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

W.P(C) No.12005 OF 2014

MAN MOHAN DAS & ORS. …….. Petitioners

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART,14

Abolition of sub-wholesalership in superior kerosene oil vide odisha public Distribution system (Control) Amendment order, 2013 – Order Challenged – policy decision to abolish the intermediary system – Recommendation of justice wadha committee – Tests for determining reasonableness of restriction have been fulfilled in this case and the Amendment order is not violative of Article 19 (I) (g) of the Constitution – Held, the O.P.D.S. Amendment order, 2013 is not violative of Article 14 of the Constitution of India. (Paras 15 to 19)

For Petitioners : Mr. Chandrakanta Nayak
For Opp.party : Mr. R.Mohapatra, Govt. Adv.

Date of hearing : 26.11.2014
Date of Judgment: 26.11.2014

JUDGMENT

DR. A.K. RATH, J.

The petitioners are the sub-wholesalers of Superior Kerosene Oil ("S.K Oil", in short) in different districts of Orissa. They are aggrieved by the Notification No.18749 dated 31.10.2013 issued by the Government of Odisha, Food, Supplies & Consumer Welfare Department, vide Annexure-1, whereby and whereunder the system of sub-wholesalership has been abolished.

2. Shorn of unnecessary details, the short facts of the case of the petitioners are that pursuant to the licence issued by the appropriate authority, the petitioners were appointed as sub-wholesalers of S.K Oil in different districts. They made applications for renewal of the licence, but the same was not renewed in view of the impugned notification, vide Annexure-1.

3. Pursuant to the issuance of notice, a counter affidavit has been filed by the opposite party no.1. The sum and substance of the case of the opposite party no.1 is that the system of sub-wholesalership of S.K Oil has been abolished in respect of 25 districts of the State with effect from 1.6.2014. Presently, the S.K. Oil is being supplied directly by the wholesalers to the Fair Price Shops ("FPS", in short). The system of sub-wholesalership was abolished pursuant to the recommendation of the Justice Wadha Committee. The same was first implemented in five districts of the State on pilot basis with effect from 1.7.2013. It is further stated that the notification, vide Annexure-1, has been issued in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 read with paragraph 5 of the Annexure to the Public Distribution System (Control) Order, 2001 and notifications of Government of India issued from time to time. Since the process of election was started in respect of Lok Sabha and State Assembly, 2014, the validity date of renewal of licence had been extended upto 31.5.2014 as it was felt that for direct delivery of S.K. Oil by the wholesalers to retailers might create dislocations in middle of the election process and possibility of attracting model code of conduct. Therefore, the impact of the Odisha Public Distribution System (Control) Amendment Order, 2013 (hereinafter referred to as "the OPDS Amendment Order, 2013") was deferred by two months in respect of 25 districts of the State. Accordingly, instructions were issued on 28.2.2014 with clear direction for renewal of licence of S.K. Oil sub-wholesalers of 25 districts upto 31.5.2014 and also arrangement to be initiated for distribution of S.K. Oil directly by the wholesalers to the retailers. It is further stated that by order dated 13.3.2014 passed in WP(C) No.8202 of 2013 , it is held that extension of licence of S.K. Oil sub-wholesalers of 25 districts upto 31.5.2014 was due to impending election process and accordingly direction was issued to abolish S.K. Oil sub-wholesalership in 25 districts after election process was over. Accordingly, the State Government abolished the S.K. Oil sub-wholesalership in 25 districts. It is further stated that as per the report of the Justice Wadhwa Committee, the intermediary system in the distribution chain, i.e. storage agent in respect of food grains has been abolished. Further, in consonance with the recommendation of the said Committee, the sub-wholesalers in respect of S.K. Oil has also been abolished, which has been confirmed by this Court vide order dated 24.4.2013 passed in WP(C) No.18522 of 2012.

4. Heard Mr.Nayak, learned Advocate for the petitioners and Mr.R.K.Mohapatra, learned Government Advocate.

5. Mr.Nayak, learned Advocate for the petitioners, submits that the impugned notification is violative of Article 14 as well as Article 19(1)(g) of the Constitution. To elaborate his submission, Mr.Nayak submits that the petitioners have legitimate expectations of carrying on their businesses. The system was abolished without affording any opportunity of hearing to the petitioners. He further submits that the impugned notification has no nexus with the object sought to be achieved inasmuch as the same is not based on intelligible differentia.

6. Per contra, Mr. Mohapatra, learned Government Advocate, submits that the impugned notification is a reasonable classification. The same cannot be constructed the violation of Article 14 as well as Article 19(1)(g) of the Constitution. He further submits that pursuant to the decision of the Justice Wadhwa Committee, the system of sub-wholesalership was abolished and accordingly, the Orissa Public Distribution System (Control) Order, 2008 (hereinafter referred to as "the OPDS Order, 2008") was amended by the Government of Odisha, Food Supplies and Consumer Welfare Department.

7. The State Government promulgated the OPDS Order, 2008 in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 read with paragraph 5 of the Annexure to the Public Distribution System (Control) Order, 2001 and the notifications of the Government of India from time to time. Clause 2 of the OPDS Order, 2008 defines dealer, retailer, sub-wholesaler and wholesaler. The same are quoted below :

> "**2. Definitions** – In this Order, unless the context otherwise requires-
>
> (h) **"Dealer"** means any person, firm, association of persons, company, Panchayati Raj Institution, Urban Local Body, Co-operative Society, Women Self Help Group, Forest Protection Committee, Self Help Group or any other institution carrying on business on wholesale or retail basis in the purchase, storage, sale and/or distribution of essential commodities meant for distribution under the Public Distribution System. The term "Dealer" includes wholesaler/sub-wholesaler/retailer and storage agents;
>
> (p) **"Retailer"** means a dealer who purchases PDS commodities from a Wholesaler and stores and sells these commodities to consumers;
>
> (r) **"Sub-wholesaler"** in Kerosene means a dealer other than agent wholesaler of Oil company and a retailer;

(s) **"Wholesaler"** means a dealer who stores and sells PDS commodities to another wholesaler or retailer, and includes a sub-wholesaler or a storage agent;"

8. While the matter stood thus, again the Government of Odisha, Food, Supplies & Consumer Welfare Department issued a notification no.18749 dated 31.10.2013, vide Annexure-1, making certain amendments in the OPDS Order, 2008. The word "Dealer" occurring in clause 2(b) has undergone an amendment. The same is quoted hereunder;

"(b) In sub-clause (h), for the words "the term "Dealer" includes wholesaler/sub-wholesaler/retailer and storage Agent", occurring at the end, the words "and includes wholesaler or handling and Transport Contractor level –I and level –II or Transport Contractor for sugar zonal Depot or State level Transport Contractor or retailer" shall be substituted;"

9. There is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The Courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds as has been stated by the apex Court in the case of Mohd. Hanif Quareshi v. State of Bihar, AIR 1958 SC 731 (at pp. 740-741)

10. What should be the approach of the Court to test the reasonableness of a statute ? The apex Court in Joti Pershad v. Administrator for the Union Territory of Delhi, AIR 1961 SC 1602 at p.1613 observed as follows :

"Where the legislature fulfils its purpose and enacts laws, which in its wisdom, are considered necessary for the solution of what after all is a very human problem the tests of 'reasonableness' have to be viewed in the context of the issues which faced the legislature. In the construction of such laws and particularly in judging of their validity the courts have necessarily to approach it from the point of view of furthering the social interests which it is the purpose of the legislation to promote, for the Courts are not, in these matters, functioning as it were in vacuo, but as parts of a society which is trying by enacted law, to solve its problems and achieve a social concord and peaceful

adjustment and thus furthering the moral and material progress of the community as a whole."

11. The first plank of argument by the learned counsel for the petitioners is that OPDS Amendment Order, 2013 is the violative of Article 19(1)(g) of the Constitution.

12. There can be no doubt that Article 19 guarantees all the six freedoms to the citizens of the country including to practise any profession, or to carry on any occupation, trade or business, but the same is conditioned by clause (6). Clause (6) of Article 19 runs thus;

> "**19. Protection of certain rights regarding freedom of speech, etc**.-
>
> (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, [nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,-
>
> (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
>
> (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise]."

The Constitution permits reasonable restrictions to be placed on the right in the interest of the general public. The State in the instant case claims protection under clause (6).

13. The apex Court has laid down several tests and guidelines to indicate what in a particular circumstance can be regarded as a reasonable restriction. The Constitution Bench of the apex Court in the case of Pathumma and others v. State of Kerala and others, AIR 1978 SC 771, after survey of the earlier decisions, held as follows :

(i) That restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(ii) That in order to judge the quality of the reasonableness no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will have to vary from case to case and with regard to changing conditions, the values of human life, social philosophy of the Constitution prevailing conditions and the surrounding circumstances all of which must enter into the judicial verdict. In other words, the position is that the court has to make not a rigid or dogmatic but an elastic and pragmatic approach to the facts of the case and to take an overall view of all the circumstances.

(iii) That to judge the reasonableness of a restriction is to examine the nature and extent, the purport and content of the right, nature of the evil sought to be remedied by the statute, the ratio of harm caused to the citizen and the benefit to be conferred on the person or the community for whose benefit the legislation is passed, urgency of the evil and necessity to rectify the same. In short, a just balance has to be struck between the restriction imposed and the social control envisaged by clause (6) of Article 19.

(iv) That there must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved. In other words, the Court has to see whether by virtue of the restriction imposed on the right of the citizen the object of the statute is really fulfilled or frustrated. If there is a direct nexus between the restriction and the object of the Act then a strong presumption in favour of the constitutionality of the Act will naturally arise.

(v) That another test of reasonableness of restrictions is the prevailing social values whose needs are satisfied by restrictions meant to protect social welfare.

(vi) That so far as the nature of reasonableness is concerned it has to be viewed not only from the point of view of the citizen but the problem before the legislature and the object which is sought to be achieved by the statute. In other words, the Courts must see whether the social control envisaged in clause (6) of Article 19 is being effectuated by the restrictions imposed on the fundamental right. It is obvious that if the Courts look at the restrictions only from the point of view of the citizen who is affected it will not be a correct or safe approach

> inasmuch as the restriction is bound to be irksome and painful to the citizen even though it may be for the public good. Therefore, a just balance must be struck in relation to the restriction and the public good that is done to the people at large. It is obvious that, however important the right of a citizen or an individual may be, it has to yield to be the larger interests of the country or the community."

14. We would like to examine the facts and circumstances of the present case in the light of the principles enunciated above in order to find out whether or not the OPDS Amendment Order, 2013 is in violative of the rights of the petitioners enshrined under Article 19(1)(g) of the Constitution.

The Government of Odisha, in its Food Supplies and Consumer Welfare Department, took a policy decision to abolish the sub-wholesalership basing on the recommendation of Justice Wadhwa Committee which was constituted by the Hon'ble apex Court. The conscious policy decision was taken to abolish the intermediary system. On abolition of sub-wholesalers, the wholesalers are supplying SK Oil directly to the retailers without any intermediary system in the distribution chain.

15. Thus all the tests laid down by the apex Court for determining reasonableness of a restriction have been amply fulfilled in this case and we are unable to find any constitutional infirmity in this case on the ground that the OPDS Amendment Order, 2013 is violative of Article 19(1)(g) of the Constitution. We are of the clear opinion that the provisions of OPDS Amendment Order, 2013 are reasonable restrictions within the meaning of clause (6) of Article 19 of the Constitution.

16. This brings us to the second branch of argument relating to applicability of Article 14 of the Constitution. Article 14 forbids hostile discrimination and not reasonable restrictions. It is for the State to make a reasonable classification which must fulfill two conditions.

17. In Ram Krishna Dalmia v. Shri Justice S.R. Tendulkar, AIR 1958 SC 538 at p.547), the apex Court, after considering a large number of its previous decisions, observed as follows:

> "It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely,

(i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and

(ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis, namely geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration."

18. On the anvil of the decisions cited supra, let us see whether the OPDS Amendment Order, 2013 can be said to be permissible classification. While dealing with the first argument, we have already point out that pursuant to the recommendation of the Justice Wadha Committee, the system of sub-wholesalership was abolished.

19. In our opinion, both the conditions of reasonable classification, as indicated above, are fully satisfied in this case; for the reasons; we hold that the OPDS Amendment Order, 2013 is not violative of Article 14 of the Constitution.

20. The matter may be considered from another angle. The conscious policy decision was taken to abolish the intermediary system. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. It is not for the Courts to consider relative merits of different economic polices and consider whether a wiser or better one can be evolved as has been held by the apex Court in the case of BALCO Employees Union (Regd.) v. Union of India and others, AIR 2002 SC 350. The writ petition, being devoid of merit, is accordingly dismissed.

Writ petition dismissed.

2015 (I) ILR - CUT-1061

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

JCRLA NO. 34 OF 2006

SUBASH CHANDRA PRADHAN .....Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

CRIMINAL TRIAL – Murder case – appreciation of evidence – No eye witness about the actual infliction of injury – P.Ws.6,7,8 & 9 were intimated about murder by one Panu Sahu who was not examined by the prosecution – Their evidence being hearsay no credibility can be attached to it – Even one Kalika Pradhan (sister of the appellant) who made the disclosure statement to the informant (P.W.6) that it was the appellant who murdered the deceased was withheld from the witness box – As per the prosecution story appellant arrived the incident schene empty handed as he asked knife from the deceased to cut a mango so Katuri, the weapon of offence belongs to the deceased – Moreover in the chemical examination report no human blood stains found from the Katuri – F.I.R. being prepared only after arrival of police at the spot is expected to be fabricated – Held, prosecution has miserably failed to establish appellant's guilt beyond reasonable doubt – Impugned conviction and sentence is set aside.

(Paras 10 to 16)

For Appellant - Mr. Arunendra Mohanty, Adv.
For Respondent - Mr. Sk. Zafarulla, ASC.

Date of hearing : 16.01.2015
Date of judgment: 23.02.2015

JUDGMENT

VINOD PRASAD,J.

The sole appellant Subash Chandra Pradhan being aggrieved by his conviction u/s 302 I.P.C. and imposed sentence of life imprisonment and to pay a fine of Rs.5000/- and in default to serve further 2 years RI by Additional Sessions Judge, FTC, district Nayagarh, in S.T.No. 49/485 of

2004-03, State of Orissa versus Subash Chandra Pradhan, vide impugned judgment and order dated 20.3.2006, has preferred instant appeal challenging the said verdict hankered by success.

2. Recapitulating the background incident briefly it becomes manifest from the entire trial court record including tendered documentary evidences and oral testimonies of witnesses that Gopinath Sasmal(deceased) was a resident of village Benagadia under Khandapada police station, district Nayagarh, and had four sons Madhusudan/ informant/PW6, Golak/PW9, Sudama/PW7 and Bhikhari/PW8. Since last a decade or so deceased was employed as a jungle watchman by co-villagers to guard local Ghodamari jungle commonly known as *"Izat Ghodamari Benagadia jungle"*. As usual, Gopinath Sasmal, the deceased, left his house for his watchman duty on 26.4.2003 at 6 a.m. Same day at about 8 a.m. one person by the name of Naya Sahu R/O village Patna came to Madhusudan, the informant/PW6, and disclosed that the present appellant had taken a *Katuri* from the deceased Gopinath and from it had cut a Mango and after eating the same had murdered Gopinath Sasmal by slicing his neck and then had escaped from the murder scene. Coming to know of his father's murder, informant/PW6 with his brothers and co villagers rushed to the incident scene only to spot deceased corpse lying under a tamarind tree with a sustained incised wound chopping off his neck. At the occurrence scene Kalika Pradhan, sister of present appellant, arrived and disclosed to the informant/PW6 that it was the appellant who had murdered his father by *Katuri* and had escaped from the murder site. Khandapada Police was informed on phone and post their arrival at the incident place that the informant /PW6 dictated FIR, Ext.5 , which was penned down by Dayanidhi Pradhan, and the same was handed over to the police, on the strength of which formal FIR, Ext. 5/3, at the police station Khandapada was registered as P.S. Case No. 49 at 11.30 a.m. same day exhibiting distance between the police station and incident scene as 9 KMs.

3. Priyaranjan Sathpathi, OIC, Khandapada police station/PW16, immediately initiated the investigation, came to the incident village, sketched spot map, Ext.8, interrogated and recorded statements of witnesses, got cadaver of the deceased photographed, performed inquest on the dead body and slated down inquest memo, Ext. 1, prepared dead body chalan Ext.9 and seized blood stained and plain earth from the spot with blood stained slippers, two blood stained stone chips, and prepared seizure list thereof as Ext.3. Appellant was arrested on 26.4.2003 at 8 p.m., who confessed his guilt vide

Ext.10 and then led the police party and the recovery witnesses to Ratendilati and from the southern side of Kuania river, near village Serjanga Patharapada, brought out a Katuri,(M.O.I,) weapon of assault, which was seized vide seizure memo Ext.2.Wearing apparels of the appellant and one blood stained napkin were also seized by the I.O./PW16. After conducting some further investigation PW16 handed over residue of the investigation to the incumbent OIC Jyoti Prakash Panda/ PW17 on 26.5.2003, who, after conducting further investigation, charge sheeted the appellant. Ext. 14 is the chemical examiner's report concerning weapon of murder and the attires of the appellant.

4. Dr. Shantisena Misra/PW15, a paediatric surgeon attached with Khandapada hospital, had conducted post mortem examination on the cadaver of the deceased on 26.4.2003 at 4.30 p.m. and had slated down autopsy report Ext.6. Body was despatched from the village same day at 2.20 p.m. and had arrived at the mortuary 4.30 p.m. brought by constables C/329 H.K.Behra and c/365 N. Panigrahi. According to the doctor deceased was 65 years of age, had average built body and rigor mortis was present over all his limbs. Blisters were present over his chest, right thigh and left leg. Following ante mortem physical injury was detected by the doctor on the dead body:-

> "*Incised wound 3cm x 1 ½ cm deep up to bone size at the level of thyroid cartilage on the left side of the neck transversely placed with tearing of major vessels and fracture of cervical vertebra on left side with abcerdant bleeding from the wound site with other viscera pale but intact. The wound was ante mortem."*

Death had occasioned due to shock and sever haemorrhage occasioned by cutting of large vessels on the left side neck due to injury caused by heavy and sharp cutting weapon which was homicidal in nature. Subsequently this witness on the requisition sent by the I.O. through court, had opined that sustained injury could be inflicted by M.O.I. vide Ext.7.

5. Now turning to the court's proceedings, observing necessary formalities in the committal court, case of the appellant was committed to Sessions Court for trial, where Ad-hoc Additional Sessions Judge, charged him with offence u/s 302 I.P.C. on 21.12.2005, but since that charge was abjured, accused pleaded not guilty and claimed to be tried and hence to establish the charge he was tried by resorting to Sessions trial procedure.

6. In the trial, prosecution confined its case to oral testimonies of seventeen witnesses including four eye witnesses Nibash Biswal/PW11, Rabindra Kumar Pradhan/PW12,Bira Sasmal/PW13and Babuli Barada/PW14. Daitary Naik/PW1 is the inquest witness while Alekha Sethi/PW2 and Udayanath Mallik/PW3 are seizure witnesses. Sons of the deceased Madhusudan Sasmal/PW6, Bhikari Sasmal/PW8, Golak Bihari Sasmal/PW9, and his nephew Sudama Sasmal/PW7 are post occurrence witnesses. Sambari Pradha/ PW10 is the witness of confession made by the appellant whereas two I.O.s are PW16 and 17. Dr. Santisena Misra/ PW15 is the autopsy doctor. Additionally prosecution also relied upon fourteen exhibits as documentary evidences.

7. Plea of the accused appellant was of total denial and false implication, but no defence witness was examined by him in support thereof.

8. Learned trial Judge through the impugned decision held that the prosecution had established accused guilt conclusively and therefore convicted and sentenced the accused appellant as above which judgment and order is under challenge in this appeal.

9. In the aforementioned back ground scenario that we have heard Sri Pradhan for the appellant and Sri S.K.Zafrulla, learned Additional Standing Counsel for the State and have scanned oral and documentary evidences and entire trial court record.

10. Incisively unleashing castigation of the impugned judgment, it is harangued by the appellant's counsel that by resorting to conjecture and surmises that the appellant has been held to be guilty when prosecution has miserably failed to establish the charge. No eye witness about the actual infliction of injury was produced and the so called eye witnesses also had not witnessed the actual assault nor they have corroborated the prosecution version. Sons and nephew are post incident witnesses and their evidences are valueless and nugatory to anoint guilt. Investigation is galore with mistakes and do not instil any confidence. Evidence of all the witnesses evidently are hearsay and inadmissible in as much as Kalika, sister of the appellant, was withheld by the prosecution and hence no reliance can be placed on oral testimonies of the examined witnesses. FIR was fabricated at the spot without having any ring of truth in its contents and the same is the outcome of confabulation, deliberation and concoction. Furthermore, a single blow without any motive at the spur of the moment do not take into its fold offence

u/s 302 I.P.C. and at the worst only an offence u/s 304 part-I is made out and hence impugned judgment of conviction and sentence being fallible is liable to be set aside and appellant be acquitted of the charge or the offence be mollified to culpable homicide not amounting to murder and be sentenced to the period of imprisonment already under gone by him as he has already in custody since the date of his arrest 26.4.2003 and has served more than a decade of imprisonment.

11. Submitting conversely learned State counsel urged that the deceased was last seen in the company of the appellant and immediately after the incident appellant was spotted running from the incident scene and hence irresistible intuitive conclusion can only be that but for the appellant nobody else is the perpetrator of the crime. Medical report and opinion by the doctor concerning the weapon certifies prosecution allegations and thus conclusive residue establishes appellant's guilt. Appeal sans merit and be dismissed is the final submission raised by learned State counsel.

12. We have carefully pondered over rival contentions in the light of evidences on record and our summations and critical analysis evinces that it is not in dispute that the deceased was a watchman of Khodamari Jungle and at the date, time and place of the incident, since was not at all challenged, that he met with a homicidal death. Doctor's evidence and autopsy report/Ext.6 clearly establishes his murder. Appellant's counsel also did not harp much on these significant aspects and he opted to concentrate only on the fact that appellant's involvement in the crime is not proved conclusively to the hilt and hence he deserves acquittal and such a contention, in our summation, carries must weight and substance for hereinafter reasons and discussions.

13. It is manifest from the record that so far as sons and nephew of the deceased, PW6,7, 8 &9, are concerned, they were intimated about the murder by one Panu Sahu resident of village Patna. They had no first hand information regarding the crime and hence their depositions can be bracketed only as hearsay evidences relating to actual murder. What is most piquant aspect is that Panu Sahu was not examined in the trial to state how he came to know about the murder of the deceased. The logical inescapable conclusion is that whatever PWs 6 to 9 have testified before the court , firstly has not been established beyond all reasonable doubt and most significantly is all hearsay and in admissible in evidence. No credibility can be attached to such depositions. What makes the matter in worse is that even sister of the

appellant Kalika was also withheld from testifying in court. Prosecution relies upon her disclosure heavily and to be specific that seems to be the only incriminating material against the appellant. Disclosure by Kalika to the informant and his brothers, again is hearsay and no importance can be attached to it, unless Kalika herself corroborates, such a disclosure and deposed how she came to know about the incident. In absence of evidences of both the above witnesses the entire prosecution version lies within the realm of totally inadmissible evidences of hearsay of the worst kind and no reliance can be placed on such evidences to hold appellant guilty of the crime. Learned trial Judge while examining the prosecution case, completely ignored this significant legal aspect and fell in the trap of last seen evidence, which makes his entire analysis wrong and unacceptable.

14. Besides above disquieting feature there are unsatisfactory aspect of the prosecution version and to take stock of those, firstly there is no material on record of establish that the appellant had cut a mango and had eaten it as there is no peeled of leaves nor the seed was found nor they have been depicted in the site plan map nor the I.O. has collected and seized them, so much so that site plan does not depict any mango tree nearby at all. It is significant to recollect that the dead body of the deceased was found under a tamarind tree and consequently the first part of prosecution story is left with no corroborative evidence. This makes the disclosure by so called Kalika also extremely doubtful. Secondly, according to the prosecution story itself, the appellant at the beginning of the incident arrived at the incident spot empty handed, as it is prosecution case itself is that he asked knife from the deceased to cut a mango and hence the *Katuri*, weapon of assault, belonged to the deceased and not to the appellant and there is no evidence to the effect by any witness that the recovered *Katuri* belonged to the deceased. Thirdly that the recovered *Katuri*, marked 'D' in chemical examiners report had no blood stains on it and hence whether at all it was wielded as a weapon of assault is a disproved fact. Chemical examiners report vide Ext 14 makes this aspect manifest which discredits prosecution case irreparably. Fourthly, that the FIR, according to informant's deposition, was prepared only after arrival of the police at the scene of the incident and consequently possibility of it being outcome of concoction and fabrication cannot be ruled out or in any manner , the same is based on information received from Kalika, sister of appellant, who was withheld by the prosecution from being examined in trial compelling us to draw an adverse inference against it and it seems that probably Kalika was introduced during investigation to foist a case against

the appellant and since she did not dance on the tune of the informant that her evidence was kept under the carpet and all these attending and surrounding circumstances, on critical analysis, crumbles the entire prosecution edifice.

15. Lastly, but un-eschewably, we now examine the most harangued contention by the State counsel and heavily relied upon by learned trial court, the last seen incriminating evidence. On this score we find the view by the learned trial court completely unjust, inappropriate and fallible. Instead of making an in-depth analysis of oral and documentary evidence, learned trial court has read and analyzed the evidences in a pedantic manner making his conclusions faulty. First of all the last seen theory surfaced only through disclosure by Kalika, who never came in witness box to support her information, secondly, her narration about the manner in which the incident occurred is not borne out from site plan and other evidences on record, thirdly that, according to Crime Detail Form, attached with the paper book, the cadaver of the deceased was lying in an open field *"Bari Land"*. Since the sole witness of last seen evidence did not depose during the trial , there was no occasion for the trial court to base its opinion on such an un-creditworthy valueless material/ evidence and we out right discard said evidence to hold appellant guilty of such a serious charge of murder.

16. Drawing the curtain, we find that the prosecution has miserably failed to establish appellant's guilt beyond all reasonable doubt and hence allow this appellant's appeal by setting aside his conviction and sentence recorded through impugned judgment and order and acquit him of the charge of murder and direct that he be set at liberty from jail where ever he is confined forthwith unless he is required in connection with any other case.

17. Appeal is allowed as above. Let this order be intimated to the trial court.

Appeal allowed.

2015 (I) ILR - CUT-1068

I. MAHANTY, J.

OJ.C. NO. 3194 OF 1993

JOGENDRA PANDA .....Petitioner.

.Vrs.

COLLECTOR, KALAHANDI & ORS. .....Opp parties

ORISSA MERGED STATES (LAWS) ACT, 1950 – S.7 (b) r/w Art. 65 Limitation Act.

Alienation of land by a tribal to a non-tribal – Violation of section 7 (b) of the Act. – Claim of adverse possession – Effect of – Held, a non- tribal can not acquire right & title over the immovable property belonging to a tribal by invoking the Doctrine of Adverse possession. (Para- 9)

For petitioner: : M/s. S.Mishra -2, S.Mohanty, R.C. Rath & A.K.Mishra

For Opp. Parties : Addl. Standing Counsel M/s. S.K.Mund, K.Patnaik , R.Samal & S.Pattanaik

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Date of Judgment : 19.06.2014

JUDGMENT

I. MAHANTY, J.

In this writ application, the petitioner-Jogendra Panda has sought to challenge the order dated 09.07.1990 passed by the Revenue Officer, Dharamgarh in R.M.C. No.490 under Section 23-A of the Orissa Land Reforms Act, 1960 (In short 'the O.L.R. Act') directing issue of restoration warrant of the schedule land in favour of the legal heirs of the recorded tenant i.e. the present private opposite party Nos.3 to 5, who are admittedly belong to 'Sabara' community and have been listed as Scheduled Tribes. The present petitioner, who is a 'Brahmin' by caste sought to challenge the said order before the A.D.M.(L.R.), Kalahandi, Bhawanipatna in O.L.R. Appeal No.23 of 1990 and the said appeal came to be allowed by order dated

28.11.1990, whereby, the A.D.M., Kalahandi set aside the order passed by the Revenue Officer. The predecessors in interest of the private opposite party Nos.3 to 5 challenged the order passed in appeal in the Court of the Collector, Kalahandi in O.L.R. Revision Case Nos.1/91 and 2/91 and the said revisions came to be allowed by the learned Collector, Kalahandi by order dated 26.03.1993 setting aside the order passed in appeal and reaffirming the order passed by the Revenue Officer by declaring the transaction vide R.S.D. No.1538 dated 07.05.1964 between Padman Sabar and Joginder Panda as void and with the further finding that the present writ petitioner (opposite party therein) had not perfected his title by way of adverse possession and, consequently, directed the land to be restored in favour of the successors in interest of the suit land i.e. the present private opposite party Nos.3 to 5. Therefore, being aggrieved, the present writ petitioner-Jogendra Panda has sought to challenge the order passed by the Revenue Officer under Annexure-1 and the order passed by the Revisional Authority under Annexure-4 by way of filing the present writ petition.

2. The learned counsel appearing for the petitioner submitted that the writ petitioner is admittedly a Non-Scheduled Caste or Tribe person and belongs to Brahmin caste and had purchased Ac2.40 decimals of land in village Jharkundamal, in Khata No.40, Plot No.380 on payment of consideration amount accompanied by delivery of possession from opposite party Nos.3 & 4, who belong to Scheduled Tribe, by way of a Registered Sale Deed No.1538 dated 07.05.1964. It is further submitted that opposite party No.3 & 4 filed R.M.C. No.11 of 1990 before opposite party No.2 (Revenue Officer, Dharamagarh) for recovery of possession of the case land under Section 23-A of the O.L.R. Act, inter alia, on the allegation that the petitioner was in unauthorized possession since the date of purchase. It is submitted that the Revenue Officer relying on an erroneous decision of the Board of Revenue reported in 56(1983) C.L.T. 17, allowed the claim of the opposite party Nos.3 & 4 by his order dated 09.07.1990 under Annexure-1 which is impugned herein.

3. The learned counsel for the petitioner further submitted that challenge to the aforesaid order had been made by the writ petitioner in O.L.R. Appeal No.23 of 1990 before the Additional District Magistrate, Kalahandi. In the said proceeding, the appellate court came to a finding that the decision of the Board of Revenue relied upon by the Revenue Officer was no longer good law in view of the decision of this Court in the case of Anadi Mohanta &

others vs. State of Orissa and Others, 68(1989) C.L.T. 1 and consequently, the appeal filed by the writ petitioner had come to be allowed. The opposite party Nos.3 & 4 as well as opposite party No.5 filed separate revision before opposite party No.1-Collector, Kalahandi and it is alleged by the petitioner that the revision came to be allowed on the basis of a mis-interpretation of the aforesaid decision rendered by this Court in the case of Anadi Mohanta (Supra) and consequently, the revision cases were allowed with a finding that the period of limitation would be 30 years to the transfers effected without necessary permission under the Orissa Merged States (Laws) Act, 1950.

Learned counsel for the petitioner asserted that whereas the period of limitation under Section 23 of the O.L.R. Act, 1960 was originally 12 years with relation to unauthorized occupation for a proceeding under 23-A, it is only on 01.05.1991 an amendment was carried out to the aforesaid provision and period of limitation stood extended to 30 years by Orissa Act 8 of 1991. Therefore, it is contended on behalf of the petitioner that since the petitioner's possession was on the basis of the sale deed executed in his favour in the year 1964, was contrary to Section 7(b) of The Orissa Merged States (Laws) Act, 1950. The petitioner acquired title by way of adverse possession on 07.05.1976 i.e. on completion of 12 years from 07.05.1964. Therefore, the petitioner having perfected his title to the property by way of adverse possession, the initiation of a proceeding for recovery of the land by the private opposite parties in the year 1990 was barred by limitation.

4. Learned counsel for the opposite parties, on the other hand, admitted that opposite party Nos.3 & 4 had executed a sale deed in favour of the writ petitioner on 07.05.1964, but the said sale was in contravention of Section 7(b) of the Orissa Merged States (Laws) Act, 1950. It is further submitted that the O.L.R. Act, 1960 came to be notified on 25.09.1965 (excepting Chapters-III & IV) and came into force with effect from 01.10.1965. Chapters III & IV came into force with effect from 09.12.1965 and 07.01.1972 respectively. Sections 22 & 23 being part of Chapter-II of the O.L.R. Act came into force since 01.10.1965. The said provision prohibits transfer of land by a Scheduled Tribe member to a Non-Scheduled Tribe member without permission in non-scheduled areas. In other words, while Section 22 restricted the alienation of land belonging to Scheduled Tribes and declared that any transfer of holding belonging to a Scheduled Tribe shall be void unless under Sub-section(3) there of written permission of the Revenue Officer was duly obtained and under Section 23, in the case of any

transfer in contravention of Section 22(1), the Revenue Officer was authorized either on his own motion or on the application of any interested person to conduct an enquiry and make a necessary declaration either suo motu or on an application of interested parties to cause restoration of the property to the transferer or his heirs and for such purpose to take such necessary steps for compliance of the said order. Apart from the above, Section 23-A came to be inserted in the O.L.R. Act, 1960 by Orissa Act No.44 of 1976 whereby the Revenue Officer was authorised to direct eviction of all persons in unauthorized occupation of property either on his own motion or at behest of an interested party after giving notice to the parties likely to be affected thereof. Admittedly Section 23-A was incorporated by amendment on 25.10.1976.

5. Learned counsel for the opposite parties contend that the order of the Revenue Officer under Annexure-1 as affirmed by the Collector, Kalahandi in the revisional order under Anenxure-4 clearly indicates that the present petitioner though claim to have purchased the property by way of a registered sale deed on 07.05.1964, clearly admitted that the said sale deed was void on account of violation of Section 7(b) of the Orissa Merged States (Laws) Act, 1950 and consequently, the only basis on which the writ petitioner seeks to establish his right over the land in dispute is essentially his claim of "adverse possession".

Admittedly, the sale transaction was conducted on 07.05.1964 i.e. prior to the coming into force of the provisions of the O.L.R. Act. It is the further finding of the Revenue Officer that Section 7(b) to the Orissa Merged States (Laws) Act, 1950 puts a bar on transfer of land by persons belonging to aboriginal tribe without the necessary permission of the competent authority and the private opposite party belong to the Sabar caste which was declared as an aboriginal tribe under notification dated 22.05.1962. Therefore, the Revenue Officer held that any sale transaction of land belonging to an aboriginal tribe without the permission of the competent authority would be hit by the provisions of the Orissa Merged States (Laws) Act, 1950 and, accordingly, he decided that as per provisions of Section 23 of the O.L.R. Act, the sale transaction having been effected without the necessary permission of the competent authority, the said transaction is void and the land was directed to be recorded in the name of the petitioner therein (opposite parties and their legal heirs herein).

6. Insofar as the claim of limitation of 12 years adverse possession is concerned, the Revenue Officer came to a finding that the said period has not matured by 02.10.1973, the limitation for adverse possession of land belonging to Scheduled Tribe category persons was extended to 30 years from the said date and, therefore, by the date the petitioner claims to have perfected his title by way of adverse possession, the period of limitation was no longer 12 years but had stood extended to 30 years and consequently initiation of the proceeding under Section 23-A of the O.L.R. Act, 1960 in the year 1990 was not beyond the period of limitation prescribed by the necessary statutes. Though the writ petitioner succeeded in appeal, the revisional authority i.e. the Collector, Kalahandi under Anenxure-4 set aside the said appellate order affirming the order of the Revenue Officer. Insofar as the plea of limitation is concerned, the revisional authority came to hold that the period of limitation came to be amended by Orissa Act 9 of 1974 which came into force from 02.10.1973 amending the period of limitation from 12 years to 30 years and, therefore, since admittedly the void sale transaction took place on 07.05.1964 and the original period of 12 years would have only lapsed in 07.05.1976 and there having been amendment of law prior thereto i.e. on 02.10.1973 extending the period of limitation from 12 years to 30 years, no claim of the petitioner for having perfected his title by way of adverse possession on completion of 12 years post amendment could be accepted.

7. In the light of the submissions as recorded hereinabove, the only issue that arises for consideration in the present case is that until 07.05.1964, the land was owned by the private opposite parties, who were admittedly members of the aboriginal tribe and belong to Scheduled Tribe. On 07.05.1964 the land came to be transferred to the writ petitioner (who is a Brahmin, "a person not belonging any aboriginal tribe"). Admittedly, in the present case, the private opposite parties initiated a proceeding under Section 23-A of the O.L.R. Act in the year 1990 before the Revenue Officer. Therefore, the question that arises as to whether by the time of filing of the Revenue Misc. Case before the Revenue Officer, period of limitation had expired or not. A further question that needs to be determined in the present case is what is the present period of limitation that would be applicable in the fact and circumstance of the present case. In the case at hand, the date of sale deed is admitted to be 07.05.1964. The period of limitation originally prescribed for initiation of proceeding was 12 years and amendment was carried out to the O.L.R. Act by Act 9 of 1974 which came into force from

02.10.1973 enhancing the limitation period to 30 years. Admittedly, by the date of the said amendment since the period of 12 years had not lapsed by then, no question of writ petitioner perfecting his title by way of adverse possession can or does arise. Consequently, with the amendment from 02.10.1973, the period of limitation was enhanced to 30 years and the proceeding under Section 23-A of the O.L.R. Act has been commenced by the opposite parties in the year 1990. The initiation of such proceeding was definitely within the period prescribed for limitation and consequently was duly maintainable. Therefore, the supplementary issue as noted herein above is answered in favour of the private opposite parties and against the writ petitioner.

