics assumes, significance.

11. Relying on the evidence of P.W. 29 and his reports vide Exts. 47 and 48, the learned trial court held that the house-hold expenditure of the appellant under different heads was Rs. 1,15,738/-, whereas his income from salary was calculated at Rs. 95,802/-. The learned counsel for the appellant criticized the assessment made by P.W. 29 as also the finding of the court below in that respect on the ground that the standard expenditure of a public servant cannot be more than his salary income for a specified period. Relying on the decision in the case of ***Sajjan Singh v. State of Punjab,*** AIR 1964 SC 464, learned counsel argued that the expenditure of a public servant on household cannot be standardized at more than his salary income.

12. I have gone through the reported authority as relied upon. With due respect, may I state here that no principle was settled in the said case regarding calculation of household expenses vis-a-vis the salary income. In the facts and circumstances involved in the said case, the Hon'ble apex Court

calculated the household expenditures of the appellant therein at 1/3rd of his salary income during the check period.

13. Be that as it may, to appreciate the defence contention, I have gone through the evidence of the P.W. 29. During cross-examination, this witness conceded that his report was least concerned with the practical way of life of a particular person. In paragraph-11, he stated that he prepared a mechanical report considering the facts supplied by the prosecution. He also admitted that in respect of Bhubaneswar, there was no National Sample Survey Report and Price Indices was supposed to vary in different parts of Orissa. He also agreed that the defence suggestion that no hard and fast rule could be laid down to prepare income and expenditure of an individual. His evidence reveals that he relied on National Sample Survey Reports and the Price Indices meant for Urban Non-manual employees published by Central Statistical Organization, New Delhi without any specific reference to Bhubaneswar or the place of residence of the appellant during the check period.

Having scrutinized the evidence of this official witness, this Court feels it reasonable to assess the expenditure of the appellant during the check period at the proportion of 75% of his net salary, which comes to Rs. 72,000/-.

14. Now adverting to the valuation of the other items of property in possession of the appellant, I first take up the two residential buildings, one at Bhubaneswar and the other at Sahadapada. Relying on the evidence of P.W. 13, learned trial court held that the building at Bhubaneswar was valued at Rs. 3,35, 912/- and that at Sahadapada was valued at Rs. 57,323/- . The learned trial court did not accept the defence evidence to the effect that the cost of construction of the house at Bhubaneswar was Rs.2,05,000/- and the cost of the building at Sahadapada was Rs. 43,000/-. The learned trial court while appreciating the evidence of P.W. 13 has not given due weightage to the elicitations made during the cross-examination by the defence. In paragraph-9 of his deposition, this witness stated that the rate of construction will vary depending on the use of Granite stone, Laterite Stone or bricks and the cost of construction with Laterite Stone will be less compared to the cost involved in construction with Granite Stone or bricks. He admits not to have examined the nature of materials used in the construction of the building and compound wall and he calculated the cost on

the basis of bricks. He has further admitted in paragraph-10 of his evidence that he did not assess the fabrication work separately. He failed to remember as to what was the quality of wood used in the door frame of the buildings. He agreed with the defence suggestion that if a house is constructed under personal supervision of the owner, some amount has to be deducted from the cost of construction. A scrutiny of the evidence of this witness leaves a room for doubt about the genuineness of the valuation made by him in respect of the building inasmuch as he concedes to have not been meticulous and practical while assessing the individual items of materials used in the construction work.

15. So far as the house at Sahadapada is concerned, the P.W. 13 has further conceded that the said house being situated at a rural area, the cost of labour was less compared to the cost of labour at urban area like Bhubaneswar. He did not deny or accept the defence suggestion that the cost of the building at Sahadapada was Rs. 39,200/-. At the same time, he affirmed that if the building was constructed in the year 1981, the cost of construction would be less than what he calculated. It be mentioned here that according to the appellant, the said building was constructed in the year 1981. The ultimate version of P.W. 13 during cross-examination is that he did not take into consideration the actuals while evaluating the buildings and that by measuring the plinth area, he evaluated the buildings basing on the CPWD rate. Having scrutinized the evidence of the P.W. 13 coupled with the evidence adduced by the defence, this Court feels it just and reasonable to deduct a sum of Rs. 50,000/- from the assessed cost of the building at Bhubaneswar and Rs. 10,000/- from the assessed cost of the building at Sahadapada.

16. It is rightly pointed out by the learned counsel for the appellant that although the net profit of the medicine shop was calculated by the Investigating Agency, obviously, after deducting all the expenditure including the cost of the Refrigerator, the cost of the Refrigerator amounting to Rs. 3654/- ought not to have been again included in the assets of the appellant. The learned trial court lost sight of this aspect while assessing the value of the assets in terms of money.

In toto, a sum of Rs. 63,654/-, therefore, is to be deducted from Rs. 4,49,206/-.

17. As an obstruction, it is found that while the income of the appellant during the check period was to the tune of Rs. 4,60,419/- and expenditure was to the tune of Rs. 72,000/- leaving the savings amounting to Rs. 3,88,419/-, the property in his possession was Rs. 3,85,552/-. Accordingly, during the check period, the appellant had not amassed any property disproportionate to his known sources of income. The findings of the learned trial court leading to conviction of the appellant, being not based upon correct appreciation of evidence, cannot be sustained.

18. In the result, the appeal is allowed. The judgment of conviction and sentence passed by the learned trial court against the appellant is hereby set aside. The bail bond of the appellant be discharged.

Appeal allowed.

2015 (I) ILR - CUT- 947

S.C. PARIJA, J.

ARBA NO.25 OF 2012

M/S. J. S. CONSTRUCTION PVT. LTD. .....Appellant

.Vrs.

CHIEF ENGINEER, DRAINAGE, CTC. & ANR. ..... Respondents

ARBITRATION & CONCILIATION ACT, 1996 – S. 31 (7) (a) & (b)

Award of interest – Pre-award period – If there is bar in the contract between the Parties, the Arbitrator cannot award interest for the pre-award period.

In the present case since there is bar against payment of interest in the contract the learned Arbitrator was not justified to award interest for the pre-award period i.e. between the date when the cause of action arose and the date of award – However payment of 18% interest P.A. from the date of award till payment is within his domain – Held, there is no infirmity in the impugned order setting aside the award of interest for the pre-award period by the learned Arbitrator.

(Paras 19,20)

Case laws Referred to:-

1.AIR 2010 SC 1511 : (State of Haryana & Ors.-V- S.L. Arora & Company)
2.(1996) 1 SCC 516 : (Port of Calcutta-V- Engineers-De-Space-Age)
3.(2010) 1 SCC 549 : (Madnani Construction Corpn.(P) Ltd.-V- Union of India)
4.(2009) 12 SCC 1 : (State Rajasthan & Anr.-V-Rerro Concrete Construction Pvt. Ltd.)

For Appellant - M/s. Milan Kanungo, S.K. Mishra, Y. Mohanty, S.N. Das & P.S. Acharya.
For Respondents - Addl. Standing Counsel.

Date of Judgment : 06.2.2015

JUDGMENT

S.C.PARIJA, J.

This appeal is directed against the order dated 09.05.2012, passed by the learned District Judge, Cuttack, in Arbitration Petition No.229 of 2010, partly allowing the application of the respondents filed under Section 34 of the Arbitration and Conciliation Act, 1996, by setting aside the pre-award interest awarded by the learned Arbitrator and confirming the award passed in favour of the respondents (employer) for payment of Rs.71,13,110/- minus Rs.62,589/-, with 18% interest from the date of the award, till final payment is made.

2. The brief facts of the case is that the respondents (employer) floated a Global Tender for construction of "Birupa Barrage With One Regulator (Civil Works)" for Rs.50,00,000/- through the erstwhile Department of Irrigation & Power, which has been subsequently renamed as "Department of Water Resources, Government of Orissa". The appellant-Contractor was one of the tenderers for the said work and the contract valued for Rs.5,30,92,822.65 paise was awarded in favour of the appellant-Contractor with the stipulation to commence the work on 14.12.1981 and complete the same on 13.02.1986. Thereafter, there was dispute and differences between the appellant-Contractor and the respondents (employer) with regard to measurement and final payment of the bill of the appellant-Contractor. Hence, the appellant-Contractor sent a notice on 02.11.2005 to the employer to resolve the dispute. When the same was not responded to, the appellant-Contractor filed a petition under Section 11(6) of the Arbitration and

Conciliation Act, 1996 ("the Act" for short), and on the intervention of the Hon'ble Chief Justice of Orissa High Court, the sole Arbitrator Shri Justice Basudev Panigrahi was appointed to arbitrate the dispute between the parties.

3. The appellant-Contractor filed the claim statement before the learned Arbitrator, making claim on 15 heads, as according to the appellant-Contractor, due to change of the drawings and designs and the extra work required to be done at the instance of the employer during execution of the work, which was beyond the terms of the contract, resulted in extra cost in execution. It was the case of the appellant-Contractor that the aforesaid extra cost incurred in execution of the work being attributable to the direction of the employer, the appellant-Contractor was entitled to claim on those heads with interest @18% per annum. The abstract of the claims made by the appellant-Contractor on 15 heads were as follows:

Item No.1	Excess of excavation of foundation quantity	Rs.3,06,000.00
Item No.2	Allied nature of works pertaining to Sheet pilling and payment due thereof.	Rs.2,79,450.00
Item No.3	Payment creditable to Respondents' Account towards mobilization	(-)Rs.20,221.00
Item No.4	Extra Cost of Dewatering	Rs.57,24,740.00
Item No.5	Payment due towards fixation of Salitax Board	Rs.17,45,000.00
Item No.6	Variation exceeding limit and payment due	Rs.31,47,920.00
Item No.7	Reconciliation of Cement A/C without financial implication on either side.	
Item No.8	Payment creditable to Respondents towards Empty Gunny Bags.	(-)Rs.42,368.00
Item No.9	Reconciliation of Steel reinforcement A/C without financial implication on either party.	
Item No.10	Hire Charges of compressor retained by Respondents	Rs.9,01,120.00
Item No.11	Reimbursement cost of dewatering due to off loading of BoQ Items.	Rs.22,79,349.00
Item No.12	Refundable Capital Money deposited in shape of ISD & Retention Money.	Rs.7,99,117.80 (Excluding Interest furnished separately)
Item No.13	Admitted so-called Final Bill	Rs.12,35,543.00
Item No.14	Compensation for breach of Contract.	Rs.53,09,283.00
	Payment of accrued interest @12% per annum with effect from 1.7.1987 till the actual date of payment.	

4. The employer (respondents) resisted the claim by filing of defence statement, wherein it was pleaded that the claim of the appellant-Contractor was not maintainable, being hopelessly barred by limitation as it had accepted the full and final measurement, except the measurement in respect of the earth work, as mention in item no.1, through its Managing Director, while signing the final bill on 03.03.1992. The claims had also been resisted to be not maintainable on the ground of waiver and estoppel, inasmuch as, the appellant-Contractor had not raised any dispute within the time stipulated, even though it had received the reply to his letter dated 30.07.2005 from the employer-Executive Engineer. So far as the claim of the appellant-Contractor in respect of item no.1, it was admitted that the said measurement was not final, but subsequently the Department having allowed the claim in part in respect of the said item, by approximation of the measurement of the extra work and agreeing to pay on 02.06.2001 for Rs.2,21,000/- instead of Rs.3,06,000/-, the claim was without any basis. The rest of the claims under other heads had been resisted to be not maintainable and also without any basis. It was also the plea of the respondents (employer) that the appellant-Contractor was not entitled to interest on any claim for any period prior to the date of the award or for the period from the date of the award till the date of payment, in view of the stipulation in Clause-57(e) of the General Conditions of Contract.

5. On the pleadings of the parties, learned Arbitrator framed the following issues:-

"ISSUES

1. Whether the claim made by the Claimant is maintainable in law? If so, whether it is barred by the law of limitation?
2. Whether the Claimant can maintain this proceeding after having signed in the Final Bill?
3. Whether there is any cause of action for the Claimant to file this proceeding?
4. Whether the Claimant is entitled to any amount as claimed? If so, what is the quantum?
5. Whether the respondents could deny the claim of the Claimant?
6. To what relief, if any, the parties are entitled?"

6. Answering all the issues in favour of the appellant-Contractor, the learned Arbitrator passed the award, holding that under claim item nos.1,4,5,6,10,12 and 13, the appellant-Contractor is entitled to an amount of Rs.71,13,110/-, together with pre-award interest of Rs.1,44,44,515/- minus Rs.2,35,313/- (as awarded in favour of the employer), with 18% interest from the date of the award, till payment. The abstract of the award is as follows:-

Claim Items	Date of Claim	Amount claimed (Rs.)	Amount Awarded (Rs.)	Pre-Award Interest payable (Rs.)	
No.1	1.7.1987	03,06,000/-	02,63,000/-	07,27,260/-	Claimant to get
No.4	-do-	57,24,740/-	20,23,500/-	05,58,486/-	-do-
No.5	-do-	17,45,000/-	17,45,000/-	48,16,200/-	-do-
No.6	-do-	31,47,920/-	15,50,000/-	42,78,000/-	-do-
No.10	29.09.1986	09,01,120/-	02,48,370/-	06,78,136/-	-do-
No.12	-do-	02,68,190/-	02,68,190/-	07,08,021/-	-do-
No.13	01.07.1987	12,35,543/-	10,14,550/-	26,78,412/-	
			71,13,110/-	1,44,44,515/-	2,15,57,625/-
No.3	01.07.1987	Not allowed	20,221/-	55,807/-	Respondents to get
No.8	01.07.1987	-do-	42,368/-	1,16,935/-	2,35,331/-
			62,589/-	1,72,742/-	2,13,22,294/-
No.11	01.07.1987	Not allowed			
No.14	01.07.1987	Rejected			
No.2	Allied nature o works	Not allowed			
No.7	Reconciliation of Cement Account	Allowed without financial implication on either side.			
No.9	Steel Account	Allowed without financial implication on either party			

7. Being aggrieved by the award passed by the learned Arbitrator dated 30.07.2010, in ARBP No.60 OF 2005, the respondents moved the learned District Judge, Cuttack, in Arbitration Petition No.229 of 2010, under Section 34 of the Act, for setting aside the award.

8. Learned District Judge, Cuttack, after considering the materials on record and examining the findings recorded by the learned Arbitrator, set aside the award with regard to grant of interest for the pre-award period amounting to Rs.1,44,44,515/- and confirmed the award for payment of Rs.71,13,110/- minus Rs.62,589/-, with 18% interest from the date of the award, till final payment is made.

9. Learned counsel for the appellant-Contractor submitted that the award of interest for the pre-award period is the discretion of the learned Arbitrator, as per Section 31(7)(a) of the Act. In the present case, learned Arbitrator having awarded interest amounting to Rs.1,44,44,515/- for the pre-award period on consideration of the fact situation, learned District Judge, Cuttack, was not justified in interfering with the same, in exercise of power under Section 34 of the Act.

10. Learned counsel for the appellant-Contractor has relied upon a decision of the apex Court in ***State of Haryana and Ors. v. S.L.Arora and Company***, AIR 2010 SC 1511, in support of his contention that granting of pre-award interest is within the discretion of the learned Arbitrator and in the instant case, learned Arbitrator having exercised such discretion in a just, fair and proper manner, no interference was warranted under Section 34 of the Act.

Learned counsel for the appellant-Contractor further contended that even if the appellant was not entitled to interest for the pre-reference period, that is, from the date of cause of action to the date of reference, the appellant-Contractor will be entitled to interest pendente lite, that is, for the period from the date of reference to the date of award, having regard to the decisions of the apex Court in ***Port of Calcutta v. Engineers-De-Space-Age,*** *(1996) 1 SCC 516 and* ***Madnani Construction Corpn. (P) Ltd. v. Union of India,*** *(2010) 1 SCC 549.*

11. Learned Additional Standing Counsel appearing for the respondents submitted that Clause-57(e) of the General Conditions of Contract specifically bars award of any interest on claims for any period prior to the date of the award or for the period from date of the award till the date of payment. It is submitted that Section 31(7)(a) of the Act provides that unless otherwise agreed by the parties, the Arbitrator may award interest for the period between the date on which the cause of action arose and the date on which the award is made (pre-reference period plus pendente lite), at such rate it deems reasonable. Referring to the ratio laid down by the apex Court in *S.L.Arora (supra),* learned counsel for the respondents submitted that with regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of any such contract, as per the discretion of the Arbitrator.

12. Learned counsel for the respondents has relied upon a decision of the apex Court in ***State of Rajasthan and another v. Ferro Concrete***

Construction Private Limited, (2009) 12 SCC 1, in support of his contention that where there is a specific bar in the agreement for award of interest, the Arbitrator is debarred from awarding any interest.

It is accordingly submitted that in view of the specific bar in the contract for award of any interest for the pre-award period, learned District Judge, Cuttack, was fully justified in setting aside the award of Rs.1,44,44,515/- by the learned Arbitrator towards interest for the pre-award period.

13. In *S.L.Arora (supra)*, the apex Court while dealing with the power of the Arbitrator to award interest under Section 31(7)(a) and (b) of the Act, has observed as under:

"(i) Clause (a) relates to pre-award period and clause (b) relates to post-award period. The contract binds and prevails in regard to interest during the pre-award period. The contract has no application in regard to interest during the post-award period.

(ii) Clause (a) gives discretion to the arbitral tribunal in regard to the rate, the period, the quantum (principal which is to be subjected to interest) when awarding interest. But such discretion is always subject to the contract between the parties. Clause (b) also gives discretion to the arbitral tribunal to award interest for the post-award period but that discretion is not subject to any contract; and if that discretion is not exercised by the arbitral tribunal, then the statute steps in and mandates payment of interest, at the specified rate of 18% per annum for the post-award period.

(iii) While clause (a) gives the parties an option to contract out of interest, no such option is available in regard to the post-award period."

In short, with regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract as per discretion of the Arbitrator. On the other hand, in regard to the post-award period, interest is payable as per the discretion of the Arbitrator and in the absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum.

14. In ***Sayeed Ahmed and Company v. State of Uttar Pradesh and others,*** *(2009) 12 SCC 26,* the apex Court has held as under:-

"Having regard to sub-Section (7) of Section 31 of the Act, the different between pre-reference period and pendente lite period has disappeared insofar as award of interest by the arbitrator. The said Section recognizes only two periods and makes the following provisions:

(a) In regard to the period between the date on which the cause of action arose and the date on which the award is made (pre-reference period plus pendente lite), the Arbitral Tribunal may award interest at such rate as it deems reasonable, for the whole or any part of the period, *unless otherwise agreed by the parties*"

(b) For the period from the date of award to the date of payment the interest shall be 18% per annum if no specific order is made in regard to interest. The arbitrator may however award interest at a different rate for the period between the date of award and date of payment."

15. In ***Union of India v. Saraswat Trading Agency,*** *(2009)16 SCC 504,* the apex Court reiterated that if there is a bar against payment of interest in the contract, the Arbitrator cannot award any interest for the pre-reference period or pendente lite.

16. The apex Court in ***M/s Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat and Ors.,*** AIR 2010 SC 3337, has reiterated that Section 31(7)(a) of the Act by using the words "unless otherwise agreed by the parties" categorically clarifies that the Arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to date of award. Therefore where the parties had agreed that no interest shall be payable, arbitral tribunal cannot award interest between the date when the cause of action arose to date of award.

17. The legal principles with regard to the power of the Arbitrator to award interest for the pre-award period and post-award period under Section 31(7)(a) and (b) of the Act, decided in *S.L.Arora (supra), Sayeed Ahmed (supra) and Sree Kamatchi Amman Constructions (supra),* have been affirmed and reiterated in a very recent three-Judge Bench decision of the apex Court in ***Hyder Consulting (UK) Ltd. v. Governor, State of Orissa,*** 2014 (13) SCALE 169.

18. In the present case, Clause-57(e) of the General Conditions of Contract provides as under:-

> "(e) no interest will be allowed on any claim for any period prior to the date of the award as well as for the period from the date of the award till the date of the decree;"

19. In view of such bar against payment of interest in the contract between the parties, learned Arbitrator was not justified in exercising his discretion in awarding interest for the pre-award period between the date when the cause of action arose to the date of award. However, the award of interest @18% per annum from the date of award till payment is within the domain of the learned Arbitrator, which cannot be faulted.

20. For the reasons as aforestated, I do not find any infirmity in the impugned order of the learned District Judge, Cuttack, dated 09.05.2012, passed under Section 34 of the Act, setting aside the award of interest for the pre-award period by the learned Arbitrator, so as to warrant any interference. The appeal being devoid of merits, the same is accordingly dismissed. No costs.

Appeal dismissed.

2015 (I) ILR - CUT- 955

B. K. NAYAK, J.

MISC. CASE NO.42 OF 2014
(Arising out of ELEPT No.14 of 2014)

ANUBHAV PATNAIK .....Petitioner

.Vrs.

SOUMYA RANJAN PATNAIK .....Opp.Party

A. REPRESENTATION OF THE PEOPLE ACT, 1951 – Ss. 81, 83, 86 r/w O-6, R-16 & O-7, R-11 C.P.C.

Election Petition – Allegations of corrupt practice – Full Particulars of corrupt practice not disclosed – Copies of affidavits served on the respondent do not contain the endorsement of the Oath Commissioner or notary or the Magistrate – Affidavits are not in the prescribed form and cannot be said to be the true copy – Non-compliance of Section 81 (3) and 83 of the Act and Rule 94-A of the conduct of Election Rules, 1961 – Provisions are mandatory in nature – Held, Election Petition is liable to be dismissed U/s.86 (1) of the Act for violation of the provision U/s. 81 (3) of the Act.

(Para 16)

B. REPRESENTATION OF THE PEOPLE ACT, 1951 – S. 100

Election Petition – Allegations of corrupt practice – Heavy onus lies on the election petitioner seeking to set aside the election of the successful Candidate – Failure to plead material facts is fatal to the election petition as no amendment of pleadings is permissible to introduce such material facts after the time limit prescribed for filing of election petition – Held, the election petition is lacking material facts and having not disclosed cause of action is liable to be dismissed.

(Para 25)

Case laws Referred to:-

1.AIR 1984 SC 305 : (Mithilesh Kumar Pandey-V- Baidyanath Yadav & Ors.)
2.(2001) 8 SCC 233 : (Hari Shankar Jain-V- Sonia Gadhi)
3.(2000) 8 SCC 191 : (Ravinder Singh –V- Janmeja Singh & Ors.)
4.(2000) 2 SCC 294 : (V. Narayana Swamy-V- C.P. Thiruna Vukkarasu)
5.(1996) 5 SCC 181 : (Dr. Shipra (Smt.) & Ors.-V- Shantilal Khoiwal & Ors.)
6.AIR 1964 SC 1545 : (Murarka Radhey Shyam Ram Kumar-V- Roop Singh Rathore)
9.(2008) 11 SCC 740 : (Umesh Challijill-V- K.P. Rajendran)
10.(2012) 7 SCC 788 : (Ponnala Lakshmaiah-V- Kommuri Pratap Reddy & Ors.)
11.(1999) 4 SCC 274 : (T.M. Jacob-V- C. Poulose & Ors.)
12.(2010) 7 SCC 428 : (K.K. Ramachandran Master-V- M.V. Sreyamakumar & Ors.)

For Petitioner - M/s. Bidyadhar Mishra, Sr. Advocate, P. Bharadwaj & S. Satpathy.
For Opp.Party - M/s. Pitambar Acharya, Sr. Advocate, S. Rath, B.K. Jena, J. Parida, B.P. Das, P.K. Ray & S.R.Pati.

Date of hearing : 27.02.2015
Date of judgment : 26.03.2015

JUDGMENT

B.K.NAYAK, J.

This order arises out of Misc. Case No.42 of 2014 (in ELEPT No.14 of 2014) filed by the respondent in the election petition under Order 6, Rule 16 and Order 7, Rule-11 of the Code of Civil Procedure read with Section 86, Representation of the People Act, 1951 (in short, 'The Act') with a prayer to strikeout the pleadings in the election petition and to dismiss the election petition on the ground that the pleadings in the election petition are vague, scandalous and lack in material particulars and that they do not disclose any cause of action.

2. For brevity and convenience, the petitioner in the misc. case is described as the respondent and the opposite party-Election petitioner is described as the petitioner.

3. The petitioner has filed ELEPT No.14 of 2014 challenging the election of the respondent to the Orissa Legislative Assembly from 120-Khandapada Assembly Constituency. The election to the Khandapada Assembly Constituency was held on 17.04.2014 and the result thereof was declared on 16.05.2014 declaring the respondent elected. The election of the respondent has been challenged by the petitioner in the election petition on the ground of adoption of corrupt practices at the election by the respondent-returned candidate and for non-compliance of different provisions of the Representation of the People Act,1951 and the Rules framed thereunder.