8. Insofar as the applicability of the Limitation Act is concerned, the issues are no longer res integra in view of the judgment of the Hon'ble Supreme Court in the case of Amrendra Pratap Singh vs. Tej Bahadur Prajapati and Others, AIR 2004 Supreme Court 3782. The relevant portions of the said judgment are quoted hereunder.

> "The law does not intend to confer any premium on the wrong doing of a person in wrongful possession. It pronounces the penalty of extinction of title on the person who though entitled to assert his right and remove the wrong doer and re-enter into possession, has defaulted and remained inactive for a period of 12 years, which the law considers reasonable for attracting the said penalty. Inaction for a period of 12 years is treated by the Doctrine of Adverse Possession as evidence of the loss of desire on the part of the rightful owner to assert his ownership and reclaim possession. The nature of the property, the nature of title vesting in the rightful owner, the kind of possession which the adverse possessor is exercising, are all relevant factors which enter into consideration for attracting applicability of the doctrine of Adverse Possession. The right in the property ought to be one which is alienable and is capable of being acquired by the competitor. Adverse possession operates on an alienable right. The right stands alienated by operation of law, for it was capable of being alienated voluntarily and is sought to be recognized by doctrine of adverse possession as having been alienated involuntarily, by default and inaction on the part of the rightful claimant, who knows actually or constructively of the wrongful acts of the competitor and yet sits idle. Such inaction or default in taking care of one's own rights over

> property is also capable of being called a manner of 'dealing' with one's property which results in extinguishing one's property which results in extinguishing one's title in property and vesting the same in the wrong doer in possession of property and thus amounts to transfer of immovable property' in the wider sense assignable in the context of social welfare legislation enacted with the object of protecting a weaker section. (Paras 22, 23)

In instant case until 7-4-1964 the land was owned by three members of an aboriginal tribe and a Scheduled Tribe. On 7-4-1964 the land came to be transferred to defendant a person not belonging to any aboriginal tribe. Proceeding on the premise that in the year 1970, on the date of the filing of the suit the defendant No.1 had been in possession of the property for a period of more than 12 years. Can it be said that he had perfected his title by adverse possession or that the suit filed by the plaintiff had become barred by time on account of having been filed 12 years after the date when the possession of the defendant became adverse to the plaintiff or his predecessors in-title ?

Held, acquisition of title in favour of a non-tribal by invoking the Doctrine of Adverse Possession over the immovable property belonging to a tribal, is prohibited by law and cannot be countenanced by the Court. On other words a default or inaction on the part of a tribal which results in deprivation or deterioration of his rights over immovable property would amount to dealing' by him with such property, and hence a transfer of immovable property. It is so because a tribal is considered by the legislature not to be capable of protecting his own immovable property. A provision has been made by para 3A of the 1956 Regulations for evicting any unauthorized occupant, by way of trespass or otherwise, of any immovable property of the member of the Scheduled Tribe, the steps in regard to which may be taken by the tribal or by any person interested therein or even suo motu by the competent authority. The concept of locus standi loses its significance. The State is the custodian and trustee of the immovable property of tribals and is enjoined to see that the tribal remains in possession of such property. No period of limitation is prescribed by Para 3A. The prescription of the period of 12 years in Art.65 of the Limitation Act becomes irrelevant so far as the immovable property of a tribal is concerned. The tribal need not file a civil suit which will be governed by law of limitation, it is enough if he or any one of his behalf moves the State or the State itself moves into action to protect

him and restores his property to him. To such an action neither Art. 65 of Limitation Act nor S.27 thereof would be attracted. The period upto 6.4.1964 during which the land belonged to the tribals, has to be excluded from calculating the period of limitation. Undoubtedly, on 07.04.1964 the land having been sold by a tribal to a non-tribal defendant with the previous permission of the Sub-Divisional Officer, the possession of defendant over the land on and from that date shall be treated as hostile. In the suit filed by the plaintiff-appellant tribal in the year 1970 the period of limitation shall have to be calculated by reference to Art. 65 of the Limitation Act. By that time only a period of 6 years i.e. between 1964 and 1970 had elapsed. The suit was not barred by limitation."

The aforesaid judgment has been reaffirmed once again by the Hon'ble Supreme Court in the case of Lincai Gamango and Others vs. Dayanidhi Jena and Others, AIR 2004 Supreme Court 3457. It would be most relevant to take note of paragraphs-7 & 9 of the said judgment which are quoted hereunder.

> "7. We find both these reasons given by the High Court are not sustainable. Coming first to the second point, we find that there is a decision of this Court direct on the point. It is reported in 2003(9)JT (SC) 201, Amrendra Pratap Singh v. Tej Bahadur Prajapati and others. The matter related to transfer of land falling in tribal area belonging to the Scheduled Tribes. The matter was governed by Regulations 2, 3 and 7-D of the Orissa Scheduled Areas Transfer of Immovable property (by Scheduled Tribes) Regulations, 1956 viz. the same Regulations which govern this case also. The question involved was also regarding acquisition of right by adverse possession. Considering the matter in detail, in the light of the provisions of the aforesaid Regulation, this Court found that one of the questions which falls for consideration was "whether right by adverse possession can be acquired by a non-aboriginal on the property belonging to a member of aboriginal tribe"? (para 14 of the judgment). In context with the above question posed, this Court observed in para 23 of the judgment as follows:
>
> "…..The right in the property ought to be one which is alienable and is capable of being acquired by the competitor. Adverse possession operates on an alienable right. The right stands alienated by operation

> of law, for it was capable of being alienated voluntarily and is sought to be recognized by doctrine of adverse possession as having been alienated involuntarily by default and inaction on the part of the rightful claimant……."

This Court then noticed two decisions one that of the Privy Council reported in AIR 1923 PC 205, Madhavrao Waman Saundalgekar and others v. Raghunath Venkatesh Deshpande and others and AIR(36) 1949 Nag 265, Karimullakhan S/o Mohd. Ishaqkhan and another v. Bhanupratap Singh, holding that title by adverse possession on inam lands, watan lands and debutter was incapable of acquisition since alienation of such land was prohibited in the interest of the State. We further find that the decision in the case of Madhiya Nayak (supra) relied upon by the High Court was referred to before this Court and it is observed that the question as to whether a non-tribal could at all commence prescribing acquisition of title by adverse possession over the land belonging to a tribal which is situated in a tribal area, was neither raised nor that point had arisen in the case of Madhiya Nayak. It is further observed that the provisions of S. 7-D of the Regulations are to be read in the light of the fact that the acquisition of right and title by adverse possession is claimed by a tribal over the immovable property of another tribal but not where the question is in regard to an non-tribal claiming title by adverse possession over the land belonging to a tribal situate in a tribal area. It is, therefore, clear in view of the decision in the case of Amrendra Pratap Singh (supra) that a non-tribal would not acquire right and title on the basis of adverse possession. Therefore, the second ground for setting aside the order passed by the appellate Court falls through. Therefore, the other factual aspect about the possession of the respondents over the disputed land and entries in their favour may also not be of much consequence, in any case, this aspect of the matter has to be seen and considered afresh in the light of other facts and circumstances of the case.

9. In our view, the order passed by the High Court is not sustainable. The question of acquisition of right and title by adverse possession by non-tribal over the land in the scheduled area belonging to a member of the Scheduled Tribe does not arise. Since the finding of the High Court on this point is not sustainable, in our view, the whole matter needs a fresh look considering the facts as indicated in details in different orders passed at different stages namely, the first order passed by the Project Administrator which matter was later on remanded in appeal by order dated 8.4.1982 and

thereafter the facts as mentioned in the subsequent orders including one passed in appeal which has been set aside by the High Court by means of the impugned order. If necessary, other relevant evidence on the record as sought to be pointed out by the learned counsel may also have to be seen in the light of the provisions of the Regulation No.2 of 1956 before holding that there is no evidence or material supporting ownership, title or possession of the applicants viz. the tribals. The implications of the claim of the respondent for allegedly having perfected their rights by adverse possession may also have to be examined."

9. In the light of the judgments rendered by the Hon'ble Supreme Court referred hereinabove both in the case of Amrendra Pratap Singh (Supra) as well as Lincai Gamango and Others (Supra), what is most important to note herein is that, the question of acquisition of right and title by way of adverse possession by a non-tribal over the land belonging to a member of the Scheduled Tribe does not arise since it is now been well settled that law does not intent to confer any premium on the wrong doing of a person in wrongful possession. It has been categorically held by the Hon'ble Supreme Court that acquisition of title in favour of a non-tribal by invoking the Doctrine of Adverse Possession over the immovable property belonging to a tribal is prohibited by law and cannot be countenanced by the court. This is so since a tribal has been considered by the legislature not to be capable of protecting his own rights over immovable property and consequently where law has been enacted by legislature protecting such rights and in violation of such laws a transaction of sale is effected. The object of such legislation itself would be lost if any other interpretation is given to a person claiming adverse possession as held in the aforesaid decision.

Insofar as the law of limitation is concerned, it pronounces the penalty of extinction of title on a person who though entitled to assert his right and remove the wrong doer and re-enter into possession, has defaulted and remained inactive for the period of limitation prescribed which the law prescribes reasonable for attracting the penalty. Therefore for a person to lose his title to someone else on the ground of the doctrine of adverse possession, the nature of the right in the property has to be one which is alienable and is capable of being acquired by the competitor where legislature itself has put a bar and/or a precondition to such alienation, no question of alternate plea of adverse possession by a person who claims to have purchased the said land and come into possession of the said land on

the basis of a void purchase which had been admittedly made in violation of Section 7(b) of the Orissa Merged States (Laws) Act since it would effectively amount to conferring premium on the wrong doer for his wrongful possession which has been specifically laid down by the Hon'ble Supreme Court. For better appreciation Section 7(b(i) of the Orissa Merged States (Laws) Act is quoted hereunder.

> "**7. Modification of Tenancy Laws in force in the merged States-**
> (b) an occupancy tenant shall be entitled-
>
> (i) to freely transfer his holding subject to the restriction that no transfer of a holding from a member of an aboriginal tribe to a member of a non-aboriginal tribe shall be valid unless such transfer is made with the previous permission of the Sub-divisional Officer concerned;"

10. Although various judgments of this Court referred to by various parties, in view of the judgments of the Hon'ble Supreme Court which are cited above, no reference need be made thereto since the same have become redundant in view of the authoritative pronouncement of the Hon'ble Apex Court on the subject.

11. In view of the aforesaid reasons and the judgments referred to hereinabove, after analyzing the facts and pleadings of the parties, I find no justification in entertaining the writ application or any challenge to the orders passed by the Revenue Officer, Dharamgarh under Annexure-1 and by the Collector, Kalahandi under Annexure-4. Consequently, while directing dismissal of this writ petition, further direct the Revenue Officer concerned to take effective immediate measures to comply with the direction of the revisional authority forthwith. The interim order dated 15.03.1994 passed in Misc. Case No.2848 of 1993 stands vacated.

Writ petition dismissed.

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

W.P.(C). NO. 31251 OF 2011

M/S BALAJI TOBACCO STORE ……..Petitioner.

.Vrs.

THE SALES TAX OFFICER,
CUTTACK-I EAST CIRCLE,
CUTTACK. ……..Opp. Party

ODISHA VAT ACT, 2004 – Ss. 42, 43

Audit assessment – Whether assessment order can be passed U/s. 42 of the Act after completion of the assessment U/s.43 of the Act for the self same period ? – Held, audit assessment U/s.42 of the Act can not be made after completion of the assessment of the escaped turnover U/s. 43 of the said Act, for the self same period.

(Para-22)

For petitioner : Mr. B.P.Mohanty, N.Paikray, K.K.Sahoo, J.J.Pradhan & S.K.Patel

For Opp. Parties : Mr. M.S.Raman Addl. Standing Counsel for Commercial Taxes Deptt

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Date of Judgment 18.03.2015

JUDGMENT

B.N.MAHAPATRA, J.

This Writ Petition has been filed with a prayer for quashing the order of assessment dated 27.05.2011 passed under Section 42 of the Orissa Value Added Tax Act, 2004 (for short, 'OVAT Act') by the opposite party-Sales Tax Officer, Cuttack-1 East Circle, Cuttack (hereinafter referred to as 'Assessing Authority') for the period 29.03.2006 to 30.11.2008 under Annexure-1 on the ground that the Assessing Authority has no authority/jurisdiction to pass the said order.

2. In the Writ Petition, though several grounds have been taken to challenge the order of assessment, Mr.B.P.Mohanty, learned counsel for the petitioner confines his argument to one ground, i.e., the impugned order of

assessment dated 27.05.2011 passed under Section 42 of the OVAT Act for the period 29.03.2006 to 30.11.2008 is not sustainable in law since the opposite party-Assessing Authority by order of assessment dated 25.09.2006 has already assessed the petitioner under Section 43 of the OVAT Act and levied tax at the rate of 4% on un-manufactured tobacco for the period 24.01.2006 to 31.07.2006, which was included in the present tax period. According to Mr. Mohanty no assessment order under Section 42 of the OVAT Act can be passed after completion of the assessment under Section 43 of the OVAT Act for the self same period. It was further submitted that this action of the opposite party also amounts to taxing the same turnover twice for which assessment order is bad in law.

3. Mr.M.S.Raman, learned Additional Standing Counsel for the Revenue submitted that both the Sections, i.e., Section 42 and Section 43 operate in different fields for the purpose of assessment under the OVAT Act. The Assessing Authority is vested with the jurisdiction/power to make assessment either under Section 42 or Section 43 of the OVAT Act, as the case may be. There is no legal bar to make assessment under Section 42 of the OVAT Act after completion of assessment under Section 43 of the said Act for the self-same period(s).

4. On rival contentions of the parties, the only question that falls for consideration by this Court is as to whether the Taxing authority has jurisdiction to make audit assessment under Section 42 of the OVAT Act after completion of the assessment under Section 43 of the said Act for the self-same tax period(s) ?

5. The dispute involved in the present writ petition lies in a narrow compass. Undisputed facts are that the petitioner is registered under the OVAT Act. The petitioner has been assessed under Section 43 of the OVAT Act for the period 24.01.2006 to 31.07.2006 vide assessment order dated 25.09.2006 and the said period is again included in the assessment order dated 27.05.2011 passed under Section 42 for the tax period 29.03.2006 to 30.11.2008 impugned in the present writ petition.

6. The Scheme of the OVAT Act read with OVAT Rules provides a complete mechanism for making different types of assessment for the purpose of determination of tax liability under the said Act. Such assessments, as provided under sub-section (5) of Section 2 of the OVAT Act, are self assessment (section 39), provisional assessment (section 40),

audit assessment (section 42), assessment of escaped turnover (section 43), assessment of unregistered dealer liable to be registered (section 44) and assessment of casual dealer (section 45). In the present case, we are concerned with audit assessment and escaped assessment.

7. The relevant provisions of those two Sections necessary for our purpose are extracted hereunder:

"**42. Audit assessment .—**

Where the tax audit conducted under sub-section (3) of Section 41 results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit, evasion of tax or contravention of any provision of this Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under Section 39 or Section 40, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person or through his authorized representative on a date and place specified therein and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report."

xx xx xx

(Underlined for emphasis)

43. Turnover escaping assessment.—

(1) Where, after a dealer is assessed under Section 39, 40, 42 or 44 for any tax period, the assessing authority, on the basis of any information in his possession, is of the opinion that the whole or any part of the turnover of the dealer in respect of such tax period or tax periods has—

(a) escaped assessment, or

(b) been under-assessed, or

(c) been assessed at a rate lower than the rate at which it is assessable;

or that the dealer has been allowed—

(i) wrongly any deduction from his turnover, or

(ii) input tax credit, to which he is not eligible,

the assessing authority may serve a notice on the dealer in such form and manner as may be prescribed and after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he deems necessary, proceed to assess to the best of his judgment the amount of tax due from the dealer.

xx xx xx"

(Underlined for emphasis)

8. It may also be necessary for our purpose to extract here the relevant portion of Rule 49 and Rule 50 of the OVAT Rules, 2005.

"49. Audit assessment.—

(1) If the tax audit conducted under Section 41 results in findings, which the assessing authority considers to be affecting the tax liability of a dealer for a tax period or tax periods, such authority shall serve a notice in Form VAT-306 along with a copy of the audit visit report, upon such dealer, directing him to appear in person or through his authorized representative on such date, time and place, as specified in the said notice for compliance of the requirements of sub-rules (2) and (3).

xx xx xx

50. Assessment of escaped turnover.—

(1) Where a dealer has already been assessed under Section 39, 40, 42 or 44 and it is required to reopen the assessment under sub-section (1) of Section 43 for occurrence of any or more of the events specified in that sub-section, the assessing authority shall serve a notice in Form VAT-307 upon the dealer.

xx xx xx"

(Underlined for emphasis)

9. The language of Section 43 of the OVAT Act read with Rule 50 of the OVAT Rules contemplates that assessment under Section 43 of the OVAT Act can be made after a dealer is assessed either under Sections 39,

40, 42 or 44 for any tax period, on the basis of information in possession of the assessing authority, and he is of the opinion that the whole or any part of the turnover of the dealer in respect of such tax period or tax periods has (i) escaped assessment, or (ii) has been under-assessed, or (iii) has been assessed at a rate lower than the rate at which it is assessable, or (iv) that the dealer has been allowed.— (a) wrongly any deduction from his turnover, (b) input tax credit to which he is not eligible.

Therefore, assessment of escaped turnover under Section 43 of the OVAT Act can be made even after completion of audit assessment under Section 42 of the said Act for selfsame tax period. But, this does not mean that no assessment under Section 43 of the OVAT Act can be made without completion of assessment under Section 42 of the said Act. As stated above, assessment under Section 43 can be made after a dealer is assessed under Sections 39, 40, 42 or 44 for any tax period on fulfillment of the condition (s) stated in Section 43.

10. Needless to say that escapement of turnover from assessment cannot be predicted before the assessment is completed. Therefore, only in case of completion of assessment either under Section 39, 40, 42 or 44, the escaped assessment as provided under Section 43 can be invoked for the occurrence of any or more of the events stated in Section 43. Thus, a turnover cannot be said to be escaped assessment if proceeding in respect of assessment under either of the Sections referred to in Section 43 are pending and no final order of assessment has been passed. A proceeding is said to be pending as soon as it commences and until it is concluded. Only after final order of assessment, it can be said whether the whole or any part of the turnover of the dealer has escaped assessment.

11. At this juncture, it would be beneficial to look at the beginning words appearing in Section 43 of OVAT Act and Rule 50(1) of the OVAT Rules. Section 43 starts with **"**where, after a dealer is assessed under Section 39, 40, 42 or 44.....**"** and Rule 50 starts with **"**where a dealer has already been assessed under Section 39, 40, 42 or 44 and it is required to reopen....**"**. Use of the above words in Section 43 and Rule 50(1) makes the legislative intent clear that only after a dealer is assessed or has already been assessed under Sections 39, 40, 42 or 44 of the OVAT Act, reassessment proceeding can be initiated under Section 43 of the OVAT Act.

12. Now, if we closely look at Section 42, which speaks of audit assessment, we will find that where the tax audit conducted under sub-section (3) of Section 41 results in detection of suppression of purchase or sale or both, erroneous claims of deduction including input tax audit, evasion of tax or contravention of any provision of the Act affecting the tax liability of the dealer, the assessing authority may notwithstanding the fact that the dealer may have been assessed under Section 39 or 40, serve on such dealer a notice as prescribed under the Rules along with a copy of the audit visit report for making an audit assessment. Therefore, if audit assessment has to be made after completion of any other assessment provided under the OVAT Act, the same is restricted to assessment made under Section 39 or Section 40 of the OVAT Act and all other types of assessment provided under the said Act are impliedly excluded. If the Legislature in its wisdom has taken away assessment as contemplated under Section 43 from Section 42 for the purpose of making audit assessment, after completion of any other assessment under the OVAT Act, Section 43 cannot be read into Section 42 by the State.

13. At this juncture, it would be beneficial to refer to the following decisions of the Hon'ble Supreme Court.

The Hon'ble Supreme Court in the case of ***P.K. Unni vs. Nirmala Industries and others,*** *AIR 1990 SC 933*, held as under:

> "14. The Court must indeed proceed on the assumption that the legislature did not make a mistake and that it intended to say what it said: See Nalinakhya Bysack v. Shyam Sunder Haldar & Ors., [1953] SCR 533 at 545 : (AIR 1953 SC 148 at p.152). Assuming there is a defect or an omission in the words used by the legislature, the Court would not go to its aid to correct or make up the deficiency. The Court cannot add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. "No case can be found to authorise any court to alter a word so as to produce a casus omissus": Per Lord Halsbury, Mersey Docks v. Henderson. [1888] 13 App. Cas. 595, 602. "We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there": Crawford v. Spooner, [1846] 6 Moore P.C. 1, 8, 9.

> Where the language of the statute leads to manifest contra- diction 489 Of the apparent purpose of the enactment, the Court can, of course, adopt a construction which will carry out the obvi- ous intention of the legislature. In doing so "a judge must not alter the material of which the Act is woven, but he can and should iron out the creases." : Per Denning, L.J., as he then was, Seaford Court Estates v. Asher, [1949] 2 All ER 155 (at 164). See the observation of Sarkar, J. in M. Pentiah & Ors. v. Muddala Veeramallapa & Ors., [1961] 2 S.C.R. 295 at 314 : (AIR 1961 SC 1107 at page 1115)."

14. In ***Union of India vs. Deoki Nandan Aggarwal,*** *AIR 1992 SC 96*, the Hon'ble Supreme Court held as under:

> "7.1. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities. [885A-D]"

15. In view of the above settled legal position, Section 43 cannot be read into Section 42 by the State when the Legislature in its wisdom excluded Section 43 from the provisions of Section 42 of the OVAT Act. Consequentially, no assessment under Section 42 can be made after completion of the assessment under Section 43 for the self-same tax period.

16. The matter can be looked at from a different angle. Under Section 42 of the OVAT Act, audit assessment has to be completed on the basis of the materials available in the audit visit report. There was no scope for the Assessing Authority to utilize any material other than the materials available in the audit report while making the audit assessment. (See ***Bhusan Power & Steel Ltd. vs. State of Orissa and others*****,** (2012) 47 VST 466 (Orissa).

17. Now, let us see the scope of the assessment under section 43. Scope of assessment under Section 43 is wider than the assessment provided under Section 42. In a proceeding under Section 43 of the OVAT Act, the Assessing Authority may bring to charge the turnover which had escaped assessment other than or in addition to that turnover which has led to issuance of the notice under Section 43. (See ***Commissioner of Income Tax vs. Sun Engineering Works Ltd.*** (1992) 198 ITR 297).

18. At this juncture, it will be relevant to refer to Section 41 of the OVAT Act which provides "Identification of tax payers for tax audit". Sub-Section (2) of Section 41 of the OVAT Act reads as follows:

> "(2) After identification of individual dealers or class of dealers for tax audit under sub-section (1), the Commissioner shall direct that tax audit in respect of such individual dealers or class of dealers be conducted in accordance with the audit programme approved by him. Provided that the Commissioner may direct tax audit in respect of any individual dealers or class of dealers on out of turn basis or for more than once in an audit cycle to prevent evasion of tax and ensure proper tax compliance."
>
> *(Underlined for emphasis)*

Rule 41 of the OVAT Rules, 2005 deals with "Selection of dealers for tax audit". Sub-Rule (2) of Rule 41 provides as follows:

> "(2) The Commissioner, where considers it necessary to safeguard the interest of revenue or where any enquiry is required to be conducted on any specific issue or issues relating to any dealer, or class or classes of dealer, on being referred by an officer appointed under sub-section (2) of Section 3, may direct audit to be taken up."
>
> *(Underlined for emphasis)*

19. Perusal of the above provisions reveals that Section 41(2) of the OVAT Act read with Rule 41(2) of the OVAT Rules empowers the Commissioner to direct audit on any specific issue or issues relating to any dealer or class or classes of dealers on being referred to by subordinate officers to check tax evasion.

Therefore, in case of an assessee, if the Revenue authorities decide not to exercise the power conferred under Section 41(2) of the OVAT Act read with Rule 41(2) of the OVAT Rules to make audit assessment for

particular tax period and choose to proceed to complete the assessment under Section 43 of the OAVT Act, it is thereafter not permissible to assess the petitioner under Section 42 of the OVAT Act.

20. The Hon'ble Supreme Court in the case of ***Institute of Chartered Accountants of India vs. Price Waterhouse and Another,*** *(1997) 6 SCC 312,* held as under:

> "15. .....It is settled rule of interpretation that all the provisions would be read together harmoniously so as to give effect to all the provisions as a consistent whole rendering no part of the provision as surplusage. Otherwise, by process of interpretation, a part of the provision or a clause would be rendered otiose."

21. Law is also well-settled that when the statute requires doing certain thing in certain way, the thing must be done in that way or not at all. Other methods or modes of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusion alteris", meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. (See *Taylor v. Taylor, (1876) 1 Ch.D.426; Nazir Ahmed v. King Emperor, AIR 1936 PC 253; Ram Phal Kundu v. Kamal Sharma, (2004) 2 SCC 759; and Indian Bank's Association v. Devkala Consultancy Service, AIR 2004 SC 2615*).

22. For the reasons stated above, we are of the considered view that audit assessment under Section 42 cannot be made after completion of the assessment of escaped turnover under Section 43 of the OVAT Act read with Rule 50 of the OVAT Rules for the self-same tax period(s).

23. In view of the above, the order of assessment dated 27.05.2011 passed under Section 42 of the OVAT Act for the period 29.03.2006 to 30.11.2008 under Annexure-1 is hereby set aside. However, it is open to the Assessing Authority to assess the petitioner under Section 42 of the OVAT Act excluding the period from 24.01.2006 to 31.07.2006 for which the dealer has already been assessed under Section 43 of the OVAT Act.

24. With the aforesaid observations and directions, the writ petition is allowed.

Writ petition allowed.

2015 (I) ILR - CUT- 1088

S. PANDA, J.

W.P.(C) NO.13591 OF 2013

ASHEEMA SAMANTRAY .....Petitioner

.Vrs.

NAMITA SINGH AND ORS. .....Opp. Parties

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

Suit for permanent injunction – Rejection of plaint – Action challenged – On a plain reading of the plaint it appears that the plaintiff has made out a case to be tried subject to the evidence adduced by the parties – The court below has not gone into the merits of the case, therefore, the impugned order is not coming under the definition of a decree and as such appeal is not the alternative remedy – Held, the impugned order being an error apparent on the face of the record is setaside in exercise of jurisdiction under Article 227 of the Constitution of India – Direction issued to the learned trial Court to proceed with the suit in accordance with law. (Para-9)

For Petitioner : M/s. A.K.Mohapatra-I, S.C. Rath & I.Khan

For Opp. Parties : M/s. A.A.Das, B.K.Parida, S..Mohanty. A.N.Pattnayak & S.A.Pattnaik

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Date of Judgment : 03.04.2015

JUDGMENT

S.PANDA, J.

This Writ Petition has been filed by the petitioner challenging the order dated 18.5.2013 passed by the learned Civil Judge (Senior Division), Puri in C.S No.237 of 2013 allowing an application filed under Order 7, Rule 11 of C.P.C. to reject the plaint.

2. The brief facts of the case are that the petitioner as plaintiff filed C.S No.237 of 2013 before the learned Civil Judge (Senior Division), Puri for permanent injunction. Along with the plaint the plaintiff also filed an

application under Order 39, Rules 1 and 2 of C.P.C for temporary injunction, which was registered as I.A No.113 of 2013.

3. The opposite parties-defendants appeared in the suit through caveat and filed an application under Order 7, Rule 11 of C.P.C to reject the plaint *inter alia* taking a stand that the suit is barred by law under the provisions of Benami Transactions (Prohibition) Act, 1988 in view of the plea of Benami transaction taken by the plaintiff between one Jayakrushna and defendant no.2. The pleading disclose no cause of action against the defendants, hence the plaint is liable to be rejected. The plaintiff filed her objection to the said application contending that the suit is not barred under the provisions of Benami Transactions (Prohibition) Act, 1988 as the said Act has got prospective effect and in this case the Sale Deed challenged by the plaintiff were of the year 1972 and 1974. The title of the property is *sub judice* between the parties before the Commissioner, Consolidation therefore the present suit for permanent injunction is maintainable.

4. The court below after hearing the parties by the impugned order allowed the application with a finding that the present suit for permanent injunction filed by the plaintiff is not at all maintainable more particularly when the right, title, interest of the parties is in dispute before the Consolidation, Commissioner. The claim of the plaintiff is not only barred under Section 51 of O.C.H & P.F.L Act, 1972 but also the same is barred under Section 67 of the O.L.R Act.

5. Learned counsel appearing for the petitioner submitted that the court below has failed to appreciate that neither Section 51 of O.C.H & P.F.L. Act nor Section 67 of O.L.R Act bars the jurisdiction of the Civil Court to entertain a suit for permanent injunction. He further submitted that if the matter is pending before the Consolidation authorities, the Civil Court can grant relief of permanent injunction. He also submitted that the cause of action for filing of the suit arose after final publication of the Consolidation R.O.R and closure of Consolidation Operation in the Mouza. In support of his contention he has relied on the decisions reported in

6. Learned counsel appearing for opposite parties however supported the impugned order and submitted that the plaintiff has no cause of action to file the suit against the defendants. He further submitted that against the impugned order is appealable therefore the Writ Petition is not maintainable.

In support of his contention he has relied on the decisions reported in **2013 (II) CLR 958**, **2012 (I) OLR 569** and **117 (2014) CLT 1052.**

7. This Court in the case of **Arun Kumar Vs. N.Nirmala Devi and others** reported in **2013 (II) CLR 958** held that an order rejecting a plaint on whatever ground, is a decree, as defined under Section 2 (2) of the C.P.C and is appealable.

7.1 In the case of **Bijan Kishore Mohanty Vs. Smt. Kanakalata Das @ Mohanty and two others** reported in **2012 (I) OLR 569** this Court held that for rejecting a plaint only the averments of the plaint are to be gone into and the Court has to ensure that meaningless litigations, which are otherwise bound to prove abortive, should not be permitted to occupy the judicial time of the Court. If from perusal of the plaint itself it is seen that the plaintiff has absolutely no interest over the suit properties, even if, the plaintiff has alleged some facts to be existing, which are required to be provided during the trial of the suit, the plaint can be rejected for want of cause of action.

7.2 This Court in the case of **Akshaya Kumar Samal and others Vs. Gitipuspa Samal and others** reported in **117 (2014) CLT 1052** held that if a plaint does not disclose any cause of action, the court can reject the plaint at any stage of the suit, as the provisions of Order 7, Rule 11 of C.P.C are imperative and can operate at any stage of the suit.

8. The Apex Court in the case of **Salem Advocate Bar Association, Tamil Nadu Vs. Union of India** reported in **AIR 2003 SC 189** held that Order 7, Rule 11 of C.P.C being procedural would not require the automatic rejection of the plaint at the first instance. If there is any defect as contemplated by Rule 11 (e) or non compliance as referred to in Rule 11 (f), the court should ordinarily give an opportunity for rectifying the defects and in the event of the same not being done, the court will have the liberty or the right to reject the plaint. It does not either expressly or by necessary implication provide that power under Order 7, Rule 11 of C.P.C could be exercised at a particular stage only. In the absence of any restriction placed by the statutory provision, it is open to the Court exercise that power at any stage. (AIR 1987 SC 1926)

8.1 This Court in the case of **Orissa Mining Corporation Ltd. Vs. M/s Klockner and Company and others** reported in **AIR 1996 ORISSA**

163 held that rejection of plaint in four classes of cases mentioned in Clauses (a) to (d) are not the instances given in which a court can reject a plaint or as limiting the inherent powers of the Court in respect thereof. In disposing of a suit under this Rule the court ought not to dismiss the suit but should reject the plaint.

9. In view of the aforesaid settled position of law and on a plain reading of the plaint, it appears that the plaintiff has made out a case to be tried subject to the evidence adduced by the parties. The court below has not gone into the merits of the case, therefore, the impugned order is not coming under the definition of a decree as defined in the Code of Civil Procedure and as such appeal is not the alternative remedy. Since the court below without following the aforesaid settled position of law rejected the plaint by the impugned order, the same is an error apparent on the face of the record. Accordingly, this Court in exercise of the jurisdiction under Article 227 of the Constitution of India while setting aside the impugned order directs the learned Civil Judge (Senior Division), Puri to proceed with C.S No.237 of 2013 in accordance with law. The Writ Petition along with Misc. Case is accordingly disposed of.

Writ petition disposed of.

2015 (I) ILR - CUT- 1091

S.PANDA, J.

W.P.(C) NO. 11053 OF 2012

BAYANI DAS .....Petitioner.

.Vrs.

BASANTI AGASTI & ORS. .....Opp parties

CIVIL PROCEDURE CODE, 1908 – O-23,R-1(4)
r/w 0-1, R-10 (2) C.P.C.

Suit for partition – Plaintiff was examined and cross examined by the defendants – Subsequent application by plaintiff for withdrawal of the suit – At this stage defendant No 13 filed application to transpose her as plaintiff and to permit her to continue the suit as valuable right accrued in her favour after examination of the plaintiff – Application rejected – Order challenged in writ petition. – Position of the plaintiff and defendants are almost similar in a suit for partition of immovable properties and the plaintiff has no absolute right to withdraw the suit – Allowing withdrawal of such suit amounts to abuse of the process of the court – In order to avoid multiplicity of proceedings the court below should have allowed the application of defendant-No13 – Held, the impugned order is setaside and the application filed by defendant no 13 is allowed.

(Para-11,12)

For Petitioner : M/s. S.K.Mishra, J.Pradhan, D.K.Pradhan, D.Samal, B.K.Nayak

For Opp. Parties : M/s. M.Mohanty, J.P.Das
M/s. H.S.Panda M/s. K.K.Gaya, .B.Swain
M/s. S.N.Pattanaik, S. Barik, A.C.Panda & S.D.Ray
M/s. S.N.Pattnaik, A.Ch. Panda, A.R.Mohanty, N.R.Mohanty

Date of Judgment : 31.03.2015

JUDGMENT

S.PANDA, J.

Petitioner in this application has challenged the order dated 23.2.2012 passed by learned Addl. Civil Judge (Sr.Divn.), Balasore in C.S. No. 888 of 2000-I rejecting the applications filed by her under Order, 23 Rule, 1(4) and under Order, 1 Rule, 10(2) of the Code of Civil Procedure to transpose her as plaintiff and to permit her to proceed with the suit for partition. Petitioner is the defendant No. 13 who contests the suit.

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

One Sudhakar Panigrahi as plaintiff filed C.S. No. 888 of 2000 for partition and other consequential relief. After the death of the original

plaintiff Sudhakar Panigrahi the present opposite party No.1 being the daughter substituted as plaintiff in the suit and her two brothers were impleaded as defendant Nos. 26 and 27 who are present opposite party Nos. 30 and 31. The present petitioner is representing the branch of Balakrushna as per the genealogy. She is the daughter of Pranakrushna, son of Balakrushna. Defendant Nos. 1, 2, 13, 14,20,21,25, 28 to 31 have filed their written statements in the suit. Out of them defendant No. 14 to 31 are purchasers of the suit property. In their written statement defendant Nos. 1 and 2 have stated that Pranakrushna died much prior to the year 1956 leaving behind his two daughters namely Pagili (defendant No. 12) and Bayani (defendant No. 13) for which defendant Nos. 12 and 13 are not entitled to get any share. They have further stated that due to dissension between the Balakrushana and Jasobanta, they were separated from each other by way of amicable partition prior to Current Settlement and they were possessing their shares separately and separate record of rights has also been recorded separately in their names.

3. Defendant No. 13 has stated in her written statement that the suit property has been partitioned between the plaintiff and defendant Nos. 1 to 13 much prior to Current Settlement and accordingly parties were possessing their separate shares and major settlement record of rights has also been recorded in the name of defendant No. 13 separately in respect of her share of lands and the plaintiff has no manner of right, title, interest on her shares. Defendant No. 14 is the purchaser from the father of defendant No. 13. He has also admitted in his written statement regarding partition between the Balakrushna and Jasobanta.

4. During pendency of the suit the original plaintiff entered into compromise on 3.5.2002 with defendant Nos. 6, 9, 11 and on 3.8.2002 with defendant Nos. 21 and 25 and on 13.9.2002 with defendant Nos. 1, 2, 5 to 8 and on 3.4.2006 with defendant Nos. 26 to 31. In view of the above aforesaid compromise the opposite party No.1 filed an application on 17.11.2011 for withdrawal of the suit. Petitioner has filed her objection challenging the maintainability of the petition. She has denied the assertions made in the petition and stated specifically therein that plaintiff has already examined and cross-examined and she has filed the application to withdraw the case after eleven years from the date of filing of the suit. A valuable right accrued in favour of the defendant No. 13 after examination and cross examination of the plaintiff in the suit. Hence she is seeking the relief of the court to transpose herself as plaintiff accordingly she has filed applications under

Order, 23 Rule, 1(4) and under Order, 1 Rule, 10(2) of the Code of Civil Procedure to transpose her as plaintiff and to permit her to proceed with the case.