4. Upon service of notice in the election petition, the respondent appeared, filed his written statement and the present misc. case. In the miscellaneous petition reference has been made to the written statement filed by the respondent. It is contended that the mandatory provisions of sub-section (3) of Section 81 and Section 83 of the Representation of the People Act and Rule 94-A of the Conduct of Election Rules,1961 have not been complied with by the petitioner and that the election petition does not disclose any cause of action.

In particular, it is stated in the miscellaneous petition read with the written statement that concise statement of material facts and full particulars of corrupt practices have not been pleaded in the election petition. It is stated that paragraphs 15 (A) to 15 (Q) of the election petition, which are said to be allegations regarding corrupt practice, lack full and detail particulars of corrupt practices as required under Section 83 (1) (b) of the Act. It is stated that the allegations and facts described in those paragraphs in fact do not make out any corrupt practice within the meaning of Section 123 of the Act.

It is further stated that the affidavit with regard to corrupt practice is not in consonance with statutory Form-25 read with Rule 94-A of the Conduct of Election Rules,1961.

It is also urged that the copies of affidavits accompanying the copy of the election petition served on the respondent are not in accordance with the provision of Section 83 (1) (c) proviso as they do not disclose or indicate that the affidavits have been sworn or affirmed before the Oath Commissioner or the Notary or the Magistrate of the First Class inasmuch they do not bear the endorsement of any such officer and as such the copy of the election petition with the affidavit served on the respondent cannot be said to be the true copy of the election petition and as such the election petition is liable to be dismissed in terms of Section 86 (1) of the Act for violation of the provisions of sub-section (3) of Section 81 of the Act. In order to substantiate his contention, the learned counsel for the respondent has submitted before this Court, the copy of the election petition served on the respondent along with a Memo for perusal.

It is also contended that the election petition as a whole does not disclose any cause of action and hence liable to be dismissed in limine under Order-7, Rule-11 of the C.P.C. In support of his contentions, the learned counsel for the respondent relies on the following decisions :

(i) ***AIR 1984 SC 305: Mithilesh Kumar Pandey v. Baidyanath Yadav and others.***
(ii) ***(2001) 8 SCC-233 : Hari Shankar Jain v. Sonia Gandhi.***
(iii) ***(2000) 8 SCC 191 : Ravinder Singh v. Janmeja Singh and others.***
(iv) ***(2000) 2 SCC 294: V. Narayana Swamy v. C.P. Thiruna Vukkarasu.***
(v) ***(1996) 5 SCC 181 : Dr. Shipra (Smt) and others v. Shantilal Khoiwal and others.***

5. The petitioner has filed his objection to the misc. case refuting all contentions raised in the miscellaneous application. It is stated in the objection that the pleadings in the election petition are in conformity with the statutory requirements and that they do not tend to mislead the respondent in any manner. It is stated that the material facts on which the petitioner relies and full particulars of corrupt practices alleged by the petitioner have been pleaded in the election petition, and that understanding the same fully, the respondent has already filed his written statement. It is also stated that the affidavit accompanying the pleadings in the election petition, are in full conformity with the statutory requirement. It is also contended that any defect in the copy of the affidavit served on the respondent, such as, absence of the endorsement/certificate of the Notary/Oath Commissioner/Magistrate First Class before whom the affidavit was sworn or affirmed is not fatal to the election petition.

6. In support of his contention the learned Senior Counsel for the petitioner relies, amongst others, on the following decisions :

(i) ***Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore: AIR 1964 SC 1545.***

(ii) ***Umesh Challiyill v. K.P. Rajendran : (2008) 11 SCC 740.***

(iii) ***Ponnala Lakshmaiah v. Kommuri Pratap Reddy and others: (2012) 7 SCC 788.***

(iv) **T.*M. Jacob v. C. Poulose & Others : (1999) 4 SCC 274.***

(v) ***K.K. Ramachandran Master v. M.V. Sreyamakumar & others : (2010) 7 SCC 428.***

7. The petitioner in the election petition has filed two affidavits apart from verification. In the first affidavit, which is evidently in terms of Order 6 Rule 15 (4) of the C.P.C, it is stated that the statements made in paragraphs-1 to 13 of the election petition relate to facts regarding the schedule of election, number of total voters and the election process in chronology up to the date of declaration of election results, which are true to the best of the knowledge of the petitioner, derived from statutory notification and official records. Paragrphs-14 & 15 (A) to 15 (Q) are concise statements of material facts/grounds on the basis of which the petitioner claims relief and such facts are true to the best of knowledge of the petitioner. It is also stated that paragraph nos.16 and 17 are also true to the knowledge of the petitioner. The

second affidavit is in Form-25 as per Rule-94-A of the Conduct of Election Rules. Paragraph (a) of the said affidavit relate to statements made in paragraph nos.1 to 14 of the election petition which are said to be true to the knowledge of the petitioner. Paragraph (b) of the said affidavit relate to material facts alleged in paragraphs-15(A) to 15(Q) of the election petition about the commission of corrupt practice of improper reception of votes in favour of the returned candidate by the Returning Officer, Counting Supervisors and Counting Agents in active aid, connivance and with the consent of the returned candidate, which are said to be true to the information of the petitioner. But the source of such information has not been indicated.

8. Paragraphs-1 to 14 of the election petition contain the schedule of the election, some statutory provisions, some generalized statements that the respondent-returned candidate in connivance with the government officers engaged in the task of counting of votes illegally counted some votes polled by the petitioner in favour of the returned candidate. It is also alleged that such government officers manipulated the polling and counting of votes to the advantage of the respondent, which would be evident from statutory Form 17(C) Part-I and Part-II. But no details of improper and illegal counting or rejection of votes are mentioned.

9. In Paragraphs 15(A) to 15(Q) of the election petition the following allegations have been made :

(i) In sixteen number of booths (Booth Nos.7, 10, 16, 21, 22, 44, 141, 150, 151, 186, 42, 55, 66, 91, 132 and 134), no signature of any polling agent has been obtained by the Presiding Officer in Part-I of Form-17 (C).

(ii) In respect of three number of booths (Booth Nos.12, 35 and 79), there is deliberate omission in Part-I of Form-17(C) regarding serial numbers of the control units and balloting units of the EVMs used in those polling stations.

(iii) In respect of three number of booths (Booth Nos.111, 129 and 132), the serial numbers of control unit and balloting unit of the EVMs have been interpolated and re-written without any initials of the Presiding Officer with a design to further the prospects of the returned candidate.

(iv) In three number of booths (Booth Nos.62, 74 and 81) the entry in Part-I of Form-17(C) regarding total number of votes polled was made at the time of counting of votes and not on the date of polling, which is evident from the discrepancy in handwriting appearing in Part-I & Part-II of Form-17(C).

(v) In respect of Booth Nos.82, 101, 135, 150, 178, 189, 171, 157, 10, 12, 17, 24, 40, 55, 86, 89, 93, 106, 122 and 131, the entry at serial no.2 in Part-I of Form 17 (C) meant for recording the total number of voters in the register of voters has been left blank.

(vi) In respect of Booth Nos.28, 115 and 136, no polling booth number or name has been mentioned in Part-I of Form 17(C), which implies that there was booth capturing and manipulation of votes so as to ensure the defeat of the petitioner and victory of the respondent.

(vii) In respect of Booth No.44 entries at Sl.Nos.1 to 5 in Part-I of Form-17(C) have been left blank which implies that the Presiding Officer consciously left the said serial number unfilled so as to manipulate the process of counting.

(viii) In respect of Booth No.66, entries in respect of Sl. Nos.1 to 8 in Part-I of Form 17(C) have been left blank with a view to manipulate the process of counting.

(ix) In respect of Booth Nos.124, 95, 151 and 30 entries in Part-I of Form 17(C) from Sl. Nos.1 to 5 have also been left blank which implies that the Presiding Officer at the instance of the respondent left those entries blank in order to manipulate the process of counting.

(x) In respect of Booth Nos.82, 101, 135, 150, 178, 189, 171, 157, 122, 131, 10, 12, 17, 24, 40, 55, 86, 89, 93 and 106, one or the other entries in Part-I of Form-17 (b) have been left blank which implies that the Presiding Officer at the instance of the respondent left those entries blank in order to manipulate the process of counting.

(xi) In respect of Booth Nos.17 and 31, the entries at the sl. No.2 of Part-I of Form 17(C) has been over written without any initial.

(xii) In respect of Booth No.50 manipulation has been done in respect of entry at Sl. No.1 of Part-I of Form 17(C) and this has been done in order to aid and assist the electoral prospect of the respondent.

(xiii) At the time of counting of votes whenever any discrepancy was noticed by the counting agents of the petitioner, the same was brought to the notice of the Returning Officer, the Presiding Officer and the Counting Supervisor by the agents of the petitioner, but those officers paid no attention.

It is stated that the documents enclosed to the election petition would demonstrate as to how the Returning Officer, Polling Officer and the Counting Supervisor were bent upon to manipulate the recording and counting of votes to the advantage of the respondent. But contrary to the assertion no document has been enclosed.

10. It is trite that an election petition can be dismissed for non-compliance of Sections 81, 82 and 117 of the Act and it may also be dismissed if the matter falls within the scope of Order 6, Rule 16 and Order 7, Rule 11 of the C.P.C.

It is contended by the learned Senior Counsel for respondent that the affidavit with regard to alleged corrupt practices is not in consonance with statutory Form No.25 read with Rule 94-A of the Conduct of Election Rules,1961.

The learned counsel for the petitioner contends, relying upon the Constitution Bench decision of the Hon'ble apex Court in the case of ***Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore: AIR 1964 SC 1545*** and the case of ***Umesh Challiyill v. K.P. Rajendran : (2008) 11 SCC 740*** that a defective affidavit is not a sufficient ground for summary dismissal of the election petition as the provisions of Section 83 of the Act are not mandatorily to be complied with in order to make a petition valid and as such defect in an affidavit can be allowed to be rectified at a later stage. He further contends that the test is whether the defects in the affidavit go to the root of the matter or were only cosmetic in nature. If affidavit sworn by the election petitioner contains only minor variations from the prescribed format and conveys in substance and essence the contents of the prescribed format, election petition cannot be summarily dismissed. If the court construes the defects to be of serious nature, it should give adequate opportunity to the election petitioner to rectify the same, instead of dismissing the election petition at the threshold. Similar view has also been expressed in the case of ***Ponnala Lakshmaiah v. Kommuri Pratap Reddy and others: (2012) 7 SCC 788.***

11. Learned counsel for the respondent has relied upon the decisions of the Hon'ble Supreme Court in the cases of ***V. Narayana Swamy v. C.P. Thiruna Vukkarasu : (2000) 2 SCC 294*** and ***Ravinder Singh v. Janmeja Singh and others: (2000) 8 SCC 191.***

In the case of ***V. Narayana Swamy,*** the three Judge Bench of the Hon'ble apex Court took into consideration several earlier decisions including the case of ***Murarka Radhey Shyam Ram Kumar*** (supra) and has held in paragraph-23 of the judgment as follows :

> "**23.** It will be thus seen that an election petition is based on the rights, which are purely the creature of a statute, and if the statute renders any particular requirement mandatory, the court cannot exercise dispensing powers to waive non-compliance. For the purpose of considering a preliminary objection as to the maintainability of the election petition the averments in the petition should be assumed to be true and the court has to find out whether these averments disclose a cause of action or a tribal issue as such. Sections 81, 83 (1) (c) and 86 read with Rule 94-A of the rules and Form 25 are to be read conjointly as an integral scheme. When so read if the court finds non-compliance it has to uphold the preliminary objection and has no option except to dismiss the petition. There is difference between "material facts" and "material particulars". While the failure to plead material facts is fatal to the election petition the absence of material particulars can be cured at a later stage by an appropriate amendment. "Material facts" mean the entire bundle of facts, which would constitute a complete cause of action and these must be concisely stated in the election petition, i.e., clause (a) of sub-section (1) of section 83. Then under clause (b) of sub-section (1) of Section 83 the election petition must contain full particulars of any corrupt practice. These particulars are obviously different from material facts on which the petition is founded. A petition levelling a charge of corrupt practice is required by law to be supported by an affidavit and the election petitioner is obliged to disclose his source of information in respect of the commission of corrupt practice. He must state which of the allegations are true to his knowledge and which to his belief on information received and believed by him to be true. It is not the form of the affidavit but its substance that matters. To plead corrupt practice as contemplated by

law it has to be specifically alleged that the corrupt practices were committed with the consent of the candidate and that a particular electoral right of a person was affected. It cannot be left to time, chance or conjecture for the court to draw inference by adopting an involved process of reasoning. Where the alleged corrupt practice is open to two equal possible inferences the pleadings of corrupt practice must fail. Where several paragraphs of the election petition alleging corrupt practices remain unaffirmed under the verification clause as well as the affidavit, the unsworn allegation could have no legal existence and the court could not take cognizance thereof. Charge of corrupt practice being quasi-criminal in nature the court must always insist on strict compliance with the provisions of law. In such a case it is equally essential that the particulars of the charge of allegations are clearly and precisely stated in the petition. It is the violation of the provisions of section 81 of the Act which can attract the application of the doctrine of substantial compliance. The defect of the type provided in Section 83 of the Act on the other hand can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure. Non-compliance with the provisions of Section 83 may lead to dismissal of the petition if the matter falls within the scope of Order 6 Rule 16 and Order 7 Rule 11 of the Code of Civil Procedure. Where neither the verification in the petition nor the affidavit gives any indication of the sources of information of the petitioner as to the facts stated in the petition which are not to his knowledge and the petitioner persists that the verification is correct and the affidavit in the form prescribed does not suffer from any defect the allegations of corrupt practices cannot be inquired and tried at all. In such a case the petition has to be rejected on the threshold for non-compliance with the mandatory provisions of law as to pleadings. It is no part of the duty of the court suo motu even to direct furnishing of better particulars when objection is raised by the other side. Where the petition does not disclose any cause of action it has to be rejected. The court, however, cannot dissect the pleadings into several parts and consider whether each one of them discloses a cause of action. The petition has to be considered as a whole. There cannot be a partial rejection of the petition."

It is thus clear that non-disclosure of source of information about corrupt practice in the affidavit is fatal to the election petition.

Similarly in the case of ***Ravinder Singh*** (supra) the Hon'ble Supreme Court held as follows :

> "**11.** Section 83 of the Act is mandatory in character and requires not only a concise statement of material facts and full particulars of the alleged corrupt practice, so as to present a full and complete picture of the action to be detailed in the election petition but under the proviso to Section 83 (1) of the Act, the election petition levelling a charge of corrupt practice is required, by law, to be supported by an affidavit in which the election petitioner is obliged to disclose his source of information in respect of the commission of that corrupt practice. The reason for this insistence is obvious. It is necessary for an election petitioner to make such a charge with full responsibility and to prevent any fishing and roving inquiry and save the returned candidate from being taken by surprise. In the absence of proper affidavit, in the prescribed form, filed in support of the corrupt practice of bribery, the allegation pertaining thereto, could not be put to trial- the defect being of a fatal nature."

12. As has been seen earlier, in the instant case, the petitioner has filed two affidavits, besides verification in support of the election petition. In the first affidavit, which is apparently filed as required under Order 6 Rule 15(4), C.P.C., it is stated that paragraphs-15 (A) to 15(Q) of the election petition are material facts relating to corrupt practice and such statements are true to the best of knowledge of the petitioner. However in the affidavit in Form-25 under Rule 94-A of the Conduct of Election Rules, in paragraph (b) thereof it has been stated that paragraphs-15(A) to 15(Q) of the election petition which are statements relating to corrupt practice are true to the information of the petitioner. But the source of such information has not been indicated in the affidavit. The two affidavits are wholly inconsistent and irreconcilable and not amenable to rectification or reconciliation. The defect goes to the very root of the matter and hence incurable and not merely cosmetic or technical in nature. Therefore, the ratio laid down in the cases of ***V. Narayana Swamy*** and ***Ravinder Singh*** is fully applicable and hence the defect in the affidavits is fatal and the election petition is liable to be dismissed at the threshold.

13. Another contention raised by the learned counsel for the respondent is that the copies of the affidavits accompanying the copy of the election petition served on the respondent are not in conformity with Section 83(1) (c) proviso as they do not disclose that the affidavits were sworn or affirmed before the Oath Commissioner or the Notary or the Magistrate of First Class since they do not bear the endorsement of any such Officer and as such they cannot be said to be the true copy and hence the election petition is liable to be dismissed at the threshold. In this respect he relied upon the decision of the Hon'ble apex Court in the case of ***Dr. Shipra (Smt) & Others v. Shantilal Khoiwal and others: (1996) 5 SCC 181,*** wherein the fact situation was exactly similar to the present case. In that case the copy of the affidavit supplied to the respondent did not contain the verification by the Notary or Oath Commissioner or the Magistrate. The Hon'ble apex Court took into consideration several decisions on the point and noticed the principles laid down by the Hon'ble apex Court in the case of ***Mithilesh Kumar Pandey v. Baidyanath Yadav :AIR 1984 SC 305*** to the following effect:

> "xxx xxx xxx … … …(1) that where the copy of the election petition served on the returned candidate contains only clerical or typographical mistakes which are of no consequence, the petition cannot be dismissed straightaway under Section 86 of the Act.
>
> (2) a true copy means a copy which is wholly and substantially the same as the original and where there are insignificant or minimal mistakes, the court may not take notice thereof,
>
> (3) where the copy contains important omissions or discrepancies of a vital nature, which are likely to cause prejudice to the defence of the returned candidate, it cannot be said that there has been a substantial compliance of the provisions of Section 81(3) of the Act,
>
> (4) prima facie, the statute uses the word 'true copy' and the concept of substantial compliance cannot be extended too far to include serious or vital mistakes which shed the character of a true copy so that the copy furnished to the returned candidate cannot be said to be a true copy within the meaning of Section 81(3) of the Act, and
>
> (5) as Section 81(3) is meant to protect and safeguard the sacrosanct electoral process so as not to disturb the verdict of the voters, there is no room for giving a liberal or broad interpretation to the provisions of the said section."

Keeping in mind the aforesaid principles, the Hon'ble apex Court in the case of ***Dr. Shipra*** (supra) held as follows:

> "**11.** *In Purushottam v. Returning Officer* the present question had directly arisen. In that case the copy contained omission of vital nature, viz., the attestation by the prescribed authority. The High Court had held that the concept of substantial compliance cannot be extended to overlook serious or vital mistakes which shed the character of a true copy so that the copy furnished to the returned candidate cannot be said to be a true copy. We approve of the above-view. Verification by a Notary or any other prescribed authority is a vital act which assures that the election petitioner had affirmed before the Notary etc. that the statement containing imputation of corrupt practices was duly and solemnly verified to be correct statement to the best of his knowledge of information as specified in the election petition and the affidavit filed in support thereof; that reinforces the assertions. Thus affirmation before the prescribed authority in the affidavit and the supply of its true copy should also contain such affirmation so that the returned candidate would not be misled in his understanding that imputation of corrupt practices was solemnly affirmed or duly verified before the prescribed authority. For that purpose, Form 25 mandates verification before the prescribed authority. The object appears to be that the returned candidate is not misled that it was not duly verified. The concept of substantial compliance of filing the original with the election petition and the omission thereof in the copy supplied to the returned candidate as true copy cannot be said to be a curable irregularity. Allegations of corrupt practices are very serious imputations which, if proved, would entail civil consequences of declaring that he became disqualified for election for a maximum period of six years under Section 8-A, apart from conviction under Section 136 (2).Therefore, compliance of the statutory requirement is an integral part of the election petition and true copy supplied to the returned candidate should as a sine qua non contain the due verification and attestation by the prescribed authority and certified to be true copy by the election petitioner in his/her own signature. The principle of substantial compliance cannot be accepted in the fact-situation.

> **17.** The question that must be posed, as indicted by this Court's previous decisions, is: Does the document purporting to be a true copy of the election petition mislead in a material particular? The "true copy" of the election petition furnished by the appellant (election petitioner) to the respondent (the successful candidate) did not show that the appellant's affidavit supporting his allegations of corrupt practice had been duly sworn or affirmed. Where corrupt practice is alleged, the election petitioner must support the allegation by making an affidavit in the format prescribed. An affidavit must be sworn or affirmed in the manner required by law, or it is not an affidavit. The document purporting to be a true copy of the election petition furnished by the appellant to the respondent gave the impression that the appellant's affidavit supporting his allegations of corrupt practice had not been sworn or affirmed and was, therefore, no affidavit at all; it misled in a material particular and its supply was, as the High Court held, fatal to the election petition."

14. Learned counsel for the petitioner, on the other hand, contends that in view of the Constitution Bench decision in the cases of ***Murarka Radhey Shyam Ram Kumar*** (supra), ***T.M. Jacob v. C. Poulose and others : (1999) 4 SCC 274*** and similar other decisions, the law laid down in ***Dr. Shipra*** (supra) cannot be said to be good law.

In the case of ***Murarka Radhey Shyam Ram Kumar*** (supra) where the copy of the election petition served on the returned candidate was attested and signed by the election petitioner as a true copy, but there was absence of signature of the election petitioner below the word, 'petitioner' and also there was some minor defect committed by the Oath Commissioner in the verification, it was held that the defect was not fatal to the election petition. The Court further held that the word "copy" does not mean an absolutely exact copy, but means that the copy shall be so true that nobody can by any possibility misunderstand it.

15. In ***Dr. Shipra*** (supra), the Hon'ble apex Court did take note of ***Murarka Radhey Shyam Ram Kumar*** (supra) and similar other decisions and in paragraph-10 of the judgment held as follows:

> "**10.** ... … … … We have carefully gone through all the cited decisions and given our anxious consideration to the respective contentions. In none of the cases the present question had arisen. In

> all the cases, though the affidavit or the election petition contained allegations of corrupt practices and true copies were served, the omissions in the copies were not of material facts which become an integral part of the election petition or of the pleadings. Therefore, this Court had not insisted upon strict standard of the scrutiny as required under Section 86."

In the case of ***T.M. Jacob*** (supra) the copy of the affidavit in support of allegations of corrupt practice made in the petition contained endorsement that the affidavit had been duly signed, verified and affirmed by the petitioner before a Notary and the Notary had also signed below the endorsement but name, address and stamp and seal of the Notary was missing in the copy of the affidavit. It was therefore held by the Hon'ble apex Court that there was substantial compliance with requirements of Section 81(3) read with Section 83 (1) (c) of the Act and the defect in the copy was not vital and had not misled the returned candidate. While so holding the Bench took into consideration the decision in ***Dr. Shipra*** (supra) and held that ***Dr. Shipra*** (supra) was distinguishable on facts. Nowhere, it has been held that ***Dr. Shipra*** did not lay down the correct position of law or that it was not good law.

16. In the instant case, the copies of affidavits served on the respondent do not contain the endorsement of the Oath Commissioner at all and, therefore, the fact situation is exactly similar to the case of ***Dr. Shipra*** (supra) and, therefore, relying on the principles laid down therein it must be held that the copy of the affidavits served on the respondent cannot be said to be true copy and as such the election petition is liable to be dismissed under Section 86 read with Section 81 (3) of the Act.

17. The next contention of the learned counsel for the respondent is that the allegations in the election petition and the material facts those are described in 15(A) to 15(Q) of the election petition do not make out any cause of action.

18. Grounds for declaring the election of the returned candidate void have been prescribed in sub-section (1) of Section 100 of the Act, which are extracted hereunder :

> "**100. Grounds for declaring election to be void-**(1) Subject to the provisions of sub-section (2) if the High Court is of opinion-

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act [or the Government of Union Territories Act,1963 (20 of 1963)]; or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(i) by the improper acceptance or any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate [by an agent other than his election agent] or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, [the High Court] shall declare the election of the returned candidate to be void]"

19. Section 123 of the Act in Clauses (1) to (8) describe different types of corrupt practice. The allegations of corrupt practices as averred in paragraphs 15(A) to 15(Q) of the election petition relate to failure of the Returning Officer and Counting Supervisors to fill up certain columns in Part-I of Form 17(C) in respect of certain booths and failure to put initial in respect of some corrections or re-writings in respect of some entry in such forms and the like. It is alleged that such defects would imply that the Presiding Officer consciously committed such defects to manipulate the process of counting. There is however no averment as to how many votes were polled in each of such booths in respect of which defects or deficiencies in Form 17(C) were found and by virtue of such implied manipulation how and to what extent the returned candidate has been benefited and/or the petitioner has been adversely affected. There is also no averment as to in what manner and to what extent the result of election has been affected due to the alleged defects in Form-17 (C). Law does not mandate that for such defects in Form-17(C) the votes polled in the particular booths should be out rightly rejected or

discarded. The pleadings in the election petition are vague, evasive and speculative and found wanting in material facts constituting corrupt practice as envisaged under Section 100 (1) (b) or on the ground of non-compliance of the provision of the Act and the Rules as contemplated in Section 100 (1) (d) (iv) of the Act.

20. As seen earlier in ***V. Narayana Swamy*** (supra) that there is difference between "material facts" and "material particulars". While failure to plead material facts is fatal to the election petition the absence of material particulars can be cured at a later stage by an appropriate amendment. "Material facts" mean the entire bundle of facts, which would constitute a complete cause of action and these must be concisely stated in the election petition as mandated in Section 83 (1) (a). Under Section 83(1) (b), the election petition must contain full particulars of any corrupt practice which are different from material facts on which the petition is founded. Non-compliance with the provisions of Section 83 may lead to dismissal of the petition if the matter falls within the scope of Order 6 Rule 16 and Order-7 Rule-11 C.P.C. Similar view has also been expressed in the case of ***K.K. Ramachandran Master v. M.V. Sreyama Kumar and others: (2010) 7 SCC 428, Ponnala Lakshmaiah v. Kommuri Pratap Reddy and others : (2012) 7 SCC 788*** and ***Jitu Patnaik v. Sanatan Mohakud and others : (2012) 4 SCC 194.***

21. In ***Umesh Challiyill v. K.P. Rajendran, reported in (2008) 11 supreme court cases 740,*** the following observation has been made in para-19 of the judgment which is necessary for guidance while deciding as to what should the election petition contain where the election has been challenged on the ground of corrupt practice:

> "In *R.P. Moidutty v. P.T. Kunju Mohammad* Their Lordships have expressed that heavy onus lies on the election petitioner seeking setting aside of the election of a successful candidate to make out a clear case for such relief both in the pleadings and at the trial. The mandate of the people should not be interfered with lightly and it emphasized that under Section 83 of the Act ordinarily it would suffice if the election petition contains a concise statement of the material facts relied on by the petitioner but in the case of corrupt practice the election petition must set forth full particulars thereof including as full a statement as possible of the names of the parties

alleged to have committed such corrupt practice, the date and place of the commission of each such practice."

22. In ***Ravinder Singh v. Janmeja Singh and others, reported in (2000) 8 SCC 191***, it is observed that in respect of alleged corrupt practice the election petitioner is obliged to disclose his source of information in respect of the commission of the alleged corrupt practice which is necessary to prevent any fishing and roving inquiry and save the return candidate from being taken by surprise.

23. In a recent decision reported in ***2014(II) CLR (SC)-839 (C.P. John v. Babu M. Pallissery & Ors.***), it is observed by the Hon'ble apex Court that an election petition should set forth full particulars of the alleged corrupt practice and while doing so it should specially state the names of the parties who are alleged to have committed such corrupt practice and also the date and place where such corrupt practice was committed. In other words, it is observed that the particulars relating to corrupt practice should not be lacking in any respect.

In para-20 of the said judgment it is further observed as follows :

"Therefore, a conspectus reading of Section 83(1)(a) read along with its proviso of the Act, as well as, Rule-94-A and Form No.25 of the Rules make the legal position clear that in the filing of an Election Petition challenging the successful election of a candidate, the election petitioner should take extra care and leave no room for doubt while making any allegation of corrupt practice indulged in by the successful candidate and that he cannot be later on heard to state that the allegations were generally spoken to or as discussed sporadically and on that basis the petition came to be filed. In other words, unless and until the election petitioner comes forward with a definite plea of his case that the allegation of corrupt practice is supported by legally acceptable material evidence without an iota of doubt as to such allegation, the Election Petition cannot be entertained and will have to be rejected at the threshold. It will be relevant to state that since the successful candidate in an election has got the support of the majority of the voters who cast their votes in his favour, the success gained by a candidate in a public election cannot be allowed to be called in question by any unsuccessful candidate by making frivolous or baseless allegations and thereby unnecessarily drag the successful

candidate to the Court proceedings and make waste of his precious time, which would have otherwise been devoted for the welfare of the members of his consistency."

24. It is held by the apex Court in the case of ***Hari Shankar Jain v. Sonia Gandhi: (2001) 8 SCC 233*** as follows :

"**23.**Section 83(1) (a) of R.P.A., 1951 mandates that an election petition shall contain a concise statement of the *material facts* on which the petitioner relies. By a series of decisions of this Court, it is well settled that the material facts required to be stated are those facts which can be considered as material supporting the allegations made. In other words, they must be such facts as would afford a basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of Civil Procedure,1908. The expression "cause of action" has been compendiously defined to mean every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of court, Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of the party is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. (*See Samant N. Balkrishna v. George Fernandez, Jitendra Bahadur Singh v. Krishna Behari.)* Merely quoting the words of the section like chanting of a mantra does not amount to stating material facts. Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary. In *V.S. Achuthanandan v. P.J. Francis* this Court has held, on a conspectus of a series of decisions of this Court, that material facts are such preliminary facts which must be proved at the trial by a party to establish existence of a cause of action. Failure to plead "material facts" is fatal to the election petition and no amendment of the pleadings is permissible to introduce such material facts after the time –limit prescribed for filing the election petition."

25. Considering the nature of pleadings as seen in paragraph no.19 above it must be held that they are wanting in material facts and, therefore, the election petition does not disclose cause of action and, therefore, liable to be dismissed.

26. In the light of the discussions made above, the misc. case is allowed and the election petition (ELEPT No.14 of 2014) stands dismissed.

Application allowed.

2015 (I) ILR - CUT- 974

S.K.MISHRA, J.

CRLA. NO. 79 OF 2008

SANTOSH PATRA & ORS. ……..Appellants

.Vrs.

STATE OF ORISSA ……Respondent

N.D.P.S. ACT, 1985 – Ss. 52, 55

Seizure of contraband – Two conditions required to be fulfilled – An Officer may accompany the seized articles shall be allowed by the officer-in-charge of the police station to affix his seal to such articles and take samples there of – It is further required that all samples so taken shall also be sealed with the seal of the officer-in-charge of the police station.

In this case it is not proved that the sample packets which are drawn by P.W.1 were also sealed with the seal of the O.I.C. of the police station in whose interim custody the articles were kept after detection of the seizure – The brass seal used to seal the articles and sample packets has not been produced in the Court – P.W.4 has denied that the brass seal was kept in his zima on execution of a zimanama – Non compliance of Sections 52 and 55 of the Act – Held, impugned judgment of conviction and sentence is setaside.

(para- 24,25)

For Appellants : M/s. Biswajit Nayak
M/s. Manoj Kumar Rajguru
& B.K.Mishra
M/s. S.Behera, S.P.Mishra &
S.L.Choudhury.
For Respondent : Additional Standing Counsel

Date of judgment:10.11.2014

JUDGMENT

S.K.MISHRA,J.

The appellants assail the judgment dated 22.12.2007 passed by learned Addl. Sessions Judge-cum-Special Judge, Bargarh, in C.T. Case No.166/2006 convicting them for the offence under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "Act" for brevity) and sentencing each of them to undergo R.I. for ten years and to pay a fine of Rs.1,00,000/- each in default to undergo R.I. for a further period of one year.

2. The prosecution case as revealed from the record may be stated succinctly as follows:-

On December 18, 2008 at 4.00 P.M. a secret message was received by Sub-Inspector of Excise, District Mobile, Bargarh Shri Jyotirmay Patel (P.W.1) that ganja was being transported in a silver colour Indica Car bearing Regn. No.0R-07-E-4411 which was coming towards Bhatli road, Bargarh Town. The information was reduced by P.W.1 into writing. He sent a copy thereof to his immediate superior authority, viz. to the Inspector of Excise Bargarh as per Ext.18 and thereafter proceeded towards the spot where the car was expected to come. On reaching the spot, the raiding party found a Indica car bearing the aforesaid registration number on the verge of moving on the Highway but the vehicle could not move, possibly having developed some ignition trouble. It was found that four persons were sitting in the vehicle on the verge of moving and it was being driven by the 5th man who disclosed his identity as A-1, Santosh Patra. In presence of witnesses, Sub-Inspector of Excise -Shri Jyotirmaya Patel (P.W.1) disclosed his identity and intention of search and gave an option to the accused persons as per Ext.1 as to whether they wanted to be searched in presence of a Magistrate or in presence of a gazetted officer. The accused persons, it is alleged, opted for search in presence of a gazetted Officer. On the requisition of P.W.1, the Sub-Divisional Police Officer, Bargarh, Shri Prasanta Kumar Bhoi (P.W.3), who is a gazetted Officer arrived at the spot. On personal search of the accused persons no incriminating was found on their person. When the car was searched, a brown colour air bag, a royal colour attaché box, a red brown colour air bag, a black colour air bag and one sky colour allwyn attaché were

found in the dickey of the Indica car. The bags were filled with ganja wrapped in polythenes. Weighing scale were brought and the polythene packets taken out from each container were weighed separately. It was found each bag contained 8 kgs., 9.2 kgs, 10.8 kgs, 8.4 kgs. and 7.6 kgs. Ganja respectively. Thereafter, P.W.1 collected samples of 25 grams of ganja from each container in two separate packets. The sample packets and remaining ganja as found in each bags were sealed separately at the spot as required by law, and thereafter all necessary steps were taken under the Act and rules. P.W.1 prepared the seizure list, Ext.3, at the spot in presence of the witnesses and copies of the same were supplied to the accused persons and their endorsement obtained in Ext.3. At the spot, P.W.1 registered a case vide District Mobile Excise Case No.45/2006-2007 dated 18.12.2006 against the accused persons under Section 20 of the Act. The accused persons were interrogated. The driver of the vehicles could not produce his driving license as well as documents of the vehicle. The case was accordingly seized as per seizure list Ext.3. Immediately thereafter, the seized containers, the sample packets, seized vehicle and the accused persons were handed over to the Officer-In-Charge, Bargarh Police Station, who resealed the seized articles. P.W.1 kept his brass seal in custody of witness, namely Tikeswar Sahu(P.W.4), the samples were analyzed by the Chemical Examiner, who filed a report vide Ext.13, with the finding that the samples were that of ganja, cannabis as defined under Section 2(iii) (b) of the Act. On being satisfied about commission of offence under section 20 of the act by the five accused persons they being unable to explain their physical possession, P.W.1 prosecuted them for alleged commission of offence. After framing of charge, the accused persons pleaded not guilty and, accordingly, they faced trial

3. To substantiate its case, the prosecution has examined five witnesses. P.W.1-Jyoritmaya Patel is the Sub-Inspector, District Mobile, Bargarh, who happens to be the informant and the Investigating Officer of the case, P.W.2-Krushna Chandra Sahu is the Excise Constable, who was a member of the raiding party, P.W.3-Prasanta Kumar Bhoi is the gazetted officer of the rank of Deputy Superintendent of Police in whose presence search and seizure were made, P.W.4-Tikeswar Sahu and P.W.5-Naba Kishore Pattnaik are the so called independent witnesses to the search and seizure. They have not supported the case of the prosecution at the trial and resiled from their earlier statement made before t he Investigating Officer. Besides examining

witnesses the prosecution has proved and exhibited eighteen documents and also produced material objects marked as M.Os.I to X at the trial.

4. The defence, on the other hand, has neither examined any witness nor produced any document in support of their case.

5. At the time of trial, the accused persons took the plea of complete denial. Their specific case is that they had come to Bargarh to attend a function and while moving around Bargarh Bus Stand, they had been apprehended and implicated in the case.

6. The learned Special Judge, Bargarh, taking into consideration the evidence led on behalf of the prosecution especially the evidence of P.Ws.1 to 3 and the contents of the document filed, has come to the conclusion that the prosecution has proved that the contraband weighing 44 kgs. of ganja, which were seized in course of investigation and inferred that the appellants were in joint criminal possession of the contraband. Therefore, he proceeded to convict and sentence them as aforesaid.

7. In course of hearing, learned counsel appearing for appellant nos.2 to 5, in essences, raised two points. Firstly, it was contended that since the contraband articles were seized from a car, which were occupied by five persons, the exclusive and conscious possession of each of them of the contraband is not established. In this connection, they rely upon the reported case of ***Avtar Singh and others v. State of Punjab***; AIR 2002 SUPREME COURT 3343. Secondly, it is contended by the learned counsel for the appellants that there has been violation of Section 52(3) and Section 55 of the Act. Hence the accused should be set at liberty holding that the prosecution has not proved its case beyond reasonable doubt.

8. The learned Addl. Standing Counsel for the State, on the other hand, argued that possession need not be physical possession but can be constructive, having power and control over the article in question. He relied upon the case of ***Gunwanti Lal V. State of M.P.***; AIR 1972 SC 1756. He further, contended that once possession is established presumption under Section 35 of the Act applied similar to the position in terms of Section 54 where also presumption is available to be drawn for possession of illicit articles. He relies upon the case of ***Madan Lal & another v. State of Himachal Pradesh***; (2003)26 OCR(SC) 287.

9. An examination of the evidence led on behalf of the prosecution reveals that P.Ws.1 to 3 support the prosecution whereas two independent witnesses P.Ws.4 and 5 have turned hostile to the prosecution. On the basis of such hostility of the two witnesses, the learned counsel for the appellants contended that there is no independent corroboration of the evidence of P.Ws.1 to 3 and, therefore, the appellants should not be held guilty of the offence as exclusive and conscious possession could not be proved through the official witnesses.

10. It is seen from the record that the learned Special Judge has taken into consideration the reported case of ***Danardan Patro v. State of Orissa***; 2002(II) OLR 443, wherein this Court has held that in a criminal case the decision should not depend on the whims or mercy of some untrustworthy person who supported the prosecution at the time of investigation and turned hostile at the time of trial. Of course, if any positive evidence is available from such hostile witness that should be duly considered and appreciated. Learned Special Judge has further noted the observation that mere plea of denial or ignorance about the occurrence by such hostile witness is not detrimental to the prosecution in view of other acceptable evidence is on record to prove the charge.

11. Learned trial judge has also taken into consideration the case of ***Kandhuri Charan Mohanty v. State of Orissa;*** (2003) 24 OCR 3 which is also a case under Section 29(b)(i) of the Act. It is held in paragraph-7 of the judgment that there is no dispute on the principle of law that evidence of official witnesses shall not be discarded for want of independent corroboration or on the mere ground that they are official witnesses. It is, however, well settled that evidence of official witnesses in the absence of independent corroboration because of hostile attitude of the independent witnesses, should be assessed carefully while considering the truth or falsity in the allegation and merit of that evidence. That apart in the case of ***State Government of NCT Delhi V. Sunil and another;*** 200(7) Supreme 728, it has been held by the Supreme Court that it is not legally approvable procedure to presume the police action as unreliable to start with nor to jettison such action merely for the reason that independent person did not support the prosecution case.

12. Thus, on a careful examination of the evidence of P.Ws.1 to 3, this Court found that there is ample corroboration of the factum of seizure by each other and the Court, that has recorded their evidence, has come to the

conclusion that these witnesses are trustworthy and reliable witnesses. The appellate court should not lightly brush aside such conclusion as the trial judge has seen the demeanor of the witnesses as the evidence has been recorded in his presence. Thus, hostility of P.Ws.4 and 5 will not help the appellants in throwing away the case of the prosecution.

13. P.W.1 gave a detailed narration of the fact which is in tune with averments incorporated in his first information report lodged at the spot. He found accused Santosh Kumar Patra and four other accused persons in that car. M.Os.1 to V were found in the dickey of Indica car where those five accused persons were traveling. The driver neither had any driving licence nor the documents of the vehicle were with him. No one came forward to claim the vehicle. The search and seizure was made in presence of a Deputy Superintendent of Police. The evidence shows that immediately after formalities of search and seizure were performed, the accused persons and seized articles were produced before the Officer-in-charge, Bargarh Police Station for safe custody.

14. It is not disputed that the vehicle from which the seized air bags and attaché were seized were occupied by five persons. So relying upon the case of ***Avtar Singh and others v. State of Punjab (supra),*** learned counsel for the appellants contended that it is quite probable that one of them could be the custodian of goods whether or nor he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods.

15. The Supreme Court in the case of ***Megh Singh v. State of Punjab***; (2003) 26 OCR (SC)-523 has held as follows:

> "The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in ***Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Orsa.*** (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.
>
> The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

> As noted in ***Gunwantlal v. The State of M.P.*** (AIR 1972 SC 1756) possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person whom physical possession is given holds it subject to that power or control.
>
> The word 'possession' means the legal right to possession (See ***Health v. Drown*** (1972) (2) AII ER 561 (HL). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See ***Sullivan v. Earl of Caithness*** (1976 (1) AII ER 844 (QBD)).
>
> Once possession is established, the person who claims that it is not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in ***Madan Lal and Anr. V. State of Himachal Pradesh*** (2003) 26 OCR (SC) 287."

16. In the case of ***State of Hariyana v. Jarnail Singh and others;*** (2004)28 OCR 430 such joint possession has been upheld by the Supreme Court and conviction has been recorded.

17. From reading of the aforesaid cases reveals that in the case of ***Madanlal and another v. State of Himachal Pradesh (supra)*** four persons were traveling in a car together, in the case of ***Megh Singh v. State of Punjab (supra)*** three persons were found sitting on gunny bags and in the case of ***State of Hariyana v. Jarnail Singh and others (supra)*** three persons were sitting in the cabin of the tanker and the 4th man was driving the vehicle. From the middle chamber of that tanker 73 gunny bags containing poppy husk were recovered and in all the three cases it was held that the recovery of the contraband were from the conscious possession of the accused persons.

18. Therefore, in view of the aforementioned decisions in favour of the prosecution, this Court is not inclined to accept the view taken by the Supreme Court in the case of ***Avtar Singh and others v. State of Punjab***

(supra). Thus, this Court holds that the prosecution has proved its case beyond all reasonable doubt that 44 kgs. of ganja were seized from the possession of all the accused persons and this Court is not inclined to interfere with the findings recorded by the trial court on that score.

19. The next important contention raised by the learned counsel for the appellants that there has been violation of Sections 52 and 55 of the Act. Section 52 of the Act reads as follows:

"Section 52. Disposal of persons arrested and articles seized.

(1) Any officer arresting a person under Section 41. Section 42, Section 43 or Section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under Sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under Sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to,

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under Sec.53.

(4) The authority or officer to whom any person or article is forwarded under Sub-section (2) or Sub-section (3) shall, with all convenient dispatch, take such measures as may be necessary for the disposal according to law of such person or article."

Section 55 of the Act reads as follows:

"Section 55- Police to take charge of articles seized and delivered- An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."

20. In this case it is seen that after seizure, P.W.1 produced the seized article and the accused persons before the Officer-in-charge Bargarh Police Station. Ext.5 is the written requisition, Ext.5/1 is the endorsement of Officer-in-charge, Bargarh Police Station. The Officer-in-charge of Bargarh Police Station has not been examined in this case. The Malkhana Register of that Police Station has not been produced and the relevant entry has not been proved in this case.

21. It is further evident from the statement of P.W.1 that on 19.12.2006 he took custody of the accused persons and the seized articles from Officer-in-charge as per his requisition, Ext.6, and produced the accused persons and seized articles before the Special Court. The accused persons were remanded to judicial custody by the Judge, Special Court. However, in absence of Nazir of the court the seized articles in sealed conditions could not be deposited in court Malkhana and redeposited in a police station Malkhana vide requisition Ext.7 and Ext.7/1 is the acknowledgement of Sub-Inspector-in-charge of Malkhana. Learned court below has held that these two aspects of keeping the seized materials in the custody of the officer-in-charge of the Bargarh Police and redepositing the seized articles in the Police Station Malkhana which is by giving the same to the S.I.-in-charge of the Malkhana are not controverted in this case. The reasoning is fallacious. It is for the prosecution to establish that after seizure of the contraband article till the same was produced before the court and sent for chemical examination, the same should be kept in proper custody so that there will be no chance of any foul play. However, the evidence of P.W.1, in cross examination, at paragraph 17 shows that he has not indicated the relevant time when the seized articles and sample packets were obtained from the Police Station Malkhana for depositing in Court.

22. Similar situation arose in the reported case of ***Jadaba Dehury @ Dehery v. State of Orissa***; (2009) 44 OCR-320 wherein this Court taking into consideration the case of ***Kedarnath Mallik @ Kedar Mallik v. State of Orissa;*** 2001 Crl.L.J. 1307 has held that it is well settled that non-compliance of mandatory requirements of the N.D.P.S. Act render a prosecution there under invalid in law and in the facts of non-compliance of the mandate of Section of 55 of the Act shall render the prosecution case vulnerable.

23. Sub-section (3) of Section 52 of the Act provides that every person arrested and article seized under Sub-section (2) of Section 41, Section 42, Section 43 or Section 44 shall be forwarded without unnecessary delay to, (a)the officer-in-charge of the nearest police station, or (b) the officer empowered under Sec.53. In this case, it is the case of the prosecution that after seizure of the articles and arrest of the accused persons, the Officer investigating the case forwarded the same to the Officer-in-charge of the nearest Police Station, i.e. Bargarh Police Station. However, no officer of Bargarh Police Station has been examined by the prosecution in this case to substantiate the case put forth by the prosecution.

24. Section 55 of the Act provides that Police shall take in-charge of the articles seized till delivery. An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. This section provides that if any contraband is seized then the same shall be delivered to the Officer-in-charge of a nearest Police Station for safe custody pending orders of the Magistrate. The Officer-in-charge shall allow any Officer who may accompany such articles to the Police Station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. So two conditions were required to be fulfilled. An Officer may accompany the seized articles shall be allowed by the Officer-in-charge of the Police Station to affix his seal to such articles and take samples thereof. It is further required that all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. This provision has been violated in this case as it is not proved in the case that the sample packets, which are drawn by P.W.1, were also sealed with the seal of the O.I.C. of the Police Station in whose interim custody the articles were kept after detection of the seizure. It is further apparent from the record that the brass seal, which was used to seal the articles and sample packets, has not been produced in the Court. The prosecution witness P.W.4, namely Tikiswar Sahu, has denied that the brass seal was kept in his zima on execution of a zimanama. So all

these material aspects taken together create doubt in the mind of the court regarding the compliance of Sections 52 and 55 of the Act.

25. Accordingly, this Court is of the view that the appeal should succeed on the admitted non-compliance of Sections 52 and 55 of the Act and the order of conviction and sentence passed by learned Addl. Sessions Judge-cum-Special Judge, Bargarh, in C.T. Case No.166/2006 should be set aside. Hence the appeal is allowed. The judgment dated 22.12.2007 passed by the learned Addl. Sessions Judge-cum-Special Judge, Bargarh, in C.T. Case No.166/2006 convicting them for the offence under Section 20(b)(ii)(C) of the Act and sentencing each of them to undergo R.I. for ten years and to pay a fine of Rs.1,00,000/- each in default to undergo R.I. for a further period of one year is hereby set aside. The appellants are acquitted of the offence alleged. The appellants be set at liberty forthwith, if their detention is not required in any other case.

Appeal allowed.

2015 (I) ILR - CUT- 984

C.R.DASH, J.

W.P.(C) NO.3614 OF 2010

BIRA KISHORE PRADHAN .....Petitioner

.Vrs.

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

INDUSTRIAL DISPUTES ACT, 1947–Ss. 25-F, 25-P

Workman worked as casual labourer for eleven months – Retrenchment – Neither he was issued written order of appointment nor written order of termination – Non Compliance of Section 25- F of the Act – Admittedly some juniors of the petitioner are still working in the department which alone can not be a ground to award reinstatement – Held, considering the fact that the amount the petitioner would have got had he been allowed to work and his ability

to start to an honourable living, direction issued to O.P.2 to pay compensation of Rs. 75,000/- to the petitioner in lieu of reinstatement.

(Paras 16,17,18)

For Petitioner : M/s. Sanjay Kumar Mishra, P.K. Mohapatra & S. Dash.
For Opp. Parties : Addl. Government Advocate

Date of Judgment : 10.12.2014

JUDGMENT

C.R. DASH, J.

The award dated 25.06.2007 passed by the learned Labour Court, Bhubaneswar in I.D. Case No.15 of 1997 vide Annexure-1 is impugned in this writ petition.

2. The petitioner was working as a daily labourer under the Management of Notified Area Council, Jatni ('N.A.C.' for short) w.e.f. 21.01.1994 on daily wage of Rs.25/- (rupees twenty-five). All of a sudden the Management of N.A.C., Jatni terminated the service of the petitioner workman w.e.f. 18.05.1995 without any notice. The petitioner workman approached the Executive Officer of the N.A.C., Jatni for engagement, but in vain. On the other hand some other persons, who were quite junior to the petitioner workman, were allowed to work under the Management of the N.A.C., Jatni. With such background the petitioner workman raised an Industrial Dispute and the appropriate Government referred the matter under Section 10(1) read with Section 12 (5) of the Industrial Disputes Act. The reference reads as follows :-

> "Whether the action of the Management of Notified Area Council, Jatni in terminating the services of Sri Bira Kishor Pradhan, Casual Labourer w.e.f. 18.05.1995 is legal and/or justified ? If not, what relief Sri Pradhan is entitled to ?"