5. Plaintiff has filed her objection to the aforesaid application wherein it was contended that the claim of defendant No. 13 is not identical and similar with the claim of the plaintiff, rather the claims are both rival and against each other. Defendant No. 13 can only be transposed as plaintiff only when she accepted the plaint case and without such acceptance she cannot be transposed as plaintiff. As the nature of claim will be changed and the compromise entered into by the parties will be affected and further evidence necessary it will be a denovo trial. The court below after hearing the parties rejected the application by impugned order.

6. Learned counsel for the petitioner contended that since the suit is for partition and the position of plaintiff and defendants are almost similar and trial has commenced the court below should have allowed the application of the petitioner by permitting her to transpose as plaintiff instead of observing that a separate suit can be filed by the petitioner.

7. Learned counsel appearing for the opposite party-plaintiff however supported the impugned order submitted that since the plaintiff has no grievance against the defendants with whom the compromise was entered into and she does not want to proceed with the suit the court below rightly rejected the application of the petitioner. The claim of the present petitioner who is defendant No. 13 totally contradicted to the claim of the plaintiff. As she has not accepted the plaint case the court below rightly passed the impugned order hence interference with the said order does not warrants.

8. In view of the contention raised by the learned counsel for the parties and after going through the record the following facts are admitted. The suit is for partition, the trial has commenced and plaintiff was examined and cross examined by the defendants. Though the original plaintiff entered into compromise with some of the defendants and the contesting defendant Nos. 12 and 13 representing one of the branch of the genealogy therefore after examination and cross examination of the plaintiff, a valuable right accrued in favour of the defendant No. 13 for which the application was filed to transpose herself as plaintiff to avoid multiplicity of proceeding and to restrict the abuse of process of court.

9. Law is well settled that the plaintiff and defendants have same right to claim partition. It is not material as to what manner the parties are arrayed as plaintiffs and defendants in the suit. Even the defendants can be transposed as plaintiffs and can continue the suit if they feel that the plaintiffs are not continuing the suit in their interest and the plaintiffs have no absolute right to withdraw the suit and proceeding. This Court in the case of ***Gokulananda Jena V. Jadunath Jena and others*** reported in ***2002(II) OLR 453*** and in the case of ***Mahitosh Sinha V. Shyamapada Sinha and others*** reported in ***2005(Supp.) OLR 958*** held that in a suit for partition of immovable property the plaintiff has no absolute right to withdraw a suit. While rendering the said decision this Court also taken into consideration the decision of the Privy Council in the case of ***Bhupendra Narayan Sinha V. Rajeshwar Prasad*** reported in ***A.I.R. 1931 PC 161***. In the said decision it was held that transposition of a party under Order, 1 Rule, 10 of the Civil Procedure Code should be allowed where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings.

10. The trial court has taken into consideration the case reported in ***AIR 1968 SC 111, M/s. Hulas Rai Baij Nath V. Firm K.B.Bass and Co.*** wherein the Apex Court has held that in a suit for rendition of accounts by principal against his agent the principal is entitled to withdraw the suit even at the stage when issues have been framed and some evidence has been recorded but no preliminary decree for rendition of accounts has yet been passed. The defendant cannot insist that the plaintiff must be compelled to proceed with the suit.

11. The plaintiff has filed an application for withdrawal of the suit. The defendant has filed an application to transpose her as plaintiff to continue the suit and claimed partition as valuable right accrued in her favour after examination of the plaintiff in the suit. It is not disputed that the suit is for partition and the position of plaintiff and defendants are almost similar in a suit for partition. Therefore the principle decided by the Apex Court in the case of ***M/s. Hulas Rai Baij Nath(supra)*** is not applicable to the present case. To avoid multiplicity of proceeding and in case the withdrawal of the suit is allowed it amounts to abuse the process of Court. Hence, for the interest of justice the court below should have allowed the application of the petitioner.

12. In view of the discussions made hereinabove as there is error apparent on the face of the record this Court in exercising the jurisdiction under Article 227 of the Constitution of India sets aside the impugned order and allows the application filed by defendant No. 13. Further this Court directs the court below to proceed with the suit and dispose of the same in accordance with law. Accordingly the writ petition is allowed.

Writ petition allowed.

2015 (I) ILR - CUT- 1096

B. N. MAHAPATRA, J.

MACA NO. 440 OF 2012

THE DIV. MANAGER, NATIONAL INSURANCE CO. LTD., CUTTACK .....Appellant

.Vrs.

ANUSUYA SAMAL & ORS. .....Respondents

A. MOTOR VEHICLES ACT, 1988 – S.168

Just Compensation – Quantum – Compassionate appointment for wife of the deceased – Whether compensation payable to the claimants be reduced by 50% on the principle of balancing between loss and gain ? – Held, amount of compensation payable to the claimants under the M.V.Act can not be reduced on the ground that the wife of the deceased has been given appointment on compassionate ground under the Rehabilitation Assistance Scheme by the employer of her deceased husband. (Paras 34 to 38)

B. MOTOR VEHICLES ACT, 1988 – S.168

Just Compensation – Future Prospectus – Deceased was in a permanent job with future promotion and increment in salary – He was 26 years at the time of death – He is entitled to 50% of his actual salaried income towards future prospects.

(Para 23)

C. MOTOR VEHICLES ACT, 1988 – S.168

Just Compensation – Deduction towards personal expenses – It depends upon the size of the dependant family members – If it is less the personal expenses of a person will be more and vice versa.

In this case claimants are four in number being the wife, father, daughter and unmarried sister of the deceased – Held, deduction towards personal expenses should be 1/4th of the salary of the deceased. (Paras 24, 25)

Case Laws Referred to :-

1. (2013) 4 T.A.C. 369 (S.C) : Sanobanu Nazirbhai Mirza & Ors. -V- Ahmedabad Municipal Transport Services
2. (2013) 9 SCC 54 : Rajesh & Ors. -V- Rajbir Singh & Ors.
3. 2011 (I) ILR CUT 115 : Kunibala Sahoo & Ors. -V- Jagmohan Majhi & Anr. and M/s. Oriental Insurance Co. Ltd. -V- Kunibala Sahoo & Ors.
4. 2011(II) OLR 63 : Divisional Manager, New India Assurance Co. Ltd -V- Manjulata Jena & Ors.
5. 2011 (1) TAC 874 (SC) : K.R.Madhusudan & Ors. -V- Administrative Officer. & Anr.
6. 2011 (1) TAC 4 (SC) : Shakti Devi -V- New India Insurance Co. Ltd. & Anr.
7. (2012) 6 SCC 421 : Santosh Devi -V- National Insuranc e Co. Ltd.
8. 2013 (2) T.A.C. 579 (All.) L Lalita Rathore & Anr. -V- Darshan Lal & Ors.
9. (1999) 1 SCC 90 : Helen C.Rebello & Ors. -V- Maharashtra State Road Tpt. Corpn.
10. (2002) 6 SCC 281 : United India Insurance Co. Ltd. & Ors. -V- Patricia Jean Mahajan

For Appellant : M/s. V.Narsingh, S.K.Senapati & S.Das
For Respondents : M/s. A.S.Nandy, A.K.Singh & B.K.Singh

Date of Judgment: 30.03.2015

B.N.MAHAPATRA, J.

The present appeal has been filed at the instance of the Insurance Company challenging the judgment dated 26.11.2011 passed by the 2nd Motor Accidents Claims Tribunal, Northern Division, Sambalpur (for short, 'Tribunal') in MAC Case No.294 of 2003 (D) raising an important question

relating to determination of compensation amount under Motor Vehicles Act, 1988 (for short 'MV Act').

2. The undisputed facts leading to filing of the present Appeal are that on 16.10.2003 at about 10 PM, while the deceased Prakash Samal was proceeding in the motorcycle bearing registration NO.OR-06T-5623 towards Dhenkanal, near Malati Chowdhary Talashilpa Prakalpa, Podapada on NH-42 (Cuttack-Sambalpur road), a Marshal Jeep bearing registration No.OR-02L-0186 came from opposite direction and dashed against him, as a result of which Prakash Samal received serious injuries and became senseless. Immediately, he was shifted to Dhenkanal District Headquarters Hospital and then to S.C.B. Medical College and Hospital, Cuttack, where he succumbed to the injuries on the next day. At the time of accident, the deceased was 26 years old and was earning Rs.6,500/- per month as a Police Constable. The deceased is husband of respondent No.1, father of respondent No.2, son of respondent No.3 and brother of respondent No.4. The claimants filed claim petition against the owner and the insurer of the offending vehicle claiming compensation of Rs.10.00 lakhs.

3. Before the Tribunal, the owner of the offending Jeep filed the written statements taking stand that the said Marshal Jeep was duly insured with the National Insurance Company Limited, Cuttack and it was driven by Amiya Kumar Behera, who had a valid driving licence and in case of any award, the Insurance Company is liable to indemnify her (owner). However, at the later stage, the owner of the offending vehicle has not contested the claim.

4. The Insurance Company filed written statements calling upon the owner of the vehicle to produce the insurance policy and took the plea of general denial to the averments of the claimants.

5. On the rival contentions of the parties, the Tribunal framed the following issues.

(i) Whether, the deceased Prakash Chandra Samal died due to vehicular accident on 16.10.2003 at about 10.00 PM near Malati Chowdhary Talashilpa Prakalpa, Podapada on NH-42 due to rash and negligent driving of the driver of OR-02L-0186 (Marshal Jeep)?

(ii) Whether, the petitioner(s) is/are entitled to get any compensation? If so, from whom and to what extent?

(iii) What other relief the petitioner(s) is/are entitled to?

6. In order to substantiate the claims, the claimants examined three witnesses out of whom PW-1 and PW-2 are the petitioners and PW-3 is an independent witness and all of them have relied on the documents of GR Case registered in connection with the said accident.

Opposite parties though have not adduced any evidence but the opposite party-Insurance Company had relied on the investigation report.

7. The learned Tribunal taking into consideration both oral and documentary evidence adduced/produced by the parties held that the deceased Prakash Ch. Samal died on account of vehicular accident caused by the Marshal Jeep bearing Registration No.OR-02L-0186 on 16.10.2003 and the accident occurred due to rash and negligent driving of the driver of the offending vehicle. Learned Tribunal applied multiplier 17 to determine the dependency taking the age of the deceased as 26 years at the time of accident. Taking into consideration the salary certificate issued by the Deputy Superintendent of Police, Sambalpur of Constable No.896, the Tribunal held the gross income of the deceased to be Rs.5,715/- which included special pay of Rs.150/-, KMA Rs.75/-, CA Rs.75/-, SDA Rs.200/-. After deducting allowances and professional tax, the Tribunal assessed the net monthly income of the deceased at Rs.5,400/- . Further deducting 1/3rd towards personal expenses, the monthly contribution to the family was calculated at Rs.3,600/-. Thus, the Tribunal determined the amount of compensation at Rs.7,34,400/-. Rs.5,000/-, Rs.3,000/- and Rs.2,600/- were also awarded towards loss of consortium, loss of estate and for funeral expenses respectively. Thus, the total compensation was determined at Rs.7,45,000/-. The prayer of the Insurance Company to reduce the amount of compensation suitably, as the wife of the deceased has got appointment on Rehabilitation Assistance Scheme was rejected by the learned Tribunal on the ground that she is getting salary for the services rendered by her. The learned Tribunal further held that the investigation report of the investigator of the Insurance Company (Ext.A) filed by the Insurance Company is of no help to the Insurance Company as the same has not been proved and there is nothing to show that there is violation of policy condition of the Marshal Jeep or the contributory negligence of the deceased. Being dissatisfied with the order of the Tribunal, the Insurance Company has filed the present Appeal.

8. Mr.V.Narsingh, learned counsel for the appellant Insurance Company vehemently argued that the amount of compensation awarded by the Tribunal is not just and proper. It is at the higher side. Moreover, the amount of compensation determined should have been reduced by 50% as the wife of the deceased has been given appointment on Rehabilitation Assistance Scheme and is getting monthly salary of Rs.10,000/-, which is more than the salary last drawn by the deceased. In support of his above contention, he relied upon the judgment of the Hon'ble Supreme Court in the case of *Bhakra Beas Management Board vs. Kanta Agrawal (Smt.) and others,* (2008) 11 SCC 366.

Mr.Narsingh further argued that there was no eyewitness to the accident involving the vehicle insured with the appellant. Compensation has been calculated basing on the postmortem report even though the deceased was a Government servant. Placing reliance on the judgment in the case of the *State of Haryana Vs. Jashir Kaur*, (2003) 7 SCC 484, it was submitted that compensation should be just and it cannot be a bonanza. He further argued that the award of interest for a period of preceding three years from the date of impugned judgment is unwarranted as there is no laches on the part of the appellant-Insurance Company in the matter of disposal of claim petition.

9. Per contra, Mr.A.S.Nandy, learned counsel appearing on behalf of the respondent-claimants submitted that the amount of compensation awarded by the Tribunal is at lower side and it is contrary to the judgment of the Hon'ble Supreme Court in the case of *Sarla Verma Vs. Delhi Transport Corporation*, (2009) 2 TAC 677. He further submitted that the appointment of the wife of the deceased on compassionate ground has no correlation with the accidental death of her husband and such appointment to the widow-wife of the deceased could have been offered had the deceased died for any other reason while in service. Therefore, the amount of compensation payable under the M.V. Act cannot be reduced by 50% as claimed by the appellant-Insurance Company.

Further contention of Mr.Nandy is that deduction of $1/3^{rd}$ towards personal expenses is at higher side and the same should be $1/4^{th}$ of the income of the deceased. It was argued that future prospects of the deceased have not been taken into consideration while computing the amount of compensation. Mr.Nandy further contended that the interest allowed at the rate of 6% by the

Tribunal is not in consonance with the interest rate prevalent at the relevant time and the same should have been 9% per annum. In support of his above contentions, Mr.Nandy relied upon various judgments of the Hon'ble Supreme Court as well as High Courts.

10. In course of hearing, vide order dated 20.02.2015 the appellant-National Insurance Company was put to notice through Mr. V. Narasingh, learned counsel for its response as to why in view of the judgment of the Hon'ble Supreme Court in the case of *Smt. Sarla Verma (supra)*, the amount of compensation awarded by the Tribunal should not be suitably enhanced on account of future prospects since the deceased was in a stable service as Police Constable and as to why deduction on account of personal expenses should not be reduced to $1/4^{th}$ from $1/3^{rd}$ of the total income of the deceased considering that the deceased had four dependants.

11. In compliance of the order dated 20.02.2015, Mr.Narsingh, learned counsel for the appellant-Insurance Company filed his objection on 20.03.2015stating therein that compensation can only be enhanced provided attending circumstances of the case warrant the same. In the present case, since the compensation awarded is at the higher side, it does not warrant enhancement mechanically relying on principles laid down in the case of Sarla Verma (supra). The issue relating to enhancement of compensation on account of future prospects has been referred to by the larger Bench *in (N.I.C.O. Vs. Puspa and others)*. Judgment of the Hon'ble Supreme Court in the case of *Vimal Kanwar and others Vs. Kishore Dan and others,* 2013 (3) TAC 6 (SC) relied upon by the claimants is not applicable to the present case in view of the judgment in *Bhakra Beas Management Board (supra),* as in the said judgment detailed law has been discussed.

Further, there being no cross objection filed, the question of enhancing the compensation would not arise. The basic proposition of law is that a party who suffers due to an order or a decree and does not appeal against it or assail it would normally not be permitted at the appellate stage to try and take advantage of the situation by claiming enhancement. The lower Court has rightly deducted $1/3^{rd}$ on account of personal expenses keeping in view the marriageable age of claimant No.4 and lack of dependency of claimant No.1, who is a salaried person.

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

(i) Whether the amount of compensation awarded by the learned Tribunal is just and proper?

(ii) Whether Tribunal has erred in not taking into account the future prospects of the deceased?

(iii) Whether deduction towards personal expenses at the rate of 1/3rd of the gross income is just and proper in the facts and circumstances of the case?

(iv) Whether amount of compensation payable to the claimants under the provisions of the M.V. Act is liable to be reduced by 50%, as claimed by appellant-Insurance Company on the ground that wife of the deceased has been given appointment on compassionate ground under Rehabilitation Assistance Scheme by the employer of her deceased husband?

(v) Whether the rate of interest and period for which payment of interest allowed is just and proper?

13. Since question Nos.(i), (ii) and (iii) are interlinked they are dealt with together.

14. While the appellant-Insurance Company contends that the amount of compensation awarded under the M.V. Act is at the higher side; claimants on the contrary seriously contended that it is at the lower side and contrary to law laid down by the Hon'ble Supreme Court in several judgments.

15. Under the M.V. Act, law postulates determination of just compensation. Determination of just compensation as required under Section 168 of the M.V. Act has nothing to do with the amount of compensation claimed by the claimants.

16. The Hon'ble Supreme Court in the case of ***Sanobanu Nazirbhai Mirza and others vs. Ahmedabad Municipal Transport Services,*** *(2013) 4 T.A.C. 369 (S.C.),* held that it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the deceased which they are legally and legitimately entitled to mitigate their hardship and agony. [also see ***Rajesh and others vs. Rajbir Singh and others,*** *(2013) 9 SCC 54]*

17. This Court in the cases of ***Kunibala Sahoo & Others vs. Jagmohan Majhi and another and M/s. Oriental Insurance Company Ltd. vs. Kunibala Sahoo & others***, 2011 (1) ILR CUT 115, held as follows:-

> "Section 168 of the M.V. Act deals with award of Claims Tribunal. The said section empowers the Claims Tribunal to determine the amount of compensation which appears to it to be just. Therefore, the Tribunal is duty bound to determine the just compensation under Section 168 of the M.V. Act in the given circumstances in a particular case. There is no restriction that the compensation could be awarded only up to the amount claimed by the claimants. This being the intention of the legislature, the determination of just compensation as required under Section 168 of the M.V. Act is nothing to do with the amount of compensation claimed by the claimants. Amount of just compensation determinable under Section 168 of the M.V. Act may be less or more than the amount of compensation claimed by the claimant depending upon the facts and circumstances of a particular case.
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> In the case of ***Nagappa vs. Gurudayal Singh and others, AIR 2003 SC 674,*** the apex Court held that under the provisions of Motor Vehicles Act, 1988, there is no restriction that compensation could be awarded only up to the amount claimed by the claimants. In an appropriate case where from the evidence brought on record if the Tribunal/Court considers that claimant is entitled to get more compensation than the amount claimed, the Tribunal may pass such award. Only embargo is — it should be 'Just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act.
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> This Court in ***Mulla Md. Abdul Wahid vs. Abdul Rahim and another, 76 (1993) C.L.T. 605*** held that the Tribunal has the duty to determine the amount of compensation which appears to it to be just. The expression "just compensation" would obviously mean what is fair, moderate and reasonable and awardable in the proved circumstances of a particular case and the Tribunal has the power to award compensation more than the amount claimed by the claimants."

18. This Court in the case of ***Divisional Manager, New India Assurance Company Limited Vs. Manjulata Jena and others,*** 2011 (II) OLR 63 held that even in absence of an appeal by the claimant in an appropriate case, this Court can enhance the quantum of compensation payable under the M.V.Act.

19. So far as future prospects of the deceased is concerned, law is well-settled that if the deceased is in a permanent job, his future prospects should be taken into consideration for the purpose of determination of the compensation. Hon'ble Supreme Court in the case of ***Sarla Verma (supra)*** held as under:

"**Question (i)-addition to income for future prospects:**

20. Generally the actual income of the deceased less income tax should be the starting point for calculating the compensation. The question is whether actual income at the time of death should be taken as the income or whether any addition should be made by taking note of future prospects.

21. In ***Susamma Thomas,*** this Court held that the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand (annual contribution to the dependants); and that where the deceased had a stable job, the court can take note of the prospects of the future and it will be unreasonable to estimate the loss of dependency on the actual income of the deceased at the time of death. In that case, the salary of the deceased, aged 39 years at the time of death, was Rs.1032/- per month. Having regard to the evidence in regard to future prospects, this Court was of the view that the higher estimate of monthly income could be made at Rs.2000 as gross income before deducting the personal living expenses.

22. The decision in Susamma Thomas was followed in ***Sarla Dixit v. Balwant Yadav,*** 1996 (3) SCC 179, where the deceased was getting a gross salary of Rs.1543/- per month. Having regard to the future prospects of promotions and increases, this Court assumed that by the time he retired, his earning would have nearly doubled, say Rs.3000/-. This Court took the average of the actual income at the time of death and the projected income if he had lived a normal life period, and determined the monthly income as Rs.2200/- per month.

23. In ***Abati Bezbaruah v. Dy. Director General, Geological Survey of India*** (2003) 3 SCC 148), as against the actual salary income of Rs.42,000/- per annum, (Rs.3500/- per month) at the time of the accident, this Court assumed the income as Rs.45,000 per annum, having regard to the future prospects and career advancement of the deceased who was 40 years of age.

24. In ***Susamma Thomas,*** this Court increased the income by nearly 100%, in ***Sarla Dixit*** the income was increased only by 50% and in ***Abati Bezbaruah*** the income was increased by a mere 7%. In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. Where the annual income is in the taxable range, the words 'actual salary' should be read as 'actual salary less tax'. The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of the deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments, etc.), the Courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."

"In view of imponderables and uncertainties, we are in favour of adopting as a rule of Thumb, an addition of 50% of the actual salary to the income of the deceased towards future prospects where the deceased had a permanent job and was below 40 years. Where the annual income is in the Taxable range the words "actual salary" should be read as "actual salary less tax". The addition should be only 30% if the age of the deceased was 40 to 50 years."

(Underlined for emphasis)

20. In ***K.R. Madhusudan and others Vs. Administrative Officer and another***, reported in 2011 (1) TAC 874 (SC), the Hon'ble Supreme Court held as under:-

> "10. The present case stands on different factual basis where there is clear and incontrovertible evidence on record that the deceased was entitled and in fact bound to get a rise in income in the future, a fact which was corroborated by evidence on record. Thus, we are of the view that the present case comes within the 'exceptional circumstances' and not within the purview of rule of thumb laid down by the Sarala Verma (supra) judgment. Hence, even though the deceased was about 50 years of age, he shall be entitled to increase in income due to future prospects."
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> *(Underlined for emphasis)*

21. In ***Shakti Devi Vs. New India Insurance Co. Ltd. and another***, 2011(1) TAC 4 (SC), the Hon'ble Supreme Court held as under:-

> "12. So far as the present case is concerned, at the time of accident, the deceased was 22 years old and not married. He was running a general store from his house and earning about Rs.1,000/- per month from the business. In Sarala Verma (supra), this Court stated that where the deceased was self-employed, the Court shall usually take only the actual income at the time of death; a departure from there should be made only in rare and exceptional cases involving special circumstances. Does the present case involve special circumstances? In our view, it does. The evidence has come that the deceased was to get employment in the forest department after the retirement of his father. Obviously the evidence is based on the Government policy. The deceased, thus, had a reasonable expectation of the Government employment in near future. In the circumstances, the actual income at the time of deceased's death needs to be revised and taking into consideration the special circumstances of the case, in our view, the monthly income of the deceased deserves to be fixed at Rs.2,000/-."

22. The Hon'ble Supreme Court in the case of ***Santosh Devi Vs. National Insurance Co. Ltd. (2012) 6 SCC 421,*** held that a person who is self employed or he is engaged on fixed wage will also get 30% increase in his total income over a period of time and if he/she becomes victim of accident then the same formula deserves to be applied for calculating the quantum of compensation.

23. In the instant case, undisputedly, the deceased was serving as a Constable under the Superintendent of Police, Sambalpur and the salary

certificate issued by the Deputy Superintendent of Police, Sambalpur of Constable No.896 for the month of September, 2003 shows that the gross income of the deceased was Rs.5,715/- which included Special Pay of Rs.150/-, KMA Rs.75/-, CA Rs.75/-, SDA Rs.200/-. Learned Tribunal deducting the allowances and professional tax assessed the net income of the deceased at Rs.5,400/-. At the time of death, the deceased was 26 years old. Undisputedly, the deceased was in a permanent job with future promotion and increment in salary. In view of the same, 50% of the actual salaried income of the deceased towards future prospects shall be added for the purpose of computation of compensation, which comes to Rs.8,100/- (Rs.5,400/- + Rs.2,700/-).

24. So far as deduction towards personal expenses is concerned, the learned Tribunal deducted 1/3rd towards personal expenses. Deduction towards personal expenses depends upon the size of the dependant family members. If the size of dependant family members is less, the personal expenses of a person will be more and vice versa. The Hon'ble Supreme Court in the case of ***Sarla Verma and others (supra)*** held as under:-

> "…We are of the view that where the deceased was married the deduction towards personal and living expenses of the deceased should be one third (1/3rd), where the number of dependant family members is 2 to 3, one fourth (1/4th), where the number of the dependent family members is 4 to 6, and 1/5th, where the number of dependant family members exceeds six."

25. In the instant case, as stated above, the claimants are four in number; they are wife, father, daughter and unmarried sister of the deceased. In view of the same, deduction towards personal expenses should be 1/4th of the salary of the deceased, which comes to Rs.2,025/-, i.e., 1/4th of Rs.8,100/-.

26. As regards application of multiplier, the Hon'ble Supreme Court in ***Sarla Verma*** case (supra) held as under:

> "42 We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for

41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

Thus in the present case, the deceased being 26 years old at the time of accident, the appropriate multiplier would be 17.

27. In view of the above, the amount of compensation comes to Rs.12,39,300/- (Rs.8,100/- -- Rs.2,025/- x 12 x 17).

28. Question No.(iv) is whether the amount of compensation should be reduced as claimed by the appellant-Insurance Company by 50% on the ground that the wife of the deceased has got employment on compassionate ground under Rehabilitation Assistance Scheme.

29. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of ***Bhakra Beas Management Board*** *(supra),* Mr. Narasingh submitted that the Tribunal erred in not reducing the amount of compensation computed under M.V. Act by 50% as the wife of the deceased has been given appointment on Rehabilitation Assistance Scheme and is getting salary of Rs.10,000/- per month. The contention of Mr.Narsingh is that the principle of balancing the losses and gains by reason of death to arrive at the amount of compensation is a general rule.

On the other hand, the contention of Mr. A.S. Nandy, learned counsel for the respondents is that appointment of the wife of the deceased under Superintendent of Police, Sambalpur has no correlation with the accidental death of her husband and such appointment to the wife of the deceased would have been given had the death caused to the husband for any other reason while he was in service.

30. Mr. Nandy, learned counsel for the claimants/respondents filed an affidavit indicating that the claimant-widow was given appointment under Rehabilitation Assistance Scheme with the scale of pay at Rs.3050-75-3950-85-4590 by the employer of her husband who is serving as a Police Constable No.801 in the office of Superintendent of Police, Sambalpur and in the present case the employer is no way connected with the accidental death of her husband and therefore, Superintendent of Police, Sambalpur is not liable to pay any compensation under the M.V. Act. Thus, appointment of the wife of the deceased as Constable under Superintendent of Police, Sambalpur has no correlation with accidental death of her husband.

In support of his contention, Mr. Nandy, learned counsel relied upon the judgment of the Hon'ble Supreme Court in the case of ***Vimal Kanwar and others (supra)*** and the judgment of the Allahabad High Court in the case of ***Smt. Lalita Rathore and Another vs. Darshan Lal and others***, 2013 (2) T.A.C. 579 (All.)

31. At this juncture, it would be beneficial to refer to the following decisions of the Hon'ble Supreme Court.

32. The Hon'ble Supreme Court in the case of ***Helen C. Rebello (Mrs.) and others vs. Maharashtra State Road Transport Corporation,*** *(1999) 1 SCC 90,* while deciding whether the amount received under life insurance policy was liable to be deducted on the principle of balancing the loss and gain held as under:

> "**26.** This Court, in this case did observe, though did not decide, to which we refer that the use of the words, "which appears to it *to be just*" under Section 110-B gives wider power to the Tribunal in the matter of determination of compensation under the 1939 Act. There is another case of this Court in which there is a passing reference to the deduction out of the compensation payable under the Motor Vehicles Act. In *N. Sivammal* v. *Managing Director, Pandian Roadways Corpn*. this Court held that the deduction of Rs 10,000 receivable as monetary benefit to the widow of the pension amount, was not justified. So, though deduction of the widow's pension was not accepted but for this, no principle was discussed therein. However, having given our full consideration, we find there is a deliberate change in the language in the later Act, revealing the intent of the legislature, viz., to confer wider discretion on the Tribunal which is not to be found in the earlier Act. Thus, any decision based on the principle applicable to the earlier Act, would not be applicable while adjudicating the compensation payable to the claimant in the later Act.
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> **27.** Fleming, in his classic work on the *Law of Torts*, has summed up the law on the subject in these words. This is also referred to in *Sushila Devi* v. *Ibrahim:*
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> "The pecuniary loss of such dependant can only be ascertained by balancing, on the one hand, the loss to him of future pecuniary benefit, and, on the other, any pecuniary advantage e which, from

whatever source, comes to him by reason of the death. … There is a vital distinction between the receipt of moneys under accident insurance and life assurance policies. In the case of accident policies, the full value is deductible on the ground that there was no certainty, or even a reasonable probability, that the insured would ever suffer an accident. But since man is certain to die, it would not be justifiable to set off the whole proceeds from a life assurance policy, since it is legitimate to assume that the widow would have received some benefit, if her husband had pre-deceased her during the currency of the policy or if the policy had matured during their joint lives. The exact extent of permissible reduction, however, is still a matter of uncertainty…

28. Fleming has also expressed that the deduction or set-off of the life insurance could not be justifiable. When he uses the words "not be justifiable" he refers to one's conscience, fairness and contrary to what is just. In this context, the use of the word "just", which was neither in the English 1846 Act nor in the Indian 1855 Act, now brought in under the 1939 Act, gains importance. This shows that the word "just" was deliberately brought in Section 110-B of the 1939 Act to enlarge the consideration in computing the compensation which, of course, would include the question of deductibility, if any. This leads us to an irresistible conclusion that the principle of computation of the compensation both under the English Fatal Accidents Act, 1846 and under the Indian Fatal Accidents Act, 1855 by the earlier decisions, were restrictive in nature in the absence of any guiding words therein, hence the courts applied the general principle at the common law of loss and gain but that would not apply to the considerations under Section 110-B of the 1939 Act which enlarges the discretion to deliver better justice to the claimant, in computing the compensation, to see what is just. Thus, we find that all the decisions of the High Courts, which based their interpretation on the principles of these two Acts, viz., the English 1846 Act and the Indian 1855 Act to hold that deductions were valid cannot be upheld. As we have observed above, the decisions even with reference to the decision of this Court in *Gobald Motor Service* where the question was neither raised nor adjudicated and that case also, being under the 1855 Act, cannot be pressed into service. Thus, these courts by giving a restrictive interpretation in computation of compensation based on

the limitation of the language of the Fatal Accidents Act, fell into an error, as it did not take into account the change of language in the 1939 Act and did not consider the widening of the discretion of the Tribunal under Section 110-B. The word "just", as its nomenclature, denotes equitability, fairness and reasonableness having a large peripheral field. The largeness is, of course, not arbitrary; it is restricted by the conscience which is fair, reasonable and equitable, if it exceeds; it is termed as unfair, unreasonable, unequitable, not just. Thus, this field of wider discretion of the Tribunal has to be within the said limitations and the limitations under any provision of this Act or any other provision having the force of law. In *Law Lexicon*, 5th Edn., by T.P. Mukherjee "just" is described:

"The term 'just' is derived from the Latin word *justus*. It has various meanings and its meaning is often governed by the context. 'Just' may apply in nearly all of its senses, either to ethics or law, denoting something which is morally right and fair and sometimes that which is right and fair according to positive law. It connotes reasonableness and something conforming to rectitude and justice, something equitable, fair (vide p. 1100 of Vol. 50, *Corpus Juris Secundum*). At p. 438 of *Words and Phrases*, edited by West Publishing Co., Vol. 23 the true meaning of the word 'just' is in these terms:

'The word "just" is derived from the Latin justus, which is from the Latin jus, which means a right and more technically a legal right-a-law. Thus "*jus dicere*" was to pronounce the judgment; to give the legal decision. The word "just" is defined by the *Century Standard Dictionary* as right in law or ethics and in *Standard Dictionary* as conforming to the requirements of right or of positive law, in *Anderson's Law Dictionary* as probable, reasonable, *Kinney's Law Dictionary* defines "just" as fair, adequate, reasonable, probable; and *justa cause* as a just cause, a lawful ground. Vide *Bregman* v. *Kress* NYS at p. 1073.' "

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32. So far as the general principle of estimating damages under the common law is concerned, it is settled that the pecuniary loss can be ascertained only by balancing on one hand, the loss to the claimant of the future pecuniary benefits that would have accrued to him but for the death with the "pecuniary advantage" which from whatever

source comes to him by reason of the death. In other words, it is the balancing of loss and gain of the claimant occasioned by the death. But this has to change its colour to the extent a statute intends to do. Thus, this has to be interpreted in the light of the provisions of the Motor Vehicles Act, 1939. It is very clear, to which there could be no doubt that this Act delivers compensation to the claimant only on account of accidental injury or death, not on account of any other death. Thus, the pecuniary advantage accruing under this Act has to be deciphered, correlating with the accidental death. The compensation payable under the Motor Vehicles Act is on account of the pecuniary loss to the claimant by accidental injury or death and not other forms of death. If there is natural death or death by suicide, serious illness, including even death by accident, through train, air flight not involving a motor vehicle, it would not be covered under the Motor Vehicles Act. Thus, the application of the general principle under the common law of loss and gain for the computation of compensation under this Act must correlate to this type of injury or death, viz., accidental. If the words "pecuniary advantage" from whatever source are to be interpreted to mean any form of death under this Act, it would dilute all possible benefits conferred on the claimant and would be contrary to the spirit of the law. If the "pecuniary advantage" resulting from death means pecuniary advantage coming under all forms of death then it will include all the assets moveable, immovable, shares, bank accounts, cash and every amount receivable under any contract. In other words, all heritable assets including what is willed by the deceased etc. This would obliterate both, all possible conferment of economic security to the claimant by the deceased and the intentions of the legislature. By such an interpretation, the tortfeasor in spite of his wrongful act or negligence, which contributes to the death, would have in many cases no liability or meagre liability. In our considered opinion, the general principle of loss and gain takes colour of this statute, viz., the gain has to be interpreted which is as a result of the accidental death and the loss on account of the accidental death. Thus, under the present Act, whatever pecuniary advantage is received by the claimant, from whatever source, would only mean which comes to the claimant on account of the accidental death and not other forms of death. The constitution of the Motor Accident Claims Tribunal itself under Section 110 is, as the section states:

"… for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, …".

33. Thus, it would not include that which the claimant receives on account of other forms of deaths, which he would have received even apart from accidental death. Thus, such pecuniary advantage would have no correlation to the accidental death for which compensation is computed. Any amount received or receivable not only on account of the accidental death but that which would have come to the claimant even otherwise, could not be construed to be the "pecuniary advantage", liable for deduction. However, where the employer insures his employee, as against injury or death arising out of an accident, any amount received out of such insurance on the happening of such incident may be an amount liable for deduction. However, our legislature has taken note of such contingency through the proviso of Section 95. Under it the liability of the insurer is excluded in respect of injury or death, arising out of and in the course of employment of an employee.

34. This is based on the principle that the claimant for the happening of the same incidence may not gain twice from two sources. This, it is excluded thus, either through the wisdom of the legislature or through the principle of loss and gain through deduction not to give gain to the claimant twice arising from the same transaction, viz., the same accident. It is significant to record here in both the sources, viz., either under the Motor Vehicles Act or from the employer, the compensation receivable by the claimant is either statutory or through the security of the employer securing for his employee but in both cases he receives the amount without his contribution. How thus an amount earned out of one's labour or contribution towards one's wealth, savings, etc. either for himself or for his family which such person knows under the law has to go to his heirs after his death either by succession or under a Will could be said to be the "pecuniary gain" only on account of one's accidental death. This, of course, is a pecuniary gain but how this is equitable or could be balanced out of the amount to be received as compensation under the Motor Vehicles Act. There is no corelation between the two amounts. Not even remotely. How can an amount of loss and gain of one

contract be made applicable to the loss and gain of another contract. Similarly, how an amount receivable under a statute has any corelation with an amount earned by an individual. Principle of loss and gain has to be on the same plane within the same sphere, of course, subject to the contract to the contrary or any provisions of law.