3. The Management of the N.A.C., Jatni, on being noticed, entered appearance and filed written statement. It was specifically averred in the written statement that the petitioner workman was working as daily labourer in the residence of the Executive Officer, Jatni N.A.C. from 01.06.1994 till 17.05.1995 @ Rs.25/- per day with intermittent break. The assertion of the petitioner workman to the effect that he was working w.e.f. 21.01.1994 to

17.05.1995 was denied. It was further averred in the written statement that the petitioner workman was not allowed to work by the N.A.C., Jatni w.e.f. 18.05.1995 without issuance of any notice for termination, as written appointment order was not issued by the Management at the time of engaging the petitioner workman. It was further averred in the written statement that Sri Manmaohan Rout, Manorama Katayat and Sri Shyam Sundar Sahoo were engaged as daily labourer at a date later to the engagement of the petitioner workman.

4. The Management however did not contest the proceeding and it was set ex parte vide order dated 17.11.2000.

5. The petitioner workman examined himself as W.W.1, and in his evidence he supported the averments made in his petition to the effect that he was engaged as daily labourer by the Management from 21.01.1994 to 17.05.1995. It was further deposed by him that his services were terminated w.e.f. 18.05.1995 by way of refusal of employment. The Management without following the procedure laid down in the Industrial Disputes Act, terminated his service though he had worked continuously for more than 240 days during twelve calendar months preceding the date of his termination from service.

6. Learned Presiding Officer, Labour Court, Bhubaneswar dismissed the claim of the petitioner workman on the ground that the petitioner has failed to prove that he was in continuous service within the meaning of Section 25 (B) of the Industrial Disputes Act, 1947 (for short 'the Act'). In reaching such conclusion, the P.O., Labour Court, Bhubaneswar relied on the decision of Hon'ble the Supreme Court in the case of **Range Forest Officer *vs*. S.T. Hadimani,** 2002-1 L.L.J. Supreme Court 1053. It was specifically held by the learned P.O., Labour Court, Bhubaneswar that only from the bald statement of the workman it cannot be said that the workman was in continuous service, and when the workman has failed to prove that he was in continuous service, he is not entitled to any benefit under Section 25-F of the Act, and consequently it cannot be held that termination of service of the petitioner workman by the Management w.e.f. 18.05.1995 was illegal in any way.

7. In spite of sufficiency of notice, the N.A.C., Jatni (opp. party no.2) has chosen not to appear in this case.

8. Learned counsel for the petitioner workman submits that refusal to allow a workman to work comes under the definition of 'retrenchment', as defined in Section 2 (oo) of the Act. It is further submitted that the petitioner being a poor workman and he having come to the witness box to say that he had worked continuously for 240 days, the burden of proof shifts to the Management to show that the workman had in fact not worked for a continuous period of 240 days. It is further submitted that, in this case the principle of "last come first go" having not been followed and some of the junior employees of the petitioner having been allowed to work after retrenchment of the petitioner from service, the petitioner is entitled to the benefit of reinstatement.

9. The petitioner workman, in the present case, has pleaded in his statement of claim as well as in the rejoinder that he had worked as a daily labourer from 21.01.1994 to 17.05.1995 continuously and was drawing his salary by signing vouchers. He substantiated such pleadings on leading oral evidence by examining himself as W.W.1. The evidence of the petitioner workman as W.W.1 goes uncontroverted, as the Management, N.A.C. was set ex parte on 17.11.2000. The Management, N.A.C. in its written statement has specifically admitted that the petitioner was working as a daily labourer @ daily wage of Rs.25/- from 01.06.1994 to 17.05.1995 with intermittent break. It is further averred by the Management, N.A.C. that at the time of appointment of the petitioner, no written appointment order was issued and for that reason it was not felt necessary to issue a written termination order. From the materials in the pleadings of the parties it is clear that the petitioner workman has worked for more than 240 days, even if it is accepted that he has worked from 01.06.1994 to 17.05.1995. No document was there, which would have been indicative of appointment or termination of the petitioner. The petitioner therefore could not have proved any documentary evidence showing his appointment and termination. The petitioner workman in his rejoinder has specifically asserted that he was drawing his salary by signing vouchers. If the Management, N.A.C. would have contested the proceeding, the petitioner workman could have asked the Management, N.A.C. to produce the vouchers or any other documents to substantiate his claim. The Management having been set ex parte, the workman was left with no choice but to leave the matter after examining him as a witness. The evidence of the workman however goes uncontroverted. Hon'ble Supreme Court in the case of **Director, Fisheries Terminal Division *vs.* Bhikubhai Meghajibhai**

Chavda, A.I.R. 2010 (SC) 1236, analyzing Sections 25-B and 25-F of the Act, in paragraphs 15, 16 and 17 of the judgment has ruled thus :-

> "15. The respondent claims he was employed in the year 1985 as a watchman and his services were retrenched in the year 1991 and during the period between 1985 to 1991, he had worked for a period of more than 240 days. The burden of proof is on the respondent to show that he had worked for 240 days in preceding twelve months prior to his alleged retrenchment. The law on this issue appears to be now well settled.
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> 16. This court in the case of R.M.Yellatty vs. Assistant Executive Engineer [(2006) 1 SCC 106], has observed:
>
> "However, applying general principles and on reading the aforesaid judgments, we find that this Court, has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping up in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-wage earners, there will be no letter of appointment of termination. There will also be no receipt of proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment of termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case."
>
> 17. Applying the principles laid down in the above case by this court, the evidence produced by the appellants has not been consistent. The appellants claim that the respondent did not work for 240 days. The respondent was a workman hired on a daily wage basis. So it is obvious, as this court pointed out in the above case that he would have difficulty in having access to all the official documents, muster rolls etc. in connection with his service. He has come forward and deposed, so in our opinion the burden of proof shifts to the employer/appellants to prove that he did not complete 240 days of service in the requisite period to constitute continuous service."

10. From the principle enunciated supra it is therefore clear that if the workman has come forward and deposed that he worked for 240 days, the burden of proof shifts to the employer to prove that the workman did not complete 240 days of service in the requisite period to constitute continuous service. Learned P.O., Labour Court has not been alive to the fact that whatever evidence had been lead by the petitioner workman had gone uncontroverted and the petitioner workman had no scope further to call the Management to produce any record to show that he had not, in fact, worked for 240 days in the requisite period to constitute continuous service. In view of such fact, it is to be held that the petitioner workman, in view of his oral evidence, had worked for 240 days in the requisite period to constitute continuous service and it was incumbent on the Management, N.A.C. to comply with the provision of Section 25-F of the Industrial Disputes Act while terminating his service.

11. Coming to the second contention raised by learned counsel for the petitioner workman, it is found from the written statement of the Management, N.A.C. that Sri Manmaohan Rout, Manorama Katayat and Sri Shyam Sundar Sahoo were engaged as daily labourer at a date later to the engagement of the petitioner workman. In view of the provisions contained in Section 25-G of the I.D. Act, if necessity of retrenchment of any workman was felt by the Management, N.A.C., then it should have resorted to the principle of "last come first go". Allowing juniors of the petitioner to remain in service while retrenching the petitioner from service is violative of Section 25-G of the Act, according to learned counsel for the petitioner.

12. Hon'ble Supreme Court, in the case of **Harjinder Singh *vs.* Punjab State Warehousing Corporation,** A.I.R. 2010 SC 1116, has held that the workman is not required to prove that he had worked for a period of 240 days within twelve calendar months preceding the termination of service, to attract application of Section 25-G of the Act. It is sufficient for him to plead and prove that while effecting retrenchment the employer has violated the principle of "last come first go" without tangible reasons.

13. It is admitted fact that three persons junior to the petitioner have been allowed to work while the petitioner's service has been terminated. From the materials on record and admission of the Management, N.A.C. it is found that there has been violation of the principle of "last come first go" and consequently there has been contravention of the provision of Section 25-G of the I.D. Act.

14. The Management, N.A.C. neither contested the proceeding before the P.O., Labour Court nor had appeared before this Court in spite of sufficiency of notice. For the callousness on the part of the Management, N.A.C. the poor and hapless workman cannot be allowed to suffer the technicalities and niceties of law.

15. Learned counsel for the petitioner has prayed for reinstatement of the petitioner with full back-wages.

16. Hon'ble Supreme Court, in the case of **Asst. Engineer, Rajastan Development Corporation *vs.* Geetam Singh,** 2013 I.L.R. 225, was seized with the question as to whether the direction to the employer for reinstatement with continuity of service and 25% back wages was legally sustainable, where a workman had worked only for eight months as a daily wager and his termination had been held to be in contravention of Section 25-F of the I.D. Act.

Partly allowing the Appeal filed by the Management, Hon'ble Supreme Court held that, in case of wrongful retrenchment of a daily wager, who worked for a short period, the award of reinstatement cannot be said to be proper and rather the award of compensation in such cases would be in consonance with the demand of justice. Before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors including the mode and manner of appointment, nature of employment, length of service, ground on which termination has been set aside and the delay in raising the industrial dispute before grant of relief in an industrial dispute.

17. Taking into consideration the aforesaid principle, it is found that the workman, in the present case, has worked barely for eleven months as a casual labourer. Neither he was issued with any written appointment order nor he was issued with any written termination order. In the meantime restriction has been imposed by the Housing and Urban Development Department of the Govt. of Odisha so far as appointments by Municipalities and N.A.Cs. are concerned. True it is that some of the juniors of the petitioner are still working in the Department, but that alone cannot be a ground to award reinstatement when much development has taken place in the meantime so far as public employment is concerned.

18. Taking into consideration all the aforesaid facts, present price index, the amount the petitioner would have got had he been allowed to work, and

ability of the petitioner to start an honourable living, this writ petition is allowed with a direction to the N.A.C., Jatni (opposite party no.2) to pay compensation of Rs.75,000/- (rupees seventy-five thousand) to the petitioner in lieu of reinstatement. The compensation amount be paid within two months, failing which the Management shall be liable to pay interest at the rate of 6% per annum. The Writ Petition is accordingly disposed of.

Writ petition disposed of.

2015 (I) ILR - CUT- 991

RAGHUBIR DASH , J.

MACA NOS. 82 & 97 OF 2013

DIVISIONAL MANAGER, NEW INDIA ASSURANCE CO. LTD. ……..Appellant

.Vrs.

SANDYARANI BEBARTA & ORS. ……..Respondents

MOTER VEHICLES ACT, 1988 – Ss.166,168

Motor accident – Computation of Compensation – Deceased left behind him a poultry farm and garment shop which was managed by him single handedly – Quantum of deprivation of income – Claimants might have engaged one person as manager to look after the deceased's business – For engagement of such manager dependants require to pay Rs 6,000/- per month – This being a departure from the normal rule on ascertainment of loss of dependency that amount should be taken as the actual loss of income and there should not be any deduction towards personal and living expenses nor any addition towards future prospect – Taking the sum of Rs. 6,000/- as loss of dependency per month and as the deceased was 37 years old at the time of accident adopting the multiplier of 15 it comes to Rs.10, 80, 000/- – This Court enhanced loss of Consortium from Rs. 10, 000/- to Rs. 1,00,000/- and funeral expenses from Rs. 5, 000/- to 25, 000/- and upheld Rs. 5000/- towards loss of estate and awarded total Compensation of Rs. 12,10, 000/- with 7% interest per annum.

(Paras 10,11)

For Petitioners : M/s. Mahitosh Sinha , P.R.Sinha & P.K.Mahali

For Opp. Parties : M/s. Kishore Kumar Jena , A.K.Mohapatra & S.N.Das.

Date of hearing : 13.03.2014
Date of judgment : 24.03.2014

JUDGMENT

R. DASH, J.

Both the appeals arise out of the award dated 2.11.2012 made in MACT Case No.345 of 2005 by the Member, 3rd Motor Accident Claims Tribunal, Bhubaneswar determining the just compensation at Rs.13,70,000/-. Appellants in MACA No.97 of 2013 are the petitioners/claimants and the appellant in MACA No.82 of 2013 is the insurer of the offending vehicle. D. Laxman Raju and M/s. Tata Motors Limited, Jamshedpur who are arrayed as respondents in both the appeals as opposite party Nos.1 and 2 before the learned Tribunal are the owner and manufacturer, respectively, of the offending vehicle.

2. The claim for compensation was filed under Section 166 of the Motor Vehicles Act, 1988 (for short, the Act) claiming a sum of Rs.40 lakhs as compensation on account of death of the deceased, namely, Premananda Bebarta in a vehicular accident taking place on 27.1.2005 at about 6.30 P.M. at Gandhi Chowk, Balugaon Bazar. The offending vehicle is a Truck bearing Registration No.JH-05- A/6529/P/05.

3. It is not understood as to why the manufacturer of the offending vehicle has been arrayed as a party in the claim case. He did not appear before the Tribunal and was set ex parte. The owner of the vehicle filed a rejoinder but did not participate in the proceeding. The Insurance Company challenged the petitioners' claim denying the validity of driving licence and insurance of the offending Truck. Before the Tribunal the claimants claimed that the deceased was having income from his business in garments and one Poultry Farm. His total income was more than Rs.15,000/- per month. It was further contended that at the time of his death he was 37 year of old. He left behind the petitioners as his dependants. Petitioner No.1 is his widow, petitioner Nos.2 and 3 are minor daughters and petitioner No.4 is his old mother.

4. The learned Tribunal having considered the evidence adduced before it came to a conclusion that the accident occurred due to the rash and/or negligent driving on the part of the driver of the offending vehicle. Though the impugned award reveals that the Insurance Company denied the insurance of the offending vehicle, no issue has been framed on that count and there is no observation anywhere in the impugned award as to whether the offending vehicle was under the coverage of insurance issued by the New India Assurance Co. Ltd., the appellant in MACA No.82 of 2013. However, the appeal memo is silent on the insurance matter and it is simply states that the Insurance Company had taken a specific stand that the driver of the Truck had no valid driving licence. The award has been challenged by the Insurance Company on several grounds but none of the ground is with regard to the absence of insurance coverage. Therefore, this Court presumes that there is no dispute about the offending vehicle being covered under insurance policy as on the date of accident. Determining the monthly income of the deceased at Rs.10,000/- and applying the multiplier of 12, the learned Tribunal calculated the total loss of income and after deducting 1/4th of the total income towards personal and living expenses of the deceased, the loss of dependency was worked out at Rs.13,50,000/-. Besides this amount, the learned Tribunal awarded Rs.10,000/- towards loss of consortium and Rs.5,000/- each towards loss of estate and funeral expenses. It also awarded cost of Rs.1,000/- and allowed interest at the rate of 7% from the date of filing of the claim petition till the date of payment. The claim petition was, accordingly, allowed ex parte against opposite party Nos.1 and 2, the manufacturer and the owner of the Truck, and on contest against opposite party No.3, the Insurance Company and directed the awarded amount to be paid by the Insurance Company.

5. The Insurance Company challenges the impugned award on the grounds that the monthly income of the deceased fixed notionally by the Tribunal is not only arbitrary but also highly excessive having no basis and that the rate of interest awarded is also on the higher side. The claimants in their appeal have challenged the award contending that the learned Tribunal has arbitrarily ignored the deceased's poultry business and the income derived there from while determining the monthly income of the deceased and that the loss of future prospect was not taken into account while determining the amount of compensation. It is also claimed that the deceased being 37 years of age at the time of his death, the multiplier of 16 should have been adopted by the learned Tribunal.

6. Both the sides having challenged the correctness of the determination of the monthly income of the deceased from his business, the evidence on record requires careful scrutiny. P.W.1 is the deceased's brother who claims that the deceased's monthly income was more than Rs.15,000/- and he used to contribute Rs.15,000/- every month for the maintenance of the family. With regard to the deceased's business he has further stated that he was having a Poultry Farm, besides his business in readymade garments. In connection with the Poultry Farm, he has produced a copy of a resolution (Ext.11) of the District Level Committee, Khurda showing that the State Government had sanctioned subsidy for the poultry farm in favour of the deceased. In support of his claim that the deceased was having business in readymade garments, he has produced some statements issued by the State Bank of India, Forest Park Branch in respect of Cash Credit Loan the deceased had availed to run his garment business. In crossexamination he failed to answer as to whether the deceased's garments shop had any 'sales tax number'. However, he admits that his brother was not an income tax assessee. P.W.2 is a retired District Agriculture Officer, Khurda district. He claims that during his incumbency the deceased's poultry farm was inspected from time to time while it was under construction and even after its completion. He claims to have seen the deceased running his Poultry Farm successfully wherein the investment was to the tune of Rs.3.50 lakhs. He claims that the deceased was earning profit of Rs.15,000/- approximately. But this statement is not supported by any document. He has exhibited a copy of the proceeding of the District Level Committee meeting of Krushi Sahayak Kendra, Khurda held on 4.3.2003 which is marked as Ext.11. It reflects that the deceased had executed a project on 'Poultry' and subsidy to the tune of Rs.69,772/- was sanctioned by the Committee towards the capital investment made in the project.

7. P.W.3, the deceased's wife also has deposed that her husband was running a Poultry Farm and a readymade garment shop and used to contribute Rs.15,000/- per month for the maintenance of the family. P.W.4 claims that he has got one garment manufacturing unit in the name and style "Indigo Casuals" and that his wife has a garment show-room in the name and style "Indigo Fashions". He has further stated that the deceased had a garment shop in the name "Anuchinta Garments" which was being financed by the State Bank of India and that the deceased used to purchase garments from "Indigo Fashions" and "Indigo Casuals". He further claims to have got knowledge that the deceased used to purchase garments from Cuttack and

Calcutta market and supply the same to the retailers at Chandpur, Tangi and Balugaon. He claims to have heard from the deceased that the latter was earning more than Rs.15,000/- per month out of his garment business and Poultry Farm. He has exhibited five bills marked Ext.12 series claiming that he had granted the bills to the deceased towards purchase of garments from "Indigo Fashions". In crossexamination, he has stated that he was supplying garments to the deceased from 2002 to 2005. He further states that carbon copy of all the bills are no more available with him and that he does not have any sales tax license.

8. Learned Tribunal has observed that the income from the deceased's garment business was not fixed and that mere submission of a project report does not mean that he had income out of the Poultry Farm. With this observation, the learned Tribunal made a notional assessment of deceased's monthly income at Rs.10,000/-. Though some receipts have been exhibited, those are related to deceased's garment business. Those are not sufficient to make assessment of the deceased's income from that business. The oral evidence is also not clear and cogent in order to assist the Court to give a positive finding on the income from the garment business. The same thing can be said about the Poultry Farm. The evidence adduced on behalf of the claimants show that the deceased was running a Poultry Farm but the oral evidence on the income from the Poultry Farm is not convincing. Therefore, the deceased's monthly income has to be made on some guess work. Since the applicants expect to get more compensation, chance of exaggerated statements with regard to deceased's income is always there. The oral evidence is to the effect that the deceased was having income of more than Rs.15,000/- per month from his business. Learned Tribunal has assessed the monthly income at Rs.10,000/-. In the absence of clear and cogent evidence, this Court does not find any reason to disagree with the finding of the learned Tribunal.

9. In case of death of a person whose source of income is his business, or who derives income from agriculture, the normal rule about deprivation of income is not strictly applicable. The loss of income has to be determined keeping in mind the fact that the assets would still continue with the family of the deceased and fetch income. In *New India Assurance Co. V. Yogesh Devi; (2012) 51 OCR (SC) 759*, the deceased was owner of three buses and he was the driver of one of the buses. He died in a motorcycle accident. In that case the apex Court observed that the assets, i.e., the three buses would still

continue with the family of the deceased and fetch income. The only difference would be that his heirs may have to engage a manager to manage the assets for which they would pay some amount to the manager and that they would have to engage a driver for the bus which the deceased was driving. So, the amounts required to be paid to the manager and the driver would be the loss to the claimants. In a case involving the death of an agriculturist, the apex Court has observed that the land possessed by the deceased still remains with the claimants. However, there is a possibility that the claimants may be required to engage persons to look after agriculture. Therefore, the normal rule about the deprivation of income is not strictly applicable to cases where agricultural income is the source (*AIR 2003 SC 3696; State of Haryana V. Jasbir Kaur*). In this case also the deceased left behind him the assets, i.e., the Poultry Farm and the garment shop. The deceased's only source of income is business. The quantum of deprivation of income is to be determined in accordance with the principle laid down in *New India Assurance Co. V. Yogesh Devi* and *State of Haryana V. Jasbir Kaur* (supra).

10. After the death of the deceased, the claimants might have engaged one person to look after deceased's business in garment so also the Poultry Farm which were being single-handedly managed by the deceased. The death occurred in the year 2005. For the engagement of a manager/supervisor to look after the deceased's business, the deceased's dependants would require to pay remuneration at least at the rate of Rs.6,000/- per month. This being is a departure from the normal rule on ascertainment of loss of dependency, this amount should be taken as the actual loss of income and there should not be any deduction towards personal and living expenses nor should there be any addition towards future prospect. Taking the sum of Rs.6,000/- as loss of dependency per month, the total loss of dependency adopting the multiplier of 15 (the multiplier is selected in accordance with the decision in Smt. Sarla Verma Vs. Delhi Transport Corporation; AIR 2009 SC 3104) comes to Rs.10,80,000/-. The learned Tribunal has awarded Rs.10,000/- towards loss of consortium, Rs.5,000/- towards loss of funeral expenses and Rs.5,000/- towards loss of estate. In *Rajesh V. Rajbir Singh; (2013) 9 SCC 54,* Hon'ble Supreme Court has observed that compensation for loss of consortium should at least be Rs.1,00,000/- and compensation for funeral expenses should at least be Rs.25,000/-. Therefore, the amount awarded towards loss of consortium as well as funeral expenses is liable to be enhanced to Rs.1,00,000/- and Rs.25,000/- respectively. The learned Tribunal has awarded interest at the rate of 7% per annum. Though the Insurance

Company claims it to be on the higher side, this Court is of the considered view that the rate of interest allowed by the Tribunal is quite justified and need not be interfered with.

11. Both the appeals are disposed of accordingly. The award under challenge is modified to the extent that the total compensation amount awardable in this case is Rs.12,10,000/- (Rupees twelve lakhs ten thousand) which shall carry interest at the rate of 7% per annum payable from the date of the claim petition, i.e., 2.7.2005 till the date of payment. The amount under the award shall be payable by the Insurance Company and the same be deposited with the learned Tribunal within two months and on furnishing the receipt showing such deposit, the statutory deposit with accrued interest be refunded to the Insurance Company.

Appeals disposed of.

2015 (I) ILR - CUT- 997

DR. A. K. RATH, J.

W.P.(C) NO. 19738 OF 2008

RAMAKANT NAIK & ORS. .....Petitioners

.Vrs.

BHANJA DALABEHERA .....Opp.Party

CIVIL PROCEDURE CODE, 1908 – O-26, R-9

Survey knowing Commissioner – Appointment – Discretion of the Court – Where controversy between the parties relates to area/identification of the suit land and the Court feels local investigation is required, the Court should not ordinarily refuse to appoint a Commissioner qualified to conduct the investigation.

In the present case since indentities of the suit plots are not in dispute the learned trial Court was justified in rejecting the application under Order 26 Rule 9 C.P.C. – There being no error in the impugned order this Court is not inclined to interfere with the same.

(Paras 8,9)

Case laws Referred to:-

1.64 (1987) CLT 722 : (Mahendranath Parida-V- Purnananda Parida & Ors.)
2.2012 (Supp.II) OLR 520 : (Ram Prasad Mishra-V- Dinabandu Patri & Anr.)

For Petitioners - M/s. R.P. Mohapatra, Miss D. Mohapatra, P. Pradhan
For Opp.Party - M/s. L. Samantray, U. K. Barik, R. Pradhan & B. Pradhan.

Date of hearing : 06.02.2015
Date of judgment : 13.02.2015

JUDGMENT

DR. A.K. RATH, J.

The instant challenge is to laciniate the order dated 11.12.2008 passed by the learned Civil Judge (Senior Division), Aska in C.S. No.71 of 2005 rejecting the application of the petitioners to depute a survey knowing Commissioner or the Tahasildar to demarcate the suit land.