33. The Hon'ble Supreme Court in the case of ***United India Insurance Co. Ltd. and others v. Patricia Jean Mahajan,*** *(2002) 6 SCC 281*, held as under:

> **"34.** Shri P.P. Rao, learned counsel appearing for the claimants submitted that the scope of the provisions relating to award of compensation under the Motor Vehicles Act is wider as compared to the provisions of the Fatal Accidents Acts. It is further indicated that *Gobald case* is a case under the Fatal Accidents Acts. For the above contention he has relied upon the observation made in *Rebello case*. It has also been submitted that only such benefits, which accrued to the claimants by reason of death, occurred due to an accident and not otherwise, can be deducted. Apart from drawing a distinction between the scope of provisions of the two Acts, namely, the Motor Vehicles Act and the Fatal Accidents Act, this Court in *Helen Rebello case* accepted the argument that the amount of insurance policies would be payable to the insured, the death may be accidental or otherwise, and even where the death may not occur the amount will be payable on its maturity. The insured chooses to have insurance policy and he keeps on paying the premium for the same, during all the time till maturity or his death. It has been held that such a pecuniary benefit by reason of death would not be such as may be deductible from the amount of compensation.
>
> xx xx xx
>
> **36.** We are in full agreement with the observations made in the case of *Helen Rebello* that principle of balancing between losses and gains, by reason of death, to arrive at the amount of compensation is a general rule, but what is more important is that such receipts by the claimants must have some correlation with the accidental death by reason of which alone the claimants have received the amounts. We do not think it would be necessary for us to go into the question of distinction made between the provisions of the Fatal Accidents Act

> and the Motor Vehicles Act. According to the decisions referred to in the earlier part of this judgment, it is clear that the amount on account of social security as may have been received must have a nexus or relation with the accidental injury or death, so far to be deductible from the amount of compensation. There must be some correlation between the amount received and the accidental death or it may be in the same sphere, absence (*sic*) the amount received shall not be deducted from the amount of compensation. Thus, the amount received on account of insurance policy of the deceased cannot be deducted from the amount of compensation though no doubt the receipt of the insurance amount is accelerated due to premature death of the insured. So far as other items in respect of which learned counsel for the Insurance Company has vehemently urged, for example some allowance paid to the children, and Mrs Patricia Mahajan under the social security system, no correlation of those receipts with the accidental death has been shown much less established. Apart from the fact that contribution comes from different sources for constituting the fund out of which payment on account of social security system is made, one of the constituents of the fund is tax which is deducted from income for the purpose. We feel that the High Court has rightly disallowed any deduction on account of receipts under the insurance policy and other receipts under the social security system which the claimant would have also otherwise been entitled to receive irrespective of accidental death of Dr Mahajan. If the proposition "receipts from whatever source" is interpreted so widely that it may cover all the receipts, which may come into the hands of the claimants, in view of the mere death of the victim, it would only defeat the purpose of the Act providing for just compensation on account of accidental death. Such gains, maybe on account of savings or other investment etc. made by the deceased, would not go to the benefit of the wrongdoer and the claimant should not be left worse off, if he had never taken an insurance policy or had not made investments for future returns."

34. In view of the above, the principle of balancing the loss and gain must have some correlation with the accidental death by reason of which alone, the claimants had received the amount. It would not include any amount which the claimants received on account of other forms of death, which they would have received even apart from accidental death.

35. It may be relevant here to refer to the judgment of the Hon'ble Supreme Court in the case of ***Vimal Kanwar and others*** (supra), wherein, it has been held as under:

> "20. The second issue is "whether the salary receivable by the claimant on compassionate appointment comes within the periphery of the Motor Vehicles Act to be termed as 'pecuniary advantage' liable for deduction".
>
> "Compassionate appointment" can be one of the conditions of service of an employee, if a scheme to that effect is framed by the employer. In case, the employee dies in harness i.e. while in service leaving behind the dependants, one of the dependants may request for compassionate appointment to maintain the family of the deceased employee who dies in harness. This cannot be stated to be an advantage receivable by the heirs on account of one's death and have no correlation with the amount receivable under a statute occasioned on account of accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in normal course, due to illness and to maintain the family of the deceased one of the dependants may be entitled for compassionate appointment but that cannot be termed as "pecuniary advantage" that comes under the periphery of the Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles Act."

36. In the instant case, undisputedly the deceased was working as Police Constable No.896 in the office of the Deputy Superintendent of Police, Sambalpur. The appointment was given to the widow of the deceased after death of her husband by the Superintendent of Police, Sambalpur under Rehabilitation Assistance Scheme. The appointment has no co-relation to the accidental death of the deceased-late Prakash Ch. Samal. Normally, such appointment would have been given to the widow of the deceased had the death of her husband been caused for any other reason while in service.

37. The judgment of the Hon'ble Supreme Court in the case of ***Bhakra Beas Management Board*** *(supra)* is of no assistance to the appellant-

Insurance Company since the facts of that case are completely different from the facts of the present case.

At this juncture, it will be appropriate to refer here to relevant portion of the judgment of Allahabad High Court in the case of ***Smt. Lalita Rathore and Another*** *(supra),* wherein the facts of *Bhakra Beas Management Board (supra)* has been elaborately narrated as under:

> "17. ...Before applying the ratio of judgment of the Apex Court in the case of Bhakra Beas Management Board (supra), it would be appropriate to examine the facts of the case first. In that case, the deceased was travelling in a jeep which met with the accident with truck and the Management (the appellant) immediately after the death of deceased offered compassionate appointment to his wife and also provided residence to the wife. In this background, the Apex Court observed that such benefit has to be taken into account while fixing the compensation.
>
> 18. We find that the factual aspect in the case on hand, does not fit with the factual situation as was there in the case of Bhakra Beas Management Board (supra). The position will be different in a case where the employer who offered compassionate appointment is not in any manner liable to pay any amount towards compensation to the claimants, as it is here. If the employer happens to be a person who is liable to pay compensation for the loss caused in road accident, offers some pecuniary benefits by way of giving employment etc., the employer/defendant in the claim petition may come forward and say that the pecuniary loss which has been caused to the claimants has been set off by granting such compassionate appointment and this factor should be taken into consideration while assessing the pecuniary loss to the claimants."

38. In view of the above, the amount of compensation payable to the claimants under the provisions of M.V. Act cannot be reduced on the ground that the wife of the deceased has been given appointment on compassionate ground under Rehabilitation Assistance Scheme by the employer of her deceased husband.

39. Question No.(v) is whether the rate of interest and period for which payment of interest allowed is just and proper

40. Section 171 of the M.V. Act provides that where any Claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim.

Considering the above provisions of law and the finding of the learned Tribunal that claimants/respondents were not diligent in prosecuting the claim petition for which delay has been caused in disposal of the claim petition, I don't find any illegality in the order of the learned Tribunal directing payment of interest for a period of preceding three years from the date of the judgment till the payment is made by the Insurance Company. In course of hearing, respondents/claimants have not brought any document/material to the notice of this Court that during the relevant period, the rate of interest was more than 6% per annum on bank deposits. Therefore, the Insurance Company is directed to pay interest at the rate of 6% per annum on the amount of compensation of Rs.12,39,300/- from 26th November, 2008, i.e., three years prior to the date of the judgment of the Tribunal dated 26.11.2011 till the date of payment.

41. In view of the above, the Insurance company is directed to deposit the amount of compensation of Rs.12,39,300/- (rupees twelve lakh thirty-nine thousand and three hundred) along with interest as directed in the preceding paragraph within eight weeks from today. On deposit of the revised amount of compensation along with interest, the Tribunal shall disburse the same among the claimants in the same manner it directed in the impugned judgment.

42. On production of evidence showing deposit of the awarded amount along with interest before the Tribunal, the Registrar (Judicial) of this Court is directed to refund the statutory amount as well as compensation amount along with interest accrued thereon, which were earlier deposited in this Court, to the Insurance Company.

43. In the result, the appeal is disposed of with the aforesaid observations and directions.

Appeal disposed of.

2015 (I) ILR - CUT-1119

B.K.NAYAK, J.

CRP. NO. 2 OF 2008

SUSHILA PANDA & ORS. .....Petitioners.

.Vrs.

LOKANATH PANDA .....Opp party

CIVIL PROCEDURE CODE,1908 – O 23, R-3

Compromise petition – Duty of the court to see whether the agreement of compromise or adjustment is lawful or not – If it is lawful the court is bound to record the compromise – In the other hand compromise would only be confined to the parties to the suit – However if any body not being a party to the suit is aggrieved by such compromise it is open for the said party to challenge the same in a separate suit – Held, the impugned order rejecting the joint petition of the parties for compromise on the ground that santosh and krushna were not added as parties to the suit is setaside.

For Petitioner - M/s. N.C.Pati
For OPP.Party- None

Date of Order -18.12.14

ORDER

B.K.NAYAK, J.

Heard learned counsel for the petitioners.

In spite of service of notice, the sole opposite party has not entered appearance.

Order dated 03.01.2008 passed by the Civil Judge (Senior Division), Sonepur in C.S. No.102 of 2006 rejecting the joint petition for compromise filed by the parties, has been assailed in this revision.

The opposite party as plaintiff filed the suit for declaration that the registered Will dated 12.02.1993 executed by Brundabati, Wife of Bhimsen Panda in respect of the suit property is illegal, inoperative and a nullity. Admittedly the suit property originally belonged to Bhimsen, the husband of

Brundabati Panda. After the death of Bhimsen, the properties were recorded in the name of Brundabati in the consolidation record of rights. Sahadev Panda is the deceased brother of Bhimsen. The plaintiff and Defendant nos.3 & 4 are the natural born children of Sahadev. Defendant nos.1 and 2 are the wives of Santosh and Krushna, who are also the sons of Sahadev. Plaintiff claimed the property as the adopted son of Bhimsen and Brundabati and challenged the genuineness of the Will executed by Brundabati in favour of the defendants. In their written statement the defendants denied the adoption of plaintiff by Bhimsen and Brundabati and also claimed that the Will executed in their favour by Brundabati was valid and genuine.

During the course of trial of the suit, the parties entered into a settlement and filed a compromise petition before the trial court in which different portions of the suit property were distributed amongst the parties. The trial court has, however, rejected the petition holding that since the main issue in the suit is about the genuineness of the alleged Will and adoption of the plaintiff and in the event both the issues are answered in the negative, the suit properties are to be succeeded by all the legal heirs, who are children of Bhimsen's brother including Santosh and Krhushna, who have not been impleaded as parties to the suit and in their absence the compromise can not be allowed since they would not be bound by the compromise.

Order 23 Rule-3 which provides for compromise of the suit, runs as under :

> "**3. Compromise of suit**- Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise [in writing and signed by the parties], or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit]:
>
> [Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]

[*Explanation*-An agreement or compromise which is void or voidable under the Indian Contract Act,1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.]"

The language of Rule -3 of Order 23 makes it clear that the compromise would be only confined to the parties of the suit and it does not bind persons, who are not parties. The Court is bound to record the compromise if the agreement or compromise is lawful. A suit can also be partially compromised between some of the parties or with relation to some of the subject-matter. The explanation to Rule-3 makes it clear that agreement or compromise which was void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of the rule. Therefore, any agreement or transaction, which is declared to be void or voidable or which is barred under any statute shall also be termed as not lawful. While considering a petition for compromise the court is also to see as to whether the agreement of compromise or adjustment is lawful or not. Persons, who are not parties to the suit, are not bound by the compromise and if they are affected or aggrieved by any compromise decree passed by the court, it is open to them to challenge the same in a separate suit, as compromise under Order 23 Rule-3 remains confined only to the parties to the compromise.

In such view of the matter, the observation of the court below that the compromise cannot be allowed for the reason that Santosh and Krushna were not added as parties to the suit is illegal and unsustainable. Therefore, the impugned order is set aside and the revision is allowed and the matter is remitted back to the trial court to reconsider the compromise application only to find out whether the terms of compromise are lawful or not.

Revision allowed.

2015 (I) ILR - CUT-1122

S.K. MISHRA,J.

CRLREV NO. 181 OF 2013

NIMAI CHARAN MOHANTY .....Petitioner

.Vrs.

REPUBLIC OF INDIA .....Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S. 239

Discharge – Offence U/s. 120. IPC. – Petitioner is an advocate – Due to his wrong advice there was release of original N.S.C.s. in favour of the main accused – No evidence, direct or circumstantial to show any conspiracy between the petitioner and other accused persons for which he had given wrong opinion – Since copies of the Certificates are kept the prosecution case will not be weakened by the conduct of the petitioner – Held. the impugned order rejecting the application of the petitioner U/s. 239 Cr.P.C. is setaside – He is discharged from the offence alleged against him.

(Paras- 11,12)

For Petitioner : M/s. Soumya Mishra, A.K.Dash & S..Nanda

For Opp. Parties : Mr. S.K.Padhi, Senior Standing Counsel (C.B.I)

Date of Judgment -10. 11 2014

JUDGMENT

S.K.MISHRA, J.

In this Criminal Revision, the accused namely Nimai Charan Mohanty assails the order dated 07.02.2014 passed in T.R. No. 2 of 2010 of the court of the Special Judge, C.B.I.-I, Bhubaneswar, rejecting his application under Section 239 of the Cr.P.C. to discharge him.

2. The investigation of the case was taken over by the C.B.I. as per the direction of this Court in W.P.(Crl.) No. 55 of 2003 vide order dated 24.04.2006. Specific direction was given by this Court to investigate the circumstance under which the original N.S.Cs. were permitted to be returned to the main accused. It was alleged in the F.I.R. that one Jagadish Prasad

Saha, resident of Ward No.9, Baripada, Mayurbhanj and Puspa Devi entered into conspiracy with others and in pursuance thereof had taken loans from the Evening and Baripada branches of The Mayurbhanj Central Cooperative Bank Ltd. (hereinafter referred to as the "MCCB Ltd.") to the tune of Rs.9,49,500/- by pledging N.S.Cs. purportedly issued from G.P.O., Patna, Bihar though the same were purportedly stolen in transit. The outstanding balance against the loan was Rs.13,17,349/- as on 31.03.2001. It was further alleged that the N.S.Cs. shown issued from Patna G.P.O. favouring Jagadish Prasad Saha and Puspa Devi were pledged for obtaining those loans from the MCCB Ltd. It is further alleged by the prosecution that even after receiving the memos and Interim Special Audit Reports in this regard, the Secretary of the Bank and the Branch Managers of the said Bank preferred not to initiate any punitive action against the defaulter.

3. In course of investigation it transpires that the duties of the officers of the MCCB Ltd. in the matter of processing, sanction and recovery of loans against pledging of N.S.Cs. are envisaged in the "Mayurbhanj Central Co-op. Bank Ltd. Loan against pledge of National Savings Certificate and Kisan Vikas Patra Rules." As per those Rules any officer of the Head Office duly authorized by the Secretary and the Branch Managers were competent to sanction loan against pledge of the certificate. But the Branch Managers were allowed to sanction such loan up to a limit of Rs.1 lakh only. However, they have exceeded their sanction limit and sanctioned the loan in favour of the aforesaid accused violating the rules of guiding the same.

4. As far as the present petitioner is concerned, it transpires during investigation that on receipt of the specific and detailed report of the Audit Officers pointing out that the N.S.Cs. purportedly pledged for this loan were actually stolen in transit and figured in the negative list, accused Secretary B.K.Dash and Passing Officers Sk. Jallaluddin did not take any action against the loanee. Later on receipt of the letter from the I.I.C., Baripada Police Station not to release the said N.S.Cs. even after repayment, accused Secretary B.K.Dash brought the matter into the notice of the Collector and Management-in-charge of the MCCB Ltd. for obtaining an order. The Collector and Management-in-charge of the MCCB Ltd. formed a committee comprising of the Secretary of the Bank, Law Officer of the Bank, DRCS & ARCS of Baripada. He also allowed that the opinion of the Govt. Pleader may be taken, if need be. Secretary B.K.Dash instead of taking the opinion of the committee members, referred the file to the Government Pleader

depicting an encouraging picture about repayment of loan. The Government Pleader N.C.Mohanty opined that the original N.S.Cs. may be returned to the loanee after retaining copies duly certified by one Executive Magistrate. Then a meeting of the Committee constituted by the Collector, attended by accused Secretary B.K.Dash, Makarfa Singh, DRCS and S.K.Jena, ARCS was held on 01.12.2010, in which the illegal opinion of said N.C.Mohanty, Government Pleader was ratified. The minutes of the said meeting were communicated to the then Branch Manager of Evening branch. The application submitted by accused loanee J.P.Saha for return of impugned N.S.Cs was forwarded by the said Branch Manager to accused Secretary B.K.Dash, who issued orders for return of the N.S.Cs.

5. The specific allegation against the present petitioner N.C.Mohanty, the then Government Pleader, Mayurbhanj, Baripada, is that he in conspiracy with others has given wrong opinion to release the stolen/forged N.S.Cs. even though he had knowledge that the Police were enquiring into the matter. Upon completion of investigation, Charge-sheet has been submitted by the C.B.I. against the petitioner and the other accused persons for commission of the offences under Sections 120-B read with 411, 420, 467, 468, 471 and 201 of the I.P.C. and Sections 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988. After appearance of the accused persons, the petitioner filed an application to discharge him under Section 239 of the Cr.P.C. His application was rejected by the leaned Special Judge, C.B.I., Bhubaneswar. Thereafter, the petitioner has filed a criminal revision before this Court bearing Crl. Revision No. 1005 of 2013, which was disposed of on 10.01.2014 by this Court remitting the matter back to the learned Special Judge, C.B.I. for reconsideration of the same and dispose of by passing a reasoned order after affording reasonable opportunity of hearing to both the parties. The petition of the petitioner was disposed of on 07.02.2014 by the learned Special Judge, C.B.I.-1, Bhubaneswar in T.R. No.2 of 2010 rejecting his application under Section 239 of the Cr.P.C. Such order has been assailed in this revision application.

6. At this stage, the fact of the opinion given by the petitioner is not in dispute. After referral of the same to him, the petitioner being the Government Pleader of Mayurbhanj district has given the opinion. It is apt to quote the same for better appreciation.

"Secretary M.C.Co. Bank

After going through the notings of the Collector, Mbj. and fact in issue involved and entire case history I opine as follows:-

Since the borrower has already paid Rs.9 lakhs 60 thousand and 944 rupees to the Bank his intention is not to defraud the bank. In case he is willing to clear up the entire dues within the stipulated time as prayed for with the condition to release his pledged N.S.Cs. the Bank may release the same in the best interest of recovery of money, which is really the Govt. and Public money and the Bank is only the custodian. Prior to such release the Bank must receive an application cum undertaking to that effect from the borrower. In view of the letters forwarded by I.I.C., Baripada town P.S. not to release the N.S.Cs for future investigation, the Bank may get the Xerox copies of these N.S.Cs. duly attested by the Executive Magistrate, Authorised to attest and keep them for reference to show before investigating agencies. Moreover, the signature in the receipt for such return of N.S.Cs. in the register in details will be sufficient to corroborate then attested copies."

7. The admitted fact at this stage is that the matter was referred to the petitioner for his opinion as he was acting as a Government Pleader of Mayurbhanj district. He gave his opinion regarding the release of the N.S.Cs. in favour of the main accused. The question therefore remains whether such an act on the part of the petitioner will constitute an offence and that he has conspired with other accused persons to defraud the Bank.

8. Learned counsel for the petitioner relying upon the reported cases of **Central Bureau of Investigation, Hyderabad v. K.Narayana Rao,** 2013 (I) OLR (SC) 74 and **Nrusingha Nath Mishra v. Republic of India**, (2010) 46 OCR 623, argues that only on the basis of a wrong opinion given by an Advocate in absence of any other material to indicate that he has entered into a conspiracy with other accused persons, the accused cannot be charged of the offences complained of. The learned Retainer Counsel for the C.B.I., on the other hand, supported the order passed by the learned Special Judge, C.B.I. and has urged that the order passed by the learned Special Judge, C.B.I. does not suffer from any illegality and therefore, the same should not be disturbed.

9. Having gone through the order of the learned Special Judge, C.B.I., it appears that the learned Special Judge has entered into conjectures and surmises and has held that the petitioner has submitted a false legal opinion about the genuineness of the document in question. This finding regarding the legal opinion about the genuineness of the document in question does not arise in this case. The moot question that is to be decided at this stage is, if there are sufficient materials on record to find out if the present petitioner has entered into a criminal conspiracy with other accused persons to return the N.S.Cs. in favour of the main accused and in pursuance to such criminal conspiracy he deliberately rendered an illegal opinion. In the case of **Central Bureau of Investigation, Hyderabad v. K.Narayana Rao** (supra), the Supreme Court has held that a lawyer owes an "unremitting loyalty" to the interests of the client. The Supreme Court has further held that merely because his opinion may not be acceptable he cannot be mulcted with the criminal prosecution, particularly, in absence of tangible evidence that he associated with other conspirators. The Supreme Court has further held that at the most, he may be liable for gross negligence of professional misconduct if it is established by acceptable evidence and cannot be charged of the offence under Sections 420 and 109 of the I.P.C. along with other conspirators without proper and acceptable link between them. It is further made clear by the Supreme Court that if there is a link or evidence to connect him with the other conspirators for causing loss to the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials were lacking in the reported case.

10. In the case of **Nrusingha Nath Mishra v. Republic of India** (supra), this Court has come to a conclusion that a report or opinion rendered by an Advocate to his client, if found to be incorrect, cannot constitute an offence when nothing is shown that such report or opinion is purposefully given to commit any offence.

11. In this case, having gone through the records produced by the learned Retainer Counsel for the C.B.I., this Court has come to the conclusion that there is not an iota of evidence to show that there is a conspiracy between the petitioner and the other accused persons. The only admitted fact is the opinion given by the petitioner appears to be illegal. The opinion given in the case may not be legal in view of the fact that investigation of the case was pending. However, even if the N.S.Cs are returned to the main accused after

keeping copies thereof, the prosecution can well rely on the secondary evidence after laying foundation as envisaged under Section 65 of the Evidence Act and in no way the prosecution case can be weakened by the conduct of the petitioner. Nowhere in the charge-sheet filed by the C.B.I., the Investigating Agency, has clarified how and with whom the present petitioner has entered with a conspiracy as consequence of which he gave a wrong opinion to release the stolen/forged N.S.Cs. There is also no material, direct or circumstantial, to hold that the petitioner has entered into a criminal conspiracy with other accused.

12. In that view of the matter, this Court has come to the conclusion that the ratio decided in the aforesaid cases is squarely applicable to the case in hand and the petitioner should not be mulcted in the criminal conspiracy. Accordingly, the Revision Application succeeds. The order dated 07.02.2014 passed by the learned Special Judge, C.B.I.-1, Bhubaneswar in T.R. No.02 of 2010 is set aside and the application filed by the petitioner under Section 239 of the Cr.P.C. is allowed. He is discharged from the offence alleged against him. The Criminal Revision is accordingly allowed.

Revision allowed.

2015 (I) ILR - CUT-1127

S.K. MISHRA,J.

ABLAPL NO. 342 OF 2015

RATIKANTA RAY .....Petitioner

.Vrs.

STATE OF ODISHA .....Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S. 438

Anticipatory bail – Offence under Sections 341, 294, 323, 325, 506 I.P.C. and Section 3 of the Scheduled Caste and Scheduled Tribe

(Prevention of Atrocities) Act, 1989 – Maintainability of application U/s. 438 Cr. P.C. in view of the bar U/s. 18 of the Act – Since the allegations made do not make out a prima-facie case punishable U/s. 3 of the Act, Section 18 of the said Act shall not be a bar to entertain the application U/s.438 Cr.P.C. – Held, application for anticipatory bail is allowed.

(Paras-9,10)

For petitioner : Mr. N.K.Sahu

Date of Order: 29.01.15

ORDER

S.K. MISHRA,J.

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

2. This order arises out of an application under Section 438 of the Code of Criminal Procedure, 1973, hereinafter referred to as the "Code" for brevity. The petitioner is apprehending arrest for alleged commission of offences under Sections 341, 294, 323, 325 and 506 of the I.P.C. and Section 3 of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, hereinafter referred to as "S.C. & S.T. (P.A.) Act", in G.R. Case No. 3 of 2015 of the court of S.D.J.M., Bhadrak, arising out of Bhandaripokhari P.S. Case No.1 of 2015.

3. The allegation against the present petitioner is that the informant was working in the brick kiln of the petitioner. There was some dispute regarding the payment of the dues, for which the informant worked in a different brickkiln for one day, for which the petitioner became angry and said "KANA MO MUNHARE UTARA KARUCHU MAGIA PANA". Then he pushed him from the brick stack, for which he sustained injury. This incident took place on 21.12.2014. However, the informant lodged the F.I.R. on 02.01.2015.

4. Important question that arises in this case is, whether an application under Section 438 of the Code can be maintained in view of the provision under Section 18 of the S.C. & S.T. (P.A.) Act. The relevant provision under Section 3(1)(x) of the said Act is quoted below:

> "3. **Punishment for offences of atrocities**:- (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-

xxx xxx xxx

(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;

xxx xxx xxx

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine."

Section 18 of the said Act reads as under:

"18. **Section 438 of the Code not to apply to persons committing an offence under the Act-** Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

5. While dealing with similar matter, this Court in **Ramesh Prasad Bhanja and others v. State of Orissa,** 1996 Cri L.J. 2743 has held that the expression "accusation of having committed an offence under this Act" does not mean that mere registration of the case under the Act would ipso facto attract the prohibition contained in Section 18. This Court further held that the opinion of the police regarding the nature of alleged offence is neither final nor conclusive. The Single Bench of this Court further held that merely because a case is mechanically registered under the Act, the provision of Section 438 of the Code cannot be said to be inapplicable in each and every case. If the allegations make out a prima facie case under Section 3 or for that matter Sections 4 and 5 of the Act, the jurisdiction to entertain an application under Section 438 is definitely ousted. It was further held that where however, the allegations do not make out any prima facie case punishable under any of the provisions of the Act, the bar under Section 18 is inapplicable and the provision of Section 438 of the Code can be availed of.

6. While considering an appeal arises out of an order passed by the High Court under Section 482 of the Cr.P.C., the Supreme Court in the case of **Gorige Pentaiah v. State of A.P. and others,** 2009 Cri.L.J, 350 has held that in order to constitute an offence under Section 3(1)(x) of the said Act, the allegation must contain basic ingredients of Section 3(1)(x) of the said Act and that the complainant ought to have alleged that the accused-appellant

was not a member of a Scheduled Caste or a Scheduled Tribe and the respondent was intentionally insulted or intimidated by the accused with intent to humiliate in a place within

public view.

7. A Single Judge of the Delhi High Court in the case of **Sajjan Kumar v. The State and another,** 132 (2006) DLT 18 has the occasion to examine this aspect of the case. After taking into consideration various decisions of the Supreme Court as well as different High Courts, the learned Single Judge has held as follows:

> "7. The basic ingredients of the offence under Clause (x) of Sub-section (1) of Section 3 of the SC/ST Act are : (a) that there must be an 'intentional insult' or 'intimidation' with 'intend' to humiliate SC/ST member by a non-SC/ST member, and (b) that insult must have been done in any place within the "public view". The use of expression 'intentional insult or intimidation' with 'intention' to humiliate, makes it abundantly clear that the mens rea is an essential ingredient of the offence and it must also be established that the accused had the knowledge that the victim is the SC/ST and that the offence was committed for that reason. Merely calling a person by caste would not attract the provisions of this Act. There must be specific accusation alleged against each of the accused."

8. In the case of **Bilas Pandurang Pawar and another v. State of Maharashtra and others**, AIR 2012 SC 3316, the Supreme Court held that Section 18 of the S.C. & S.T. (P.A.) Act creates a bar for invoking Section 438 of the Code. However, a duty is cast on the Court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the S.C. and S.T. (P.A.) Act has been prima facie made out.

9. Keeping in view the aforesaid discussions, this Court is of the opinion that legislature intended an act to be an offence under Section 3(1)(x) of the SC and ST (PA) Act, the ingredients of the offence i.e. 'insult', 'intimidation' and 'humiliation' of a member of the Scheduled Caste or a Scheduled Tribe by person(s) not belonging to the aforesaid categories in any place in public view must be satisfied. It is the further opinion of this Court that the expression 'public view' in Section 3(1)(x) of the said Act has been incorporated to mean that the persons, howsoever small in number, should be

independent, impartial and not interested in any of the parties. In other words, the persons having any kind of association with the complainant would be necessarily excluded.

10. Keeping in view the aforesaid consideration, this Court is of the opinion that prima facie from the F.I.R. following facts are discernible:

(a) Though he has uttered the name of the caste of the informant, there is no justification to hold that an insult or intimidation or humiliation of a member of the scheduled caste has been made out;

(b) Moreover, there is no reference of a public remaining present at the spot.

Keeping in view the aforesaid consideration, this Court is of the opinion that an offence under Section 3(1)(x) of the S.C. & S.T. (P.A.) Act is not made out against the petitioner and therefore Section 18 of the said Act shall not be a bar. Considering the fact that the other offences are minor in nature and only the offence under Section 506 of the I.P.C. is non-bailable, the application for grant of anticipatory bail is allowed. It is directed that in the event the petitioner is arrested in the aforesaid case, he shall be released on bail by the Arresting Officer on such terms and conditions as deems just and proper by him. The Bail Application is accordingly disposed of.

Application allowed.

2015 (I) ILR - CUT-1131

RAGHUBIR DASH, J.

R.S.A. NO. 83 OF 2005

SASHIDHAR BARIK & ORS. .....Appellants

.Vrs.

RATNAMANI BARIK & ANR. .....Respondents

HINDU SUCCESSION ACT, 1956 – S.15 (1)(a)

Hindu widow inherited property from her second husband, dying intestate – A daughter was born out of her womb by her first husband – Question is who will inherit the property ? Held, property will be succeeded by her only natural born daughter although she was born through her first husband. (Paras 14,15)

Case Laws Referred to :-

1. AIR 2003 Gauhati 92 : Smt. Dhanistha Kalita -V- Ramakanta Kalita & Ors.
2. AIR 2002 SC 1 : Bhagat Ram -V- Teja Singh
3. AIR 1985 HP 8 : Roshan Lal & Anr. -V- Dalipa
4. AIR 1971 MP 129 : Keshri Parmai Lodhi & Anr. -V- Harprasad & Ors.
5. AIR 1987 SC 1616 : Lachman Singh -V- Kirpa Singh & Ors.

For Appellants : M/s. A.K.Mohapatra, P.Jena, S.Jena & S.Das.
M/s. P.K.Misra, B.M.Pattanaik-2, R.N.Mishra & H.Muduli

For Respondents : M/s. P.Patnaik, G.M.Rath, M.K.Mishra, S.K.Patnaik, S.S.Padhy & A.K.Mohanty (For Respondent No.1)

M/s. B.H.Mohanty, R.K.Nayak, D.P.Mohanty, B.Das & T.K.Mohanty (For Respondent No.2)

Date of hearing : 15.05.2014
Date of judgment : 19.06.2014

JUDGMENT

R. DASH, J.

This Second Appeal is against the judgment and decree dated 18.01.2005 and 31.01.2005, respectively, passed by the learned District Judge, Keonjhar in R.F.A. No.44 of 2004 confirming the judgment and decree dated 29.07.2004 and 13.08.2004, respectively, passed by the learned Civil Judge (Senior Division), Keonjhar decreeing the plaintiff's suit bearing T.S. No.53 of 2002.

2. Respondent No.1-Ratnamani Barik is the plaintiff. She filed the suit for declaration and perpetual injunction. The subject matters of the suit are the properties mentioned in schedule 'Ga' and 'Gha' of the plaint, hereinafter referred to as the suit properties.

3. Facts not in dispute are as follows:

One Lata first married to Hrushi, who died prior to 1956 leaving behind his widow (Lata) and daughter Ratnamani (the plaintiff) as his successors. Ratnamani has got only one daughter, namely, Banabasi, who is arrayed as defendant No.1 in the suit. After the death of Hrushi, his widow Lata married to Kalakar, who also died prior to 1956 leaving behind Lata as his only successor-in-interest. Kalakar had one brother, namely, Kantha. D-2 to D-12 are the successors-in-interest of Kantha. Here, it is pertinent to mention that both the husbands of Lata belong to two of the four branches of the common ancestor late Ananta Barik. After the death of Kalakar, his widow Lata filed O.S. No.53 of 1960 and got the share of Kalakar allotted to her and, getting delivery of possession thereof, she continued to remain in possession of the same. Plaint schedule 'Kha' properties are part of the properties she got in the said partition. During her life time Lata, for her legal necessity, had sold plaint schedule 'Kha' land to different persons. However, since those properties are not in dispute, the purchasers thereof have not been made parties to the suit.

4. Against the aforestated backdrop, it is the plaintiff's case that plaint schedule 'Ga' land, which is also a part of the properties Lata had got in the partition, has been bequeathed by Lata under an unregistered Will executed in favour of Banabasi (D-1), who is Lata's grand-daughter and on the strength of that Will D-1 has been in possession and enjoyment of schedule 'Ga' property. The residue of the property Lata had got in the partition is the schedule 'Gha' property. It is plaintiff's case that being the natural daughter of Lata the plaintiff has succeeded to the property in schedule 'Gha' in respect of which Lata has died intestate. After the death of Lata, it is claimed, plaintiff has been in possession of schedule 'Gha' properties. It is alleged that D-2 to D-12, being agnates of Kalakar (Lata's second husband), created disturbance in plaintiff's possession over the suit land. Hence, the suit for declaration of her right, title and interest in respect of schedule 'Gha' properties. The plaintiff has also sought for declaration of her title over schedule 'Ga' land in case no title is found to have passed on to D-1 under the aforestated Will.

5. D-1 filed W.S. supporting plaintiff's stand.

6. D-2 to D-12 in their joint written statement have disputed the execution of any Will by Lata in favour of D-1. They also dispute plaintiff's claim that she has succeeded to the properties that Lata had got in partition under the decree passed in O.S. No.53 of 1960. They claim that Kalakar, the second husband of Lata, having died prior to 1956 and the present plaintiff being not the daughter of Kalakar, the property of Kalakar, which was allotted to Lata, reverts back to D-2 to D-12 who are, admittedly, the heirs of Kalakar's elder brother-Kantha. Their further assertion is that Lata, who was being taken care of and maintained by D-2 to D-12, has relinquished the suit properties in favour of D-2 to D-12. They also take the stand that the Will in question being not genuine, D-1 cannot derive any title in schedule 'Ga' properties on the basis of the Will. D-2 to D-12 claim that they have acquired right, title and interest over the suit properties by way of reversion.

7. Learned courts below have recorded concurrent findings that by operation of Section 14 of the Hindu Succession Act, 1956 (in short, the Act) Lata became full owner in respect of the property she got in O.S. No.53 of 1960 and plaintiff being Lata's natural daughter through her first husband would succeed to all the properties in respect of which Lata died intestate, irrespective of the fact that the source of the property is Lata's second husband, who is not the father of the plaintiff.

8. The Second Appeal is admitted on the following substantial question of law:

> Whether daughter of the first husband of a Hindu female inheriting property of her second husband can be taken as 'daughter' within the meaning of Section 15(2)(b) of the Hindu Succession Act, 1956?

9. Before entering into the rival contentions of the parties it is felt useful to reproduce Section 15 of the Act for reference:-

> **General rules of succession in the case of female Hindus.-** (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,-

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),-

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter), not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

10. Learned counsel for the Appellants argues vehemently, raising the contention that in view of the principles stipulated in Section 15(2)(b) of the Act, the suit properties inherited by Lata having come from the source of her second husband-Kalakar and both Kalakar and Lata having died without any issue begotten out of their wedlock, the suit properties would devolve upon the Appellants, who are undisputedly heirs of late Kalakar.

Learned counsel for the Respondents, on the other hand, submits that plaintiff-Respondent No.1 being the natural born daughter of Lata, the property left behind by her is to be succeeded by her natural born daughter as per the principle laid down in Section 15(1)(a) of the Act and that the principles contained in Section 15(2) are not at all attracted.

11. Both sides have cited judgments to support their respective contentions. In **AIR 2003 Gauhati 92 (Smt. Dhanistha Kalita -Vrs.- Ramakanta Kalita and others)**, which is relied on by the Appellants, the question to be determined was whether the expression "son and daughter" used in clause (b) of Section 15 (2) of the Act includes the son and daughter of a female Hindu, whom she had begotten from a husband other than the husband, whose property she had inherited. Before going to answer the said question, His Lordship referred to the reasons for incorporating Section 15(2) in the Act, as assigned by the Joint Committee in Clause 17 of the Hindu Succession Bill, 1954 which reads as follows:

> While revising the order of succession among the heirs to a Hindu female, the Joint Committee have provided that properties inherited by her from her father reverts to the family of the father in the absence of issue and similarly property inherited from her husband or father-in-law reverts to the heirs of the husband in the absence of issue. In the opinion of the Joint Committee such a provision would prevent properties passing into the hands of persons to whom justice would demand they should not pass."

Thereafter, His Lordship referred to the following observation of the Hon'ble Apex Court in **Bhagat Ram -Vrs.- Teja Singh, reported in AIR 2002 SC 1**:

> "The source from which she inherits the property is always important and that would govern the situation. Otherwise persons who are not even remotely related to the person who originally held the property would acquire rights to inherit that property. That would defeat the intent and purpose of sub-section (2) of Section 15, which gives a special pattern of succession."

and then His Lordship proceed to make the following observation answering the question in the negative:

> "Since the object of S. 15(2) is to ensure that the property left by a Hindu female does not lose the real source from where the deceased female had inherited the property, one has no option but to hold that son and daughter (including the children of any predeceased son or daughter) of such a Hindu female will mean the son or daughter begotten by the Hindu female from the husband, whose property she had inherited, and not the son or daughter whom she had begotten from a husband other than the one, whose property she had inherited. If such property is allowed to be drifted away from the source through which the deceased female has actually inherited the property, the object of S. 15(2) will be defeated. In other words, if such a property is allowed to be inherited by a son or daughter, whom the deceased female had begotten not through her husband, whose property it was, but from some other husband (whose property it was not), then S. 15(2)(b) will become meaningless and redundant."