2. The opposite party as plaintiff instituted C.S. No.71 of 2005 in the court of learned Civil Judge (Senior Division), Aska 2 seeking declaration of right, title and interest, recovery of possession and for permanent injunction to restrain the defendants from entering upon the suit land in respect of Hal Survey Nos.659, 660, 661 and 719 of village Saranpanka, appertaining to Khata No.72/23, Tahasil –Sorada, which corresponds to Sabik Survey No.668/1-A. The defendants in their written statement have pleaded that in a ceiling surplus proceeding the lands appertaining to Survey No.668/2 have been settled in their favour. The Tahasildar has demarcated the suit lands and gave delivery of possession in their favour. It is further pleaded that Sabik Survey No.668/1-A is different from Sabik Survey No.668/2.

3. While the matter stood thus, the defendants filed an application under Order 26 Rule 9 CPC to appoint the survey knowing Commissioner or the Tahasildar to demarcate the lands covered under road Survey No.668/1-A and Survey No.668/2. The same was objected to by the plaintiff. By order dated 11.12.2008, learned trial Court rejected the said application holding,

inter alia, that since the suit land has been demarcated by the Tahasildar in presence of the witnesses in a demarcation proceeding much prior to the institution of the suit, there is no necessity to appoint a survey knowing Commissioner for fresh measurement.

4. Heard Ms. D. Mohapatra, learned counsel for the petitioner and Mr. L. Samantray, learned counsel for the opposite party.

5. Order 26 Rule 9 C.P.C. deals with Commissions to make local investigations. The same is quoted hereunder :-

> "9. Commissions to make local investigations- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court."

6. Issuance of a Commission for local investigation is the discretion of the Court. While considering the prayer for appointment of Commission, the Court must apply its mind to the facts and circumstances of the case and pass order. No straight jacket formula can be laid down. Before issuance of Commission, the Court must be satisfied that there is prima facie case in favour of the applicant.

7. In **Mahendranath Parida vrs. Purnananda Parida and others,** 64(1987) CLT 722, it was held that when the controversy is as to identification, location or measurement of the land or premise or object, local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and go to trial prepared. The said decision was subsequently followed in **Ram Prasad Mishra vrs. Dinabandhu Patri and another,** 2012 (Supp.II) OLR, 520.

8. In the instant case, the identities of the plots are not in dispute. In the written statement as well as the petition under Order 26 Rule 9 C.P.C., it is stated that the defendants do not claim any right over the lands covered under Survey No.668/1-A. The plaintiffs also do not claim any right, title and interest over the Sabik Survey No.668/2. The trial Court on perusal of the Amin's report came to 4 hold that the land was demarcated by the Tahasilar

in a demarcation proceeding in presence of the plaintiff, defendants and local police.

9. In view of the fact that the identities of the plots are not in dispute and both the parties claimed their right, title and interest over different plots, the learned trial Court was justified in rejecting the application. There being no error apparent on the face of the impugned order, this Court is not inclined to interfere with the same. Accordingly the writ petition is dismissed.

Writ petition dismissed.

2015 (I) ILR - CUT- 1000

DR. A. K. RATH, J.

W.P.(C) NO. 14478 OF 2004

NABAGHAN ROUT & ORS. .....Petitioners

.Vrs.

ORISSA LIFT IRRIGATION CORPN. LTD. & ORS. ....Opp. Parties

SERVICE LAW – Delayed payment of retiral benefits – Authority to pay interest on delayed payment.

In this case opposite parties promulgated a scheme for voluntary retirement – Petitioners applied for the same in time – As per clause 6.2 of the scheme benefits shall be paid to the employees within 60 days of acceptance of the application – Delay of more than one year in payment of the benefits – Held, Corporation is liable to pay interest at the rate of 9% P.A. to the petitioners for the delayed payment of their retiral dues.

Case Laws Relied on :-

1. AIR 2014 SC 2861 : D.D.Tewari (D) Thr. L.R.s -V- Uttar Haryana Bijli Vitran Nigam Ltd. & Ors.

Case Laws Referred to :-

1. AIR 1983 SC 130 : D.S. Nakara & Ors. -V- Union of India

2. (1985) 1 SCC 429 : State of Kerala & Ors. -V- M.Padmanabhan Nair

For Petitioners - Mr. S.Patra
For Opp. Parties - Mr. S.Mohanty

Date of hearing : 11.03.2015
Date of judgment : 11.03.2015

JUDGMENT

DR. A.K.RATH, J.

The sole question that hinges for consideration of this Court is whether the opposite parties can be mulcated with interest for withholding the retiral dues of the petitioners on jejune grounds.

2. Shorn of unnecessary details, the short facts of the case of the petitioners are that they were working as pump drivers in the establishment of Orissa Lift Irrigation Corporation Ltd. (hereinafter referred to as "the Corporation"). In December, 2002, opposite parties 1 and 2 promulgated a Scheme for Voluntary Retirement/Voluntary Separation Scheme. The last date for submission of the application for voluntary retirement was 15.01.2003. The said Scheme provides, inter alia, that retiral dues like ex-gratia, gratuity, leave encashment and all other statutory dues would be paid to the employees within 60 days of acceptance of the application for voluntary retirement. However, opposite party no.2 issued a letter dated 02.01.2003 clarifying that the amount payable towards ex-gratia, gratuity, leave encashment along with all other statutory dues, such as, Provident Fund, Employees State Insurance Fund shall be released in one instalment to ensure disbursement to the employees on the date of separation. The further case of the petitioners is that they retired from service with effect from 30.04.2003 as per the order of the opposite parties 3 and 4. But then, the retiral dues were not paid. They submitted representations to the opposite party no.2 on 11.11.2004. However, the retiral dues of the petitioner no.1 were paid by way of cheque on 03.07.2004. So far as petitioner nos.2 and 3 are concerned, the same were paid on 21.08.2004. Since there was a delay in payment of retiral dues, they filed representations to opposite party no.2 for payment of interest at the rate of 18%.

3. Pursuant to issuance of notice, a counter affidavit has been filed by the opposite parties. The case of the opposite parties is that the calculation for voluntary retirement has been audited by the Auditors of Public Enterprises Department. The account payee cheques were received from the said department in the name of the concerned employees, who had applied for voluntary retirement. The cheques were immediately handed over to the concerned employees after the same was received from the Government. It is further stated that after transfer of L.I Points to Pani Panchayats, the work of the Corporation was reduced considerably. Pursuant to the decision of the Cabinet, the State Government decided to dispense with 7431 numbers of employees of the Corporation. The same was conveyed by the Government to the Corporation on 26.10.2002. In the above process, the Government had decided to dispense with 6067 numbers of regular employees and 1274 numbers of NMR /DLR employees of the Corporation. To facilitate the process of restructure, the employees were offered to avail the benefit of voluntary retirement scheme. It is further stated that the VRS due of petitioner no.1 amounting to Rs.2,43,552/- was received from the Government in Public Enterprises Department by way of cheque bearing no.50302 dated 11.06.2004, Similarly, the VRS dues of petitioner nos.2 and 3 amounting to Rs.2,34,416/- and Rs.2,01,986/- respectively were received by way of cheque bearing nos.517411 dated 21.8.2004 and 517412 dated 21.08.2004 respectively. The delay in payment of retiral dues cannot be attributed to the opposite parties. It is further stated that there is no provision for payment of interest against the delayed payment of the VRS dues.

4. Heard Mr.S.Patra, learned counsel for the petitioners and Mr.S. Mohanty, learned counsel for the opposite party no.2.

5. Clause 6.2 of the Voluntary Separation Scheme provides, inter alia, that the amount payable towards ex-gratia, gratuity, leave encashment and other statutory dues under the scheme shall be paid to the employees within 60 (sixty) days of acceptance of application by the Managing Director, OLIC subject to his/her clearing of all dues payable to the enterprise. On a conspectus of the said clause, it is crystal clear that the Corporation shall pay the ex-gratia, gratuity, leave encashment and other statutory dues under the scheme to the employees within 60 days of acceptance of the application by the Managing Director subject to the employee clearing of all dues of the Corporation.

6. In the instant case, the applications filed by the petitioners were accepted. They retired from service with effect from 30.04.2003. Admittedly, there is delay of more than one year in payment of retiral dues of the petitioners.

7. A Constitution Bench of the apex Court, in the case of D.S. Nakara and others v. Union of India, AIR 1983 SC 130, held that the pension is not a bounty. The same is not a gratituous payment depending upon the sweet will or grace of the employer. The grant of pension does not depend upon any discretion. 8. In State of Kerala & others v. M. Padmanabhan Nair, (1985) 1 SCC 429, the apex Court held that the pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but have become valuable rights and property in the hands of the employees. In view of the same, the culpable delay in settlement and disbursement thereof must be dealt with the penalty of payment of interest at the current market rate till actual payment to the employees.

9. The aforesaid view of the apex Court was echoed again in D.D. Tewari (D) Thr. L.Rs v. Uttar Haryana Bijli Vitran Nigam Ltd., and others, AIR 2014 SC 2861. In D.D. Tewari (supra) for delayed payment of pension and gratuity, the apex Court awarded interest at the rate of 9% per annum from the date of entitlement till the date of actual payment. The ratio of the said case applies with full force in the facts and circumstances of the case.

10. An employee opts for voluntary retirement scheme with a fond hope that the amount received at once will meet his financial crisis. If the retiral benefits are withheld for a long period then the employee would be subjected to insurmountable hardship. In view of the same, the authorities of the Corporation, in its wisdom, thought it proper, to pay the retiral dues of the employees within 60 days from the date of acceptance of the application as per Clause 6.2 of the Voluntary Separation Scheme. Non receipt of the amount from the Government of Orissa is not a ground to withhold the retiral benefits of the employees. It is highly incomprehensible as to how the Corporation accepted the applications of the employees for VRS and thereafter unjustly withheld the retiral dues for a long time on jejune grounds.

11. The logical sequitur, from the analysis made in the preceding paragraphs, is that the Corporation is liable to pay interest for delayed payment of retiral dues of the petitioners.

12. Applying the principles laid down in D.D. Tewari (supra), this Court directs the opposite parties to pay interest at the rate of 9% per annum to the petitioners for delayed payment of retiral dues from 01.07.2003 till the date of disbursement of their retiral dues. The writ petition is allowed. No costs.

Writ petition allowed.

2015 (I) ILR - CUT- 1004

PRADIP MOHANTY, J. & BISWAJIT MOHANTY, J.

W.P.(C) NO. 3026 OF 2015

DHRUBA SUNA ……..Petitioner

.Vrs.

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

ADMINISTRATIVE TRIBNALS ACT, 1985 – S. 19(4)

The provision U/s. 19(4) of the Act, only deals with the proceeding for redressal of grievances of the employee – For example when an employee has been removed from services, before coming to court, he can always file appeals and representations for redressal of his grievances – If after filing such appeal and representation, he approaches the learned Tribunal and the learned Tribunal admits the matter, then such grievance redressal proceedings pursuant to his appeal/representation vis-à-vis his removal order would abate.

In this case removal of the petitioner from service upon his conviction under the P.C.Act can not be described as a grievance redressal proceeding at the instance of the employee – Only after such proceeding culminates in a final order like removal order, the employee can initiate a grievance redressal proceeding under the relevant service rule vis-à-vis the removal order – However the departmental process undertaken by the Government authorities to take steps in accordance with law after conviction of the petitioner by a competent

court of law can not be said to be a proceeding U/s. 19(4) of the Act – Moreover original applications having not yet been admitted section 19 (4) of the Act has no application – It is also well settled that the order of removal, dismissal should not be stayed during the pendency of the proceeding challenging those orders in the Court – No fault of the Tribunal refusing to grant interim relief – Held, the submission with regard to abatement of the proceeding initiated by the departmental authorities which ultimately culminated for removal of the petitioner can not be accepted. (Paras 8, 9, 10)

For Petitioner - M/s. S.K.Swain, D.R.Rath, S.K.Rout & S.C.Bairiganjan

For Opp.Parties - Mr. Jyoti Prakash Patnaik (Addl. Govt. Adv.)

Case Laws Referred to

1. AIR 2001 SC 3320 : K.C.Sareen -V- C.B.I., Chandigarh
2. AIR 2003 SC 1115 : Public Services Tribunal Bar Association-V-State of U.P. & Anr.

Date of Judgment: 31.03.2015

JUDGMENT

BISWAJIT MOHANTY,J.

In this writ application, the petitioner has prayed for quashing the order dated 9.2.2015 under Annexure-11 whereby he has suffered the punishment of "removal from Government service" and order dated 13.2.2015 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.448(C) of 2015 under Annexure-12 to the extent it refuses the interim prayer of the petitioner to stay operation of order under Annexure-11.

2. The case of the petitioner is that the petitioner was appointed as VLW on 14.2.1986 and as GPEO on 26.5.1989 by the then Collector, Bolangir. While working there, he was appointed as ABDO on 13.1.2005 under Raikia Block of Kandhamal district by way of promotion. While working as ABDO in Patnagarh Block, the Collector, Bolangir posted him as BDO-in-Charge of Belpada Block under Patngarh Sub-Division in the district of Bolangir. While working there, he was roped in a trap case on 9.9.2008 vide Sambalpur Vigilance P.S. Case No.49 of 2008 and pursuant to such case, he was put under suspension by opposite party no.2 – Director of Panchayati Raj vide

order dated 20.9.2008 (Annexure-1). On 19.2.2009 vide Annexure-2, the petitioner was reinstated as ADBO-cum-Accounts Officer in Firingia Block of Kandhamal district. Thereafter, while working as ABDO under Paikamal Block in the district of Bargarh, the learned Special Judge (Vigilance), Bolangir vide his judgment dated 27.9.2014 passed in CTR No.3 of 2009 (arising out of Sambalpur Vigilance Case No.49 of 2008) held the petitioner guilty under Sections 7 & 13(2) read with Section 13(1)(d) of the P.C. Act and convicted him. The petitioner was sentenced to undergo R.I. for one year and to pay fine of Rs.5000/-, in default, to undergo R.I. for two months under Section-7 of the P.C. Act and to undergo R.I. for two years and to pay fine of Rs.5,000/-, in default to undergo R.I. for two months under Section 13(2) read with Section 13(1)(d) of the P.C. Act. Learned Special Judge (Vigilance) directed that both the sentences to run concurrently. Being aggrieved by the aforesaid judgment dated 27.9.2014 passed by the learned Special Judge (Vigilance), Sambalpur in C.T.R. No.3 of 2009, the petitioner preferred Criminal Appeal before this Court styled as CRLA No.536 of 2014. In the said Criminal Appeal, the petitioner filed two Misc. Cases - One Misc. Case for stay realization of fine as directed in the above noted judgment dated 27.9.2014 and another for suspension of sentence/grant of bail. On 20.10.2014, this Court was pleased to admit the appeal, called for the LCR and directed stay realization of fine and also directed that the petitioner to be released on bail till disposal of the Criminal Appeal.

3. The petitioner submitted the aforesaid order of this Court before opposite party no.1 vide representation dated 22.10.2014 (Annexure-5 Series) and prayed that no action should be taken against him. Since during pendency of the above representation, opposite party no.2 made a move to take disciplinary action against the petitioner on the basis of his conviction, the petitioner filed O.A. No.3391(C) of 2014 before the learned Tribunal with a prayer that opposite party nos.1 and 2 therein be directed not to inflict any penalty on the petitioner on the basis of his conviction during pendency of Criminal Appeal No.536 of 2014 without following the principles of natural justice and fair play. In the said O.A., the petitioner also prayed for disposal of his representation dated 22.10.2014 under Annexure-5 Series. In that case, the learned Tribunal was pleased to "Issue notice on admission" on 13.11.2014 under Annexure-6. During pendency of O.A. No.3391(C) of 2014, opposite party no.2 issued show-cause notice on 29.12.2014 (Annexure-7) directing the petitioner to file reply on proposed penalty of removal from Government service. Being aggrieved by the aforesaid show-

cause notice dated 29.12.2014, the petitioner filed O.A. No.132(C) of 2015 before the learned Tribunal. Since during pendency of O.A. No.132(C) of 2015, the time limit allowed to the petitioner under Annexure-7 dated 29.12.2014 was going to expire, he filed show-cause reply on 16.1.2015 vide Annexure-8. On 6.2.2015, O.A. No.132(C) of 2015 was taken up for adjudication and on that date, the learned Tribunal was pleased to "Issue notice on admission". Vide representation dated 10.2.2015 (Annexure-10), the petitioner submitted the above noted order dated 6.2.2015 before opposite party nos.1 and 2 requesting them not to take up disciplinary action against him during pendency of his cases before this Court and before the learned Tribunal. In the meantime, on 9.2.2015, the order under Annexure-11 was issued removing the petitioner from Government service. Being aggrieved by the aforesaid order of penalty under Annexure-11, the petitioner moved the learned Tribunal in O.A. No.448(C) of 2015. On 13.2.2015, the learned Tribunal was pleased to "Issue notice on admission". However, it refused to pass any interim relief as the order of conviction has not been set aside and no interim orders have been passed in earlier two Original Applications. This order has been filed as Annexure-12. As indicated earlier, challenging the order of removal from Government service under Annexure-11 and challenging the refusal of prayer for interim relief under Annexure-12, the present writ application has been filed.

4. Heard Mr. S.K. Swain, learned counsel for the petitioner and Mr. J. Patnaik, learned Additional Government Advocate for the State.

5. Mr. Swain, learned counsel for the petitioner submitted that since the leaned Tribunal was pleased to admit O.A. No.448(C) of 2015, it ought to have protected the petitioner by passing an interim order staying operation of order under Annexure-11 in the facts and circumstances of the case. In absence of such an interim order, the petitioner was greatly prejudiced. According to him in the present case three salient principles for granting an interim order i.e. prima facie case, balance of convenience and irreparable loss and irremediable injury existed in favour of the petitioner. Secondly, he contended that on account of pendency of his two original applications, i.e. O.A. No.3391(C) of 2014 and O.A. No.132(C) of 2015 on the self-same subject matter the proceeding against the petitioner pending before the opposite parties stood abated under Section 19(4) of the Administrative Tribunals Act, 1985, for short "the Act". In such background, the authorities could not have passed the order of penalty under Annexure-11. For all these

reasons, the learned Tribunal should have stayed the operation of order under Annexure-11 removing the petitioner from Government services.

6. Mr. Patnaik, learned Additional Government Advocate for the State submitted that it was no where the requirement of law that once a case was accepted by the Court for examining legality or otherwise of the impugned order, the court was bound to pass an interim order. While strongly refuting the arguments of Mr. Swain, learned counsel for the petitioner; Mr. Patnaik, learned Additional Government Advocate submitted that the petitioner has already been convicted by the learned Special Judge (Vigilance), Sambalpur and he has not yet obtained an order of suspension of his conviction from this Court. Relying on the decision of the Hon'ble Supreme Court in the case of **K.C. Sareen v. C.B.I., Chandigarh** reported in **AIR 2001 SC 3320**, Mr. Patnaik submitted that it is well settled that when a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a court of law, judiciousness demanded that he should be treated as corrupt until he was exonerated by a Superior Court. If a public servant, who was convicted of corruption would be allowed to continue to hold public office, it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. Thus he pointed out that the petitioner neither has got any prima facie case nor has got any balance of convenience in his favour. Mr. Patnaik also submitted that in case if ultimately the petitioner would be acquitted, he could get back his service and all monetary dues. Thus, it could not be said that in view of the order under Annexure-11, he would suffer irreparable loss and irremediable injury. With regard to Section-19(4) of "the Act", Mr. Patnaik submitted that the same had no application to the present case. None of the three Original Applications filed by the petitioner has been admitted by the learned Tribunal and in all the cases, the learned Tribunal was only pleased to "Issue notice on admission". Conceding for a moment, but not admitting that the learned Tribunal has admitted all the applications, even then, the petitioner could not derive any benefit out of the said provisions of Section-19(4) of "the Act". According to him only the proceedings for redressal of grievances connected with the subject matter of the Original Application would abate unless it is otherwise directed by the learned Tribunal. Mr. Patnaik put special emphasis on the phrases, i.e., "as to rederessal of grievances" and "in relation to the subject of such application" as contained in Section 19(4) of "the Act".

According to him the subject matter of O.A. No.3391(C) of 2014 & O.A. No.132(C) of 2015 did not deal with the grievance of the petitioner on removal order. Because by the time O.A. No.3391(C) of 2014 and O.A. No.132(C) of 2015 were filed, no removal order was there. So far as O.A. No.448(C) of 2015 was concerned, the same was filed challenging the removal order. As per Section-19(4) of "the Act", a proceeding relating to redressal of grievance of an employee in relation to which he has filed an Original Application would abate once such original application was admitted by the learned Tribunal. The key phrase here is "redressal of grievance'. Therefore, according to him if before challenging the removal order, the petitioner had filed a representation before the appropriate authority for redressal of his grievances vis-à-vis the removal order, the proceeding pursuant to such representation would abate once the Original Application challenging the removal order was admitted. In other words once Original Application was admitted, the authorities to whom the grievance redressal representation has been addressed, could not do anything on such representation. Section 19(4) could not be interpreted to give a handle to the employee to say that every proceeding in relation to the subject matter of the Original Application would abate even if such proceeding was not connected with the redressal of the grievances of the employee. In that case every employee would use the same as a sword to stall future departmental disciplinary action. Here after the conviction the authorities were proceeding as per law and prior to passing any order affecting him, the petitioner has unnecessarily filed two earlier original applications, namely, O.A. No.3391(C) of 2014 & O.A No.132(C) of 2015. In any case, according to him proceeding pursuant to his own representation would only abate after admission of the case and the steps/proceedings taken by the authorities to act as per law pursuant to conviction of the petitioner could not be treated to be a proceeding for rederessal of grievances and therefore, the same would not abate. In such background, he submitted that the contention of the learned counsel for the petitioner was without any merit and the same ought not to be entertained.

7. With regard to two fold contentions raised by the petitioner, we would like to answer the second contention relating to Section 19(4) of "the Act" first. The said provision reads as follows:

> "19(4) Where an application has been admitted by a Tribunal under sub-section (3), every proceeding under the relevant service rules as

> to redressal of grievances in relation to the subject-matter of such application pending immediately before such admission shall abate and save as otherwise direct by the Tribunal, no appeal or representation in relation to such matter shall thereafter be entertained under such rules."

Reading of the above provision makes it clear that in a case like present one, if a proceeding under relevant service rule is pending before the authorities as to redressal of grievances of the employee on his removal from service and if on such subject matter an Original Application is filed and the same is admitted by the learned Tribunal such proceeding with regard to rederessal of grievances of the employee pending before the authorities would abate unless otherwise directed by the learned Tribunal.

8. In the present case, it is clear that till date the Original Applications filed by the petitioner have not been admitted. In all these cases, the learned Tribunal has only issued notice on admission. In any case for this purpose filing of only first two Original Applications are relevant. The distinction between admitting a case and issuing notice on admission is well known. When a court issues notice on admission, it is yet to make up its mind whether to admit the matter or not which it may do after considering the return in such a case. In the present case, since Original Applications have not yet been admitted Section 19(4) of "the Act" has no application to the case. Conceding for a moment, but not admitting that the learned Tribunal has admitted the first two Original Applications, now the question would arise whether the petitioner is right in contending that all the proceedings connected with such Original Applications would abate in tune with Section 19(4) of "the Act". To this our answer would be an emphatic no. Section-19(4) of "the Act" deals only with the proceeding for redressal of grievances of the employee. For example, when an employee has been removed from services, before coming to court, he can always file appeals and representation for redressal of his grievances. If after filing of such appeal and representation, he approaches the learned Tribunal and the learned Tribunal admits the matter then such grievance redressal proceedings pursuant to his appeal/representation vis-à-vis his removal order would abate. The reason for this is obvious. After cognizance of a matter has been taken by the adjudicating authority, it would be anomalous to allow a departmental authority to have a say on the same matter, which may result in contradictory decisions. However, the steps taken in a proceeding by the departmental

authorities for removing the petitioner from service upon his conviction in a case under P.C. Act cannot be described as a grievance redressal proceeding at the instance of the employee. It is only a proceeding which the authorities are embarking upon as required under law. Only after such proceeding culminates in a final order like removal order, the employee can initiate a grievance redressal proceeding under the relevant service rule vis-à-vis the removal order. It is this later proceeding which would abate, in case an Original Application is filed challenging the removal order is admitted by the learned Tribunal. Thus the proceeding which would abate has to be a grievance redressal proceeding. The departmental process undertaken by the Government authorities to take steps in accordance with law after conviction of the petitioner in a competent court of law to reiterate again cannot be said to be a proceeding under Section 19(4) of "the Act". Therefore, the submissions of the learned counsel for the petitioner with regard to abatement of the proceeding initiated by the departmental authorities, which ultimately culminated in his removal cannot be accepted. If such a contention is accepted, then the result would be disastrous. In that case every employee coming to know about imposition of a probable/future punishment would rush to the Tribunal before the punishment order is passed and accordingly they would stall the hands of the authorities. For all these reasons, the contention of the petitioner in this regard does not merit acceptance.