12. On behalf of the Respondent No.1 one judgment of Himanchal Pradesh High Court reported in **AIR 1985 HP 8 (Roshan Lal and another - Vrs.- Dalipa)** has been cited in which an identical question has been answered in the affirmative. In that case, the Respondent was the son of one Pari born during her wedlock with her first husband Kithu. Subsequently, after the death of Kithu, Pari contacted a second marriage with Punnu, who died intestate in 1959 leaving behind Pari. No issue was born during the second marriage of Pari. The Respondent filed a suit claiming the share of Punnu. The defendants, who are the collaterals of Punnu, resisted the suit on the ground, inter alia, that the Respondent being the son of Kithu could not claim to succeed to the estate of Pari. The High Court of Himanchal Pradesh held that since the Respondent is found to be the son of Pari, sub-section (2) of Section 15 of the Act is not attracted in as much as the said section operates 'in the absence of any son or daughter of the deceased'. It is further observed that for the purposes of succession to Pari's estate under Section 15(1)(a) of the Act it is immaterial whether the Respondent was the off-spring of the marriage of Pari with Kithu or of her illicit relationship with Punnu.

13. In **Keshri Parmai Lodhi and another -Vrs.- Harprasad and others, reported in AIR 1971 MP 129**, the question to be answered was whether the word 'son' should be restricted to the son of the husband from whom the Hindu female inherited the property or it should include sons of the Hindu female irrespective of whether they are born of the husband whose property is in dispute. While answering this question, His Lordship observed that from the language used in sub-section (1) and (2) of Section 15 of the Act it is clear that the intention of the Legislature is to allow succession of the property to the sons and daughters of the Hindu female and only in the absence of any such heirs the property would go to the husband's heirs.

In the Text Book : Principles of Hindu Law by D.F. Mulla, it is commented on Section 15(1)(a) of the Act that in case of a female intestate who had remarried after the death of her husband or after divorce her sons by different husbands would all be her natural sons and entitled to inherit the property left by the female Hindu regardless of the source of the property.

14. The Gauhati High Court's conclusion that son or daughter of a female will mean the son or daughter begotten by her from the husband whose property she has inherited, is based on the observations made by the Hon'ble

Apex Court in Bhagat Ram's case (supra). This supreme Court judgment has been cited by both the parties. Learned counsel for the Appellants puts much stress on the Hon'ble Apex Court's observation that the source from which the Hindu female inherits the property is always important, otherwise, persons who are not even remotely related to the person who originally held the property would acquire rights to inherit the property and that would defeat the intent and purpose of sub-section (2) of Section 15. In my considered view, the said observation of the Hon'ble Apex Court applies to a situation where the female Hindu has died intestate leaving behind no issue born from her womb.

15. Both sides have cited the judgment of the Hon'ble Supreme Court in **Lachman Singh -Vrs.- Kirpa Singh and others, reported in AIR 1987 Supreme Court 1616**. In this judgment it has been decided that once a property becomes absolute property of a female Hindu it shall devolve first on her children (including children of the predeceased son and daughter) as provided in Section 15(1)(a) of the Act and then on other heirs subject only to the limited change introduced in Section 15(2) of the Act. It is further decided that the step sons or step daughters of the female Hindu will come in as heirs only under Clause (b) of Section 15(2) of the Act. It is further observed that the rule of devolution in Section 15 of the Act applies to all kinds of properties left behind by a female Hindu except those dealt by Clause (a) and (b) of Section 15(2) which makes a distinction as regards the property inherited by her from her parents and the property inherited from her husband or father-in-law and that too when she leaves no sons and daughters, including children of predeceased sons and daughters. In the case at hand, if Lata's daughter born to her first husband is considered to be her daughter coming within the expression 'daughter' appearing in Section 15 of the Act, then sub-section (1) of Section 15 of the Act would govern the situation. In Lachman Singh's case (supra), Hon'ble Supreme Court has observed that the word 'sons' in Clause (a) of Section 15(1) of the Act includes (i) sons born out of the womb of a female by the same husband or by different husbands including illegitimate sons too in view of Section 3(j) of the Act and, (ii) adopted sons, who are deemed to be sons for purposes of inheritance. What has been stated about the expression 'sons' in Clause (a) of Section 15(1) of the Act can equally be stated about the expression 'daughters' appearing in Section 15(1)(a) of the Act. Therefore, the inevitable conclusion is that being a daughter born out of the womb of Lata by her first husband the plaintiff-respondent No.1 comes within the

expression 'daughters' appearing in Section 15(1)(a) of the Act and with the application of Rule-1 of Section 16 of the Act, the Appellants, who are coming within the expression 'heirs of the husband', are to be kept from succeeding to the properties left behind by Lata even though she inherited the same from her second husband-Kalakar and he is not the father of plaintiff-respondent No.1.

Therefore, the learned courts below have rightly held that plaintiff-Ratnamani succeeded to the suit properties consequent upon the death of her mother Lata and that the Appellants-defendant Nos.2 to 12 are not entitled to inherit the property of Lata.

16. In the result, the Second Appeal being devoid of merit is dismissed on contest but in the facts and circumstances without any cost. The interim order dated 24.10.2005 staying further proceeding in Execution Case No.26 of 2005 stands vacated.

Appeal dismissed.

2015 (I) ILR - CUT-1139

A. K. RATH, J.

W.P.(C). NO. 15618 OF 2014

ALOK KUMAR AGRAWAL . …….Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART, 226

Cancellation of seed licence – Non-issuance of show cause notice – Had the show cause notice been issued, the petitioner could have mentioned as to why such extreme order was not justified – No case has been set out by the opposite parties that non issuance of show cause notice has not caused any prejudice to the petitioner – There has been clear violation of principles of natural justice – Held, impugned order cancelling the seed licence of the petitioner is quashed. (Paras- 23,24)

For Petitioner : Mr. A.R. Dash
For Opp. Party : Mr. P.K. Muduli, ASC

Date of hearing : 29.04.2015
Date of judgment: 06.05.2015

JUDGMENT

DR. A.K.RATH, J

By this writ petition under Articles 226 and 227 of the Constitution of India, challenge is made to the order No.562 dated 2.8.2014 passed by the District Agricultural Officer, Padampur, opposite party no.4, cancelling the licence of the petitioner to carry on business of seeds.

2. Shorn of unnecessary details, the case of the petitioner is that he is the proprietor of M/s.Venkateswar Seeds. On 9.7.2014, the District Agriculture Officer, Bargarh, opposite party no.4, issued licence to M/s.Venkateswar Seeds to carry on business of seeds, vide Annexure-1. On 10.7.2014, opposite party no.4 issued a letter conveying the decision of the Government about the appointment of the petitioner. While the matter stood thus, on 2.8.2014, vide Annexure-3, opposite party no.4 cancelled the licence granted to the petitioner on the following grounds;

"xxx xxx xxx

1. Ms Baisnodevi Seeds proprietor Hariram Agrawal, Paikmal is black listed in seed transaction under the Lisence issued by JDA (Farm & Seed) who happens to be the father of Sri Alok Kumar Agrawal proprietor Venkateswar seeds, Paikmal.

2. Ms Balajee seeds Paikmal proprietor Sri Deepak Kumar Agrawal vide Lisence is also blacklisted in seed transaction under Lisence issued by JDA (Farm & Seed) vide Letter No 21 dated 25/11/2011 who happens to be the elder brother of Sri Alok Kumar Agrwal, paikmal.

3. Mischief future seeds transaction by Sri Alok Kumar Agrawal is also apprehended as he belongs to the same family."

xxx xxx xxx"

3. Pursuant to issue of notice, a counter affidavit has been filed by the opposite parties 2 to 4. The sum and substance of the case of the opposite parties 2 to 4 is that the petitioner was the proprietor of M/s. Venkateswar Seeds. He applied for the seed licence to the opposite party no.4 for doing transaction of seeds for paddy, groundnut, moong and arhar certified seeds at the storage place and the place of sale at Paikmal in the district of Bargarh. The seed licence was issued in favour of the petitioner on 10.7.2014, vide Annexures 1 and 2. The petitioner misled the opposite party no.4 by mentioning different storage address at different points in his application like in source certificate obtained from another Government agency, i.e., Odisha Agro Industries Corporation Ltd. mentioning his address as "At/PO/G.P-Paikmal", but in the application Form 'A', the address has been mentioned as "At-Kendubhata, P.O.-Mithapali, Block-Paikmal". Further, in the rent agreement, the address has been mentioned as "Plot No.305/873, Mouza-Dunguripalli, Tehsil-Paikmal". It is further stated that the petitioner is the son of Hariram Agrawal. Hariram Agrawal was the proprietor of M/s. Maa Vaisnodevi Seeds of Paikmal, Dist.-Bargarh. He had earlier committed serious irregularities for which, the proprietorship was blacklisted by the Government. Thereafter, Deepak Kumar Agrawal, elder brother of the petitioner, started the business in the name and style of M/s.Balaji Seeds. It was found that M/s. Balaji Seeds had utilized forged purchase bills of a prestigious State Agriculture University of Karnataka, i.e. University of Agriculture Sciences, Bangalore and utilised the forged bills, forged breeder certificate, forged breeder tags for foundation seed production by registering a non-existent groundnut variety, i.e., TMV-2 which was ascertained from the Director, Odisha State Seed and Organic Products Certification Agency vide letter no.1011 dated 28.4.2014. The University of Agriculture Sciences, Bangalore had recommended for initiating legal action against the brother of the petitioner vide letter no.26 dated 25.4.2014. Thereafter, the Seed Certification Officer, Sambalpur lodged an FIR against Deepak Kumar Agrawal for submission of fake and forged documents in the groundnut seeds production during Kharif Season of 2013 and misled the Government officials for which his licence was cancelled after affording opportunity of hearing to him.

4. Further case of the opposite parties is that when the petitioner had applied for seed licence, opposite party no.2 issued instructions to the opposite party no.4 to enquire into the background of the petitioner, his past dealings with the department. A s the licence of M/s. Vaishnodevi Seeds,

proprietor Hariram Agrawal, was blacklisted and M/s. Balaji Seeds, proprietor Deepak Kumar Agrawal, was cancelled, the petitioner succeeded with his diabolical plan. As per Section 18(2) of the Seed Control Order, 1983, the petitioner being a dealer of seed was required to deposit the monthly seed transaction report of the preceding month of his organisation in Form-D to the opposite party no.4 by 5th day of each succeeding month, failing which, the authority reserves the right to suspend/cancel the licence. From the date of issue of licence, the petitioner had never submitted the monthly seeds transaction statement to the licensing authority and kept the authority in dark about the seeds transaction made by him in a clandestine manner. Further, the petitioner is not mentally developed to carry on the business and the father and brother might be the de facto operators. Thus opposite party no.4 cancelled the seed licence of the petitioner for misrepresentation of facts.

5. It is further stated that there has been no infraction of the principle of natural justice. There is every scope of carrying forward the business of the family in seed business by the petitioner particularly when the father and brother of the petitioner were blacklisted for doing various irregularities in seeds transaction. This was a sinister plot and would have shattered the whole seeds supply chain of breeder to foundation certified seeds. It is further stated that the writ petition being WP(C) No.11118 of 2014 filed by the brother of the petitioner for the self-same issue has been dismissed by this Court.

6. Mr. A.R.Dash, learned counsel for the petitioner, submitted that no opportunity of hearing was provided to the petitioner before cancelling the seed licence of the petitioner, vide Annexure-3. Further, in the counter affidavit the opposite parties cannot supplement the reasons.

7. Per contra Mr. Muduli, learned Addl. Standing Counsel for the opposite parties, submitted that clause 15(a) of the Seeds (Control) Order, 1983 provides that licensing authority may suspend or cancel the licence, if it is found that the licence had been obtained by misrepresentation as to material particular. The petitioner has suppressed the facts regarding blacklisting of M/s. Baisnodevi Seeds and cancellation of licence of M/s. Balajee Seeds. He further submitted that the writ petition in its present form is not maintainable in view of availability of alternative remedy of appeal provided under clause 16(b) of the Seeds (Control) Order, 1983. He further submitted that the principle of natural justice has no application to the

commercial transactions and no notice is required for cancellation of the seed licence. In support of his contention, Mr. Muduli relied on the decisions of the Supreme Court in the cases of Thansingh Nathmal v. The Superintendent of Taxes, Dhubri and others, *AIR 1964 SC 1419*, Sadhana Lodh v. National Insurance Co. Ltd. and another, *(2003) 3 SCC 524*, Ram Narain Arora v. Asha Rani and others, *(1999) 1 SCC 141*, M/s.Radhakrishna Agarwal and others v. State of Bihar and others, *(1977) 3 SCC 457* and Siemens Public Communication Networks Private Limited and another v. Union of India and others, *(2008) 16 SCC 215*.

8. On the rival pleadings of the parties and the submissions made at the Bar, really three points arise for consideration of this Court.

I. Whether the existence of alternative remedy would operate as a bar in entertaining a writ petition under Article 226 of the Constitution?

II. Whether the reasons mentioned in the order of cancellation of seed licence dated 2.8.2014, vide Annexure-3, can be supplemented by fresh reasons in shape of affidavit?

III. Whether the order of cancellation of seed licence dated 2.8.2014, vide Annexure-3, is an infraction of principle of natural justice?

9. **Point No.I**

In Thansingh Nathmal (supra), the Supreme Court held that the High Court does not act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.

10. In Sadhana Lodh (supra), the Supreme Court held that where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution.

11. After survey of the earlier decisions, the Supreme Court in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others, *(1998) 8 SCC 1* in paragraphs 15 and 20 of the report held as follows:

> "**15.** Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely or some old decisions of the evolutionary era of the constitutional law as they still hold the field."
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> xxx xxx xxx
>
> "**20.** Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

12. Thus alternative remedy is not a bar to entertain a writ application under Article 226 of the Constitution in at least three categories mentioned in Whirlpool Corporation (supra), namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

13. **Point No.II**

More than sixty years back, the Supreme Court, in the case of Commissioner of Police, Bombay v. Gordhandas Bhanji, *AIR 1952 SC 16*, speaking through the Bench Justice Vivian Bose in para-9 of the report, held that the public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

14. The same view was echoed in Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others, *AIR 1978 SC 851*. It was held that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. Orders are not like old wine becoming better as they grow older.

15. On the anvil of the decisions cited supra, this Court is required to examine the impugned order dated 2.8.2014 passed by the District Agricultural Officer, Padampur, opposite party no.4, vide Annexure-3.

The order of cancellation of seed licence, vide Annexure-3, has been made on three grounds mentioned in the preceding paragraphs. As would be evident from the impugned order, Hariram Agrawal (father of the petitioner) was the proprietor of M/s.Venkateswar Seeds and was blacklisted, the seed licence of Deepak Kumar Agrawal (elder brother of the petitioner), proprietor of M/s.Balaji Seeds, had been cancelled and there is apprehension that the petitioner may commit mischief in future seeds transaction. The same has been tried to be justified by Mr. Muduli on the ground that the petitioner has suppressed the material facts and violated the provision of Seed Control Order, 1983, but the same has not been reflected in the impugned order. When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Merely because the father of the petitioner was blacklisted and the seed licence of his brother has been cancelled, the same *per se* cannot be a ground to cancel the seed licence of the petitioner. In the absence of any allegations or infraction

of the provisions of the Seed Control Order, 1983, the petitioner cannot be punished or made to suffer for the action of his father and brother. The third ground shows that there is apprehension that the petitioner may commit mischief in future seeds transaction as he belongs to the same family. This is based on surmises and conjectures.

16. Point No.III

The concept of natural justice has undergone a sea change in recent years. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil consequences" encompasses infraction of not merely property or personal rights, but of civil liberties, material deprivations, and non pecuniary damages. It takes within its sweep everything that affects a citizen in his civil life.

17. In Uma Nath Pandey and others v. State of Uttar Pradesh and another, *AIR 2009 SC 2375*, the Supreme Court held as follows:-

> "**6.** Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.
>
> **7.** The expressions "natural justice" and "legal justice" do not present a water-tight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigants' defence.

> **8.** The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate, interrogate and adjudicate". In the celebrated case of Cooper v. Wandsworth Board of Works [(1863) 143 ER 414], the principle was thus stated:
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> "Even God did not pass a sentence upon Adam, before he was called upon to make his defence. "Adam" says God, "where are thou? hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat"."

18. It is apt to refer here the verdict in Kesar Enterprises Limited V. State of Uttar Pradesh and others, *(2011) 13 SCC 733* wherein the Supreme Court was considering the applicability of principles of natural justice to Rule 633 (7) of the Utter Pradesh Excise Manual. The said Rule provided that if certificate was not received within the time mentioned in the bond or pass, or if the condition of bond was infringed, the Collector of the exporting district or the Excise Inspector who granted the pass shall take necessary steps to recover from executant or his surety the penalty due under the bond. In para-30 of the report, it is held as under;

> "**30**……..we are of the opinion that keeping in view the nature, scope and consequences of direction under sub-rule (7) of Rule 633 of the Excise Manual, the principles of natural justice demand that a show cause notice should be issued and an opportunity of hearing should be afforded to the person concerned before an order under the said Rule is made, notwithstanding the fact that the said Rule does not contain any express provision for the affected party being given an opportunity of being heard."

19. The submission of Mr. Muduli, learned Addl. Standing Counsel that natural justice is not required to be followed before cancelling the seed licence of the petitioner is difficult to fathom. In Radhakrishna Agarwal (supra), the petitions filed by the appellants under Article 226 were directed against the orders of the State Government revising the rate of royalty payable by them under the lease granted to them by the State, through its Forest Department, permitting them to collect sal seeds from the forest area. The subsequent cancellation of the lease was also challenged. The petitioners raised the question of breach of contract and mala fides for the action taken. The questions raised also related to constitutional provisions regarding exercise of executive power and entering into contracts by the Government under Articles 298 and 299, and if the same continued to be subject to Part III of the Constitution. In the said context, the Supreme Court held that the proposition that whenever a State or its agents or officers deal with the citizen, either when making a transaction or, after making it, acting in exercise of powers under the terms of a contract between the parties, there is a dealing between the State and the citizen which involves performance of "certain legal and public duties", is too wide to be acceptable. The remedy of Article 226 is not open for such complaints.

20. In Siemens Public Communication Networks Private Limited (supra), the Supreme Court held that a contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bona fide and is in public interest, courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.

21. A bare reading of the said decisions, however, shows that there is a significant difference in the factual matrix in which the said case arose for consideration. The reliance placed upon Radhakrishna Agarwal (supra) and Siemens Public Communication Networks Private Limited (supra), therefore, is of no assistance to the opposite parties.

22. The submission of Mr. Muduli that the order of cancellation dated 2.8.2014, vide Annexure-3, is a speaking one and no prejudice has been caused to the petitioner is like a billabong. The decision cited by Mr. Muduli in Ram Narain Arora (supra) is also distinguishable on facts. The Supreme Court in Ram Narain Arora had the occasion to deal with the Delhi Rent Control Act, 1958.

23. No case has been set out by the opposite parties that non issuance of show-cause notice has not caused any prejudice to the petitioner. Had the show cause notice been issued, the petitioner could have mentioned as to why such extreme order was not justified. The petitioner could have come out with extenuating circumstances defending such an action, even if defaults were there and the opposite party no.4 was not satisfied with the explanation qua the charges. It is not at all possible to accept the submission of Mr. Muduli, learned Addl. Standing Counsel that no prejudice has been caused to the petitioner due to non issuance of show cause notice. Further the extreme nature of cancellation of seed licence with severe consequence would itself amount to causing prejudice to the petitioner. Thus there has been clear violation of principles of natural justice, which invalidates the order of cancellation of seed licence dated 2.8.2014, vide Annexure-3.

24. On taking a holistic view of the matter, this Court is of the considered opinion that the order of cancellation of seed licence of the petitioner dated 2.8.2014, vide Annexure-3, by the opposite party no.4, is an infraction of principle of natural justice and the same is hereby quashed. While quashing the same this Court leaves it to the opposite parties to grant an opportunity to the petitioner to have his say in relation to allegations or complaints, which according to the authority concerned provide foundation for taking action against the petitioner and only after grant of such opportunity, the action as authorised under law should be taken.

25. The writ petition is allowed. There shall be no order as to costs.

Writ petition allowed.

2015 (I) ILR - CUT-1150

DR. B. R. SARANGI, J.

W.P.(C) NO.22319 OF 2011

JAYANTA KUMAR GOSWAMI .....Petitioner

.Vrs.

GOVERNING BODY OF AKHANDALAMANI COLLEGE (+2) & ORS. .....Opp.Parties

DISCIPLINARY PROCEEDING – Petitioner, a lecturer – Non-framing of definite charges – Draft charges issued hastily without supplying documents asked for – The authority who has issued such draft charges had no authority to do so due to lack of resolution passed by the Governing Body – Though misappropriation of funds alleged, the audit report does not indicate the same against the petitioner – No prior approval of the competent authority with regard to termination of service of the petitioner – Proceeding initiated by the authority has bias against the petitioner which cannot sustain – Held, the impugned orders terminating the services of the petitioner is set aside – The petitioner be reinstated in service and he be granted all the consequential service benefits as due and admissible to him in accordance with law. (Paras 15 to 20)

Case laws Referred to:-

1.JT 1995 (1) SC 270 : (Committee of Management-V- Sambhu Saran Pandey & Ors.)
2.AIR 2001 SC 343 : (State of Punjab-V- V.K. Khanna)
3.AIR 2001 SC 24 : (Kumaon Mandal Vikash Nigam Ltd.-V- Girija Sankar Pant & Ors.)
4.2006 AIR SCW 5685 : (Rajesh Kumar-V- DCIT & Ors.)
5.2013 AIR SCW 6134 : (Vinod Kumar-V- State of Haryana & Ors.)
6.1976 (1) WLR 1255 : (Fairmount Investment Ltd.-V- Secy. Of State for Environment)
7.AIR 2003 SC 2041 : (Canara Bank-V- Debasis Das)
8.AIR 1949 PC 313 : (Lennox Arthur Patrick O' Reilly & Ors.-V- Oyril Outhbert Gittens).
9.(1969) 2 SCC 262 : (A. K. Kraipak—V- Union of India)
10.AIR 1978 SC 851 : (Mohinder Singh Gill & Anr.-V- The Chief Election Commissioner, New Delhi & Ors.)

For Petitioner - M/s. S.Patra, A. Panda, P.K. Mohapatra, S.J. Mohanty-2 & D.D. Sahu.
For Opp.Parties - M/s. A.K. Panigrahi & B.S.Das.

Date of hearing : 24.06.2014
Date of judgment : 04.07.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who was appointed as Lecturer in Oriya in Akhandalamani College, has filed this petition assailing the resolution dated 25.5.2001 passed by the Governing Body of the College terminating his services under Annexure-19 and approval thereof made by the Director, Higher Education vide order dated 7.5.2005 under Annexure-25, which was affirmed by the State Education Tribunal by order dated 11.4.2011 in Appeal No. 16 of 2006 under Annexurer-26.

2. The factual matrix of the case at hand is that Akhandalamani College (+2) at Palasahi in the district of Bhadrak, was established in the year 1982 with Intermediate Arts and Commerce stream. The Government granted concurrence in the year 1987 and the Council of Higher Secondary Education granted affiliation in the year 1998. The +3 Arts and +3 Science streams were opened in the year 1990 and the college received special permission for +3 Arts stream in the year 1992. The petitioner was appointed as Lecturer in Oriya against the 1st post in the college by following due procedure of selection pursuant to which he joined on 16.8.1982. The college became eligible and was notified on 15.3.1997 to be an aided educational institution with effect from 1.6.1994, therefore the Institution in question is an aided Institution within the meaning of Section 3(b) of the Orissa Education Act. The appointment of the petitioner was duly approved, consequence thereof he received grant-in-aid with effect from 1.6.1996 pursuant to the order dated 1.5.1997 under Annexure-1. On 15.5.1997 under Annexure-2 the petitioner was made the Principal-in-charge-cum-Secretary of the Governing Body with effect from 11.4.1997 and continued till 31.7.1998 pursuant to the order of the Director, Higher Education. Thereafter, Mr.P.K.Hota was made as the Principal-in-charge-cum-Secretary. The petitioner was placed under suspension on 11.11.1998 by the order of the President of the Governing Body and such order of suspension

3. was approved by the Director, Higher Education vide his order dated 17.12.1998. The petitioner assailed the order of suspension before this Court in OJC No. 5201 of 1999 vide Annexure-3, which was pending. Draft charges were framed against the Petitioner on 24.2.1999 under Annexure-4 for the alleged misconduct, dereliction in duty, unauthorised absence and misappropriation of college funds. The petitioner vide Annexure-5 dated 6.3.1999 sought for supply of the records, but the same were not supplied to him. But the Director vide order dated 25.1.2000 under Annexure-6 directed the President of the Governing Body for speedy disposal of the enquiry. Pending such disciplinary proceeding, the petitioner was reinstated in service vide Annexure-7 dated 15.9.2000, pursuant to which he joined on 16.9.2000. But the said order was revoked by the Director, Higher Education on 18.9.2000 under Annexure-9. Challenging such order, the petitioner filed OJC No.9497 of 2000 before this Court. Both OJC No. 5201 of 1999, which was filed challenging the order of suspension and OJC No.9497 of 2000, which was filed challenging revocation of the order of reinstatement, were disposed of by this Court by order dated 4.4.2001 vide Annexure-10. In OJC No. 5201 of 1999 this Court directed that the authorities would disburse the subsistence allowance within a period of one month and in OJC No.9497 of 2000, this Court directed to conclude the disciplinary proceeding which has been initiated against the petitioner within a period of two months from the date of communication of the order. It was also made clear that if the proceeding is not concluded within the time stipulated, the order of suspension shall be revoked and the petitioner shall be reinstated in his post. The certified copy of the order dated 4.4.2001 was served on the authorities on 6.4.2001. In the meantime, on 23.9.2000 vide Annexure-11 another final draft charge was served by the Principal-in-charge declaring himself as the disciplinary authority. But the said final draft charge though was addressed to the opposite party no.3, no communication was made to the petitioner. On 11.4.2001 under Annexure-12, the Principal-in-charge directed the petitioner to deposit the misappropriated money of Rs.4,21,900.70 within fifteen days, which was received by the petitioner on 18.4.2001 basing upon which the petitioner filed his reply on 20.4.2001 under Annexure-13 stating specifically that unless his guilt is proved in a properly constituted disciplinary proceeding, he is not liable to refund anything. It is also further stated that audit was not conducted in accordance with the Orissa Aided Educational Institution Accounting Procedure Rules, 1985, in which it was stated that the audit by the auditor appointed by the Orissa Local Fund Audit Act, 1948 has to be done. The Director vide letter dated 27.4.2001 directed the opposite

party no.4 to conclude the proceeding after convening the meeting of the Governing Body in accordance with the judgment of this Court in OJC No.9497 of 2000 disposed of on 4.4.2001. On that basis the petitioner was directed to appear before the Collector on 11.5.2001 vide Annexure-16 and thereafter on 21.5.2001 under Annexure-17 and in consequence thereof, on the basis of the materials available on record and the charges, the Governing Body on 25.5.2001 under Annexure-19 unanimously came to a conclusion to terminate the services of the petitioner and thereafter the resolution was sent to the Director, Higher Education along with the letter of the Collector dated 30.5.2001 under Annexure-20 for grant of necessary approval. But in the meantime the petitioner had filed a contempt application bearing Original Crl.Misc. Case No. 402 of 2002 due to the non-compliance of the order dated 4.4.2001 passed by this Court in OJC No.9497 of 2000. The petitioner submitted his joining report in compliance to the order dated 4.4.2001 on the condition that the proceeding having been concluded, his joining report should be accepted, but the Governing Body having passed a resolution on 25.5.2001 vide Annexure-19, the joining report of the petitioner was not accepted. Thereafter, the Governing Body filed a writ Petition bearing W.P.(C) No.3026 of 2002, which has been disposed of on 10.12.2002 directing the Director to consider the request of the college for approval of the termination of the services of the petitioner within a period of two months. The Director, Higher Education on consideration of the facts and materials and upon hearing the petitioner and Governing Body, passed an order on 7.5.2005 in Annexure-25 approving the termination order of the petitioner, against which the petitioner preferred Appeal No.16 of 2006 before the learned Education Tribunal. Learned Tribunal after affording opportunity of hearing did not interfere with the order of termination passed by the Director and dismissed the appeal vide order dated 11.4.2011 in Annexure-26, against which this writ petition has been filed.

4. On being noticed, opposite party nos.1 to 4 filed their counter affidavit stating that the petitioner was afforded all the opportunities to put-forth his grievance and after that the Governing Body has taken a decision to terminate the services of the petitioner on the basis of the materials available on record by passing a resolution, which has been duly approved by the Director, Higher Education under Section 10-A(1) of the Orissa Education Act. In appeal, the learned Education Tribunal on consideration of the materials available on record did not interfere with the order of termination

passed by the Director as the Director has passed the order in conformity with the provisions of law.

5. The petitioner filed rejoinder specifically urging the fact that the order of suspension dated 11.11.1998 is bad in law in view of the fact that the President without any authority has passed the same as no resolution was passed by the Governing Body to initiate the disciplinary proceeding against the petitioner. Apart from the same, after expiry of 30 days, without the approval of the Director, the order of suspension becomes invalid. The order of suspension was passed on 11.11.1998 and the same was approved by the Director on 17.12.1998, which was beyond the 30 days period, thereby such approval of the order of suspension cannot be sustained. It is further stated that the audit on the basis of which the proceeding was initiated is dehors the Rules. The audit related to the period from 21.7.1987 to 9.7.1998, out of which during the period from 21.7.1987 to 14.3.1997 the college was not aided and for the rest period, i.e. from 15.3.1997 to 9.7.1998 the audit should have been conducted by the local fund audit and not by the departmental auditor. The for the aided period having been conducted by the departmental auditor, the same is contrary to the provisions of law and therefore, the disciplinary proceeding basing upon such audit report also cannot sustain.

6. On the basis of the above factual matrix, Mr.S.Patra, learned counsel for the petitioner specifically urged that the draft charge under Annexure-4 dated 24.2.1999 on the basis of which the departmental proceeding has been initiated is not a definite one and as such, the charge-sheet itself does not incorporate the materials on the basis of which the same has been framed and the petitioner though asked for such documents, the same has not been supplied to him, thereby it contravened the provisions of Rule 22(2)(3) of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (hereinafter to be referred to "1974 Rules"). Therefore, there is gross non-compliance of the principles of natural justice. Hence, the initiation of the departmental proceeding is vitiated. It is further urged that the termination of the petitioner is also violative of Rule 29(e) of the Orissa Education (Establishment, Recognition and Management of Private High Schools) Rules, 1991 (hereinafter to be referred to as "Rules, 1991"). It is stated that the Governing Body- opposite party no.1 is the disciplinary authority as per Rule 21 of the 1974 Rules. Since the draft charges have not been issued by the Governing Body under Annexures-4 and 11, the very initiation of the

proceeding is contrary to the provisions of law and the draft charges which have been served vide Annexures-4 & 11 have neither been finalized nor any materials on the basis of which such charges have been framed, have been supplied to the petitioner, thereby the same is in gross violation of the principles of natural justice. The basic foundation of initiation of disciplinary proceeding with regard to the misappropriation of college funds, it is stated that much reliance has been placed on the audit report. The same has not been done in conformity with the provisions contained in Orissa Local Fund Audit Act, 1948 read with the Orissa Aided Educational Institution Accounting Procedure Rules, 1985. Therefore, the termination of the services of the petitioner without getting prior approval of the Director is also contrary to the provisions contained in Section 10-A of the Orissa Education Act. To substantiate his contention, he has relied upon the judgments of the apex Court in **Committee of Management v. Sambhu Saran Pandey and others**, JT 1995 (1) SC 270, **State of Punjab v. V.K.Khanna**, AiR 2001 SC 343, **Kumaon Mandal Vikash Nigam Ltd. v. Girija Sankar Pant and others**, AIR 2001 SC 24, **Rajesh Kmar v. DCIT and others,** 2006 AIR SCW 5685, and **Vinod Kumar v. State of Haryana and others**, 2013 AIR SCW 6134.

7. Mr.B.S.Das, learned counsel for the opposite parties 1 to 4 states that the impugned order having been passed well within the jurisdiction of opposite party no.3, the same should not be interfered with and as such, the order of approval of termination and consequential revocation of the order of reinstatement in appeal by the learned Education Tribunal is wholly and fully justified and such orders have been passed on due consideration of the materials available on record.

8. With reference to the aforesaid factual and legal contentions, the following points emerge for consideration.

(i) Whether consequent upon initiation of the disciplinary proceeding, the termination of the petitioner is in violation of the provisions of law and principles of natural justice?

(ii) Whether the order passed by the Director approving the termination of the petitioner is legal and valid?

(iii) Whether the order of termination passed on the basis of the audit report regarding misappropriation of college funds can sustain or not?

(iv) Whether the learned Education Tribunal has passed the impugned order with due application of mind or not?

9. As it appears, the draft charge-sheets under Annexures-4 and 11 have been issued without any resolution being passed by the Governing Body. Thereby there is no authority of law to issue such draft charge by the authority, who is not competent under law. As such, no complete charge has been issued against the delinquent officer. Sub-rule (2) of Rule 22 of 1974 Rules prescribes that definite charges have to be supplied to the delinquent like that of the petitioner. The materials on the basis of which the draft charges have been framed have not been supplied to the petitioner. So far as draft charges framed on the allegation of financial misconduct is concerned, the same cannot be taken into consideration on the ground that the draft charge was framed vide Annexure-4 on 24.2.1999, whereas audit was done on 5.3.1999 after submission of draft charge to the petitioner and more so, such audit has been carried out by the authority, who has no competence to do. Such audit was to be done as per the provisions contained in the Orissa Local Fund Audit Act, 1948 read with Rule 29(e) of the Orissa Aided Educational Institution Accounting Procedure Rules, 1985. Annexure-11, the subsequent draft charge dated 23.9.2000 was issued by the Principal-in-charge declaring him as the disciplinary authority without any resolution of the Governing Body. Therefore, such draft charge has been submitted by a person, who is not competent as per 1974 Rules. Hence, any action taken pursuant to such draft is vitiated. More so, such draft charge under Annexure-11 has never been served on the petitioner, rather it has been addressed to opposite party no.3, the Director, Higher Education. The said Annexure-11 was issued by the then Principal-in-charge, who resigned from the post on 4.6.1999. In view of the aforesaid reasons, it appears that the very initiation of the proceeding by issuing draft charge without having any definite charge and non-supply of the materials basing upon which charge has been framed being violative of the statutory provisions, and contrary to 1974 Rules read with 1985 Rules, the impugned order of termination cannot be sustained. It is stated that after the draft charge was submitted vide Annexure-4 on 24.2.1999, the petitioner prayed for supply of records as per Rule 22(3) of 1974 Rules vide Annexure-5, but the said documents were not supplied to him. Therefore, there is gross violation of the principle of natural justice.

10. The phrase "natural justice" means a fair crack of the whip, per Lord Russel of Killowen, in **Fairmount Investment Ltd. v. Secy. of State for Environment**, 1976(1) WLR 1255, as cited in **Canara Bank v. Debasis Das**, AIR 2003 SC 2041. The phrase "natural justice" means universal justice. **Drew v. Drew and Lebura (Macq. at p.8 per Lord Granworth**, as cited in Canara Bank v. Debasis Das (supra).

11. The words "Natural Justice" manifest justice according to one's own conscience. It is derived from the Roman concept 'jus-naturale' and 'Lex naturale' which means principle of natural law, natural justice, eternal law, natural equity or good conscience. Lord Evershed, in **Vionet v. Barrett** (reported in 1885(55) LJRD 39) remarked, "Natural Justice is the natural sense of what is right and wrong." It has been used to mean that reasons must be given for decisions: that a body deciding an issue must only act on evidence sentenced, especially where decision affecting liberty or property is to be made fair opportunity of hearing must be provided. In **Lennox Arthur Patrick O' Reilly and others v. Oyril Outhbert Gittens,** AIR 1949 PC 313, it has been held that the principles of natural justice constitute the basic elements of fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men.

12. "Natural Justice" has been used in a way "which implies the existence of moral principles of self-evidence and unarguable truth". In course of time, judges nurtured in the traditions of British jurisprudence, often involved it in conjunction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law"."Natural justice" was considered as "that part of natural law which relates to the administration of justice". Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. During the last two decades, the concept of natural justice has made great strides in the realm of administrative law. Before the epoch-making decision of the House of Lords in **Ridge v. Baldwin**, 1964 AC 40(196): (1963) 2 All ER 66 (HL), it was generally thought that the rules of natural justice apply only to judicial or quasi-judicial proceedings; and for that purpose, whenever a breach of the rule of natural justice was alleged, courts in England used to ascertain whether the impugned action was taken by the statutory authority or tribunal in the exercise of its administrative or

quasi-judicial power. In India also, this was the position before the decision dated February 7, 1967 of the apex Court in **State of Orissa v. Dr.(Miss)Bina Pani Devi,** AIR 1967 SC 1269) wherein it was held that even an administrative or decision in matters involving civil consequences, has to be made consistently with the rules of natural justice. This supposed distinction between quasi-judicial and administrative decisions, which was perceptibly mitigated in Dr.Bina Pani Dei case, was further rubbed out to a vanishing point in **A.K.Kraipak v.Union of India**, (1969) 2 SCC 262, thus: If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. An unjust decision in an administrative enquiry may have more far-reaching effect than a decision in a quasi-judicial enquiry.

13. In the language of V.R.Krishna Iyer, J. in **Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others,** AIR 1978 SC 851, it has been held as follows:

> "……..subject to certain necessary limitations natural justice is now a brooding omnipresence although varying in its play….. Its essence is good conscience in a given situation; nothing more- but nothing less".

In **A.K.Kraipak (supra),** it has been held that the rules of natural justice can operate only in areas not covered by any law validly made. They can supplement the law but cannot supplant.

14. Due to non-supply of materials, basing upon which charge has been framed, the rudiment of non-compliance of principle of natural justice has not been followed, thereby the very initiation of the proceeding is vitiated. While initiating a proceeding, it appears that the authorities are biased against the petitioner because without framing definite charge as per 1974 Rules, relying upon the draft charges the proceeding has been initiated hastily. In view of the judgment of the apex Court in **State of Punjab v. V.K.Khanna (supra)**, there must be at least substantial possibility of bias in order to render the administrative action invalid. As it appears that when the draft charge-sheet was submitted without any materials and the petitioner sought for supply of documents and the same were not provided and subsequently vide Annexure-11 draft charge was prepared and was supplied

to the Director without giving a copy to the petitioner, that itself indicates that the person, who has initiated the proceeding has bias against the petitioner. Therefore, any proceeding, which has been initiated with bias mind cannot be sustained.

15. In **Kumaon Mandal Vikash Nigam Ltd. (supra),** the apex Court held as follows:

> "The word 'Bias' in popular English parlance stands included within the attributes and broader purview of the word 'malice', which in common acceptation mean and imply 'spite' or 'ill-will' (stroud's Judicial Dictionary (5th Ed.) Volume 3) and it is now well settled that mere general statements will not be sufficient for the purposes of indication of ill-will. There must be cogent evidence available on record to come to the conclusion as to whether in fact there was existing a bias which resulted in the miscarriage of justice."

16. The authority who has issued such draft charges had no authority to do so because of lack of resolution passed by the Governing Body. That itself indicates that the authority is biased against the petitioner and proceeded without any authority of law. Therefore, the order of termination has been passed contrary to the provisions of law governing the field.

17. The allegation of misappropriation of funds has been based on the audit report. The same has not been done in conformity with the provisions of law. On perusal of the audit report, it appears that no where it has been indicated that the petitioner had misappropriated the money. The audit having been done for the period from 21.7.1987 till 31.7.1998, which is inclusive of unaided and aided period and out of which during the period from 11.4.1997 to 31.7.1998 the college was aided and the petitioner as Principal-in-charge operated the account. But for the period from 21.7.1987 to 10.4.1997, which was unaided period, the account was not operated by the petitioner, rather one Bansidhar Khatua being the Secretary of the Governing Body operated the same and signed the resolution by maintaining the accounts as per law, thereby the entire process of proceeding was continuing with mala fide and biased manner and without application of any mind. As it appears, while causing such enquiry, the provisions of law has neither been taken into consideration nor principle of natural justice has been complied with, rather, the authorities have proceeded in a biased manner with mala

fide intention, which is not permissible in the eye of law, consequence thereof, without any application of mind, the Director has approved the termination order under Annexure-25, which is nothing but an arbitrary and unreasonable exercise of power by the Director. The learned Education Tribunal in Appeal did not incline to interfere with the approval of the termination order. That itself also cannot sustain though the order itself indicates that the termination order was passed on 30.5.2005, but in effect, the same was passed on 30.5.2001 without prior approval of opposite party no.3, since the termination order has been approved by the Director contrary to the provisions contained in Section 10-A of the Orissa Education Act. Section 10-A (1)(a) of the Act reads as follows :

> "10-A.Service of teachers of aided institutions not to be terminated without approval- (1) The services of a teacher and other members of the staff of an aided Educational Institution shall not be terminated without obtaining the prior approval in writing of the
>
> (a) Director in case of a teacher and other members of the staff of a college;
>
> (b) xx xx xx "

18. On perusal of the above mentioned provisions, it appears that the services of a teacher of aided educational institution shall not be terminated without obtaining prior approval in writing of the Director in case of a teacher of a college. In the present case, the termination order having been passed on 30.5.2001 and decision was taken by the Governing Body regarding termination of his services pursuant to the resolution dated 28.5.2001, which has been approved by the Director vide letter dated 7.5.2005 under Annexure-25, it cannot be construed that there is prior approval with regard to the termination of the services of the petitioner and such order of termination has been passed due to non-compliance of the principle of natural justice.

19. The learned Education Tribunal committed gross error apparent on the face of the record by declining to interfere with the approval of the order of termination by the Director under Annexure-25. The learned Tribunal has committed gross error stating that final charges with imputations were served on the petitioner on 21.2.1999 along with relevant documents, basing upon

which charges were framed and such statement has been made on the basis of the contentions raised by opposite party no.5. The opposite party no.5 has never filed any affidavit before the learned Tribunal to that extent, which amounts to non-application of mind by the learned Tribunal. The contention raised that the petitioner was supplied with the final charges with imputations with relevant documents on 21.2.1999 are backed by documents or materials available on record. But fact remains, on the basis of the draft charge under Annexure-4, prepared on 24.2.1999 since the documents were not supplied to him as per Rule 22(3) of 1974 Rules, the petitioner called for all the documents pursuant to Annexure-25, but no such documents were supplied to him and on the basis of such draft charges, the proceeding continued. Therefore, without appreciating the facts in proper perspective, the learned Tribunal has passed the impugned order.

20. In view of the foregoing analysis, this Court is of the opinion that the impugned resolution of the Governing Body terminating the services of the petitioner under Annexure-19, the subsequent approval made by the Director, Higher Education under Annexure-25 and the order passed by the learned Education Tribunal under Annexure-26 are contrary to the provisions of law and as the same have been passed without compliance of the principles of natural justice, the same are hereby set aside.

21. In the result, the writ petition is allowed. The petitioner be reinstated in his service and he be granted all the consequential service benefits as due and admissible to him in accordance with law forthwith.

Writ petition allowed.

2015 (I) ILR – CUT-1162

DR. B. R. SARANGI, J.

W.P.(C) NO.16088 OF 2012

ARUN KUMAR MISHRA & ORS. ……Petitioners

.Vrs.

BHUBANESWAR DEVELOPMENT AUTHORITY & ANR. ……..Opp.Parties

SERVICE LAW – Regularization of DLR workmen – Industrial dispute raised – Tribunal directed regularization – Order upheld by this Court as well as by the Apex Court – Management regularized some employees but left the petitioner on the ground of lack of educational/technical qualification – Action challenged being discriminatory under Article 14 of the Constitution of India – Such plea having not raised before any of the Courts/Forums cannot be raised now – Petitioners having discharged the job for some years without objection they are presumed to be competent – Held, impugned order passed by the O.P. management denying regularization of the services of the petitioners is quashed – Direction issued to the authorities to regularize the services of the petitioners. (Para 19)

Case laws Referred to:-

1.(2008) 9 SCC 24 : (Maharajkrishan Bhatt & Anr.-V- State of J & K & Ors.)
2.(2006) 2 SCC 747 : (State of Karnataka & Ors.-V- C.Lalitha)
3.2014 (8) Supreme 738 : (M/s. Pee Vee Textiles Ltd.-V- State of Maharashtra & Ors.)
4.2014 (8) Supreme 746 : (Sultan Singh-V- State of Haryana)
5.2014 (6) Supreme 624 : (Sandhya –V- State Maharashtra & Ors.)
6.(1985) 2 SCC 648 : (Inder Pal Yadav & Ors.-V- Union of India & Ors.)
7.(1997) 6 SCC 721 : (K.C. Sharma & Ors.-V- Union of India)
8.(1978) 1 SCC 248:AIR 1978 SC 597 : (Maneka Gandhi-V- Union of India & Anr.)
9.(1981) 1 SCC 722 : (Ajay Hasia & Ors.-V- Khalid Mujib Sehravardi & Ors.)
10.(2009) 14 SCC 793 : (Dakshin Haryana Bijli Vitran Nigam & Ors.-V- Bachan Singh)

For Petitioner - M/s. A.K. Choudhry & K.K. Das.
For Opp.Parties- M/s. S. Swain, S.C. Parida, B. R. Rath.

Date of hearing : 02.03.2015
Date of judgment : 12.03. 2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioners, who are the DLR Workmen, working under the Bhubaneswar Development Authority (BDA), have filed this application seeking for a direction to regularize their services as per the award passed by the Presiding Officer, Labour Court in ID Case No. 74 of 2003, which was confirmed by this Court in W.P.(C) No. 5319 of 2005, disposed of on 11.01.2010 and upheld by the Supreme Court in Civil Appeal No. 20736 of 2010 dated 06.08.2010 and further seeking to quash the office order dated 30.04.2011 vide Annexure-11 denying regularization due to lack of educational qualification/technical qualification.

2. The fact of the case in nutshell is that the Bhubaneswar Development Authority, in short, 'BDA' was established in the year 1981 under the provisions of Orissa Development Authorities Act, 1982 and to carry out its functions, it engaged the petitioners as DLR-workmen in Class-III and Class-IV posts. After rendering uninterrupted service for five years since the petitioners' services were not regularized, they raised Industrial dispute. Consequently, the Government of Orissa referred the dispute under Sections 10 and 12 of the Industrial dispute Act to the Industrial Tribunal for adjudication with regard to regularization of service in ID Case No. 2 of 1988 on 23.01.1988. The Industrial Tribunal vide order dated 21.11.1990 in Annexure-4 passed an award in ID Case No. 2 of 1988 directing the BDA to regularize the services of the NMR/DLR employees, who have been working for more than one year and grant all consequential benefits admissible to the posts.

3. The Government of Odisha notified the award dated 21.11.1990 passed in ID Case No. 2 of 1988 on 03.12.1990 in official gazette. In consonance with the said award the opposite party-Management requested the employees' union for amicable settlement and it was agreed upon on 29.04.1991, vide Annexure-1 that the employees, who have rendered five years of service, their services would be regularized. Till the year 1993-1994 the opposite party-Management regularized the service of 290 NMR/DLR

employees and thereafter the process of regularization was stopped. In 50th Board meeting of BDA, it was decided that the cases of DLR/NMRs who have completed five years of service, would be considered for regularization, vide Annexure-2. Consequently, settlement was arrived at between the employees' union and the opposite party-Management with regard to regularization of the services on 21.12.1993 vide Annexure-3. Pursuant to Annexure-3, as the services of the 113 DLR employees including the present petitioners were not considered as per the award in ID Case No. 2 of 1988 and the decision of 50th and 83rd Board meeting, the employees' Union raised the demand for regularization and considering the same, the State Government in exercise of power conferred under Sub-Section (5) of Section 12 read with Sub-Section (1) of Section 10 of the Industrial Disputes Act, 1947 referred the matter in dispute to this Court in Labour and Employment Department Memo No. 12075 (5)/L dt. 17.12.2003 for adjudication and award. The term of reference read as under:

> "Whether the action of the management of Bhubaneswar Development Authority, Bhubaneswar in not regularizing the services of 113 numbers of N.M.R./D.L.R./Adhoc workmen is legal and or justified. If not what relief they are entitled"

The reference was registered by the Labour Court as I.D.Case No. 74 of 2003.

4. The Industrial Tribunal after due adjudication passed the award to the following effect:

> "That the action of the management of Bhubaneswar Development Authority, Bhubaneswar in not regularizing the services of 113 numbers of N.M.R./D.L.R./Adhoc workmen is illegal and unjustified. The above 113 workmen are entitled for regularization of their respective services from the date they have completed five years of service in respect of general category of workmen and three years of service in respect of the Scheduled Caste and Scheduled Tribe workmen. The management is directed to consider the case of the concerned 113 workmen for regularization at an early date.
> The reference is thus answered accordingly."

5. Thereafter a seniority list of DLR employees working in BDA was prepared and published by the BDA on 09.11.2004 vide Annexure-5, showing the nature of work/job performed by them. The petitioners' name find place against Sl. Nos. 10, 47, 51, 58, 59, 62, 87, 100, 41, 74, 71 and 36 their corresponding names were also available in the award of the Industrial Tribunal in ID Case No. 74 of 2003 at Sl. Nos. 14, 61, 64, 45, 107, 34, 86, 99, 52, 66, 77 and 42. In the written statement filed in ID Case No. 74 of 2003 nowhere opposite party-management had raised a plea about the disqualification of the present petitioners to hold the posts due to lack of proper education qualification or they are unfit to hold the posts or they were ineligible to be considered for regularization. The pleadings available in the written statement have also been annexed in the present application. Challenging the said award dated 30.12.2004 in I.D Case No. 74 of 2003, opposite party-management filed W.P.(C) Case No. 5319 of 2005 taking a plea that there was no sufficient work available for regularization and there is financial crunch. But this Court after hearing the parties dismissed the writ petition filed by the opposite party-management vide judgment dated 11.01.2010(Annexure-7). Assailing the said award passed in I.D Case No. 74 of 2003 and the judgment dated 11.01.2010, the opposite party-management approached the apex Court in SLP (Civil) No. 20736 of 2010, which was also dismissed vide order dated 06.08.2010, Annexure-8. Consequently, the award dated 30.12.2004 passed by the Industrial Tribunal with regard to regularization of services of 113 workmen including the present petitioners were upheld by this Court as well as the apex Court. Instead of regularizing the services, the opposite party-management in its 116th Board meeting held that the management will regularize all the DLR. /NMR/Ad hoc employees from the date of the order of apex Court without any arrear benefits, i.e., back wages, notional promotion, fixation of pay etc. In the said Board meeting it was also decided that if the workmen do not agree for the same, the BDA will file Review Petition before the apex Court and for that purpose a committee was constituted. Pursuant to such decision dated 10.11.2010, the opposite party-management called upon 104 DLR workmen excluding the present petitioners on 31.01.2011 to produce an undertaking in the shape of affidavit for regularization of their services in the format prescribed by the opposite party-management on or before 04.02.2011. The opposite party-management informed the petitioners that as per the decision of the 118th Board meeting dated 31.04.2011, the DLR/NMR workmen, who have not possessed the requisite qualification/technical qualification would not be considered for regularization, vide Annexure-11. The petitioners submitted

an application before the Vice-Chairman on 05.08.2011 requesting to consider their case for regularization as per the award passed by the Industrial Tribunal in I.D Case No. 74 of 2003, which has been subsequently upheld by this Court as well as the apex Court. Out of 14 left out DLR workmen, 9 DLRs submitted their testimonials showing that they have appeared at the HSC examination, but as per Agenda No. 9/123, decision was taken to regularize the services of 2 DLR workmen and the case of 7 DLRs was placed before the authority for decision and the petitioners were directed to attend the Certificate Committee in the Conference Hall on 6.11.2012 for necessary verification. But in spite of all these, the petitioners' services have not been regularized.

6. In the counter affidavit filed by the opposite party-Management, reliance was placed on Annexure-B/1 where the educational qualification/technical qualification was prescribed for the purpose of regularization, but the said notification relates to method of recruitment and conditions of services to different posts in Works Department. Rule 5 of the said notification, deals with method of recruitment, which means direct recruitment and by way of promotion. The proviso to Rule 7 inter alia states about relaxation of age limit to such extent as provided in Orissa Ex-Serviceman (Recruitment to State Civil Services & Posts Rules) in respect of ex-servicemen and in case of NMR/DLR workers as prescribed in F.D. Resolution No. 22264 dated 15.05.1997 who would be recruited having requisite qualification mentioned therein. Applying the said notification, the petitioners have been denied regularization in their services as they lack in educational qualification/ technical qualification. Hence, this application.

7. Mr.A.K.Choudhury, learned counsel for the petitioners strenuously urged that so far as regularization of the services of the petitioners is concerned, the same having been set at naught by the learned Industrial Tribunal, confirmed by this Court as well as apex Court, nothing remains to be considered by the authority except implementing the same in letter and spirit. At a belated stage, the authorities cannot raise a plea that since the petitioners lack educational qualification/technical qualification, their services cannot be regularized. Their cases have been duly adjudicated by the competent forum, the authorities have to give due relaxation in the matter of regularization in terms of the decision of the said forum and more so, at no point of time the opposite party-management has raised any objection with regard to their educational qualification/technical qualification before any of

the forums. Once the question of regularization has been adjudicated and reached its finality by the learned Industrial Tribunal and this Court as well as the apex Court, the opposite party-management is precluded to raise such question and denial of regularization of services amounts to over-reaching the order passed by the appropriate forums. In support of his submission, he has placed reliance on **Maharajkrishan Bhatt and another v. State of J & K and others**, (2008) 9 SCC 24, **State of Karnataka and others v. C.Lalitha**, (2006) 2 SCC 747, **M/s.Pee Vee Textiles Ltd. v. State of Maharashtra and others**, 2014(8) Supreme 738, **Sultan Singh v. State of Haryana**, 2014 (8) Supreme 746, **Sandhya v. State of Maharashtra and others**, 2014 (6) Supreme 624. **Inder Pal Yadav and others v. Union of India and others,** (1985) 2 SCC 648, **K.C.Sharma and others v. Union of India,** (1997) 6 SCC 721.

8. Mr.S.Swain, learned counsel appearing for the opposite party-management laid emphasis on Annexure-B/1, the notification issued by the Works Department dated 9.12.2005, where in exercise of the powers conferred under Section 309 of the Constitution of India, the Governor of Orissa has framed a rule for regulating the method of recruitment and conditions of service of persons appointed to different posts of the Orissa Subordinate Electrical Workers' Service under the administrative control of the Works Department, called "Orissa Subordinate Electrical Workers Service (Method of Recruitment and conditions of Service of Electrical Works working under the administrative control of Works Department) Rules, 2005". It is urged that the minimum qualification has been prescribed under Rule 7, the same should be adhered to while regularizing the services of the DLRs of the opposite party. The petitioners having no requisite qualification, their services cannot be regularized and decision so taken by the authority is wholly and fully justified and this Court should not interfere with the same.

9. On the basis of the facts pleaded above, it is the admitted case of the parties that the petitioners are working as DLR employees under the opposite party-management and they have rendered more than 10 years of continuous service and they are continuing till date and for regularization of their services, they had approached the State Government and consequently the State Government referred the matter under Sections 10 & 12 of the Industrial Disputes Act to the Presiding Officer, Industrial Tribunal for adjudication in ID Case No. 74 of 2003. After giving due opportunity, the

learned Industrial Tribunal passed the award in Annexure-4, which has also been challenged by the opposite party-management before this Court in a writ petition. But this Court dismissed the said writ petition against which order, the opposite party-management went to the apex Court in S.L.P which was also dismissed. Therefore, by dismissal of the writ petition as well as S.L.P, the award passed by the learned Industrial Tribunal has reached its finality and as such, the opposite party-management has to implement the award in letter and spirit. Though the petitioners were also parties to the industrial proceeding and by virtue of the award passed by the learned Industrial Tribunal like other employees, the services of the petitioners are also required to be regularized, but the opposite party-management though regularized the services of similarly situated persons, but discriminated the petitioners by not regularizing their services on the plea of non-possession of educational qualification/technical qualification. As it appears from the written statement filed before the learned Tribunal, the disqualification of the petitioners due to non-possession of educational qualification/technical qualification has never been raised. Therefore, irrespective of the fact that the petitioners may or may not have educational qualification/technical qualification with them, that cannot be raised subsequently when the matter has reached its finality with the dismissal of the SLP by the apex Court. In that case, the opposite party-management has to implement the award passed by the learned Tribunal, which has reached its finality with the dismissal of the writ petition as well as SLP preferred by the opposite party-management. So far as applicability of the Rule mentioned in Annexure-B/1 referred to by the opposite party-management is concerned, that has come into force in 2005 and more so, the said Rule is not applicable to the present petitioners because their cases have been duly adjudicated by the Industrial forum and affirmed by this Court and the apex Court and more so, the Rule is only applicable to the persons appointed to different posts of the Orissa Subordinate Electrical Workers under the administrative control of the Works Department. Nothing has been placed before this Court to indicate that the opposite party-management has adopted the said Rule for its employees. Even if the same is adopted, it will apply prospectively and not retrospectively as at no point of time any decision has been taken by the management nor any averment made in the counter indicating that the Rule has got retrospective application. In view of the decision already made by the learned Industrial Tribunal and upheld by this Court as well as the apex Court, the opposite party-management is precluded to raise any such objection which they are now raising in the present proceeding that the

petitioners do not possess the educational qualification/technical qualification when services of similarly situated persons who were also parties before the learned Industrial Tribunal, have been regularized without any objection. By making objection, it creates an artificial discrimination, which attracts Article 14 of the Constitution of India.

10. In **Inder Pal Yadav and others v. Union of India and others,** (1985) 2 SCC 648, the apex Court while dealing with the question of applicability of doctrine of equality has held as follows :

> "If the workmen are otherwise similarly situated, they are entitled to similar treatment, if not by any one else at the hands of this Court."

11. In **K.C.Sharma and others v. Union of India**, (1997) 6 SCC 721, the apex Court has held as follows :

> "The appellants should have been given relief in the same terms as was granted by the Full Bench of the Tribunal to others."

12. In **C.Lalitha (supra),** the apex Court in paragraph 29 has held as follows :

> "Service Jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the Court that would not mean that persons similarly situated should be treated differently."

13. In **Maharaj Krishna Bhatt and others (supra**), the apex Court in paragraph 23 has held as follows :

> "In fairness and in view of the fact that the decision in Abdul Rashid Rather had attained finality, the State authorities ought to have gracefully accepted the decision by granting similar benefits to the present petitioner."

14. In ***E.P. Royappa v. State of Tamilnadu & another****, (1974) 4 SCC 3*, = *AIR 1974 SC 555,* the apex Court has held as follows :

> "From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic

and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

15. In ***Maneka Gandhi v. Union of India & another,*** *(1978) 1 SCC 248* = AIR 1978 SC 597, at page 284, the apex Court has held as follows:

"Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits……. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment..The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence……..

16. In ***D.S. Nakara v. Union of India & others****, (1983) 1 SCC 305, =AIR 1983 SC 130, the apex Court has observed thus:*

> "……The thrust of Article 14 is that the citizen is entitled to equality before law and equal protection of laws. In the very nature of things the society being composed of unequals a welfare State will have to strive by both executive and legislative action to help the less fortunate in the society to ameliorate their condition so that the social and economic inequality in the society may be bridged. This would necessitate a legislation applicable to a group of citizens otherwise unequal and amelioration of whose lot is the object of State affirmative action. In the absence of doctrine of classification such legislation is likely to flounder on the bed rock of equality enshrined in Article 14. The Court realistically appraising the social stratification and economic inequality and keeping in view the guidelines on which the State action must move as constitutionally laid down in Part IV of the Constitution, evolved the doctrine of classification. The doctrine was evolved to sustain a legislation or State action designed to help weaker sections of the society or some such segments of the society in need of succour. Legislative and executive action may accordingly be sustained if it satisfies the twin tests of reasonable classification and the rational principle correlated to the object sought to be achieved....."

17. In Ajay Hasia & others v. Khalid Mujib Sehravardi & other, (1981) 1 SCC 722, the Supreme Court observed as under:

> "……It must, therefore, now be taken to be well settled that what Article 14 strikes at is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality."…….

18. In **Dakshin Haryana Bijli Vitran Nigam & others v. Bachan Singh,** *(2009) 14 SCC 793,* the apex Court has held as follows :

> "This Court time and again had observed that the principle underlying the guarantee of Article 14 of the Constitution is that all persons similarly placed shall be treated alike, both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation without any discrimination."

19. In view of the law laid down by the apex Court as mentioned above, this Court is of the considered view that the impugned order in Annexure-11 dated 30.4.2011 passed by the opposite party-management denying regularization of the services of the petitioners on the ground of lack of educational/technical qualification is arbitrary, unreasonable and violates Article 14 of the Constitution of India. Accordingly, the same is quashed. The opposite party-management is directed to regularize the services of the petitioners in compliance to the award passed by the learned Industrial Tribunal in ID Case No. 74 of 2003, which has been confirmed by this Court as well as the apex Court. The entire exercise has to be completed within a period of two months from the date of receipt of a copy of this judgment.

20. With the aforesaid direction, the writ petition is allowed. No cost.

Writ petition allowed.

2015 (I) ILR - CUT-1172

DR. B. R. SARANGI, J.

W.P.(C) NO.24770 OF 2014

ASHISH KUMAR AGRAWAL ……..Petitioner

.Vrs.

UTKAL UNIVERSITY & ORS. ……..Opp.Parties

EDUCATION – Transfer of student from one college to another – Permission allowed by the receiving college and relieving college – Such permission was approved by the Utkal University in consonance with statute 235 of the Orissa University First statute, 1990 – Subsequent denial of admission by the receiving college after expiry of the last date for admission – Action challenged – The plea can not hold good in view of the fact that it is not an admission simplicitor rather it is an admission on transfer – Moreover once the receiving college granted permission that a seat is available, a right has already accrued in favour of the petitioner and its subsequent denial will be hit by the principles of estoppel – Held, direction issued to the receiving college to admit the petitioner and allow him to prosecute his studies in respect of the subjects he has taken in the relieving college.

(Paras 6,7,8)

Case laws Referred to:-

1.AIR 2003 SC 578 : (B.L. Sreedhar & Ors.-V- K.M. Munireddy (Dead) & Ors.)
2.1992 (II) OLR 341 : (Miss Reeta Lenka-V- Bherhampur University & Anr.)
4.1989 (I) OLR 440 : (Ambika Prasad Mohanty-V- Orissa Engineering College & Anr.)
5.2014 (I) OLR 226 : (Dr. (Smt.) Pranaya Ballari Mohanty-V- Utkal University & Ors.)
3.1984 (I) OLR 564 : (David C. Jhan-V- Principal, Ispat College, Rourkela & Ors.)

For Petitioner - M/s. Sameer Kumar Das, S.K. Mishra & P.K. Behera.
For Opp.Parties - M/s. T. Pattnaik, S. Pattnaik & M. Ojha.
M/s. Bhabasis Das, P. Sahoo, K.C. Das & R. Nayak.

Date of hearing : 26.02.2015
Date of judgment : 03.03.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who is a student of +3 Commerce 1st year Degree Course, has filed this petition seeking for a direction to opposite party no.2 to admit him in the receiving college pursuant to Annexures-2 and 3 dated 14.11.2014 and 1.12.2014 respectively, whereby permission has been granted by both the relieving college and receiving college duly approved by the Utkal University.

2. The short fact of the case, in hand, is that the petitioner after passing +2 Commerce course in the year 2014 from P.N. (Autonomous) College, Khurda, was admitted into +3 1st year Commerce Course in Banki (Autonomous) College, Banki during the session 2014-15. He being a permanent resident of Khurda town and is suffering from Bronchitis with Asthama, it was difficult on his part to prosecute his studies at Banki. Consequently, he applied for transfer from Banki (Autonomous College), Banki to P.N. (Autonomous) College, Khurda as per the resolution of the Government of Odisha in Higher Education Department dated 30.09.2014 in the prescribed form by depositing the requisite fees before the Utkal University. In the application vide Annexure-2 certificate has been granted by the receiving college, namely, P.N. (Autonomous) College, Khurda, on 13.11.2014 indicating that a seat is available in +3 1st year Commerce class with subjects taken by the candidate in the former college. On 14.11.2014, the relieving college, namely, Banki (Autonomous) College, Banki has issued no objection to issue CLC to enable the petitioner to get admission in the receiving college, where a seat is lying vacant. The petitioner submitted the application before the Utkal University for granting approval of transfer with requisite fees. Considering the same the University granted necessary permission for transfer from Banki (Autonomous) College, Banki vide Annexure-3 to enable the petitioner to get himself admitted in +3 1st year Commerce Course in P.N. (Autonomous) College, Khurda with the same subject as taken in the former college vide order dated 1.12.2014. The petitioner produced the same before opposite party no.2, but for some reason

or other, opposite party no.2 did not admit the petitioner. Hence this application.

3. Mr.S.K.Das, learned counsel for the petitioner strenuously urged that having granted necessary permission on the basis of which everything has been acted upon in accordance with law by the respective colleges and also by the University, the action of opposite party no.2 in not admitting the petitioner is arbitrary, unreasonable and hit by the principles of estoppels, more particularly, it is urged that the opposite party no.2 having made entries in Annexure-2 that a seat is available in +3 1st year Commerce class with subjects taken by the candidate in the former college, basing upon which the relieving college had granted necessary permission to grant necessary CLC to take admission in the receiving college, which the University has permitted, at this point of time, the opposite party no.2 should not remain silent over the matter instead of acting on the same. He further submits that because of change of Principal in the college of opposite party no.2, the petitioner is deprived of getting admission into the said college. In support of his submission, Mr.Das has relied upon the judgments of this Court as well as the apex Court in **B.L. Sreedhar and others. V. K.M. Munireddy (Dead) and others**, AIR 2003 SC 578, **Miss Reeta Lenka v. Berhampur University and another,** 1992 (II) OLR-341, **David C. Jhan v. Principal, Ispat College, Rourkela and others,** 1984 (I) OLR-564, **Ambika Prasad Mohanty v. Orissa Engineering College and another,** 1989 (I) OLR-440, **Dr**. **(Smt.) Pranaya Ballari Mohanty v. Utkal University and others,** 2014 (I) OLR-226, **Rajanikanta Priyadarshy v. Utkal University,** W.P.(C) 22918 of 2013 disposed of on 23.12.2014.

4. Mr.T.N.Pattnaik, learned counsel for the Utkal University referring to the counter affidavit specifically states that transfer of a particular student from one college to another is purely done in consonance with Statute 235 of the Orissa University First Statute, 1990 and the same is given effect to only on the basis of the no objection from both the colleges, i.e., the college, which is to receive the student and the college which is to allow the student to leave the college. It is stated that the Principal of Banki (Autonomous) College, Banki has already given consent for the said purpose and also the Principal of P.N. (Autonomous) College, Khurda has given permission to go ahead with the said purpose as evident from the record. After receiving the same, the University has also granted permission for transfer of the petitioner from one college to another. Since permission has been granted in

accordance with Statute 235 of the Orissa University First Statute, 1990, the same should be acted upon by the respective colleges.

5. Opposite party no.2 has also filed counter affidavit stating that admittedly the petitioner wants to get admission in P.N. (Autonomous) College, Khurda on transfer from Banki (Autonomous) College, Banki, for the current academic session 2014-15 and as per circular of the Government, the admission process must be completed before 31st of December, 2014 and it is stated that no iota of evidence has been produced to substantiate that the petitioner has approached the Principal with required documents such as

(a) Permission letter from competent authorities;

(b) Original CLC from Banki Autonomous College, Banki;

(c) Cancelled C.L.C.

(d) Mark-sheet.

(e) Details of Attendance.

(f) Details of First Semester

(g) Self attested passport sized pictures.

It is further urged that grant of permission by the authorities for transfer of students from one college to another college, does not ipso facto guarantee the right to take admission unless he fulfills the requirements as mentioned above. The admission having been over on 31.12.2014, it will cause great dislocation if any admission would be given to the petitioner at this point of time.

6. Considering the contentions raised by the learned counsel for the parties and after going through the records, it appears that admittedly the petitioner is prosecuting his +3 1st year Commerce Course in Banki (Autonomous) College, Banki. Due to his health problem, he applied in the prescribed form vide Annexure-2 in which the receiving college, namely, P.N. (Autonomous) College, Khurda has specifically stated that one seat is available with the subjects taken by the candidate in the former college on 13.11.2014. Since a seat is available at the receiving college, the relieving college, namely, Banki (Autonomous) College, Banki on 14.11.2014 made endorsement that the petitioner is a student of +3 1st year Commerce Course of the college and his subjects are Accounting (Honours) and his conduct and

character is good and therefore, it has no objection to issue CLC. The said application was duly forwarded to the Utkal University with requisite fees and on consideration of the same, the Utkal University passed order in Annexure-3 granting permission to obtain transfer certificate from Banki (Autonomous) College, Banki and allow the petitioner to get himself admitted in +3 1st year Commerce class in P.N. (Autonomous) College, Khurda in the same subjects as taken in the former college on 1.12.2014. Such permission was accorded in view of the provisions contained in Statute 235 of the Orissa University First Statute, 1990. Once such permission has been accorded by the Utkal University, there is no reason for the receiving College not to allow admission in the institution because on the basis of the endorsement given that a seat is available, the institution has held out a promise to allow the student to take admission in the college with the same subject which was taken in the former college, which has been so permitted by the University vide Annexure-3. Having given the certificate that a seat with the subject taken by the petitioner in the former College is available on the basis of which the petitioner proceeded further and consequently the relieving college also granted necessary endorsement to allow the petitioner to take CLC to get admission in the receiving college with permission of the University in Annexure-3, subsequently, opposite party no.2 cannot turn around and say that no right is accrued in favour of the petitioner to get himself admitted into the institution, as the same is hit by the principles of estoppels because the petitioner has acted upon basing on the promise made by the receiving college indicating that a seat in the same subject is available and the same having been acted upon, at a subsequent stage, he cannot be denied such admission, which is contrary to the provisions of law. Such contention is being fortified by the judgments referred to above by Mr.S.K.Das, learned counsel for the petitioner and therefore, the opposite party no.2 cannot deny admission to the petitioner in his own institution in respect of the seat available with the same subject taken by the candidate in the former college.

7. So far as the contention that the last date for admission being 31st of December, 2014, no admission can be granted to the petitioner after expiry of the last date is concerned, the same cannot hold good in view of the fact that it is not an admission simpliciter, rather it is an admission on transfer from one college to another for which necessary permission has been accorded by the University as per Statute 235 of the Orissa University First Statute, 1990 and on the basis of the permission accorded in favour of the

petitioner, he cannot be denied admission on transfer into the receiving college, which has reached finality by grant necessary permission by the University.

8. For the foregoing reasons and keeping in view the law laid down by this Court as well as apex Court, this Court directs the opposite party no.2 to admit the petitioner in the college within a period of ten days from the date of receipt of a copy of this judgment and allow the petitioner to prosecute his studies in respect of the subjects he has taken in the relieving college, i.e., Banki (Autonomous) College, Banki.

9. With the aforesaid direction, the writ petition is allowed. No cost.

Writ petition allowed.

2015 (I) ILR - CUT-1177

D. DASH, J.

F.A. NO. 250 OF 1994

SUBASH CHANDRA PANIGRAHI ……..Appellant

.Vrs.

RAJIB LOCHAN PANIGRAHI & ORS. …….;Respondents

A. HINDU SUCCESSION ACT, 1956 – S.6

Coparcenary Property – Joint Hindu family governed by Mitakshra law – The daughter of a coparcener shall by birth become a coparcener in the same manner as the son – Held, the substituted provision of section 6 as brought in by Amendment Act, 2005 is held to be retrospective in operation. (Para 27)

B. CIVIL PROCEDURE CODE, 1908 – O-20, R-18

Preliminary decree in partition suit – Though it determines shares, does not bring about the final partition – A suit for partition continues after passing of preliminary decree till passing of final

decree – So preliminary decree can be altered/modified/amended in the event of changed circumstances.

In this case plaintiff No.(s) 2 & 3, minor daughters of defendant No. 1 became entitled to share in suit schedule B & C properties like the son plaintiff No. 1 after commencement of Hindu Succession (Amendment Act, 2005) – As the preliminary decree passed prior to coming into force of the above amending Act and before passing of the final decree the preliminary decree can be modified to include shares of plaintiff No.(s) 2 & 3 in the coparcenary property– Since appeal is the continuation of the suit and applying the doctrine of merger this court instead of asking the parties to approach the trial court, determined the share of the parties including their father in accordance with law.

(Paras 28, 29, 30)

C. HINDU LAW – Joint family property – Suit for partition – Claim of self acquisition – Burden of proof – Initial burden rests upon the party who asserts any item of property as joint and to establish the same by leading satisfactory evidence – Then only the burden shifts to the party asserting self acquisition and to prove that the property was acquired out of his income from independent source without the aid of the joint family property.

In this case plaintiff No.(s) 1, 2 & 3 filed suit against their father defendant No. 1 for partition of Sch. B, C & D properties claiming that Sch. B, C properties are ancestral properties and 'Sch. D' property though stands in the name of Def. No. 1 it was out of the income from Sch. B & C properties – In the other hand Def. No. 1 claims 'Sch. D' property was his self acquisition – Though learned trial court held all the properties are joint this court considering the pleadings and evidence that Defendant No. 1 had independent source of income as he was serving as village Post Master, working as a 'D' class contractor and running a rice mill, held that he had established through sufficient evidence that Sch. D property was his self acquired property and plaintiffs are not entitled to any share over the said property.