9. Now with regard to refusal of passing of interim order by the learned Tribunal, we find no illegality committed by the learned Tribunal. It is well settled that the order of termination or removal or dismissal should not be stayed during pendency of the proceeding challenging those orders in the court. By such interim order if an employee is allowed to continue in service and if ultimately the writ petition is dismissed, then it would tantamount to usurpation of public office without any right to the same. Further if an interim order is passed staying operation of the removal order, the same would be giving the final relief to an employee at an interim stage which he would have got in case the order of dismissal, removal, termination and compulsory retirement is found not to be justified. If the order of removal is set aside then an employee can be compensated by moulding the relief appropriately in terms of arrears of salary, promotions which may have become due or otherwise compensating him in some other way. But in case the order of removal is found to be justified then holding of the office during the operation of the interim order would amount to usurpation of an office which the employee was not entitled to hold. The action becomes irreversible

as the salary paid to the employee cannot be recovered as he has worked during that period and the orders passed by him during the period he holds office cannot also be put at naught. All these things have been made clear in ***AIR 2003 SC 1115 (Public Services Tribunal Bar Association v. State of U.P. & another)***.

10 Thus, judging from any angle, we do not find any fault in the impugned order passed by the learned Tribunal refusing to grant interim relief as at Annexure-12. With regard to challenge of the petitioner to Annexure-11 is concerned, we refrain from saying anything as the learned Tribunal has already issued notice on admission and is ultimately going to adjudicate the same. In such background, the writ application is dismissed. However, we make it clear that observations made here except those relating to interpretation of Section 19(4) of "the Act" would in no way affect/influence adjudication of the Original Applications filed by the petitioner, which are pending before the learned Tribunal.

Writ petition dismissed.

2015 (I) ILR - CUT-1012

DR. B. R. SARANGI, J.

W.P.(C) NO.25121 OF 2012

SARTHAK BEURA ……..Petitioner

.Vrs.

SECRETARY B.S.E., ODISHA & ORS. ……..Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART. 226

Change of parents name in the Original High School Certificate – Refusal by the Board of Secondary Education, Odisha – Writ petition – Decree passed by a competent Civil Court, declaring the parentage of the petitioner – No appeal against such decree by any of the parties which has reached its finality – Direction issued to the Board of Secondary Education, Odisha to issue corrected Certificate mentioning the names of the parents of the petitioner as per the decree of the Civil Court. (Paras 5,6)

For Petitioner - M/s. Biraja Pr. Das, A. Ekka,
J. S. Maharana.
For Opp.Parties - M/s. P.K. Mohanty, D.N. Mohapatra,
J. Mohanty, P.K. Nayak & S.N. Dash.

Date of hearing : 11.12.2013
Date of judgment: 07.01.2014

JUDGMENT

DR. B.R.SARANGI, J.

Assailing the letter dated 22.11.2011 issued by the Deputy Secretary, Board of Secondary Education, Odisha (CZ), Cuttack under Annexure-4 refusing to change the parents' name of the petitioner in the original High School Certificate, the present writ petition has been filed.

2. The petitioner's case in nutshell is that he is the natural born son of Ranjan Kumar Beura and Menaka Beura. During admission of the petitioner in the primary school, his parents name were inadvertently recorded as Babaji Charan Beura and Kanakalata Beura and the said mistake was recorded at the time of admission in the High School. When the petitioner was ready to appear at the Annual High School Certificate Examination, 2011, the wrong entry of the parentage of the petitioner was detected by the original parents. The original parents of the petitioner at that point of time requested the Headmaster of the School, opposite party no.3 to correct the mistake. Since the school authorities did not take any steps, the petitioner had to appear at the Annual High School Certificate Examination, 2011 with Roll No. 23RE040 from Chaulia Bamara High School and he passed the said examination in 1st division. On the basis of the repeated request made by the natural parents, the Headmaster of the School, opposite party no.3 wrote a letter to opposite party no.2 with a request to correct the parents' name of the petitioner. In response to the same, the Deputy Secretary of the Board of Secondary Education vide letter no. 4862 dated 22.7.2011 intimated the Headmaster of the School to submit necessary documents for correction of the certificates. In response to the same, the Headmaster of the School furnished all the necessary documents desired by opposite party no.2 on 28.7.2011 for making necessary correction of the certificate, but without considering the same, the opposite party no.2 by the impugned letter dated 22.11.2011 refused to make any change in respect of the natural parents in

the certificate without assigning any reasons, rather it has only been stated that the original pass certificate granted by the authorities is in conformity with the admission register and as there is no clerical error or printing mistake at Board's level, change of parents name at this stage is not possible as per Rule. Finding no other way out, the petitioner represented through his natural father filed Civil Suit No. 19 of 2012 before the learned Civil Judge (Junior Division), Kendrapara, and the court below by judgment dated 25.7.2012 under Annexure-5 decreed the suit by declaring that the petitioner is the natural born son of Ranjan Kumar Beura and Menaka Beura. Relying upon the said civil court decree, the petitioner has approached this Court for change of his parents' name in the Original H.S.C. Certificate granted by the Board of Secondary Education.

3. Mr.Biraja Pr. Das, learned counsel appearing for the petitioner submitted that when there is civil court decree regarding the parentage of the petitioner, there is no impediment on the part of the Board of Secondary Education not to enter the natural parents' name in the H.S.C. Certificate. In support of his submission, he has referred to the order dated 25.1.2011 passed by this Court in W.P.(C) No. 10215 of 2010 (Rasmibarsa Panda v. Secretary, Board of Secondary Education, Orissa, Cuttack), wherein this Court in a similar circumstance relying upon the civil court decree directed the Board of Secondary Education to issue corrected provisional certificate-cum-Memorandum of marks to the petitioner in the said case by mentioning the names of her natural parents.

4. Pursuant to the notice issued by this Court, Board of Secondary Education appeared and filed counter affidavit stating that no illegalities or irregularities have been committed by the Board authorities in refusing to carry out the corrections by incorporating the names of the natural parents of the petitioner, rather, the Board authorities have acted in conformity with the provisions of law. Inasmuch as there is no clerical error or printing mistake and as such there is no scope to make any correction at Board level since the parents' name furnished by the school authorities has been reflected in the Annual High School Certificate Examination, 2011. So far as the reliance placed on the decree of the civil court is concerned, the same was never made available before the Board authorities to consider the same, rather, the same has been done after the impugned order in Annexure-4 was passed. Reference has also been made to Section (vi) of Regulations 39 and 40 in order to justify the action of the Board authorities.

5. After hearing the learned counsel for the parties and perusing the records and the judgment dated 25.11.2011 passed by learned Civil Judge (Junior Division), Kendrapara in Civil Suit No.19 of 2012, it is clear that against the said judgment, no appeal has been preferred by any of the parties, thereby the judgment so passed by the learned Civil Judge has reached finality with regard to the declaration of parentage of the petitioner. Such finding has been arrived at after trying the suit and the judgment and decree have been passed by the competent civil court. The Civil Court which decided the status of the petitioner have got the competence to do so. Thus, the said judgment amounts to a judgment in rem and binds all parties since no appeal has been preferred to set aside such declaration made by the civil court in any higher forum. Therefore, there is no impediment on the part of the Board of Secondary Education to make necessary correction in respect of the parents of the petitioner in the Annual High School Certificate.

6. Applying the principles laid down by this Court in Rasmibarsa Panda (supra) as well as considering the facts and circumstances of the case, this Court directs the Board of Secondary Education to issue corrected Annual High School certificate mentioning the names of the parents of the petitioner as Ranjan Kumar Beura and Menaka Beura in terms of the declaration made by the learned Civil Judge (Junior Division), Kendrapara in Civil Suit No. 19 of 2012. The petitioner is directed to produce a certified copy of this judgment along with the judgment and decree passed by the learned Civil Judge (Junior Division), Kendrapara in Civil Suit No. 19 of 2012 within a period of one week before the Board authorities. The entire exercise shall be completed within a period of two months from the date of receipt of a certified copy of this judgment.

7. The writ petition is accordingly allowed. No cost.

Writ petition allowed.

2015 (I) ILR - CUT-1016

DR. B.R. SARANGI, J.

O.J.C. NO. 14734 OF 1998

ESSEL MINING & INDUSTRIES LTD. ……Petitioner

.*Vrs.*

BARNABAS DANG & ANR. ……Opp.Parties

INDUSTRIAL DISPUTES ACT, 1947 – S. 11-A

Powers of Labour Courts U/s. 11-A of the Act – Should not be arbitrary – Industrial Tribunal or the Labour Court is expected to interfere with the decision of the management only when it is satisfied with reasons that the punishment is highly disproportionate to the degree of guilt of the workman concerned.

In this case the learned P.O. Industrial Tribunal having come to the conclusion that there is no procedural irregularity in finding the workman guilty and there is compliance of principles of natural justice has committed error in lessening the punishment by exercising power U/s. 11-A of the Act which is not permissible under law – Held, the impugned award to the extent of directing reinstatement of the workman with 50% back wages is set aside and the order of dismissal of the workman by the management is upheld.

(Paras -16,17,18)

Case laws Relied on :-

1. 2008(2) SCC (L &S) 396 : Depot Manager, APSRTC -V- B.Swamy
2. 2003(II) LLJ 181 : Chairman and Managing Director -V- P.C.Kakkar
3. AIR 2003 SC 1437 : Director General, R.P.F. & Ors. -V- Ch.Sai Babu
4. 2005 (2) SCC 481 : Bharat Heavy Electricals Ltd. -V-. M.Chandrasekhar Reddy & Ors. 5. 2004 SCC (L&S) 1078 : The Regional Manager -V- Sohan Lal
6. 2001 ILR 11 : U.P.State Road Transport -V- Mohan Lal Gupta & Ors.
7. 2005 SCC (L & S) 417 : M. P.Electricity Board -V- Jagdish Chandra Sharma
8. (1995) II LLJ 536-Bom : Bharat Petroleum Corpn. -V- Barrister Prasad & Ors.
9. (1986) II LLJ 85-Mad : T.Seeralan -V- The Presiding Officer
10. (1999) I LLJ 185-Mad : Sivaji M.V. -V- Godrej & Boyee Manufacturing
11. 2001 SCC (L&S) 108 : Regional Engg. College -V- U.Cheralu

12. 2000 SCC (L&S) 962 : Janatha Bazar (South Karnara -V- The Secretary
13. 2010(5) SCC 775 : Administrator, Union Territory of Dadra & Nagar Haveli
14. AIR 1996 SC 484 : B.C.Chaturvedi -V- Union of India & Ors.
15. AIR 1998 SC 948 : Chem Limited -V- A.L.Alaspukar & Ors.
16. AIR 2003 SC 1377 : Kailash Nath Gupta -V- Enquiry Officer, Allahabad Bank

For Petitioners - Mr. D. P. Nanda
For Opp.Parties - Mr. S.C. Samantaray

Date of hearing : 09.12.2013
Date of judgment : 10.01.2014

JUDGMENT

DR. B.R.SARANGI, J.

The Management-petitioner being the first party member before the court below, has filed this writ application assailing the award dated 29.6.1998 passed by the Presiding Officer, Industrial Tribunal, Rourkela in I.D.Case No. 59/97-C on the ground that the same is contrary to the settled principles of industrial adjudication and the same has been passed in excess of the jurisdiction conferred under Section 11-A of the Industrial Disputes Act.

2. The fact of the case in nutshell is that the opposite party nos.1 and 2 (opp.party no.2 has died in the meantime) being the 2nd party workmen were working under the petitioner-management as Choukidars since 1982. In the month of December, 1992 each of them was issued with charge-sheet on the allegation that due to negligence in duty between 10 P.M. of 20.11.1992 and 6 A.M. of 1.12.1992, 4571 pieces of detonators, some copper strips and lightening arrestors were stolen away from the magazine which they were guarding. Subsequently, on enquiry being caused, it was found that on the night of occurrence at 11 P.M. some miscreants caught hold of them and forcibly made them to smell something for which they lost their senses and could not know about the incident. When they intimated this fact to the Manager, he asked them to put their signature/ thumb impression on a document written in English, which has not been explained to them. Being asked by the workmen about the purpose for taking their signature/ thumb

impression on the document, the Manager told that the matter would be reported to the police to save them. So, on good faith, the opposite party no.1 put his signature and the deceased-opposite party no.2 had given his thumb impression on the said document. In course of enquiry, some of the documents had been prepared on which the signature/ thumb impression of the workmen-opposite parties had been taken and the said documents were written in Oriya or Hindi, which had not been explained to them. However, on completion of the domestic enquiry, the petitioner-management gave 2nd show cause notice basing upon which they submitted their explanation separately on 22.3.1993. Without considering the same in proper perspective, the petitioner-management dismissed both the workmen from service with effect from 2.4.1993. As a consequence of dismissal of the 2nd party members from service, industrial dispute was raised before the conciliation authorities and the same having failed, the Government of India in the Ministry of Labour in exercise of powers conferred by clause (d) of sub-section (1) and sub-section (2A) of Section 10 of the Industrial Disputes Act, 1947, in short, "the Act", referred the following dispute for adjudication vide letter no.L-26012/5/94IR (Misc.) dated 12.1.1995.

> "Whether the action of the management of Sarkunda Manganese Mines of M/s.Essel Mining and Industries Ltd. In dismissing Shri Sonika Haro and Sri Barnbas Dang w.e.f. 2.4.93 is justified?"

3. The first party management-petitioner had stated that on the night of occurrence when the workmen were engaged in guarding the magzine of Surkunda Mines because of their negligence some detonators, copper strips and lightening arrestors were stolen away. The management issued charge-sheet against both the workmen separately and in their explanation, it is stated that in the night of occurrence they were awake up to 11 PM and thereafter both of them fell asleep. On the next date at about 6 A.M. when they woke up after being called by Kanhu Naik and T.J.Mohanto, they found the door of the magzine in broken state. They also found that some detonators, copper strips and lightening arrestors were missing therefrom. As the explanation submitted by them were not found satisfactory, the management conducted a domestic enquiry to enquire into the charges. On affording due opportunity and by complying the principles of natural justice, the Enquiry Officer submitted his report to the management holding that the charge is established. On receipt of the enquiry report, the management furnished copies to the workmen to facilitate them for making representation,

if any. The copies of the enquiry proceedings along with the exhibits were also furnished to them. Thereafter, the workmen submitted their representations. After going through the enquiry report and the representations made by the 2nd party workmen, the Mines Manager of the petitioner-management concurred with the findings of the Enquiry Officer and dismissed the 2nd party workmen from services of the company with effect from 2.4.1993.

4. On the basis of the pleadings of the parties, learned Presiding Officer, Industrial Tribunal, Bhubaneswar framed three issues, which are as follows:

(I) Whether the action of the management in dismissing Sri Sonika Naro and Sri Barnabas Dang w.e.f. 2.4.93 is justified ?

(II) If not, to what relief the workmen are entitled?

(III) Whether the domestic enquiry conducted by the management is fair and proper?

5. After going through the evidence available on record, as well as considering the oral and documentary evidence, learned Presiding Officer, Industrial Tribunal came to the finding that natural justice demands that the findings of the enquiry officer must be supported by reasons and on perusal of the enquiry report, it is found that the Enquiry officer has given reasons in the conclusion he arrived at. So, there is no violation of principles of natural justice. It further found that it cannot be said that there is no evidence at all against the 2nd party workmen or evidence is such that no reasonable person could have on its basis come to the conclusion as arrived at by the enquiry officer. The finding is also not otherwise perverse and therefore, the Tribunal held that there is a prima facie case against the 2nd party workmen. After saying so, learned Presiding Officer, Industrial Tribunal has held that the malafide intention of the employer can be inferred if the punishment inflicted upon the delinquent is shockingly disproportionate to the misconduct and such finding has been arrived at while answering issue no. (III). But while answering issue nos.I & II, learned Presiding Officer, Industrial Tribunal, has held that it is a recognized principle of jurisprudence that the punishment must be commensurate with the gravity of the offence. In the instant case, the offence committed by the 2nd party workmen is that while on duty they fell asleep after 11 P.M. in the night of occurrence even though as watchman,

it was their duty to guard the magzine throughout the night and because of this negligence, the 1st party management sustained loss of Rs.9539.34 paise. But there is nothing on record available to show that either the 2nd party workmen has committed any misconduct previously. By saying so, learned Presiding Officer, Industrial Tribunal has held that the punishment of dismissal inflicted against them is disproportionately heavy and it would meet the ends of justice, if two increments of each of the 2nd party workmen is stopped with future effect. It is further stated that there is nothing on record showing gainful employment of the 2nd party workmen during their dismissal period, but since more than five years have already elapsed since the termination of services of both the 2nd party workmen, it would meet the ends of justice if 50% of back wages is paid to each of them. Accordingly, the dismissal order passed by the management against the 2nd party workmen has been quashed and direction has been given to the management to reinstate both the 2nd party workmen in service with 50% back wages with stoppage of two increments falling due from the date of termination of service with future effect.

6. Mr.D.P.Nanda, learned counsel appearing for the management-petitioner strenuously urged that once the Tribunal has come to the finding that there is compliance of principle of natural justice and confirmed the finding arrived at by the Enquiry Officer as the same is not perverse and after holding that there is no mala fide intention of the employer in inflicting the punishment considered to be shockingly disproportionate to the misconduct, the said Tribunal could not have passed an order lessening the punishment to stoppage of two increments with future effect and directed for reinstatement in service with 50% back wages. Therefore, the learned Presiding Officer, Industrial Tribunal has acted in excess of his jurisdiction by substituting the punishment ordered by the authorities in exercise of power under Section 11-A of the Industrial Disputes Act. In support of his contention, Mr.Nanda, has relied on a catena of decisions in **Depot Manager, APSRTC v. B.Swamy,** 2008(2) SCC (L &S) 396, **Chairman and Managing Director, v. P.C.Kakkar**, 2003(II) LLJ, 181, **Director General, R.P.F. and others v. Ch.Sai Babu,** AIR 2003 SC 1437, **Bharat Heavy Electricals Ltd. V. M.Chandrasekhar Reddy and others**, 2005(2) SCC 481, **The Regional Manager v. Sohan Lal**, 2004 SCC (L&S) 1078, **U.P.State Road Transport v. Mohan Lal Gupta and others**, 2001 ILR 11, **Madhya Pradesh Electricity Board v. Jagdish Chandra Sharma**, 2005 SCC (L & S) 417, **Bharat Petroleum Corporation v. Barrister Prasad and others,** (1995) II

LLJ 536-Bom, **T.Seeralan v. The Presiding Officer**, (1986) II LLJ 85-Mad., **Sivaji M.V. v. Godrej and Boyee Manufacturing**, (1999) I LLJ 185-Mad., **Regional Engg. College v. U.Cheralu,** 2001 SCC (L&S) 108, **Janatha Bazar (South Karnara v. The Secretary**, 2000 SCC (L&S) 962, and **Administrator, Union Territory of Dadra & Nagar Haveli**, 2010(5) SCC 775.

7. Mr. S.C.Samantaray, learned counsel for the workmen-opposite parties while supporting the findings arrived at by the learned Presiding Officer, Industrial Tribunal stated that the learned Presiding Officer, Industrial Tribunal has acted within the parameters of Section 11-A of the Act and it can also award lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. In view of such position, the award passed by the learned Industrial Tribunal is well within the purview of law and jurisdiction of the court and therefore, there is no infirmity or judicial error of the Tribunal warranting interference of this Court under Article 227 of the Constitution of India. In support of his contention, he has relied upon the decisions in **B.C.Chaturvedi v. Union of India and others**, AIR 1996 SC 484, **Chem Limited v. A.L.Alaspukar and others**, AIR 1998 SC 948 wherein the judgments in **Hind Construction and Engineering Co. Ltd. v. Their Workmen**, AIR 1967 SC 917, **Bharat Iron Works v. Balubhai Patel and others**, AIR 1976 SC 98 and **Kailash Nath Gupta v. Enquiry Officer, Allahabad Bank**, AIR 2003 SC 1377 have been referred.

8. Now it is to be considered whether the Presiding Officer, Industrial Tribunal is justified in passing award by giving lesser punishment in exercise of powers conferred under Section 11-A of the Act?

9. Section 11-A of the Act reads as follows :

> "Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workman- Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and

> conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances on the case may require.
>
> Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter."

On perusal of the aforesaid provision of the Act, it is clear that where an industrial dispute relating to discharge or dismissal of a workman has been referred to the Labour Court, Tribunal or National Tribunal for adjudication and in course of adjudication of the proceeding, the Tribunal is satisfied that the order of discharge or dismissal was not justified, it may by its award set aside the order of discharge or dismissal and direct for reinstatement of the workman in such terms and conditions, if any, as it thinks fit or to give such other relief to the workman including the award of lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. Therefore, power has been vested with the Industrial Tribunal to award any lesser punishment in lieu of discharge or dismissal in view of the provisions contained in Section 11-A of the Act. The said provision also makes it clear that if the discharge or dismissal was not justified, the Industrial Tribunal can by its award set aside the order of discharge or dismissal on such terms and conditions as it thinks fit.

10. Applying the above analogy to the present context, the Presiding Officer, Industrial Tribunal has come to a definite finding on the basis of the materials available on record before him that while conducting enquiry, the Enquiry Officer has arrived at the conclusion that there is no violation of principles of natural justice. At the same time his finding is not otherwise perverse and also held that there is prima facie case against the 2nd party workmen. While saying so, learned Presiding Officer, Industrial Tribunal has categorically held that in the case in hand, the punishment inflicted upon the 2nd party workmen can be said as shockingly disproportionate to their misconduct. Having held so, learned Presiding Officer, Industrial Tribunal could not have modified the sentence of imposition of punishment inasmuch as no reasonable explanation has been given while answering issue nos.1 and 2 in paragraph 15 of the award in awarding lesser punishment save and except that the loss has been caused to the 1st party management amounting

to Rs.9539.34 paise. At the same time, the learned Presiding Officer, Industrial Tribunal has categorically stated that while the opposite party workmen were on duty they went asleep after 11 P.M. on the night of occurrence even though as watchmen it was their duty to guard the magzine throughout the night. This being the finding of the learned Presiding Officer, Industrial Tribunal, awarding the lesser punishment in exercise of the power under Section 11-A of the Act appears that no cogent reason has been assigned when the Tribunal has admitted on the basis of the materials available before him it come to a definite finding that there is compliance of principle of natural justice inasmuch as there is no error apparent on the face of the record while conducting enquiry, more so, the duty cast on the Choukidar has not been discharged by the opposite party workmen. In one hand, if the Presiding Officer held that there is compliance of the provisions of law, on the other hand in a capricious manner he has awarded lesser punishment which is not permissible in law. The power of Section 11-A is left to the Tribunal to be exercised with its discretion, which is based upon reasons and the purpose and object of the said provision is to ensure that there is no victimization or unfair treatment to an employee in the hands of the employer and to safeguard against dismissals on flimsy or simple misconduct. In the case of Depot Manager, APSRTC (supa), the apex Court has held as follows :

"xx xx xx xx

> The mere fact that this was the first occasion when the respondent was caught is no ground to hold that it was accidental. What weighed with the learned Judges was the fact that the respondent had not been found to be involved in such irregularities earlier. In our view that is not very material in the facts of this case. A conductor of a bus enjoys the faith reposed in him. He accepts the responsibility of honestly collecting fares from the passengers after issuing proper tickets and is obliged to account for the money so collected. If conductors were to be dishonest in the performance of their duties, it would cause serious pecuniary loss to the employer.
>
> xx xx xx xx xx
>
> If he is dishonest in the performance of his duties, he is guilty of serious misconduct and the gravity of the misconduct cannot be minimized by the fact that he was not earlier caught indulging in such dishonest conduct. There is no guarantee that he had not acted

dishonestly in the past as well which went undetected. Even one act of dishonesty amounting to breach of faith may invite serious punishment.

xx xx xx xx xx"

11. In Chairman & Managing Director (supra), the apex Court has observed as follows :

"The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illolgical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223, the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

To put difference unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court/Tribunal, there is no scope for interference. Further to certain litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed.

XXX XXX XXX

Every officer/employee of the Bank is required to take all possible steps to protect the interests of the Bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a Bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the Bank. As was observed by this Court in ***Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Pattnaik*** (1996 (9) SCC 69), it is no defence available to say that

there was no loss or profit resulted in case, when the officer/employee acted without authority. The very discipline of an organization more particularly a Bank is dependent upon each of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and is a misconduct."

12. In Director General, R.P.F. (supra), the apex Court has also come to a finding, which reads thus:

" XX XX XX

Merely because it was felt that the punishment imposed was extreme was not enough to disturb or modify the punishment imposed on a delinquent officer.

XX XX XX

Normally, the punishment imposed by disciplinary authority should not be disturbed by high court or tribunal except in appropriate cases that too only after reaching a conclusion that the punishment imposed as grossly or shockingly disproportionate, after examining all the relevant factors including nature of charges proved against, the past conduct, penalty imposed earlier, the nature of charges proved against, the past conduct, penalty imposed earlier, the nature of duties assigned having due regard to their sensitiveness, exactness expected of and discipline required to be maintained, and the department/establishment in which the concerned delinquent person works."

13. In Bharat Heavy Electricals Ltd. (supra), the apex Court referring to **Air India Corporation, Bombay v. V.A.Rebellow and another**, reported in 1972 (1) SCC 814 has held that once bona fide loss of confidence is affirmed, the impugned order must be considered to be immune from challenge. In **Francis Klein and Company Pvt. Ltd** v. **Their Workmen and another**, reported in 1972 (4) SCC 569, the apex Court has held that when an employer loses confidence in his employee, particularly in respect of a person who is discharging an office of trust and confidence, there can be no justification for directing his reinstatement. So far as exercise of power under Section 11-A is concerned, referring to the case of the **Workmen of Firestone Tyre and Rupper Company Ltd. V. the Management and others**, 1973 (1) SCC 813 the apex Court has held that once the misconduct

is proved, the Tribunal has to sustain the order of punishment unless it was harsh indicating victimization. If a proper enquiry is conducted by an employer and a correct finding is arrived at regarding the misconduct, the Tribunal, even though it has now power to differ from the conclusion arrived at by the management, will have to give every cogent reasons for not accepting the view of the employer.

14. The scope of judicial review in disciplinary matters has been considered by the apex Court in B.C.Chaturvedi (supra), wherein it is held that the disciplinary authority and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/ Tribunal while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/ Tribunal, it would appropriately mould the relief, either directing the disciplinary/ appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare case impose appropriate punishment with cogent reasons in support thereof.

15. Mr.S.C.Samantaray, learned counsel for the opposite parties has also relied upon the very same judgment in B.C.Chaturvedi (supra), and stated that the power under Section 11-A is available to be exercised even if there is no victimization or taking recourse to unfair labour practice. Therefore, the Tribunal is empowered under Section 11-A of the Industrial Disputes Act to grant lesser punishment and also stated that there is no infirmity or jurisdictional error of the Tribunal warranting interference under Article 227 of the Constitution of India and that the Tribunal is well within its competence and jurisdiction to award lesser punishment. As regards taking into account past misconduct, Mr.Samantaray has relied upon the judgment in Chem Limited (supra) wherein it is stated that even on the basis that it was a major misconduct which was alleged and proved, looking to the past record of the service of the delinquents, no reasonable employer could have imposed punishment of dismissal. Referring to the case of Kailash Nath Gupta(supra), it is stated that there was no occasion in the long past service indicating either irregularity or misconduct of the 2nd party workmen except the charges which were the subject matter of their removal from service and

further stated that since the discretion exercised by the Tribunal is based on cogent reasons, this Court cannot exercise the powers under Article 227 of the Constitution of India.

16. In view of the judgments cited above, while considering judicial review, it is not the duty of the Court or Tribunal to substitute its views on penalty and impose some other penalty. In the event the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court or Tribunal, it would appropriately mould the relief by sending the matter back to the competent authority to reconsider the penalty imposed or to shorten the litigation, it may in exceptional and rare cases impose appropriate punishment with cogent reasons in support thereof. Section 11-A cannot be considered as conferring an arbitrary power on the Industrial Tribunal or the Labour Court. The power under Section 11-A of the. Act has to be exercised judicially and the Industrial Tribunal or the Labour Court is expected to interfere with the decision of the management under Section 11-A of the Act only when it is satisfied that the punishment imposed by the management is highly disproportionate to the degree of guilt of the workman concerned. The Industrial Tribunal or the Labour Court has to give reasons for its decision.

17. In view of the aforesaid facts and circumstances, in my considered opinion, the judgments referred to by Mr.Nanda, learned counsel for the petitioner are quite applicable with full force to the facts of the present case. Learned Presiding Officer, Industrial Tribunal having come to the conclusion that there is compliance of principle of natural justice and there is no procedural irregularities in finding the workmen guilty inasmuch as the duty assigned to the workmen being Choukidar and they fell asleep during their working hours, which resulted in loss to the management to the tune of Rs.9539.34 paise due to the negligence on the part of the workmen. Therefore, in absence of any cogent reason while answering issue Nos.I and II, the Tribunal has committed error in lessening the punishment by exercising the power under Section 11-A of the Act, which is not permissible under law.

18. For the reasons stated above, the writ application is allowed and the impugned award to the extent issuing direction for reinstatement of the workmen with 50% back wages is set aside and the order of dismissal of the workmen made by the management pursuant to the enquiry is upheld. No cost. Writ petition allowed.

2015 (I) ILR - CUT- 1028

DR. B.R.SARANGI, J.

W.P.(C) NO. 12711 OF 2010

PRAVAT KISHORE MOHANTY .....Petitioner

Vrs.

CHAIRMAN-CUM-MANAGING DIRECTOR, ORISSA STATE POLICE HOUSING AND WELFARE CORPORATION LTD. AND ORS. ..... Opp.parties

CONSTITUTION OF INDIA, 1950 – ART,16

Promotion – No promotional avenues for the petitioner who is holding the post of Building Supervisor for the last 28 years – He is having requisite qualification and entitled for promotion – Merely granting Time Bound Advancement scale of pay will not suffice the claim as he is deprived of promotional avenues which forms part of the fundamental rights enshrined under Article 16 of the Constitution of India – Merely taking a plea that the Corporation is under restructuring process, that itself can not deprive the petitioner to get Promotion – Held, direction issued to the Corporation to consider the case of the petitioner for promotion to the next higher post within three months from the date of passing of the order. (paras 10,11)

For Petitioner : M/s. Laxmikanta Mohanty & S.Pattnaik
For Opp.Parties : M/s. N.K.Mishra, D.K.Pahi, A.K.Roy, & A.Mishra

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Date of hearing : 10. 02.2015
Date of Judgment : 19.02. 2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who is continuing as a Building Supervisor under the Orissa State Police Housing and Welfare Corporation Ltd., Bhubaneswar, in short, "the Corporation", has filed this petition seeking for a direction to treat him as a regular employee w.e.f. 5.11.1982 and to allow him Time Bound Advancement scale of pay w.e.f. 5.11.1997 and promotion to the post of Assistant Project Manager.

2. The short fact of the case, in hand, is that pursuant to the advertisement issued by the Corporation in daily news paper "The Prajatantra" on 3.5.1982 inviting applications for appointment as Building Supervisor in the scale of pay of Rs.320-750/-, the petitioner applied for the same and following a due procedure of selection, he was appointed as Training Supervisor from 5.11.1982. On completion of his training vide office order dated 23.6.1986, the petitioner was allowed to draw the scale of pay of Rs.320-750/- w.e.f. 15.6.1986, but the said scale of pay was reduced to Rs.320-550/- vide office order dated 23.7.1987 on the ground that Building Supervisor is equivalent to Building A.S.I. and was allowed the scale of pay admissible to the Building A.S.I. Against the said reduction of scale of pay, the petitioner made a representation on 31.8.1988 before the authority. Instead of considering the same, the petitioner was retrenched from service vide letter dated 3.2.1988. On the very same day, the petitioner was given ad hoc appointment for a period of 89 days in the scale of pay of Rs.840-1345/- and again he was retrenched from service vide order dated 17.7.1990. Challenging the said order of retrenchment, the petitioner approached this Court by filing O.J.C.No. 601 of 1991, which was disposed of vide order dated 2.12.1991 directing the authorities to absorb him in the scale of pay Rs.840-1345/- without back wages. This Court further directed that the said period would be computed for calculation of other service benefits admissible to the petitioner. In compliance to the said order, the petitioner was initially appointed for a period of six months, which was extended from time to time. Challenging the said ad hoc appointment, again the petitioner approached this Court in O.J.C. No. 8229 of 1992 seeking for regularization of services and to treat him as permanent employee under the opposite party no.1-Corporation. This Court by order dated 7.2.1996 directed for regular absorption of the petitioner instead of periodic appointment given to him. In compliance to the said order, the petitioner is continuing in the said post of Building Supervisor. Even though he has completed 15 years of service, he has not been extended with Time Bound Advancement scale of pay admissible to the post as per the O.R.S.P. Rules, 1998 giving effect from 1.1.1996. The petitioner filed a representation before opposite party no.1 on 29.9.2002 to consider his case for grant of Time Bound Advancement scale of pay. Despite such representation, the petitioner's case has not been considered as a regular employee with effect from his initial date of joining, i.e. 5.11.1982 and in the meantime, he has completed three years Correspondence Diploma (Civil) under JRN, Rajasthan Vidyapitha University, Udaypur in the year 2007, which has been reflected in the service

book of the petitioner. Even though he has passed the Diploma in Engineering (Civil), his case has not been considered for promotion to the post of Assistant Project Manager. That apart, he has not been allowed to work independently and instead he has been directed to work under an ad hoc employee. Hence, this writ petition.

3. Mr.L.K.Mohanty, learned counsel for the petitioner strenuously urged that though the petitioner has completed 28 years of service, he has not been given any promotion. The scale of pay, which was initially granted to him at the rate of Rs.320-750/- was reduced to Rs.320-550/- on the plea that Building Supervisor is equivalent to Building A.S.I. While reducing the scale of pay, the authorities have lost sight of the fact that the Building A.S.I. has got promotional avenues to the post of Building S.I., which is equivalent to the post of Assistant Project Manager. Even though the petitioner has acquired qualification of Diploma in Engineering (Civil), but he has not been granted promotion, thereby, he is facing stagnation of post held by him. That apart, Time Bound Advancement scale of pay has not been granted though by virtue of the order passed by this Court he is entitled to get continuous service. Due to stagnation and lack of promotional benefits, though Time Bound Advancement scale of pay is admissible to the petitioner, the same has not been extended to the petitioner. In addition to the same, it is urged that though the authorities are appointing persons on contractual basis against the post of Assistant Project Manager, but the petitioner's case has not been considered for such post either by promotion or by granting the scale of pay admissible to the said post. It is further urged that promotion is a part of fundamental rights of the employees as guaranteed under Article 16 of the Constitution of India and therefore, the employer is duty bound to create promotional avenues for all its employees. The petitioner having not been granted promotion for last 28 years, the authorities are acting contrary to the provisions of law. Therefore, he seeks for interference of this Court. To substantiate his contention, he has placed reliance on the decisions of the apex Court in **State of Tripura v. K.K.Roy**, AIR 2004 SC 1249, **Raghunath Prasad Singh v. Secretary (Home)Department, Govt. of Bihar,** AIR 1988 SC 1033, and **Union of India v. Hemarajsingh Chauhan and others,** AIR 2010 SC 1682.

4. Mr.N.K.Mishra, learned Sr.Counsel for the opposite party-Corporation while disputing the contentions raised by the petitioner strenuously urged that the petitioner has been allowed to officiate as

Building Supervisor instead of Training Supervisor, but he has been granted consequential benefits of increments and hike in pay applicable to the post from time to time which the petitioner accepted without any protest. So far as payment of Time Bound Advancement scale of pay is concerned, the petitioner was allowed periodical increments from 15.6.1986 and was also allowed first Time Bound Advancement scale of pay on 2.12.2010 on completion of 15 years of service, which has been accepted by the petitioner. Though the petitioner is entitled to get second Time Bound Advancement scale of pay or ACP in 2011, only after completion of 25 years of service, the same has not been extended due to pendency of this case. So far as extension of promotional benefits is concerned, it is urged that now the Corporation is undergoing re-structuring process whereby promotional avenues have to be created for its employees, in that case promotional benefits can be granted only on restructuring of the organization and the claim made to get promotion to the post of Assistant Project Manager is not admissible to the petitioner in view of the fact that the said post is a direct recruit post and therefore, the opposite parties are appointing the candidates on contractual basis instead of regular basis on open advertisement. In that view of the matter the petitioner is not entitled to get any benefits as claimed by him.

5. Considering the contentions raised by the learned counsel for the parties and after going through the records, the admitted fact is that the petitioner was initially appointed on 5.11.1982 as Training Supervisor by following due procedure of selection pursuant to the advertisement issued in daily news paper in "The Prajatantra" on 3.5.1982. After completion of training period, he was allowed to draw the salary in the scale of pay of Rs.320-750/- w.e.f. 15.6.1986, but the said scale was reduced to Rs.320-550/- as the post of Building Supervisor has been equalized to the post of Building A.S.I.. As the services of Building Supervisor were not required, the petitioner was terminated from service w.e.f. 1.2.1988, but again he was re-appointed on ad hoc basis on 2.2.1988. Thereafter, he was disengaged once again w.e.f. 7.7.1990 due to lack of availability of work. Challenging the same, the petitioner approached this Court by filing O.J.C.No.601 of 1991, which was disposed of vide order dated 12.12.1991 with a direction for his absorption w.e.f. 16.12.1991 with continuity in service, but without any wages for the period the petitioner had not rendered any service. Accordingly, the petitioner was taken back into service on 13.12.1991 and as such, he is continuing in service till date. But due to non-regularization of

service, the petitioner again approached this Court by filing O.J.C.No.8229 of 1992 seeking for a direction for regularization of services, which was disposed of vide order dated 7.2.1996. Consequently, the petitioner was brought under regular scale of pay w.e.f. 15.6.1986, i.e., the date from which he was allowed to officiate as Supervisor instead of Training Supervisor. The consequential benefits, such as, increment and hike in pay was also allowed to the petitioner from time to time, which has been accepted by him without any protest or grievance. Thereafter, he was allowed to get periodical increments from 15.6.1986 and the first Time Bound Advancement scale of pay was granted on 1.12.2001 on completion of 15 years of service, which has been accepted by the petitioner, but the second Time Bound Advancement scale of pay or ACP though the petitioner is entitled to on completion of 25 years of service with effect from 2011, but the same has not been extended due to pendency of the present writ petition.

6. So far as the claim made with regard to promotion to the post of Assistant Project Manager is concerned, the same is not admissible in view of the fact that the said post is not a promotional post, rather, it is a direct recruit post. No promotional avenue has been created for Building Supervisor in the Corporation. The post of Assistant Project Manager being a direct recruit post, no promotion can be given from the post of Building Supervisor to the post of Assistant Project Manager in the rank of Junior Engineer by way of promotion. As has been stated by the learned counsel for the opposite party-Corporation there being restructuring of posts in the Corporation, whereby the post of Assistant Project Manager has been upgraded to the post of Deputy Manager and therefore, the claim of the petitioner that he is entitled to get promotion to the post of Assistant Project Manager is a misnomer one and he cannot get promotion from the post of Building Supervisor to the post of Assistant Project Manager by way of promotion. It is admitted that the petitioner is entitled to get 2nd Time Bound Advancement scale of pay with effect from 2011 on completion of 25 years of service, but the same has not been granted because of pendency of the case. But this Court has never restrained the opposite party-Corporation not to extend such benefits, which is due and admissible in accordance with law. In that view of the matter, this Court directs the opposite parties to extend the benefit of Time Bound Advancement scale of pay to the petitioner in accordance with law within a period of three months from the date of passing of this order.

7. In the case of **State of Tripura v. K.K.Roy (supra)** the apex Court in paragraph 6 states as follows :

> "It is not a case where there existed an avenue for promotion. It is also not a case where the State intended to make amendments in the promotional policy.The appellant being a State within the meaning of Article 12 of the Constitution should have created promotional avenues for the respondent having regard to its constitutional obligations adumbrated in Articles 14 and 16 of the Constitution of India. Despite its constitutional obligations, the State cannot take a stand that as the respondent herein accepted the terms and conditions of the offer of appointment knowing fully well that there was no avenue of promotion, he cannot resile therefrom. It is not a case where the principles of estoppel or waiver should be applied having regard to the constitutional functions of the State. It is not disputed that the other States in India, Union of India having regard to the recommendations made in this behalf by the Pay Commission introduced the scheme of Assured Career Promotion in terms whereof the incumbent of a post if not promoted within a period of 12 years is granted one higher scale of pay and another upon completion of 24 years if in the meanwhile he had not been promoted despite existence of promotional avenues. When questioned, the learned counsel appearing on behalf of the appellant, even could not point out that the State of Tripura has introduced such a scheme. We wonder as to why such a scheme was not introduced by the Appellant like the other States in India, and what impeded it from doing so. Promotion being a condition of service and having regard to the requirements thereof as has been pointed out by this Court in the decisions referred to hereinbefore, it was expected that the Appellant should have followed the said principle."

8. Similarly in **Raghunath Prasad Singh(supra)**, the apex Court has held that reasonable promotional opportunities should be available in every wing of public service as that generates efficiency in service and fosters the appropriate attitude to grow for achieving excellence in service. In the absence of promotional prospects, the service is bound to degenerate and stagnation kills the desire to serve properly. Therefore, the apex Court directs the State of Bihar to provide at least two promotional opportunity to the officers of the State Police in the wireless organization within six months

from the date of passing of the order by making appropriate amendment to the Rules.

9. In **Hemarajsingh Chauhan (supra),** the apex Court has held that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16. The guarantee of a fair consideration in matter of promotion under Article 16 virtually flows from guarantee of equality under Article 14 of the Constitution.

10. Applying the said principles laid down by the apex Court in the aforementioned judgments to the present context, it appears that no promotional avenues have been created for the petitioner, who is holding the post of Building Supervisor for last 28 years having requisite qualification of Diploma in Civil Engineering and otherwise also he is entitled for promotion to the next higher grade with higher scale of pay. Merely granting Time Bound Advancement scale of pay will not suffice the claim of the petitioner in view of the fact that he is deprived of getting his promotional avenues, which every employee has a desire to get and it forms part of the fundamental rights as enshrined under Article 16 of the Constitution, which emanates from Article 14 the right to equality under the Constitution. Merely taking a plea that the Corporation is under restructuring process, that itself cannot deprive the petitioner to get promotion, which he is entitled to get.

11. For the foregoing reasons, this Court directs the opposite party-Corporation to consider the case of the petitioner for promotion to the next higher post by creating the avenues in conformity with the provisions of law either by restructuring or by making suitable amendment to the Rules governing the field and such benefits should be extended to the petitioner within a period of three months from the date of passing of the order.

12. With the above observation and direction, the writ petition stands disposed of. No order as to costs.

Writ petition disposed of.

2015 (I) ILR - CUT-1035

D. DASH, J.

F.A.O. NO. 51 OF 2013

M/S. SHREE BALAJI MINING P.V.T . LTD ……..Appellant

.Vrs.

M/S.EXTEC SCREENS & CRUSHERS (INDIA) PVT. LTD. ……..Respondent

CIVIL PROCEDURE CODE, 1908 – S.20 (C)

Suit for damages – Breach of contract – Territorial jurisdiction of Court – Cause of action for the Suit arises where the Contract is made, where the contract is to be performed and where the contract is breached.

In this case neither the contract is made at Rourkela nor it can be said to have been agreed to be performed there nor the breach occurred there – So the learned Civil Judge (Sr. Div.) Rourkela has no jurisdiction to try the suit and has rightly passed the impunged Order returning the plaint under Order 7 Rule 10 C.P.C. to the appellant to present the same in the proper Court. (Paras 5, 6)

For Appellant - M/s. R.K.Mohanty, S.Mohanty, Sumitra Mohanty, N.Mohanty, S.N.Biswal, A.Mohanty, P.Jena

For Respondent -M/s. P.R.Barik, P.Choudhury, S.Priyadarshini

Date of hearing : 04.02.2015
Date of judgment: 25.02.2015

JUDGMENT

D. DASH, J.

The appellant in this appeal being the plaintiff in C.S. No.88 of 2009 has challenged the order passed by the learned Civil Judge (Sr. Division), Rourkela allowing the petition under Order-7, Rule-10, C.P.C. filed by the defendant respondent.

2. Facts necessary for the purpose of this appeal are as under:

The appellant as the plaintiff filed the suit claiming damage against the defendant-respondent. It is stated in the plaint that the plaintiff is having its registered office at Rourkela. The defendant being a registered company is having its office at Gurgaon. The plaintiff had purchased a screening machine from the defendant in the year 2006 which was installed at the mines at Uliburu for execution of the contract job of M/s. Deepak Steel and Power Ltd. It is stated that after two years the machine started malfunctioning. So, the plaintiff sought for quotation for urgent supply of a new engine and the defendant submitted the quotation assuring the delivery within a period of 10 to 15 days and that the machine was to be supplied at Kolkata. The plaintiff then agreed and sent a letter to that effect and thereafter payment was made and the machine was to be supplied. However, the defendant deviating from the promise delayed in delivery and so they have claimed the damage of RS.52,50,000/-

The defendant entering appearance raised the question of lack of territorial jurisdiction of the court of the Civil Judge (Sr. Divison), Rourkela to entertain and adjudicate upon the suit. According to them, the contract was not made at Rourkela nor it was to be performed at Rourkela and the payment has also not been made at Rourkela. So the suit cannot be filed at Rourkela as no part of cause of action has arisen there.

3. Learned counsel for the petitioner placing reliance upon the decision of the Hon'ble Apex Court in the case of ***A.B.C. Laminart Pvt. Ltd. Vrs. A.P. Agencies, Salem,*** A.I.R. 1989 S.C. 1239 submits that the offer was accepted by the petitioner at Rourkela and the amount has been remitted from Rourkela. So part of cause of action had arisen at Rourkela and, therefore, the learned Civil Judge (Sr. Division), Rourkela had also the jurisdiction to entertain the suit. Thus, she submits that the order accepting the prayer for return of the plaint as passed by the trial court is unsustainable in the eye of law.

4. Learned counsel for the opposite party submits that in the present case neither the contract was made at Rourkela nor the payment was to be made there and the delivery of machine has been admittedly given at Kolkata. In view of that he contends that the trial court has rightly returned the plaint to the plaintiff to present it before proper court having jurisdiction to try the same.

Learned counsel for the respondent also places reliance on the very decision in case of A.B.C. Laminart Pvt. Ltd. (supra) as placed by the learned counsel for the petitioner. He has again relied upon the decision of East Asia Shipping Company Ltd. Vrs. Nav Bharati Enterprises Pvt. Ltd., S.A.R. (Civil) 1996 (S.C.) 616.

5. In the instant case the appellant in support of the jurisdiction of the court of the learned Civil Judge (Sr. Division), Rourkela relies on two factual aspects. (i) that the quotation being received at and being accepted at Rourkela and correspondences to that effect was made from Rourkela; and ii) money was remitted from Rourkela.

The respondent's response is that those facts are not giving rise to the cause of action for filing the suit in the court of the learned Civil Judge (Sr. Division), Rourkela. It has been held in case of A.B.C. Laminart (supra) that the jurisdiction of the court in the matter of contract will depend on the situs of the contract and the cause of action arising through the connecting factors. In Para-15, it has been held that in the matter of contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer from a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in the court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance is completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If a contract is pleaded as part of the

cause of action clothing jurisdiction to the Court where the suit is filed and that contract is found to be invalid, such part of cause of the action disappears. The above are some of the connecting factors.

The cause of action in a suit for damage for the breach of contract arises where the contract is made, where the contract is to be performed and where the contract is breached.

6. Accepting the plaint averments in entirety it is seen in the case in hand that neither the contract can be said to have been made at Rourkela nor it can be said to have been agreed to be performed there nor the breach to have occurred. For mere communication of the acceptance of the offer by making correspondence from a place, it cannot be said that the contract was made at that place. Contract is made at a place when acceptance is received and part of the cause of action for suit for damage for breach arises at that place. As per the provision of section 4 of the Contract Act, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. So by despatch of letter of acceptance of offer from Rourkela, the contract cannot be said to have been made there. Also remittance of money from that place would not suffice the purpose of bringing in the jurisdiction of said Court to entertain the suit claiming damage for breach of contract saying that cause of action has arisen there since the payment by that cannot be said to have been made to the defendant at Rourkela which is not the place where the money being remitted was payable. In the instant case there being late delivery the breach is said to have been committed and damage is claimed on account of that. Therefore, the trial court has rightly accepted the prayer of the respondent that it has no jurisdiction to try the suit and has accordingly followed the right path of returning the plaint to the appellant for being presented in the proper court. In view of above, this Court finds no such illegality or infirmity with the order impugned in this appeal so as to be interfered with.

7. For the aforesaid discussions and reasons, the appeal stands dismissed and in the circumstances without cost.

Appeal dismissed.

2015 (I) ILR - CUT-1039

S. PUJAHARI, J.

W.P.(C) NO. 22322 OF 2014

TAFZIL SARWAR ……..Petitioner

.Vrs.