(Paras 13, 14, 15)

Case Laws Referred to :-

1. AIR 1954 SC 379 : Srinivas Krishan Rao Kango -V- Narayan Devji Kango & Ors.
2. AIR 1947, P.C.189 : Appalaswami -V- Suryanarayan Murty & Ors.

3. AIR 1972 SC 1279 : M.N.Aryamurty -V- M.L.Subbaraya
4. (1995) 1 OLR 606 : Purnabasi -V- Raj Kumar.

For Appellant : M/s. B.B.Rath, B.Rath, R.P.Mohapatra, J.Rath, S.N.Mohapatra, P.K.Parida

For Respondents : M/s. M.Mishra, U.C. Pattnaik, P.K.Das, B.Mishra

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Date of Hearing : 14.02.2014
Date of Judgment: 11.04.2014

JUDGMENT

D. DASH, J.

The unsuccessful Defendant No. 1 (Appellant) in this appeal has challenged the judgment and decree passed by the learned Sub-ordinate Judge, Chhatrapur (as it was then) in Title Suit No. 31 of 1989 decreeing the suit preliminary making Plaintiff No. 1 (Respondent No -1) entitled to the share in "Schedule B, C and D" properties equal to that of the Defendant No. 1 (Appellant) with further direction to the Defendant No. 1 (Appellant) – (i) to render account to the Plaintiff (Respondent No. 1) in respect of the income of those properties; (ii) to pay `75,000/- towards the marriage expenses of Plaintiff No. 2 (Respondent No. 2); (iii) in making further provision of `1 lakh to meet the marriage expenses of Plaintiff No. 3 (Respondent No. 3); (iv) to pay a sum of `1500/- per month to Plaintiff No. 2 and 3 (Respondent No. 2 and 3) from the date of filing of the suit till 19.12.1991 and (v) to pay a sum of `700/- per month as maintenance and educational expenses to Plaintiff No. 3 (Respondent No. 3) from 19.12.1991 till her marriage.

2. For the sake of convenience, in order to avoid confusion and for proper appreciation, the parties hereinafter are being referred to as they have been arranged in the original suit.

3. Admittedly, Plaintiff No. 1, 2 and 3 are siblings being the son and daughters of Defendant No. 1 and Defendant No. 2 is their paternal grand-father. Plaintiff Nos. 1, 2 and 3 being minors, in this suit have got their representation through the next friend maternal grand-father, having no adverse interest to those of minors.

It is their case that their father Defendant No. 1 and grandfather (Defendant No.2) constituted joint Hindu family and were having family ancestral landed properties described in "Schedule - A" besides two houses and those were partitioned between them in T.S. No. 10 of 1977 of the Court of Subordinate Judge, Aska (as it was then) which was disposed of in terms of compromise. The lands described in "Schedule - B" and house better described in "Schedule - C" fell to the share of Defendant No. 1. From out of the surplus income from the property under "Schedule - B", the property described in "Schedule – D" was acquired by Defendant No. 1. It is further said that with the surplus of income derived from the "Schedule - B" property, the Defendant No. 1 not only acquired a piece of land measuring Ac. 0.0400 dec. but also established and started running a rice huller. The said construction etc. over it was made by spending money from the surplus income for which it also acquired the nature and character as ancestral property in the hand of Defendant No. 1. It is also said that the joint family property such as the rice huller came into being and ran with the help of the funds that become surplus from out of the income of "Schedule-B" property after meeting necessary expenses. It is next stated that after the partition and birth of Plaintiff No. 1, the Defendant No. 1 got addicted to several bad habits to which he was also having the leaning previously. Therefore, ultimately with oblique motive, he had filed a suit for dissolution of marriage against the mother of the Plaintiffs. Attempt to bring in a compromise in the said suit being made; the same became successful which ultimately culminated in execution of a registered document. Defendant No. 1 agreed to pay maintenance to the Plaintiffs, their mother and also to make provision for their marriage, educational and other expenses. A share was curved out for Plaintiff No. 1, son. But it is a alleged that later the same was flouted as if it was so vowed. Thereafter, further litigation arose. So, by this suit they claimed partition of the properties described in "Schedule – B, C and D" of the plaint with necessary allotment of shares together with other reliefs as stated in the plaint.

4. The Defendant No. 1 contested the suit by filing the written statement. While traversing the plaint averments, the main challenge has been levelled as regards the acquisition of the vacant land measuring Ac. 0.0400 dec. and installation of rice huller i.e. "Schedule – D" property. It is stated that the same was never purchased with the help of the surplus income from out of the ancestral joint family property which had fallen in the share of Defendant No. 1. In this connection, it is further stated that the said property purchased

is his exclusive self-acquired property having been purchased from out of his own income that is salary and other source and therefore, it is asserted that the same is not liable to be partitioned. As regards other facts relating to the arrangement made in the divorce suit etc., the Defendant No. 1 has asserted to have never flouted in any manner.

5. With the above rival pleadings, the Trial Court framed altogether eight issues and those are: - entitlement of Plaintiff No. 1 to a share equal to Defendant No. 1 from "Schedule – B, C and D" property; provision for Plaintiff No. 2 and 3 rendering the account towards the income of "Schedule-B, C and D" property by the Defendant No. 1. Liability of Defendant No. 1 to pay marriage expenses of Plaintiffs and most importantly as regards the partition of "Schedule - D" property in specific besides the issue relating to the fact as to whether the decision of the village gentries under the registered documents between the Plaintiffs mother and Defendant No. 1 has been acted upon or not.

6. On the basis of the rival case of the parties as projected in respective pleadings, the evidence piloted during the trial and upon their consideration and analysis, the Trial Court has answered that the settlement was never acted upon by the parties at any point of time and next the most important issue as regards the entitlement of share of the Plaintiffs over "Schedule- B" property has been answered in favour of the Plaintiffs along with the issue relating to Plaintiff No. 1 's entitlement of share over "Schedule-B" property to be the joint family property. Consequentially Defendant No. 1's liability to render accounts in respect of all those properties has been passed. The other issues with regard to marriage and other expenses as well as maintenance have been answered in favour of the Plaintiffs as stated above.

7. Learned Counsel for the (Defendant No. 1) Appellant at the out set submits that in this appeal, the Appellant is mainly assailing the finding with respect to "Schedule - D" property, holding the same as liable for partition, whittling down the Defendant No. 1's claim that it is his self-acquired property. In otherwords, the finding in respect of property as to have been purchased from out of the surplus of the income of family joint property in "Schedule -B and C" is under challenge and so also the decree to render accounts for the properties under that item along with the quantum of maintenance and marriage expenses.

Next adverting to the merit, his submission is that the Plaintiffs in the suit have not been able to discharge the initial burden by leading clear, cogent and acceptable evidence that the property under "Schedule -D" had been purchased by Defendant No. 1 from out of the funds available in his hand as the surplus of income from out of "Schedule-B and C" property after meeting all necessary expenses. The evidence on this score according to him is wholly insufficient. It is also his submission that the Trial Court has erroneously placed the burden on the Defendant No. 1 to prove his case that it was his self-acquired property. It is also his submission that even on that score, the Defendant No. 1 has led sufficient evidence which are enough to render the finding in favour of Defendant No. 1 that it is his self-acquired property and as such not liable for partition.

8. Learned Counsel for the Respondents (Plaintiffs), while supporting the finding of the Trial Court in respect of that issue that the property under "Schedule-D" is not the self-acquired property of the Defendant No. 1 and that it is the joint family property of the parties, has further submitted that the Defendant No. 1 has utterly failed to prove that he had any independent source of income at the relevant point of time showing even the occasion for him to purchase being in a position to spend. It is also his submission that whatever income that the Defendant No. 1 was having was all from the ancestral family property falling to his share where the Plaintiff No. 1 has the right and interest by birth and so also other Plaintiffs who are daughters of Defendant No. 1 in view of the mandate of the provision of Hindu Succession Act, 1956 as it now stands after amendment in the year 2005. According to him the Trial Court has rightly said that the Defendant No. 1 has failed to discharge the burden of proof that "Schedule - D" property is his self acquired property. It is also his submission that in the facts and circumstances of the case, the Defendant No. 1 has failed to establish the case by leading clear, cogent and acceptable evidence on the score of self acquisition as above. In the facts and circumstances of case, according to him, the Defendant No. 1 was under obligation to establish his case that "Schedule - D" property is his self-acquired property by proving the facts as to what was his actual income from his independent sources to satisfy that he was in a position to purchase with that.

9. It is next submitted by him that in view of the present position of law as it stands after amendment of Hindu Succession Act, 1956 by Hindu

Succession Amendment Act, 2005, the daughters cannot be denied their shares and therefore, the preliminary decree is to be accordingly modified.

This submission is resisted by the learned Counsel for the Appellant that there being no claim on that score in the suit, at this stage in this appeal, said relief of allotment of share to the daughters is not legally permissible. It is also his submission that they are not entitled to the same.

10. Joint family property and self-acquired property are the two concepts of Hindu law. Thus there is need to examine the law on this aspect of the case. Principle of law is well settled by now on the point. The oft quoted decision in case of "***Srinivas Krishna Rao Kango v. Narayan Devji Kango and others***" reported in AIR 1954 SC 379 is that proof of the existence of joint family does not lead to the presumption that the property held by any member of the family is joint. The initial burden rests upon the one who asserts any item of property as joint by establishing the said fact leading satisfactory evidence that at the time, the family possessed some joint property which from its nature and relative values may have formed, the nucleus from which the property in question may have been acquired. Then only the burden shifts to the party asserting self acquisition to establish affirmatively that the property was acquired without the aid of the joint family property and from out of his income from independent source.

11. In case of ***Appalaswami v. Suryanarayan Murty and others***; AIR 1947, Privy Council, 189, the concept of jointness and self acquisition of property have been explained. What should be the burden of proof if property held either jointly or separately by any member of the family has also been explained therein. Even if there is proof to show the existence of joint that family, it does not lead the Court to arrive at conclusion abruptly that the property held by any members of the family is also joint. What has been said is that the burden lies on the person who asserts that any item of the property is joint, has to prove the said fact. However, once it is proved that the family possessed some joint family property which from its nature and relative value may have formed the nucleus from which the property claimed to be joint may have been acquired. In such a case the burden shifts immediately and automatically to the party alleging self acquisition to prove affirmatively that the property is acquired without any aid of joint family property. This view taken by the Privy Council has also been followed by the Supreme Court in Srinivas Krishna Rao Kango (Supra).

12. Besides the above, it is pertinent to mention here that there is one more situation under which a property separately held by a member of the joint family at the initial stage as self-acquired property can be taken to have been altered or transformed to be one as the joint family property at a later stage and that is by way of blending. The self acquired property of a member of the joint family must have been thrown to the common stock, voluntarily, abandoning and surrendering all such separate rights and by waiving all those must have been made available for being enjoyed and claimed by all the members which must be shown by such conduct as expressed and intention as manifested. The self acquired property of the member of the joint Hindu family will never become so simply because that member does not maintain separate account of income accrued from that property even if all the members of the joint family enjoyed the same there of. But for that purpose it must be shown that the owner of such property has waved or surrendered special right in that property by his own volition and expressing such intention.

It has also been held in case of "***M.N. Aryamurty v. M.L. Subbaraya***" AIR 1972 SC 1279 and in case of ***Purnabasi v. Raj Kumar,*** (1995) 1 OLR 606 that if there has been severance of joint family and subsequently one item of property is acquired in the name of particular member of the family even though without joint fund it would be the self acquired property. The Apex Court has made it clear that if one of the members remained in possession of the entire property of the family even after severance of status, there is no presumption that the property which is acquired by him after severance of status must be regarded as acquired for the family where rents and profits were received by the member in possession and he would be liable to account for the same but the funds in the hands of that member do not become impressed with any trust in favour of other members. Therefore, if such a member acquired such property with the funds in his possession, the other members would have no claim of share in that property.

13. In the touch-stone of above settled legal principle, the case in hand requires examination with reference to the evidence on record and the foundations through pleadings. Here "Schedule - B" property admittedly is joint family property which Defendant No. 1 got in partition with his father being ancestral property. It stands admitted that this Defendant No. 1 was at that point of time having quite considerable extent of land measuring Ac. 16.55 dec. under his control which belong to the joint family. So reasonably

from its nature and relative value it can be well inferred that the said property had formed the nucleus and in view of the fact that this extent of land was in his possession and control in the absence of any evidence being let in by Defendant No. 1 specifically on the point that he was absolutely having no surplus income from out of it.

14. It has been pleaded by the Para – 3 of the plaint that with this surplus income derived from schedule B properties, that the Defendant No. 1, has acquired a piece of vacant land measuring Ac.0.0400 dec. in village Jharipadar and has installed a rice huller mill thereon. The said piece of land along with the rice huller has been acquired from the out of the surplus of the nucleus of the joint family property as prescribed in "Schedule D". It has been further pleaded in Para – 9 of the plaint that as Scheduled B and C of the property are the ancestral property of the family and Schedule D land having been acquired with the surplus income of schedule B land, the same is also the joint family property and is liable to the partitioned., The Defendant No. 1 in the written statement has denied the fact that "Schedule D" property was also the joint family property having not been purchased from out of the surplus income of the joint family property described in schedule B and C. It has been specifically pleaded in Para – 5 of the written statement that the defendant No. 1 was working as village Postmaster and was doing business by availing loan. He claims to have acquired the said properties from the out of the income from salary and business and as such the property in "Schedule D" being self acquired is not liable to the partitioned. It has been specifically stated that the property over under Schedule D of the plaint was never acquired from out of the surplus income of the nucleus of the joint family property. The Defendant No. 1 has asserted to have accordingly acquired the "Scheduled D" property and claims that to be his own property and thus denies the right of the Plaintiffs over the same.

15. The Trial Court has having taken up this issue No. 5 for discussion in Para – 8 of the judgment has gone to first of all say by analyzing the evidence that the said property under "Schedule – D" is liable to be partitioned. The Defendant- 1 in his evidence has stated that from the year 1976 to 1982, he was serving as village Postmaster and he was also doing contract business during the period. Out of his own income from the above business and service, he has stated to have purchased "Scheduled-D" property by registered sale-deed which has been admitted in evidence and marked Ext. C. In spite of this, the Trial Court has said that there remains no cogent evidence

to show that how much amount Defendant No. 1 has earned as his salary as village Postmaster and how much he has received from his work as a contractor. Therefore, he has discarded the case of Defendant No. 1 that it was purchased from out of his own income. It may be stated here that in support of the plea that Defendant No. 1 was a contractor, has filed copy of the letter issued by the Superintendent Engineer dated 30.04.1979 marked Ext. B which reveals that the Def. No. 1 was a registered "D" class contractor and his license was valid up to 31.03.1992. The Trial Court has discarded that as it has not been specifically proved as to whether he was actually allotted with any contract work or not. The Trial Court in this connection has practically discarded the case of the Defendant No. 1 due to his failure to prove the detail account as regards his own income with reference to works as a contractor and was also towards his salary as village Postmaster. This particular view in the present case appears to be erroneous. At such distant point of time, the Trial Court's view that it was the further duty of the Defendant No. 1 to produce and prove that he was being actually allotted with Govt. work and had undertaken certain work and also the other fact by leading clear, cogent and acceptable evidence as to quantum of work that he had done and what was the total work value and what was the earning from said work contract, so as to make out a full proof case is not acceptable and rather unjust, improper and an unrealistic approach. In my considered view, all these evidence after long lapse of time even if not plotted in detail, cannot lead to take a view adverse to the case of the Defendant No. 1, when broadly he has proved that he was serving as village Postmaster and was working as "D" Class contractor, having the required licence for the purpose showing independent sources and probable income. Therefore, the view of the Trial Court is unsustainable.

It has also been the case Defendant No. 1 that he had installed a rice huller and in cross-examination he has also further stated that he was a contractor for four years had made a profit of `15000/- to `16000/- and savings of `4000/- to `5000/- from out of his salary which does not appear to be unreasonable. D.W. 2's evidence also provide support to the evidence of D.W. 1, that he was village Postmaster for a period of 6 to 7 years, was also doing some contract work. All these details were not required to be specifically pleaded by Defendant No. 1 and for that when the pleading remains as regards independent sources etc, the evidence as above can't be ignored or kept out of consideration. On the other hand the Plaintiff's have not tendered any evidence to show that such facts are palpably false and have

been simply pleaded / stated to project a case of self acquisition of "Schedule-D" property and nothing more when actually there was no other source for the Defendant No. 1. So in this state of affairs in the evidence it stands proved that the Defendant No. 1 was having independent sources of income for certain period. This itself leads to an inference that when joint family property was therein as described in "Schedule-B" and with its income he was managing the family, also he was having its separate income of which the sources have been proved. Therefore, in the present case, being unable to subscribe to the Trial Court's view, it is found that the Defendant No. 1 have through sufficient evidence has established that "Schedule-D" property was his self-acquired property. In this case in hand no case of blending is set up by the Plaintiffs in the alternative. With this view, as emanate from my above discussions of pleading and evidence, I differ from the finding of the Trial Court that the Plaintiffs are entitled to any share over the said property. The "Scheduled-D" property thus is not liable to be partitioned in the present suit.

16. This leads me to delve with the submission advanced for the first time in course of hearing of this appeal as regards claim of share by Plaintiff No. 2 and 3, the daughters of Defendant No. 1 and grant thereof over the property described in "Schedule – B and C" which Defendant No. 1 got in a partition with his father as his share over ancestral property.

Admittedly at the time of hearing and decision in the suit, the Hindu Succession Amendment Act, 2005 had not come into force and it came into force only on 09.09.2005 during pendency of this appeal filed by Defendant No. 1 challenging the judgment and decree preliminarily worked out by the Trial Court and pending scrutiny by this Appellate Court.

This appeal as per the settled position of law is a continuation of suit and when the Appellate Court confirms, modifies or reverses the decree on merit, the Trial Court's decree is under law merges in the Appellate decree and it is the Appellate Court's decree which rules.

In case of the change in the law whether it will affect pending appeals was considered in case of "***Laxmi Narayan Guin and others – vrs.- Niranjan Modak;"*** (1985)1 SCC 270; ***Ram Srup – vrs. – Munshi;*** AIR 1963 SC 553; ***Mulla – vrs. Gadhu;*** AIR 1966 SC 1423 and ***United Bank of India, Calcutta – vrs. Abhijit Tea Co. Pvt. Limited and others;*** AIR 2000 SC 2957. It has been held that a change in law during the pendency the appeal has to be taken into account and will govern the rights of the parties. If the new law

speaks in language, which expressly or by clear intendment, takes in even pending matters, the Court of Trial as well as the Court of Appeal must regard to an intention so expressed, and the Court of appeal may give effect to such a law even after the judgment of the Court of first instance.

Therefore, this Court is commanded to consider applicability of the Hindu Succession Amendment Act, 2005 in respect of the rights conferred therein upon the daughters in getting shares over coparcenary property.

17. In the exercise as aforesaid at first instance, the points arising for consideration are the followings:-

(a) The right of the daughter of a coparcener in a joint Hindu family governed by Mitakhara Law in Coparcenary Property by virtue of Hindu Succession Amendment Act, 2005.

(b) The amended provision is prospective or retrospective in operation.

But before that, let there be a short survey with regard to the rules of interpretation of statute as enunciated in several cases by the Apex Court of which few are being referred to.

18. The Apex Court in case of "***Mahadfolal Kanodia – vrs.- Administrator General of West Bengal;" AIR 1960 SC 936*** has laid down the principles to be applied as under:-

(1) Statutory provisions which create or take away substantive rights are ordinarily prospective. They can be retrospective if made so expressly or by necessary implication and the retrospective operation must be limited only to the extent to which it has been so made either expressly or by necessary implication.

(2) The intention of the legislature has to be gathered from the words used by it, giving then the plain, normal grammatical meaning.

(3) If any provision of a legislation, the purpose of which is to benefit a particular class of persons is ambiguous so that it is capable of two meaning, the meaning which preserves the benefit should be adopted.

(4) If the strict grammatical interpretation gives rise to an absurdity or inconsistency such interpretation should be discarded and an interpretation which will give effect to the purpose will be put on the words, if necessary even by modification of the language used.

18.1. In case of "***Commissioner of Income Tax – vrs.- India Bank Ltd;*** AIR 1965 SC 1473, the Supreme Court reiterated with further emphasis."

"In construing the Act, we must adhere closely to the language of the Act. If there is ambiguity in terms of a provision, recourse must naturally be had to well established principles of construction, but it is not permissible first to create an artificial ambiguity and then try to resolve the ambiguity by resort to some general principles."

18.2. The principles are so succinctly stated in American Jurisprudence (2nd Edition, Vol-73, Page 434, Para 366) quoted with approval in "***S.R. Bommai – vrs. – Union of India;"*** AIR 1994 SC 1918".

"While it has been held that it is duty of the Courts to interpret a statute as they find it without reference to whether its provisions are expedient or in expedient; it has also been recognized that where a statute is ambiguous and subject to more than one interpretation, the expediency of one construction or the other is properly considered. Indeed, where the arguments are nicely balanced, expediency may trip the seals in few or of a particular construction. It is not the function of a Court in the interpretation of statutes, to vindicate the wisdom of the law. The mere fact that the statute leads to unwise results is not sufficient to justify the Courts in rejecting the plain meaning of unambiguous words or in giving to a statute a meaning of which its language is not suspectable, or in restricting the scope of a statute. By the same token, an omission or failure to prove for contingency which it may seem wise to have provided for specifically, does not justify any judicial addition to the language of the statute. To the contrary, it is the duty of the Court to interpret a statute as they find it without reference to whether its provision are wise or unwise, necessary or unnecessary, appropriate or inappropriate, or well or ill conceived."

"Rule of interpretation are meant to ascertain the true intent and purpose of the enactment and set right any anomaly, in consistency or ambiguity, while giving effect to it, the several rules of interpretation when juxtapositioned may give an impression that they are inconsistent with each other. Further the same provision, when interpreted with reference to different rules of interpretation, may lead to different results. This is because the rules of interpretation are meant to set right different types of defects. It is not possible to apply all rules of interpretation together to a provision of law. An appropriate rule of interpretation should be chosen as a tool depending

upon the nature of the defect in drafting which has to be set right. The rules of interpretation are to be applied in interpreting the statute, only if there is ambiguity, inconsistently, absurdity or redundancy. Where the words are clear, unambiguous, there is little need to open the tool kit of interpretation".

19. At this moment, it also requires to be taken note of that coparcenary is a creature of Hindu Law and is not created by agreement of parties except in case of reunion and consists of only those persons who have taken by birth an interest in the property of the holder and who can enforce partition when ever they like. It's a narrower body than joint family (**Ref.:-** ***Bhagwan Dayal*** (since deceased) ***–vrs.- Ust Reoti Devi*** (deceased) AIR 1962 SC 287 and ***Sunil Kumar and another – vrs. – Ram Bakash and others;*** AIR 1988 SC 576) The joint Hindu family is genus whereas coparcenary is an unit under it and a specie. Joint Hindu family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters whereas Hindu coparcenary is a much narrower body than the joint family; includes only those persons who acquire *by birth an interest in the joint or coparcenary property, they being sons, grand sons and great grand sons of the holder of the joint property for the time being*.

(Ref.:- ***Smt. Sitalbai and another – vrs. – Ram Chandra;*** AIR 1970 SC 343; ***Gowli Buddana – vrs. – Comm. Income Tax, Maysore;*** AIR 1966 SC 1523 ***and Bhagawati Prasad Sah and others – vrs. – Dulhin;*** AIR 1952 SC 72).

20. With these in mind, it is felt apposite to have a sojourn for having a telescopic examination upon the position of law on the subject after 1956 and prior to 2005 Amendment Act and thereafter along with their objects and reasons as well as the goal sought to be achieved.

By the Act of 1956 while codifying the law on intestate succession among Hindus, it was also aimed to carry out reforms to remove the disparities and disabilities suffered by Hindu women. But amidst much resistance it finally came into force on 17.06.1956. It conferred on women and in particular daughter equal rights as that of the son. The limited ownership ripened to absolute ownership in respect of any property possessed by a female Hindu whether acquired before or after commencement of the Act. But, the said enactment had no application to coparcenary property. The daughter was not considered as coparcener and that stood as before. However, by a proviso to Section 6, provision was made that if a male Hindu

dies leaving behind a surviving female relative specified in class – I of the Schedule or a male relative specified in that class who claims through such females relatives, the interest of the deceased in Mitakshara Coparcenary property shall devolve by testamentary or intestate succession as the case may be, under the Act and not by survivorship.

This inequality was tolerated for about 50 years where after the demand that such discrimination is wholly unjust standing on the way of rendering social justice reached its peak and no more be swept under the carpet. This called for the need of a radical reform of the law on the subject. Thus the Hindu Succession Act (Amendment) Bill, 2005 come to be introduced on 20.12.2004 in Rajya Sabha and it was passed there on 16.08.2005 followed by its passing in Lak-Sabha on 29.08.2005 and assent of the President on 05.09.2005 giving its effect from 09.09.2005. The object is to bring the equality guaranteed by Constitution having regard to the need to render social justice to women by removing the discrimination contained in Section 6 of Act of 1956 in conferring equal rights to daughters in the Hindu Mitakshara coparcenary property as sons have.

21. In the backdrop of above, the provisions of Section – 6 as it stood before and after the Amendment Act, 2005 requiring interpretation be stated hereunder :-

Section – 6 of the Hindu Succession Act, 1956 (Pre-Amendment)	**Section – 6 of the Hindu Succession Act, 1956 (Post-Amendment)**
6. Devolution of interest in coparcenary property.- When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act: Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship. Explanation 1.- For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death irrespective of whether he was entitled to claim partition or not. Explanation 2.- Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."	"6. Devolution of interest in coparcenary property. – (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,- (a) by birth become a coparcener in her own right in the same manner as the son; (b) have the same rights in the coparcenary property as she would have had if she had been a son; (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son. And any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th Day of December, 2004. (2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

XXX	XXX	XXX	(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,-
XXX	XXX	XXX	(a) the daughter is allotted the same share as is allotted to a son;
XXX	XXX	XXX	(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and
XXX	XXX	XXX	(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.
XXX	XXX	XXX	Explanation.- For the purpose of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

xxx	xxx	xxx	(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no Court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:
xxx	xxx	xxx	
xxx	xxx	xxx	
xxx	xxx	xxx	(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th Day of December, 2004.
			Explanation.- For the purposes of this section "partition" means any partition made be execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by the decree of a Court. "
xxx	xxx	xxx	

22. Simultaneous reading of the above provisions of as they stood before and now after amendment, it is seen that the heading of section remains unchanged.

22.1. Sub-section (1) of the first part has been introduced which declares the rights of the daughter of a coparcener giving her the right by birth of becoming a coparcener in her own right in the same manner as the son and then further asserting her the rights in the coparcenary property as she would have had if she had been a son which in other words treating her as that of a son and to have been born as such. Next in the same way and manner with respect to sharing of liability. Most importantly, the command given that Hindu Mitakshara coparcener has to be deemed to include referring to a daughter of a coparcener. All these leave no scope for any interpretation. The language is clear and unambiguous in the above respect of daughter of a

coparcener's right by birth as a coparcener, having rights and liability as such as of by birth in her own right and being a member of the coparcenary being as by that. Proviso saves the disposition or alienation including any partition taking place prior to 20.10.2004 from not being falling within the net of being affected consequential to such declaration of right etc; with the explanation forbidding the acceptance of any mode of partition other than the two i.e. (1) by registered deed of partition and decree of the Court again if had been done / passed prior to 20.12.2004. The legislature being conscious of the fall out of above declaration made such limited saving.

Sub-section (2) states that the property so held would be no doubt with the incidents of coparcenary ownership but that is again couched with non-obstante clause that it would be capable of being disposed by testamentary disposition referring to existing provision in Section 30 of the Act.

All the above got introduced in original Act by the Amendment Act by way of substitution of the entire Section – 6 as it existed.

Importantly, rights are thus conferred on daughters and there has been removal of inequality between son and daughter in restoring equality i.e. un-equals have been made equals as per the Constitutional Mantra rectifying the mistake.

So far as the application of the provision, cut off date i.e., 20.12.2004 has been fixed as in relation to saving alienation etc, with respect to partition prior to that in order to prevent unsettling of the state of affair, in the field, followed by the explanation deserving specific mode of partition to be recognised to prevent mischief to deprive bonafide beneficiaries by way of collusion or manipulation and the cut off date is the date of introduction of the Bill in Parliament, coming to public domain. Thus any such acts thereafter have been refused to be given legal sanction as per earlier Act has not been placed out of the net of the fall out of the declaratory provision for the daughters. But most importantly the notional partition as per earlier provision has not been recognised.

22.2. Sub-section -3 of course has undergone change in the amendment. Changes are (i) in place of male Hindu, now the word 'Male' has been omitted which stands as 'Hindu' obviously implying both male and female; (ii) Applicability has been restricted to those cases where Hindu dies after commencement of Amendment Act which was earlier in case of death of

male Hindu after commencement of principal Act; (iii) the word, having at the time of the death of male Hindu having an interest in Mitakshara coparcenary property has been substituted by:-

"his interest in the property of a joint Hindu family governed by Mitakshara law"; (iv) proviso restricting the devolution of interest of the deceased in the coparcenary property only in the event of being survived by a female relative specified in class – I of the schedule or a male relative of that class claiming through such female relative no more remains and in its place deeming division as if a partition had taken place has been introduced followed by allotment of share therein to daughter as to a son along with provision for devolution in the eventuality of their prior death; (v) provision no more remains to deny any share over the interest as it was in respect of a person separated from coparcenary.

23. The rights created and conferred are:-

(i) The daughter of a coparcener by birth became a coparcener in her own right in the same manner as the son bringing equality in status vis-à-vis the coparcenary property;

(ii) The daughter of a coparcener having the same rights in the coparcenary property, as she would have had, if she had been a son i.e. equal right in coparcenary property.

Equally, the daughter like son is also saddled with liability in respect of the said coparcenary property giving effect to the equality objective in letter and spirit. Thus the concept of coparcenary underwent sea change destroying the monopoly of male lineal descendants by giving entry to the daughters by the command of law in the said club.

It is pertinent to state here and to be borne in mind that in the year 1956, there was codification of law for the first time concerning intestate succession among Hindus. It had left the special rights of the members of Mitakshara coparcenary untouched and unaffected. Whereas the Amendment Act of 2005 is to obliterate those special rights of members of coparcenary property as by birth. This is to rectify the blunder done by way of gender discrimination against the Constitutional mandate. This leaves no scope for further interpretation when also the Amendment is by way of total substitution whose effect is that it would be deemed to be there since 17.06.1956 with the rider that w.e.f. 09.09.2005, the daughter became

coparcener with right by virtue of her birth which can't be taken to enure to the benefit of only those born on or after 09.09.2005 and it squarely benefits the daughters even born before. The entry to the club of coparcenary is with effect from 09.09.2005 since when they can be said to have been duly enrolled therein.

24. Thus by the substituted provision, it is first declared that on and from the commencement of the Amendment Act in a joint Hindu family governed by the Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the said property as she would have had if she had been a son and so also as regards liability. So first right is conferred by declaring the same as on and from 09.09.2005 which enures to the benefit by birth which is clear and unambiguous. Thus, though on the date of birth she did not have such right as per the law governing the field then, its clear that by amendment of the law, such a right is conferred on her from the date of commencement of the Act of 1956. The intention is culled out when it is seen that there has been employment of word "shall by birth become coparcener in her own right" and "what she would have had ……." With all these languages of the statute by no stretch of imagination even the birth can be said to have been kept under suspension till then. Had it been the intention, the disposition, alienation, partition etc from would not have been saved and made immune from being affected from a date anterior to the date of commencement of the Amendment Act and there was no necessity to do so by adding a proviso in creating an exception to what is in the enactment, which has to travel within the provision of main enactment and not beyond. As the general rule in construing an enactment containing a proviso is to construe them together without making either of them redundant or otiose. The devise of exclusion is adopted only to exclude a part from the whole, which but for the exclusion, continues to be a part of it and the words of exclusion are presumed to have some meaning without being readily recognised as mere surplus-age. More importantly neither there remains any separate saving section in the Amendment Act of 2005 nor even the concept of notional partition as it earlier stood gets the recognition or any protection for having attained finality and so notwithstanding the fact that there was a partition of the coparcenary property as recognised under Hindu law, the daughter of a coparcener who has been conferred with equal right in the coparcenary property as that of a son would be entitled to a share therein. That apart there remains no point in saying that vested right of other male members by amendment has been taken

away. The vested right is the right to share which the coparcener acquires by birth but the extent of that share is not a vested right as that is not determined on the date of birth when it is not definite and is likely to fluctuate every now and then with birth and deaths of coparceners. In the present case, particularly for all purposes by the conferment of right upon the daughter, the member of members in the coparcenary goes up. The same in no way dismembers any other coparceners. This runs at par with settled position of law that till disruption of joint family status takes place no coparcener can claim what is his exact share in coparcenary property. It is liable to increase or decrease depending upon the addition to the number or departure of a male member and in heritance by survivorship. But once disruption of joint family status takes place, coparcener's cease to hold the property as joint tenants but they hold so as tenants-in-common. Similarly, so far as the right of other female relatives is concerned, the same is also not wholly affected and for that the provision no more remains for deeming a partition as if to have taken place immediately before his death as existed before. The principle of Hindu law by Mulla; Vol. 1 (17^{th} Edition) as regards the right of wife, it is stated that a wife cannot herself demand a partition but if a partition does take place between her husband and his sons, she is entitled (except in South India) to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband (Article 315, page 506).This is not ignored here and the position as before prevails. For the same, the Parliament have purposely employed the word 'his interest in the property of Hindu joint family governed by Mitakshara Law in substitution of the word 'Mitakshara coparcenary property' after omitting the word 'Male' in new provision of sub-section (3) of Section-6 of the Act.' The intention not to deprive as above is manifest and clear. So, this Amended provision successfully passes that important test so as to stand for its retrospective operation.

In view of above discussion and reasons, the conclusion follows that though such right was declared on 09.09.2005, the declaration that the said right as a coparcener enures to her by birth.

25. The question whether a statute operates prospectively or retrospectively is one of the legislative intent. In para – 18, 18.1 and 18.2 reference has been made to the decision of Apex Court in case of Mahadfolal Kanodia (supra). The legal principles have been further elaborated and settled in Constitution Bench decision in case of "***Shyam Sunder and others – vrs.- Ram Kumar and another.***" AIR 2001 SC 2472, it has been held that a

substituted section in the Act is the product of an Amending Act and all the effects and consequences that follow in the case of an Amending Act, the same would also follow in the case of a substituted section in an Act. It has also been held that where an amendment affects vested rights the amendment would operate prospectively unless it is expressly made retrospective or its retrospective operation follows as a manner of necessary implication. Ordinarily, when an enactment declares the provisions law it requires to be given retrospective effect. The function of a declaratory statute is to supply an omission or explain previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed invariably it has been held to be retrospective. Mere absence of use of word 'declaration' in an Act explaining what was the law before may not appear to be a declaratory Act. But if the Court finds an Act as declaratory or explanatory it has to construe as retrospective. Further held that the function of a declaratory or explanatory Act is to supply an obvious omission or to clear up doubts as to meaning of the previous Act and such an Act comes into effect from the date of passing of the previous Act.

25.1. In this connection, it is also profitable to refer to the following observations in 'Principles of Statutory Interpretation,' 5th Edition 1992, by Sri G.P. Singh at page 351 under caption 'Declaratory Statutes':-

"The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES and approved by Supreme Court:- For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to common law, or meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error whether in the statement of common law or in the interpretation of statutes."

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It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.

25.2. The inhibition against retrospective construction is not a rigid rule and must vary secundum materium. It has been said that "the basis of the rule is

no more than simple fairness which ought to be the basis of every legal rule. (***Vijay – vrs.- State of Maharashtra;*** (2006) 6 SCC 289 referring the doctrine of fairness in the context of retrospectively)."

26. In case of "***Ganduri Koteshwaramma – vrs. – Chakiri Yanadi; (2011) 9 SCC 788,*** the Apex Court in a suit for partition between brothers, sisters and other members of the family in respect of coparcenary property had to consider the daughters entitlement in view of Amendment Act of 2005. it has been held therein that:-

"The new Section -6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from 09.09.2005. The legislature has now conferred substantive right in favour of the daughters. According to the new Section – 6, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6, that the daughter of a coparcener shall have some rights and liabilities in the coparcenary property as she would have been son is unambiguous and unequivocal. Thus, on an from 09.09.2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son."

27. In the touchstone of all the above principles of law as settled and in view of discussion held in aforesaid Paras more particularly in Para 22 to 24 of the judgment, the substituted provision of Section -6 as brought in by Amendment Act of 2005 is held to be retrospective in operation as otherwise it would be without object.

In view of above, the two decisions rendered by this Court in case of "***Pravat Ch. Pattnaik and others – vrs.- Sarat Chandra Pattnaik and another***;" 106 (2008) CLT 98 and ***Santilata Sahu – vrs.- Sabitri Sahu and others;*** 105 (2008) CLT 389 stand for commendation and those also stand firmly by the side of above view and conclusion getting further support from the reasons and legal justifications given therein before that the daughters are conferred with the rights on and from the commencement of the Amendment Act and not merely to those born thereafter.