THE DY. DIRECTOR, MINES
JODA CIRCLE ……..Opp.Party

MINES & MINERALS (DEVELOPMENT & REGULATION) ACT, 1957 – S.21(4)

Confiscation of vehicle – Illegal transportation of iron ore – Confiscation by competent authority under Rule 12 (4) of the Orissa Minerals (Prevention of theft, Smuggling & Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007 – Appeal filed under Rule 12 (7) before the District Judge – A.D.J. refused to entertain appeal as appeal lies to Deputy Director, Mines under Rule 17 – Hence the writ petition – When the superior legislation i.e., the Central Act, 1957 specifically empowers a Court, for disposal of the property seized U/s. 21(4) of the MMDR Act, the Rule made by the State Government for disposal of such property authorizing another authority besides the Court competent, is inoperative inasmuch as the same is contrary to the statutory provisions under the MMDR Act and the State Government in its rule making power under Section 23C of the MMDR Act could not have authorized any other authority for confiscation of the same – Since the competent authority has no power to confiscate the property in question, the impugned order of confiscation was without jurisdiction and appeal under Rule 12(7) of the Orissa Minerals Rules, 2007 does not lie to the District Judge – Held, the impugned order of confiscation is set aside.

(Paras 10, 11)

Case Laws Referred to

1. AIR 1970 SC 1436 : Baijnath -V- State of Bihar
2. (2006) 34 OCR 655 : M/s Jai Durga Iron Pvt. Ltd. -V- S.P., Sundergarh & Anr.
3. AIR 2008 Orissa 126 : M/s. T.R. Chemicals Ltd. & Anr. -V- State of Orissa & Anr.

For Petitioner : M/s. Biswanath Behera
For Opp.Party : Addl. Govt. Adv.

Date of order 09.02.15

ORDER

S. PUJAHARI, J.

Heard.

2. This writ petition has been filed by the petitioner challenging the order dated 28.10.2014 passed by the learned Additional District Judge, Champua in F.A.O. No.4 of 2014 impugning the order of confiscation passed against his vehicle by the opposite party-competent authority on 16.04.2014 at Annexure-2 in exercise of the power under Rule-12(4) of the Orissa Minerals (Prevention of Theft, Smuggling & Illegal Mining and Regulation of Possession, Storage, Trading and Transportation) Rules, 2007 (in short hereinafter referred to as "the Orissa Minerals Rules, 2007").

3. It appears that the writ petitioner filed an appeal vide F.A.O. No.4 of 2014 before the learned Additional District Judge, Champua against the order of confiscation passed by the opposite party confiscating his vehicle bearing registration No.OR-09-J-1184 for illegal transportation of iron ore in exercise of the power conferred on him for such confiscation under Rule-12(4) of the Orissa Minerals Rules, 2007 and the learned Additional District Judge, Champua refused to entertain the said appeal holding that against the order of the competent authority, an appeal lies to the Deputy Director, Mines, Joda under Rule-17 of the Orissa Minerals Rules, 2007. The writ petitioner being aggrieved by the same, has challenged the aforesaid order to be illegal in this writ petition with a prayer to direct the opposite party to release the vehicle as the same has been illegally seized and confiscated.

4. It is submitted by the learned counsel for the writ petitioner that since under the provisions of the Orissa Minerals Rules, 2007, an appeal lies to the Court irrespective of the fact that whether the competent authority has confiscated or any other authority has confiscated, the impugned order passed by the learned Additional District Judge, Champua cannot be sustained and liable to be set-aside and the opposite party be directed to release the vehicle in favour of the petitioner as the seizure and confiscation of his vehicle was done illegally and without any materials on record.

5. Learned counsel for the State, however, submits that Sub-rule (7) of Rule-12 of the Orissa Minerals Rules, 2007 being not clear to whom an appeal lies against such order of confiscation, the impugned order of the learned Additional District Judge, Champua cannot be found fault with, but

he fairly submits that reliance placed on Rule-17 of the Orissa Minerals Rules, 2007 by the learned Additional District Judge, Champua appears to be misconceived, inasmuch as Rule-17 speaks of an appeal against an order passed by the competent authority in exercise of the power under Sub-rule (1) of Rule-6 and Sub-rule (4) of Rule-10 of the Orissa Minerals Rules, 2007 and the order of confiscation is not an order under the said Rule but an order under Rule-12(4) of the Orissa Minerals Rules, 2007.

6. It appears that the aforesaid statutory Rule has been framed by the State Government in view of the delegation of the Central Legislature under Section 23C of the Mines and Minerals (Development & Regulation) Act, 1957 (in short "the MMDR Act"). Sub-section (4) of Section 21 of the Mines and Minerals (Development & Regulation) Act, 1957 (for short "the MMDR Act") mandates seizure minerals raised or transported without any lawful authority from any land along with the tool, equipment, vehicle or any other thing used for the said purpose by an Officer or authority specially empowered in this behalf. Sub-section (4-A) of Section 21 of the MMDR Act empowers the Court which is competent to take cognizance of the offences under Section 21(1) of the MMDR Act, to confiscate or dispose of the property.

7. The Hon'ble Apex Court in the case of ***Baijnath vrs. State of Bihar,*** reported in AIR 1970 SC 1436, taking note of the case of State of Orissa v. M.A. Tullock & Co. reported in AIR 1964 SC 1284 have held "……. where a superior legislature evinced an intention to cover the whole field, the enactment of the other legislature whether passed before or after must be held to be overborne. It was laid down that inconsistency could be proved not by a detailed comparison of the provisions of the conflicting Acts but by the mere existence of two pieces of legislation……..",

8. This Court in the case of ***M/s. Jai Durga Iron Pvt. Ltd. vrs. Superintendent of Police, Sundergarh and another,*** reported in (2006) 34 OCR 655 in paragraphs-12 and 13 has held as follows:-

> "12. From the above, it is clear that the State Act legislated by the State Legislature being in relation to Entry 23 of List-II in the 7th Schedule of the Constitution, which is with regard to Regulation of Mines and Minerals Development, the same is subject to the provisions of List-I with respect to Regulation and Development under the control of the Union. Thus, the above State Act was in force as no

similar provisions were included in the M.M. (D.&R.) Act which is a Central legislation under Entry 54 of List-I of the 7th Schedule. In view of the declaration made in Section 2 of the M.M.(D&R) Act, the moment similar provisions as contemplated in the State Act were provided for in the M.M.(D&R) Act by way of amendment with effect from 18.12.1999, the said provisions in the State Act became inoperative being occupied by the central legislation.

13. In view of the above amendment brought to the M.M.(D&R) Act by the central legislation with effect from 18.12.1999, in our considered view, the provisions of Section 12 of the M.M.(D&R) Act with regard to penalty which can be imposed on a person who fails to comply with or contravene any of the provisions of the State Act and the provisions of Section 16 of the State Act with regard to seizure of property liable to be confiscated and prosecution for such offences under Section 12 of the State Act can no longer be made applicable to minerals which are covered in the M.M.(D.&R) Act."

9. A Division Bench of this Hon'ble Court placing reliance in the case of ***Baijnath (Supra)*** and also ***M/s Jai Durga Iron Pvt. Ltd (supra)*** in the case of ***M/s. T.R. Chemicals Ltd. and another vrs. State of Orissa and another,*** reported in AIR 2008 Orissa 126 in paragraph-16 held as follows:-

"**16.** The 1999 amendment to the MMDR Act has to be held to be a "declaration" by a superior legislature with the intention to cover the whole field, especially covered under Section 23C and therefore, any enactment of the other legislature whether passed before or after must be held to be inoperative. This judgment of the Apex Court was relied upon by this Court in the case of M/s. Jai Durga Iron Pvt. Ltd. (supra) wherein this Court has come to hold that the moment similar provisions as contemplated in the State Act were provided for in the M.M. (D.& R.) Act, by way of amendment, with effect from 18.12.1999, the said provisions in the State Act became inoperative being occupied by the central legislation. Therefore, after the amendment to the Central Act, 1957, neither the Orissa Act, 1989 nor 1990 Rules framed thereunder have any competence nor were any longer enforceable."

10. Placing reliance on the law laid down in the case of ***Baijnath vrs. State of Bihar (supra)*** *so also* this Court in the case of ***M/s. Jai Durga Iron Pvt.***

Ltd. vrs. Superintendent of Police, Sundergarh and another & M/s T.R. Chemicals (Supra), this Court is of the view that when the superior legislation specifically empowers a Court, for disposal of the property seized under Section 21(4) of the MMDR Act, the Rule made by the State Government for disposal of such property authorizing another authority besides the Court competent, is inoperative inasmuch as the same is contrary to the statutory provisions under the MMDR Act and the State Government in its rule making power under Section 23C of the MMDR Act could not have authorized any other authority for confiscation of the same.

11. Therefore, since the competent authority has no power to confiscate the property as aforesaid, the impugned order of confiscation was without jurisdiction, but an appeal against such order of confiscation under Rule-12(7) of the Orissa Minerals Rules, 2007 does not lie to the District Judge. Hence, this writ petition stands allowed and the impugned order of confiscation at Annexure-2 stands set-aside. The petitioner is at liberty to seek release of his vehicle in question seized by the competent authority before the appropriate forum, i.e., the Court which is empowered to dispose of the property seized in this case by the competent authority.

Writ petition disposed of.

2015 (I) ILR - CUT-1043

BISWANATH RATH, J.

C.M.P. NO.1028 OF 2014

PRAMOD CHANDRA SENAPATI ……..Petitioner

.Vrs.

SANATAN JENA & ORS. ……..Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-39, R-7

Application under Order 39, Rule 7 C.P.C. – Plaintiff-petitioner prayed for appointment of a Commissioner for investigation and

Preservation of the trees got uprooted during Cyclone "Phylini" - There is a clear dispute between the parties not only on the possession over the property beyond the Record of Right but also on the right, title and interest over the suit property – Trial Court failed to appreciate this aspect and rejected the application – Held, impugned order is set aside – Application under Order 39, Rule 7 C.P.C. is allowed, directing the trial Court to appoint a Commissioner, who will submit his report within a stipulated period of time for consideration of the trial Court with further direction that any report obtained will be treated for the limited purpose of injunction and cannot be treated as a piece of evidence under Order 26 Rule 10 C.P.C. (Para 7)

Case laws Referred to:-

1.1986 (II) OLR 330 : (Amiya Bhusan Tripathy-V- Ahmmad Ali)
2.1991 (II) OLR 14 : (Savitri Devi & Ors.-V- Prasanna Kumari Devi & Ors.)
3.AIR 2001 A.P. 349 : (Meghraj Gayatri Devi-V- Jetling Rajeswar).

For Petitioner - M/s. Dipali Mohapatra & S. Parida,
For Opp.Parties - M/s. J.J. Chhotray.

Date of Hearing : 12.12.2014
Date of Judgment : 23.12.2014

JUDGMENT

BISWANATH RATH, J

Petitioner filed this Civil Miscellaneous Petition assailing the order dated 15.3.2014 passed by the learned Civil Judge (Senior Division), Baleswar thereby rejecting the application at the instance of the plaintiff-petitioner under Order 39, Rule 7 of the Code of Civil Procedure, 1907.

2. The brief fact of the case is that the petitioner as plaintiff filed a suit for declaration of right, title and interest over the suit schedule land, correction of Record-of-Right and also for permanent injunction. The plaintiff's case in the suit is that he is one of the sons out of five sons of his late father. One of the brothers of the petitioner, namely, Pradip had earlier filed O.S.No.111 of 1972-I for partition of their entire ancestral joint family properties impleading their father as one of the defendants. The present petitioner was impleaded as defendant no.3 in the said suit. The said suit was decreed in terms of compromise on 12.2.1975. The petitioner therefore, submitted that the entire ancestral property has been partitioned in meets and

bounds by allotting Ac.2.11 decimals of land as described in the plaint involved in the suit as 'Ga' schedule land. All the co-sharers have been given 1/4th equal share in 'Ga' schedule land i.e. Ac.2.11 decimals of land in favour of each. The petitioner alleges that even though he is in possession of his allotted share, but in the final settlement Record-of-Right, the area was wrongly reflected as Ac.1.58 decimals in stead of Ac.2.11 decimals of land. The co-sharers raised dispute over the balance portion of land taking plea of recording in the Record-of-Right. It is in this view of the matter, the petitioner was constrained to file the suit involved in this writ petition. In the suit, the petitioner had also filed an application for injunction with a prayer to restrain the defendants thereby not to disturb with the possession of the plaintiff. The trial court after hearing the parties and going through the records granted an order of status quo. It is further alleged that while the matter stood thus, during current cyclone, namely, "Phylin" 30 numbers of Saguan trees and some other trees got uprooted involving the suit property. The petitioner filed an application under Order 39, Rule 7 of the Code of Civil Procedure in the above pending suit with a prayer to appoint a Commissioner for investigation and preservation of all trees.

3. Upon notice, in the application under Order 39, Rule 7 of the Code of Civil Procedure, defendant nos.1 to 3 i.e. the present opposite parties filed a common objection making averment therein that since the suit has been posted for hearing , there is no necessity to appoint a Commissioner alleging further that the petitioner has already taken away the trees and the petitioner has filed this application with an intention to delay the proceeding. The defendants-opposite parties further submitted that there is no Teak trees on the described plot. Such application is not maintainable having been filed after the plaintiff already filed his deposition under Order 18, Rule 4 of the Code of Civil Procedure, which includes reference of the documents as exhibits. The petition of the petitioner was objected also on the ground that the hearing of the suit has already commenced, there is no necessity for appointment of Commissioner at this stage. Further, when there is dispute regarding boundary and dispute concerning right, title and interest, there is no scope to depute a Commissioner, which will ultimately disturb the trial in the proceeding. On the above premises, the defendants-opposite parties submitted for rejection of the application under Order 39, Rule 7 of the Code of Civil Procedure.

4. The matter was heard by the trial court and by order dated 15.3.2014 the trial court rejected the aforesaid application on the premises that such application has been filed when the suit was posted for settlement of issues. Further, on the premises that law is well settled that the order of inspection is not to be provided for collecting evidence for the parties and such investigation is necessary only when the parties are incapable of having knowledge or inspection in view of nature of the suit. Further, since the land in question is open and witnesses are available, there is no need for appointment of a Commissioner at this stage, as it will otherwise amount to collection of evidence.

5. Before proceeding to deal with the merit of the case, it is necessary to refer to the provision contained in Order 39, Rule 7 of the Code of Civil Procedure.

> "Rule **7. Detention, preservation, inspection, etc., of subject matter of suit.-** (1) The court may, on the application of any party to a suit and on such terms as it thinks fit,—
>
> (a) make an Order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein;
>
> (b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and
>
> (C) for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.
>
> (2) The provisions as to execution of process shall apply, mutatis mutandis, to persons authorized to enter under this rule."

6. From the above, it is amply clear that statute has made the provision for dealing particular matters under Order 39 Rule 7.

From the pleading of the parties it is amply clear that there is a clear dispute with regard to not only on the possession of the parties over the property beyond the Record-of-Right but also on the right, title interest over the disputed property as such, this Court do not find any illegality or infirmity

with plaintiff-petitioner making an application under Order 39 Rule 7 of the Code of Civil Procedure and this Court hold that the trial court failed to appreciate this aspect involved in the matter. Particularly in the contingency that has taken place during pendency of suit as narrated in detail herein above. I also further hold that the trial court has failed in making a distinction in between Order 39 Rule 7 and Order 26 Rule 9 of the Code of Civil Procedure. In deciding similar disputes particularly deciding the question whether in such contingency, an application under Order 39 Rule 7 of the Code of Civil Procedure is maintainable or not, this Court in the case of ***Amiya Bhusan Tripathy vrs. Ahmmad Ali***, as reported in 1986 (II) OLR-330, held that application under Order 39 Rule 7 of the Code of Civil Procedure is very much entertainable and in deciding so this Court further held that the report obtained or the materials obtained in the process cannot be treated as evidence under Order 26 of the Code of Civil Procedure and inspection and inquiry in such matters are for limited purpose and are required to be considered to the extent of injunction only. Similarly, in another case of similar nature this Court in a decision between ***Savitri Devi and others vrs Prasanna Kumari Devi and others*** reported in 1991(II) OLR 14 come to hold that the report of inspection in terms of Order 39 Rule 7 is not evidence unless otherwise proved and this Court also further held that there is a basic distinctive feature in the report collected under Order 39 Rule 7 of the Code of Civil Procedure vis-à-vis a report of a Commissioner appointed under Order 26 Rule 9 of the Code of Civil Procedure. I find both the above decisions squarely applicable to the petitioner's case.

I have gone through the citation cited by the opposite party vide **Meghraj Gayatri Devi vs. Jetling Rajeswar,** AIR 2001 Andhra Pradesh 349 but find facts involved in the said case is altogether different and I do not find any applicability of the this decision to the case at hand.

7. Under the aforesaid facts, circumstances and in the settled position of law, I disapprove the impugned order dated 15.03.2014 passed in C.S. No.315 of 2008 by the Civil Judge (Sr. Division), Balasore consequently while setting aside the order dated 15.3.2014 in C.S. No.315 of 2008, this Court allows the application under Order 39 Rule 7 of the Code of the Civil Procedure at the instance of the petitioner and direct the trial court to forthwith issue a commissioner for the purpose of the case at hand and submit his report within a stipulated period of time for consideration of the trial court with further direction that any report to be obtained in the process will be

treated for the limited purpose of injunction and cannot be treated as a piece of evidence under Order 26 Rule 10 of the Code of Civil Procedure.

I make it clear that the observation made in this revision are only for the purpose of Order 39 Rule 7 and cannot be utilised in the ultimate decision in the suit.

The Civil Miscellaneous Petition is accordingly allowed. However, there shall be no order as to cost.

Petition allowed.

2015 (I) ILR - CUT- 1048

S. N. PRASAD, J.

W.P.(C) NO. 21828 OF 2010

MAGUNI CHHATRIA ……..Petitioner

.Vrs.

COLLECTOR, BALANGIR & ORS. ……..Opp.Parties

ANGANWADI WORKER – Appointment – O.P. 4 was selected on submission of forged School Leaving Certificate – Petitioner raised objection – Headmaster of the concerned School reported that O.P. 4 was not a student of that School – Petitioner's claim was rejected on the ground that the objection was not received within seven days as per clause (d) of the guide line Dt. 2.5.2007 – Such order can not sustain as fraud avoids all judicial acts, ecclesiastical or temporal – Held, impugned order is set aside – Matter is remitted to O.P. 1 to pass appropriate order afresh. (Paras 12 to 17)

For Petitioner - M/s. Rabindranath Prusty, C.R. Kar & N.N.Mohapatra

For Opp.Parties - Addl. Govt. Adv. M/s. Dinesh Ku. Mohanty, D.K.Rath & K.Dang

Case Laws Referred to :-

1. (2013) 9 SCC 363 : Devendra Kumar -V- State of Uttaranchal & Ors.

Date of hearing : 8.04.2015
Date of judgment: 8.04.2015

JUDGMENT

S.N.PRASAD, J.

Petitioner being aggrieved with the order dated 22.9.2010 in Revenue Misc.Appeal No.17 of 2010 passed by the Additional District Magistrate, Bolangir by which the appeal preferred by the petitioner has been rejected, has approached this Court.

2. Brief facts of the case is that the petitioner along with opposite party no.5 and others had participated in the selection process for being engaged as Anganwadi Worker for Gatesarbarpara Anganwadi Centre. The petitioner although eligible in all respect has not been considered rather opposite party no.4 has been considered and selected as Anganwadi Worker of the concerned centre.

3. The petitioner coming to know that the certificate on the basis of which candidature of opposite party no.4 has been considered and selected is a forged certificate has made a complaint before the appellate authority praying therein to struck down selection of opposite party no.4 based upon forged certificate. The petitioner has substantiate her stand before the appellate authority that the school leaving certificate which was obtained from Golmuri Utkal Samaj High School, Jamshedpur, Jharkhand on 28.9.1997 is forged one as the Headmaster of the said school has reported vide his report dated 6.5.2010 that opposite party no.4 was not the student of the said school. Opposite party no.4 appeared before the appellate authority and submitted that the school leaving certificate granted by the school situated at Jamshedpur in the year 1997 but the same has not been challenged prior to 2010 and at the time of selection no objection was made by any person within the stipulated period i.e. within 7 days as provided under the guideline dated 2.5.2007, hence his issue cannot be rejected at this stage.

4. Case of the petitioner is that since opposite party no.4 has committed forgery and got engagement on the basis of forged certificate she has no right to remain in service and the moment it came to the notice of the authority, engagement of the opposite party no.4 is to be struck down on the ground that illegality cannot be perpetuated.

5. On the other hand, learned counsel for the opposite party no.4 argued at length and has submitted that order of the appellate authority has passed the order by framing two issues and both the issues are dealt with specific reason and as such order impugned needs no interference.

6. Further submission has been made on behalf of opposite party that the appellate authority has refused to interfere with the selection process on the ground contained in Clause (d) of the guideline dated 2.5.2007 which provides for making complaint within a period of 7 days. Since objection has been made at a belated stage, appellate authority has rightly rejected claim of the petitioner.

7. Heard learned counsel for parties at length.

8. The fact which is not in dispute is that in pursuance to the selection process for engagement of Anganwadi Worker the petitioner as well as opposite party no.4 was considered and in which opposite party no.4 was selected.

9. The petitioner has raised objection questioning validity of school leaving certificate of opposite party no.4 and her contention was also corroborated from the stand of the Headmaster of the concerned school to the effect that opposite party no.4 was never been a student of that school.

10. Opposite party no.4 had appeared before the appellate authority through her Advocate, he has also not disputed this aspect of the matter, rather he has gone into the provisions as contained in Clause (d) of the guideline dated 2.5.2007 and stated that objection is only to be raised within a period of 7 days. Since school leaving certificate was issued by the school in question in the year 1997 but it had never been question after a long period, at this stage it cannot be questioned.

11. The appellate authority had passed order rejecting claim of the petitioner on the ground that objection has been raised belatedly i.e. beyond the period of 7 days as provided in Clause (d) of the guideline dated 2.5.2007. The appellate authority although has came to conclusion by making observation in the impugned order that “on verification of the letter of Headmaster,Golmori Utkal Samaj High School dt.6.5.2010 and the original S.L.C. of Gouri Panigrahi issued on 1997 it is found that the seal affixed on the letter and the SLC does not tally with each other.

12. This observation/finding of the appellate authority suggests that the appellate authority was also of the view that there has been manipulation of

school leaving certificate but he has given finding solely on the basis of clause (d) of the guideline dated 2.5.2007 which speaks that seven days time will be given for filing of objection. In this context, clause (d) of the guideline dated 2.5.2007 is being reproduced below:

> "7 days time will be given for filing of objection, if any, by the community on the issue of nativity, educational qualification and caste certificate."

13. In this guideline, provision has been made conferring power upon the community to make objection within seven days. This provision does not entitle any candidate to make an objection. Even assuming that seven days has elapsed and after seven days the parties come to know forgery committed on the part of the candidate and selected by way of producing forged certificate, the said candidate has no right to remain in the post on the ground of forgery which has been discussed in the case of **Devendra Kumar –vs- State of Uttaranchal and others** reported in (2013) 9 SCC 363 wherein in para-13 which is being reproduced below:

> " It is settled proposition of law that where an applicant gets an office by misrepresenting the facts or by playing fraud upon the competent authority, such an order cannot be sustained in the eye of the law. "Fraud avoids all judicial acts, ecclesiastical or temporal". (Vide S.P.Chengalvaraya Naidu –v- Jagannath reported in (1994) 1 SCC 1 : AIR 1994 SC 853. In Lazarus Estates Ltd. vs- Beasley reported in (1956)1 QB 702 the Court observed without equivocation that :
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> " …. No judgment of a court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything.""

14. In view of the said principles of law which provides that fraud avoids all judicial acts, ecclesiastical or temporal. If the ratio laid down in the decision of the Hon'ble Supreme Court will be compared with the facts of the instant case, it is admitted position which has also been admitted by the appellate authority that there is discrepancy in the signature of Headmaster and seal affixed on the letter and the school leaving certificate which suggest that some fraud has been committed by the private opposite party.

15. Finding given by the appellate authority that since objection has been raised beyond seven days is based on incorrect finding in view of the settled position of law that illegality cannot be permitted to be perpetuated and the moment it came to know about the fraud, it is the duty of the authority to rectify the same.

On the basis of the said principles, this Court come to conclusion that finding of the Additional District Magistrate passed in the memorandum of appeal is not sustainable and hence the same is hereby set aside.

16. Since on the ground for submission of forged certificate by the opposite party no.4 the candidature of the petitioner could not have been considered, hence the case of the petitioner needs to be considered by the authority concerned.

17. Accordingly, that matter is remitted to the opposite party no.1 who will pass appropriate order afresh within a reasonable period, preferably within a period of six weeks from the date of receipt of copy of this order. The writ petition is accordingly disposed of.

Writ petition disposed of.