28. Adverting to the point of grant of shares to Plaintiff No. 2 and 3 in this appeal when not claimed earlier, it is profitable to quote few paras from the Apex Court's decision in case of ***Ganduri Koteshwaramma*** (supra):-

"12. The rights accrued to a daughter in the property of a joint Hindu family under 2005 Amendment Act is absolute except in the circumstances provided in the proviso appended to sub-section – 1 of Section 6. The excepted categories to which the new Section 6 of the Act is not applicable are:- (i) where the disposition or alienation including any partition has taken place before 20.12.2004; and (ii) where testamentary disposition of property has been made before 20.12.2004. Sub-section 5 of Section 6 leaves no room for doubt as it provides that this Section shall not apply to the partition which has been affected before 20.12.2004. 'Partition' has been explained to mean any partition affected by execution of a deed of partition followed by due registration or partition effected by a decree of a Court. So in view of above explanation for applicability of the Section what is relevant to find out is whether any partition has been affected before 20.12.2004 by a registered deed of partition or by a decree of a Court."

"13. The legal position is settled that partition of a joint Hindu family can be effected by various modes, inter alia, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the Court."

"14. A preliminary decree determines the rights and interest of the parties. A suit for partition is not disposed of by passing of a preliminary decree. It is by the final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After passing of the preliminary decree, the suit continues till then until the final decree is passed. If in the interregnum i.e., after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares there is no impediment for the Court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interest of the parties having regard to the changed situation.

"15. We are fortified in our view by a three- Judges Bench decision of this case in ***Phoolchand v. Gopal Lal,*** AIR 1967 SC 1470 wherein this Court stated as follows:-

We are of the opinion that there is nothing is in the Code of Civil Procedure prohibits the passing of more than one preliminary decree

if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. So far as partition suit is concerned when an event transpires after the preliminary decree which necessitates a change in shares, the Court can do so."

29. In case of ***S. Sai Reddy v. S. Narayan Reddy*** (1991) 3 SCC 647 during the pendency of the proceedings in the suit for partition before the Trial Court and prior to the passing of final decree, the 1956 Act was amended by State Legislature of Andhra Pradesh conferring share upon the unmarried daughters in the joint family property. The unmarried daughters claiming their share in the property. The matter went to High Court wherein the prayer was found favour with and then it was carried to the Apex Court. The Apex Court considering the objects and reasons behind such legislation and holding the preliminary decree to have not finally determined the shares putting the partition to an end confirmed the order of the High Court. The question again came to be raised before the Apex Court in ***Ganduri Koteshwaramma v. Chakiri Yanadi and another*** (2011) 9 SCC 788. In that case during final decree proceeding after submission of the report of the Civil Court Commissioner the Amendment Act come into force. So, necessary applications being filed for allotment of share by the deprived daughters the Trial Court allowed the application. However, the said order was set aside by the High Court. The Hon'ble Apex Court upon consideration of provision of law as well as the principle of law settled by earlier decisions having held that the daughters are entitled to the shares in the joint family property as conferred under the Amendment Act have further said:-

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"19. A suit for partition continues after passing of the preliminary decree and the proceedings in the suit get extinguished only on passing of the final decree. It is not correct statement of law that once a preliminary decree has been passed, it is not capable of modification. It needs no emphasis that the rights of the parties in a partition suit should be settled once for all in that suit alone and no other proceedings".

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"20. Section – 97 C.P.C. that provides that where any party aggrieved by a preliminary decree passed after the commencement of the court does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree does not create any hindrance or obstruction in the power of the Court to modify, amend or alter the preliminary decree or pass another preliminary decree is the changed circumstance so require."

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"21. "It's true that a final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the Trial Court in the event of changed or supervening circumstances, even if no appeal has been preferred for such preliminary decree."

The position is no more res-integra that mere passing of decree for partition whether by Trial Court or by the Appellate court is not enough. Till a partition is affected by a decree of a Court, thereby meaning till the decree for partition has attained finality by sealing and signing of the final decree, the daughters cannot be deprived of her legitimate right in the said property.

30. The above authoritative pronouncements of Apex Court provide the answer to the present case concerning the declaration of the rights of the Plaintiff No. 2 and 3 over Schedule – B and C properties and their entitlement to the shares equal to that of Plaintiff No. 1 and Defendant No. 1. When the same, can be so sought for by filing an application in the Trial Court for passing a second preliminary decree taking into consideration the changed and supervening circumstances of enforcement of the Amended provisions of law, I find no any reason to say as to why the same cannot be declared and conferred upon Plaintiff No. 2 and 3 in this appeal when it would serve no purpose to drive them back to knock at the door of the Trial Court for the said relief and more-so when this appeal is the continuation of the suit with doctrine of merger coming into play. Interestingly, in the case, at the time of decision of the suit in view of the law as it was then in fact the plaintiff No. 2 and 3 could not have maintained any appeal being not affected by the decree on the score of deprivation of their share over "Schedule – B and C" properties and for that reason they had not even claimed so in the suit which cannot be so viewed to their detriment in the changed scenario of law. The

right came to be conferred during appeal which cannot be ignored but has to be recognised as the changed and supervening event. As they are entitled to share in view of present position of law and they having not advanced the claim till now would not stand on the way of grant of their entitlement as per law. In the absence of any claim from any other side, Plaintiff No. 2 and 3 are hereby found entitled to have their shares over Schedule – B and C property to the extent of 1/4th (one fourth) each along with Plaintiff No. 1 and Defendant No. 1 each of whom are also entitled to 1/4th (one fourth) share therein as Plaintiff No. 2 and 3 become coparceners in their own right by birth which entitles them to also have a right to sue for partition against other coparceners including their father in getting their shares in accordance with law.

31. The question next arises with regard to the other reliefs which have been granted by the Trial Court. In view of my above discussion concluded at Para 15 of the judgment, and as a consequence thereto the decree which has been granted by directing the Defendant No. 1 to render accounts in respect of the income of "Schedule -D" property is liable to be modified that it should be confined to "Schedule- B and C" property.

32. For the marriage expenses, the decree has been passed for sum of `75,000/- and that is in respect of Plaintiff No. 2 and in respect of Plaintiff No. 3 a sum of `1 lakh has been directed to be paid by the Defendant No. 1 for the same along with payment of `1500/- per month to both Plaintiff No. 2 and 3 from the date of filing of the suit till 19.12.1991. Decree has been passed for directing Defendant No. 1 to pay sum of `700/- per month as maintenance and educational expenses to Plaintiff No. 3 from 19.12.1991 till her marriage. Considering the present days price index and soaring price with rate of inflation on a steep increasing trend with the cost of living ascending day by day, this Court finds that the quantum as ordered are quite reasonable and the same and in the facts and circumstances, thus are found to be just and proper cumulatively viewed with the status of the parties as well as the properties that stand in their favour remaining under the care and control of the Defendant No. 1. So, the decree on those scores stand confirmed.

33. In view of aforesaid, the appeal stands allowed in part and in the circumstances without cost. The judgment and decree stand modified to the extent that the Plaintiff No. 1, 2 and 3 and Defendant No. 1 are entitled to 1/4th (one fourth) share each over the properties described in "Schedule-B and C" of the plaint and accordingly the preliminary decree to that effect is

hereby passed with the other directions as ordained under the said decree by the Trial Court with modification therein keeping "Schedule - D" property out of the purview of rendition of accounts by Defendant No. 1 confining to "Schedule – B and C" property.

Appeal allowed in part

2015 (I) ILR - CUT-1205

S. PUJAHARI,J

CRA NO. 105 OF 1991

JAGADISH MAHANTA …….Appellant

.*Vrs*

SATE OF ORISSA ……..Respondent

CRIMINAL TRIAL – Murder Case – Eye witnesses deposed that the deceased sustained injury due to assault by the appellant but the appellant had taken a plea that the deceased died due to injury sustained in an accidental fall – Non-examination of the doctor who conducted postmortem to prove that the death was homicidal – Ext. 6, the bed head ticket discloses that the deceased was admitted in the hospital sustaining injury, supporting the defense plea – Held, charge U/s. 304 part II I.P.C. was unsustainable – Impugned judgment of conviction and sentence is setaside (Para-6)

For Petitioner : M/s. S.K.Samantray & Associates
For Opp. Parties : Addl. Government Advocate

Date of Hearing : 06.02.2015
Date of Judgment : 06.02.2015

JUDGMENT

S. PUJAHARI,J.

Being saddled with the judgment of conviction and order of sentence passed in S.T. No.84 of 1990 on the file of learned Sessions Judge, Mayurbhanj at Baripada convicting him for a charge under Section 304 Para-II I.P.C. (for short "the I.P.C.") and directing him to undergo rigorous imprisonment for three years, files this criminal appeal challenging the same.

1. Bereft of unnecessary details, the prosecution case runs as thus;

The deceased and the appellant are the relations. It is the case of the prosecution that on 13.02.1990 at about 1.15.p.m., the wife of the deceased had been to the well of one Arjun Mohapatra with a bucket to fetch water and while returning from there, she was abused by the mother of the appellant in filthy languages which was reported by her (wife of the deceased) to her deceased-husband. The deceased knowing about the aforesaid, proceeded to the house of the appellant being armed with a lathi and confronted the matter to the mother of the appellant regarding her bad manner shown towards his (deceased) wife. While hot dialogues between the deceased and the mother of the appellant were going on, the appellant appeared there from his house being armed with a lathi and dealt two lathi blows, one of such blows landed on the head of the deceased and other on the shoulder of the deceased, as a result of which he fell down there unconscious and thereafter he was shifted to Betnoti hospital for treatment and wherefrom he was shifted to Baripada Headquarters Hospital for better treatment and while he was undergoing treatment there, he succumbed to the injuries sustained. The matter then was reported to the O.I.C., Betnoti Police Station. On receipt of the aforesaid report, Ext.1, the investigation was conducted and on completion of the investigation, placed charge-sheet against the appellant as he found a prima-facie case under Section 302 I.P.C. against him.

3. On the basis of the aforesaid prosecution case, the trial court framed court framed a charge under-Section 302 IPC against the appellant and as the appellant did not plead guilt of the charge, the prosecution examined as many as seven witnesses and also exhibited certain documents to being home the charge. The appellant took a plea of denial and the death of the deceased to be accidental, but not adduce any independent witness to support his plea.

4. During course of hearing, learned counsel for the appellant submits that this case, there no cogent material to come to a conclusion that the

deceased died a homicidal death and the appellant proves a case that the death of the deceased was an accidental fall by preponderance of probability, the impugned judgment of conviction and order of sentence is unsustainable in the eye of law.

5. In response, the leaned counsel for the State through fairly submits that in this case, the doctor who had conducted autopsy over the dead body of the deceased vide Ext.7, had not specifically opined that the death of the deceased was attributable to the injuries sustained and the deceased died a homicidal death, but he submits that the eyewitness version being available that the appellant dealt lathi blows to the deceased during course of a quarrel, the impugned judgment of conviction and order of sentence of the court does not need an interference of this Court.

6. It appears from the evidence on record that P.Ws.1 and 2, who are the wife and son of the deceased, are ever witnesses to the occurrence and P.W.3 is an independent witness. P.W.4 is a post occurrence and witness. From the evidence of P.Ws.1, 2 and 3, it emerges that during course of quarrel, the present appellant dealt blow to the deceased, for which he sustained injury and fell down. It also transpires from their evidence that the deceased was removed to the hospital and while undergoing treatment he succumbed to the injury sustained. The doctor, who conducted postmortem examination, has not been examined, but his report, Ext.7 has been proved. Nothing has been emerged fromExt.7 that the death of the deceased was homicidal in nature. Though the Ext.7 discloses that the deceased sustained injury, but it does not disclose whether the injury was antemortem or postmortem. In absence of same, solely relying on the evidence of the aforesaid witnesses, the trial court appears to have found the appellant guilt of the charge of culpable homicidal not amounting to murder punishable under Section 304Part-IIIPC. No.doubt, the version of P.Ws. 1 and 2 cannot be rejected on the ground that they are close relations of the deceased, so also on the ground of interestedness, but their evidence is required to be scrutinized with care and caution. Furthermore, it is also well settled that the prosecution is duty bound to prove its case beyond all reasonable doubt and the appellant need to prove its case by preponderance of probability. The appellant also permitted to take a false plea, the same by itself cannot exonerate the prosecution to prove its case beyond reasonable doubt. When the prosecution proved its case beyond reasonable doubt, the falsity of the of the defence may further fortify such case of the prosecution is the proposition of law. Here in this case, the

appellant had taken a plea that the deceased died of injury sustained in an accidental fall during the course of a quarrel with him . Of course, P.Ws. 1,2 and 3 stated that the deceased sustained injury on account of assault by the appellant, but the trial court believing the same stated that said injury contributed to such death. Their such version is not supported by the evidence of the doctor who had prepared Ext.7 which is being exhibited on waiver and also the fact that Ext.6, the bed head ticket discloses that the deceased was admitted in the hospital sustaining injury on accidental fall. In such premises, the same casts a cloud on the version of these eye witnesses to the occurrence. When the version of the eyewitnesses in this regard is not wholly reliable, the version of P.WS. 4 and 5 that the appellant made extrajudicial confession in the absence of reason of the appellant reposing confidence on them with regard to commission of offence should not have been accepted by the trial court to come to a conclusion that the death of the deceased to be a homicidal in nature, more particularly when the prosecution has failed to examine the doctor conducting postmortem examination and prove the fact that the death of the deceased was homicidal in nature and Ext. 6 militates against the eyewitness version and supports the defence plea. Hence, the charge under Section 304 part-II IPC was unsustainable. For the said reason, I am unable to say that the appellant was guilty of charge causing hurt though not a culpable homicide, inasmuch the evidence of the witnesses to the occurrence is found to this Court to be unacceptable in view of the fact that the appellant has proved his case by preponderance of the probability that the injury could have been sustained by the deceased by an accidental fall.

7. Resultantly, for the foregoing reasons, this criminal appeal is allowed. The judgment of conviction and order of sentence passed by the trial court are hereby set-aside Consequentially, the appellant is acquitted of the charge . L.C.R. received be sent back forthwith.

Appeal allowed.

2015 (I) ILR - CUT-1209

B. RATH, J.

W.P.(C). NO. 21638 OF 2012

JUSTICE ASHOK KUMAR SAMANTARAY .....Petitioner

.Vrs.

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

ODISHA CONSUMER PROTECTION RULES, 1987 – 6 (5) (h)

Serious allegations against the petitioner as president, State Consumer Disputes Redressal Commission – Abuse of position – Removal form service basing on the report submitted by the Registrar (Inspection and Enquiry) High Court of Orissa – Action challenged- Enquiry should have been conducted by a sitting judge of the High Court being nominated by the Chief Justice as required under Rule 6 of the Rules – Report submitted by the Registrar (I&E) can not be said to be a report in terms of Rule 6 (5) (h) of the Rules, 1987 – Held, impugned orders not being in terms of Rule 6 (5) (h) of the Rules, 1987 is set aside – However it is left open to the state Government to move in the above issue as it deems fit and proper and if any such action is taken that shall be strictly in terms of provisions contained in Rule 6 (5) (h) of the Rule 1987. (Paras-13,14)

For Petitioner : M/s. P.K.Ray, N.Dash & S.Dash ,

For Opp. Parties : M/s. R.K.Mohapatra,
Addl. Government Advocate
K.N.Jena ,B.P.Bal, D.K.Mohapatra,
A.K.Sahu.P.Mohapatra,M.Pattanaik ,
S.N.Panda & P.K.Jena

Date of Hearing : 19.03.2015
Date of Judgment : 07.04.2015

JUDGMENT

BISWANATH RATH, J.

This writ petition has been filed by the petitioner challenging the impugned order of his removal vide Notification No.LSWC-31/2010/8168 dated 09.5.2012 and subsequent corrigendum vide Notification No.LSWC-

31/2010/8251/FS&CW dated 10.5.2012 as under Annexures-12 and 13 passed by the State of Orissa removing the petitioner from the post of the President of the State Consumer Dispute Redressal Commission.

2. Facts of the case as reveals from the Writ petition is that the petitioner after retirement from his post as a Judge of the High Court of Orissa was selected to hold the post of President of the Orissa State Consumer Dispute Redressal Commission following the provisions contained in Section 16(1)(a) of the Consumer Protection Act,1986. It is alleged by the petitioner that while the petitioner was continuing in the post of President of the Orissa State Consumer Dispute Redressal Commission ,a Writ petition in the guise of a Public Interest Litigation was filed before this Court vide W.P.(C) No.12276 of 2010 making therein the following prayer:

"a). Issue writ of mandamus directing Opp.party No.1 to discharge its statutory duties and responsibility/obligations under the provision of Consumer Protection Act, Rules & Regulations framed there under to achieve the aim and objective of the Consumer Protection Act.

b). Writ of mandamus directing the Opp.party No.1 to enforce and see that the State Commission and Dist. Forums function/discharge their statutory duties and responsibilities as provided under provisions of Consumer Protection Act, Rules and Regulations framed hereunder.

c). Writ of mandamus directing the Opp.party No.1 to initiate disciplinary proceeding and take action against the erring members & Presidents of the Dist.Forums and State Commission and the staffs who found to be guilty in discharging their duty and responsibility under the provision of Consumer Protection Act, Rules and Regulations framed there under and more particularly under Rule-6(5)(d),3(6)(d) of Orissa Consumer Protection Rule and Rule-13(1)(f) of Central Consumer Protection Rules and also not to pay salary to the erring members and Presidents for the days of their unauthorized absence from the duty.

d). Issue writ of mandamus/certiorari to State Commission, Opp.party no.2 to discharge its power, duties and function in accordance with provision of Consumer Protection Act, Rules & Regulation framed there under and more particularly U/s.26-B of Consumer Protection Act and also not to function in contravention of law which are stated in the foregoing paragraphs of the petition and to submit periodical report to this Hon'ble Court.

e). Writ of mandamus directing the State Govt, Opp.party No.1 to provide/appoint adequate staff and infrastructure to the office of State Commission Dispute Redressal Commission and to the District Forums within a specified time.

f). And direct the State Govt. to constitute a body/agency to inspect the Dist.Forum and State Commission periodically and to submit report about their functioning /working to State Govt. as well as to this Hon'ble Court.

And allow this writ application with cost."

It is as per the developments in the W.P.(C).No.12276 of 2010,by order dated 11.8.2011 a direction was given for an enquiry on the allegations against the petitioner to be conducted by the Registrar(Inspection & Enquiry) of the High Court of Orissa. Pursuant to such direction, the Registrar (Inspection & Enquiry) of the High Court of Orissa made an enquiry in relation to as many as 167(one hundred sixty seven) case records produced for the purpose and who upon verification of case records produced before him submitted his report in a tabular statement as appearing at Annexure-5 in the present Writ petition. In the next sitting of the High Court in W.P.(C) No.12276 of 2010,this High Court based on the information gathered from the report submitted by its Registrar(Inspection & Enquiry) sought for statement from the State Government in the matter of its future course of action on the findings revealed in the said enquiry. It is alleged by the petitioner that following the said direction of the High Court, the Competent Authority instead of holding an enquiry following the provisions contained in Rule 6(5)(h) of the Orissa Consumer Protection Rules,1987 treated the report of Registrar(Inspection & Enquiry) as a report under Rule 6 (5) (h) of the Rule, 1988 and straight way issued the impugned order of termination of the petitioner from the post of President of the Orissa State Consumer Dispute Redressal Commission and on the next day the Competent Authority also issued a corrigendum making correction of the typographical errors in the impugned termination order.

3. The allegation of the learned Senior Counsel appearing for the petitioner in the writ petition is that the petitioner being a President of the State Consumer Dispute Redressal Forum being appointed under the provision of Section 16(I)(a) of The Consumer Protection Act,1986 even though the Act has no provision for dealing with the allegations against the

President of a State Consumer Dispute Redressal Forum but following the provisions contained in Rule 6 (5)(h) and the proviso as contained therein, no President of the State Consumer Dispute Redressal Commission shall be removed from his office except by an order made by the State Government on the grounds specified in Clause (f)(g)(h) and (i) of the above Rule and after an enquiry held by a sitting Judge of the High Court nominated by Hon'ble Chief Justice of the High Court of Orissa ,in which the President of the State Commission, as the case may be, has been informed all the charges against him and giving the person concerned a reasonable opportunity of being heard in respect of those charges and found guilty. The learned Senior Counsel appearing for the petitioner further contended that there is no enquiry on the allegations against the President of the State Commission by a sitting Judge of the High Court nominated by the Hon'ble Chief Justice of the said High Court, the impugned order of removal is per se bad. The next submission of the learned Senior Counsel is that the impugned order of termination also suffers on account of non-compliance of the principle of natural justice. Learned Senior Counsel further submitted that the impugned order being passed merely based on a report submitted by the Registrar (Inspection and Enquiry) of the High Court of Orissa, is no report in the matter of an enquiry in the case of a President of the State Commission in terms of Rule 6(5)(h) read with proviso therein and thus contended for setting aside of the impugned order on all the three premises stated herein above.

4. Per contra, apart from relying on the contentions raised in the counter affidavit Sri Mohapatra, learned Government Advocate appearing for the State submitted that following a direction in a Public Interest Litigation in W.P.(C) No.12276 of 2010 dated 11.8.2011 the allegations pertaining to the President of State Commission has been enquired into by the High Court following a direction in a Public Interest Litigation numbered above and as directed therein, the Registrar (Inspection and Enquiry), High Court of Orissa has also submitted a report finding the allegations against the President of State Commission as true, as available under Annexure-5, and in view of submission of such a report and the findings therein categorically, the Competent Authority felt that there was no need to further probe into the matter treating the said report to be an out come in an enquiry by the High Court and on acceptance of the findings in the said report, the State Government as authorized under Rule 6 (5) (h) of the Rule,1988 has passed the impugned order. Sri Mohapatra, learned Senior Counsel

submitted that neither there is any infraction of any provision contained either in the rules or Act therein nor there is any illegality in the impugned order otherwise and submits that after receipt of the report dated 12.9.2011 the petitioner was issued with a show cause notice on 22.9.2011 enclosing a copy of report to have his say but the Commission chose to ignore such opportunity. Learned Senior Counsel further also submitted that in view of the serious allegations against the petitioner during his incumbency as the President of the State Commission and in view of the particular observations in the report submitted by a person of the rank of Registrar,(Inspection & Enquiry),High Court of Orissa, the petitioner does not deserve to be holding such post. It is next contended by the learned Government Advocate that as against the report submitted by the Registrar (Inspection and Enquiry) Orissa High Court, the petitioner visited the Hon'ble Apex Court by filing Special Leave to Appeal (Civil) No.27688 of 2011. The above S.L.P was ultimately dismissed by the order of the Hon'ble Apex Court dated 29.9.2011. Since the challenge of the petitioner to the direction for a report and the submission of the report has been dismissed by the Hon'ble Supreme Court, this would be treated as an approval of the report by the Hon'ble Apex Court. Therefore accepting such report by the State and passing the impugned order can not be faulted with. It is on these premises, learned Government Advocate appearing on behalf of the State prayed for dismissal of the Writ petition.

5. Section 16 of the Consumer Protection Act, 1986 deals with Composition of the State Commission. Since this case involves an issue relating to the President of the State Consumer Dispute Redressal Forum, the relevant provisions so far it relates to the President of the State Commission under Section 16 of the Consumer Protection Act, 1986 is quoted herein below.

S. 16. <u>Composition of the State Commission</u>.-

(1) Each State Commission shall consist of-

(a) a person who is or has been a Judge of a High Court, appointed by the State Government, who shall be its President:

[Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of the High Court;]

xx xx xx

Provided that where the President of the State Commission is, by reason of absence or otherwise, unable to act as Chairman of the Selection Committee, the State Government may refer the matter to the Chief Justice of the High Court for nominating a sitting Judge of that High Court to act as Chairman.

xx xx xx

Provided further that a person appointed as a President of the State Commission shall also be eligible for re-appointment in the manner provided in Clause (a) of Sub-section (1) of this section.

xx xx xx

(4) Notwithstanding anything contained in Sub-section (3), a person appointed as the President or as a member before the commencement of the Consumer Protection (Amendment) Act, 2002, shall continue to hold such office as President or member, as the case may be, till the completion of his term.]

6. Section 30 provides Rule Making Power and Section 30(2) deals with that State Government may make rules which since relevant for the purpose, is quoted herein below:

S. 30. <u>Power to make rules</u>.-

xx xx xx

(2) The State Government may, by notification, make rules for carrying out the provisions contained in Clause (b) of Sub-section (2) and Sub-section (4) of Section 7, Clause (b) of Sub-section (2) and Sub-section (4) of Section 8-A, Clause (b) of Sub-section (1) and Sub-section (3) of Section 10, Clause (c) of Sub-section (1) of Section 13, Clause-(hb) of Sub-section(1) and Sub-section (3) of Section 14, Section 15 and Clause (b) of Sub-section (1) and Sub-section (2) of Section 16 of this Act.)."

Following provisions as contained in Section 30(2), the State Government has framed the Orissa Consumer Protection Rules,1988. Rule 6 of the said rule deals with salary or honorarium and other allowances and terms and conditions of the President and Members of the State Commission. The relevant provision of the rule at Sub-rule 5 of Rule 6, as required for the purpose of the present case, is quoted herein below:-

"6.**<u>Salary or honorarium and other allowances and terms and conditions of the President and members of the State Commission:</u>**

xx xx xx

(5).The President or a member of the State Commission shall cease to be the President or members as the case may be, if he,-

(a) dies or resigns from office or attains the age specified in Sub-section(3) of Section 16 of the Act; or

(b) is adjudged an insolvent ; or

(c) is convicted of an offence involving moral turpitude ; or

(d) remains absent in three consecutive sitting of the State Commission ; or

(e) Joins a political party or a communal organization ; or

(f) becomes physically or mentally incapable to discharge his functions efficiently ; or

(g) acquires such financial or other interest as is likely to affect his functions prejudicially ; or

(h) so abuses his position as to render his continuance in office prejudicial to the public interest;

[(i) is found not discharging and attending to duties, responsibilities as required, by the provisions of Act, Rules, regulations and instructions issued from time to time:]

[Provided that the President or any member of State Consumer Disputes Redressal Commission shall not be removed from his office except by an order made by the State Government on the grounds specified in Clauses (f),(g),(h) and (i) above and after an enquiry held by a sitting Judge of the High Court nominated by the Chief Justice of Orissa in which the President or member of the State Commission, as the case may be, has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and found guilty and State Government may also suspend the Member/President at any time during or before enquiring into the charges to up hold credibility of the Commission.]"

7. During course of hearing, the case record of W.P.(C) No.12276 of 2010 as being referred to in this case by both the sides was called for. The

aforesaid writ petition is a Public Interest Litigation as filed by the Federation of Consumer Organization, Orissa making serious allegations against the President of the State Commission as well as President of some of the District Consumer Redressal Forum. By order dated 27.7.2011,the Division Bench of the High Court of Orissa hearing the aforesaid W.P.(C).No.12276 of 2010 as available under Annexure-3 in the present case passed the following order:

"**27.7.2011**:-

Put up this matter on 10th.of August, 2011 along with CONTC No.1809 of 2009.

The Registrar, State Consumer Dispute Redressal Commission, Orissa, opposite party no.2, is directed to produce the records of the last three months listing and disposal of the cases by the Commission before this Court on the date fixed. It is further directed that records of 180 FAs, which were disposed of at the stage of admission by the Commission as it appears from Annexure-2 series which is an information given under RTI Act to one Bibhuti Keshori Biswal"

8. On 11.8.2011 in another hearing of the above case, this Court after perusal of certain records of the State Consumer Redressal Forum as available under Annexure-4 in the present case passed the following order:

"**11.8.2011:-**

As per our order dated 27.7.2011 the Registrar, State Consumer disputes Redressal Commission, Orissa, opposite party No.2 has produced 180 records, out of which at random we went through eleven records, wherefrom we found that in F.A.no.59/2009 delay has been condoned in absence of other parties and the appeal has been dismissed. In the other ten cases without issuing notice to the respondents, the same have been disposed of.

F.A.48/2009 has been disposed of on 26.3.2009 after condoning delay at the first instance without issuing notice to the respondent. The order of the District Consumer Forum was set aside and the matter was remitted back for rehearing. Here, the appellant is the Oriental Insurance Company.

In F.A.No.76/2009, the appellant is ICICI Bank and the State Consumer Disputes Redressal Commission at the stage of admission on 13.04.2009 set aside the entire judgment and order impugned therein.

FA No.276 of 2009 has been allowed on 24.4.2009 at the stage of admission without giving notice to the respondent. The appellant in this case is M/s.B.M. Marketing, Ganesh Bazar, Dhenkanal.

FA No.301 of 2009 was allowed at the stage of admission without giving notice to the respondents.

In FA No.192 of 2009, the only order passed on 30.3.2009 is "Heard. This appeal is allowed at the stage of admission."

In FA No.319/2009 the order of the District Consumer Disputes Redressal Forum was set aside after hearing the appellant-Branch Manager, UTI Mutual Fund, but the respondent was not given an opportunity of hearing.

FA No.282 of 2009 was filed on 27.3.2009 by M/s.Tata Motor Finance Ltd. against one Mahendra Kumar Sahoo. In the said appeal, the statutory deposit was made on 13.4.2009. Thereafter, the matter was taken up on 27.4.2009 and without issuing notice to the respondent, the appeal was allowed.

FA Nos.208, 194, 239 and 250 of 2009 were allowed without issuing notice to the other side.

List this matter on 24.8.2011.

Let the Registrar (I&E) verify the rest of the records and find out as to how many cases have been allowed without hearing the respondents and submit a report on the date fixed."

9. It is on the direction of this Court dated 11.8.2011, the Registrar (Inspection & Enquiry),High Court of Orissa In W.P.(C) No.12276 of 2010 after making detailed enquiry submitted the report vide Annexure-5 for perusal of the Division Bench in W.P.(C) No.12276 of 2010 and by order dated 22.11.2011 the Division Bench accepted the report submitted by the Registrar(Inspection & Enquiry)High Court of Orissa and by order dated 22.11.2011 while serving the copy of the report on the State Counsel as well as the Counsel for the present petitioner appearing in the said matter, directed the State Counsel to submit to the Court about the reaction of the State Government on the report as well as the action taken thereon. While

the matter stood thus the petitioner move two Special Leave Petition in two different aspect vide S.L.P(C) CC.No.15644 of 2011 and S.L.P.(C).No.27688 of 2011. At this stage, it is relevant to take note of the order passed by the Hon'ble Apex Court in S.L.P(C) CC.No.15644 of 2011 and S.L.P.(C).No.27688 of 2011 which are quoted herein below:

"**SLP.(C) No.15644/2011**:
15.9.2011:

Taken on Board.

We do not feel inclined to interfere with the order of the High Court dated 27th.July, 2011. We are told by the learned counsel for the petitioner that after the High Court passed order dated 27th July, 2011, another order dated 11th.August, 2011 was passed.

The grievance of the petitioner seems to be that despite applying for the certified copy of the order dated 11th.August, 2011, the same has not been supplied by the High Court.

In view of the above, we dispose of these petitions with the observation that if an application for certified copy of the order dated 11th.August, 2011 has been made in accordance with the rules, copy thereof may be made over to the applicant within a period of seven days from today, if not already done."

"**SLP.(C) No.27688/2011**:
29.9.2011:

Taken on Board.

We are of the view that this special leave petition against the order of the High Court is a frivolous piece of litigation. We do not find any merit in this special leave petition. Accordingly, the special leave petition is dismissed.

However, from the High Court's order dated 11.8.2011, we find that State Consumer Redressal Commission disposed of appeals finally against the order of the District Consumer Forum without giving notice to the other side. We are of the opinion that the High Court is entitled to examine the orders of State Commission, if such situation exists."

On reading of the above order of the Hon'ble Apex Court, it makes it clear that in the first order, the Hon'ble Supreme Court directed the High Court for grant of the certified copy of the order dated 11.8.2011 whereas in the second order the Hon'ble Apex Court held that High Court has the power to look into and examine the orders of the State Commission if such situation exists. This Court does not find any order of the Hon'ble Apex Court in approval of the report of the Registrar (I&E), Orissa High Court. Therefore, the State Counsel is incorrect to say that there is approval of the report submitted by the Registrar (I&E) of this Court by the Hon'ble Apex Court.

10. Now coming back to the question to be determined at hand whether the report submitted by the Registrar (Inspection & Enquiry), Orissa High Court is a report in an enquiry as contemplated under Rule 6 (5) (h) of the Rule 1988? Reading of the above provision speaks of taking an action against the President of a State Consumer Redressal Forum following an enquiry into the allegations as contained in Rule 6(5)(h) of Rule 1987 needs to be conducted by a sitting Judge of the particular High Court that too being assigned with such job by the Hon'ble Chief Justice of the said Court. I find the report as submitted by the Registrar(Inspection & Enquiry) of the High Court of Orissa is a report pursuant to direction of a Division Bench of this Court and thus can not be termed as a report in an enquiry in terms of Rule 6 (5)(h) of Rule 1987 read with proviso therein. No doubt, there was serious allegations against the President of the State Commission which was also well within the knowledge of the State Authorities. This Court finds it strange as to how the State Government remain silent over such matter, this Court observes that such serious allegations ought not have been taken lightly by the State. Further looking to the direction of this Court as appearing in the order dated 22.11.2011 in W.P.(C)No.12276 of 2010 as reflected herein above there appears no direction to the State Government by Division Bench of this Court for accepting the report supplied to it and treat it as an enquiry report as contemplated under Rule 6(5)(h) of the Rules,1987.The order referred to herein above only required informations regarding the steps taken by the State in the particular matters. Therefore the State Authority treating the said report as an Enquiry report as contemplated under Rule 6(5)(h) of the Rules,1987 and issuing an order of termination as impugned, is wholly bad. During course of hearing, it was brought to my notice by the learned Senior Counsel appearing for the petitioner a document i.e. a letter dated 22.6.2010 formed part of a pending Misc. Case No.7994 of 2014 at the instance of the petitioner issued by the Hon'ble Judge of the

Apex Court at the relevant point of time which also categorically reflected that basing on the allegations against the President of the State Commission, the State Government has the power to cause an enquiry in to the allegations of abuse of position in exercise of power under Rule 6(5)(h) of the Orissa Consumer Protection Rules,1987 and to take action on the basis of a finding in such enquiry. Thus, it is crystal clear that in both the above situations, the State Government was only asked to take action into the allegations against the President of the State Consumer Redressal Forum following the provisions of statute and under no circumstances it can be read beyond that. There appears a strange behavior of the State and. inspite of clear and categorical direction for an enquiry on the allegations against the President and that too in accordance with law the State Government remain silent. It is at this stage necessary to make reference of certain decision of the Hon'ble Apex Court in the matter of allegations against the Judges or quasi-judicial authorities which runs as follows :-

In a case between ***Union of India and others vrs. A.N.Saxena,*** A.I.R.1992 S.C 1233, the Hon'ble Apex Court held that disciplinary action taken in regard to the action taken or purported to be taken in course of Judicial or quasi-judicial proceedings. However in such circumstances the disciplinary proceedings should be initiated with great caution and a close scrutiny of his action and only if the circumstances so warrant for the reason that non-initiation of disciplinary proceeding against a Judicial Officer may shake the confidence of the public in the Officer concerned and if lightly taken it is likely to undermine the independence and in case the action of the Judicial Officer indicates culpability there is no reason why disciplinary action should not be taken against such a person.

In another case between ***Union of India and others vrs. K. K. Dhawan,*** *A.I.R.1993-S.C-1478* very heavily relying upon its judgment in *S. Govinda Menon (1886) 17 BD 536* observed that the Officer who exercises judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person is not acting as a Judge and in the disciplinary proceeding, it is the conduct of the Officer in discharge of his official duties which is to be examined. In the said case, the Hon'ble Supreme Court has underlined some of the circumstances in which disciplinary action can be taken, which are as hereunder:

(i). Where the officer had acted in the manner as would reflect on his reputation or integrity or good faith or devotion of duty.

(ii). if there is prima-facie material to show reckless or misconduct in discharge of his duty.

(iii). If he has acted in a manner which is unbecoming of a Government servant.

(iv). If he had acted in order to unduly favour a party.

Similarly in another decision in between ***M.H.Devendrappa vrs, The Karnataka State Small Industries Development Corporation***, A.I.R.1998-S.C-1064, the Hon'ble Supreme Court ruled that any action of an employee which is detrimental to the prestige of the Institution or employment would amount to misconduct.

Law as settled by the Hon'ble Apex Court in a case in between ***Sanjeevi Naidu etc. vrs. State of Madras and another,*** A.I.R.1970-S.C-1102 and again in ***Hemaladha Gargya vrs. CIT,*** (2003) 9 S.C.C-510 holding that a designated Authority under the Act can not delegate its power / duty further at all and has to do its duty itself.

Law is also well settled that if an action is required to be under taken in a particular manner then that has to be done in that manner or not. In the case at hand, statute specifically provides a mechanism for handling the issues involved. This position has been settled in a catena of decisions which runs as follows:

Privy Council in Nazir Ahmad v. King Emperor 1936 P.C.253.

Municipal Corporation of Delhi v. Jagdish Lal and another AIR 1970 S.C.7.

Ram Charan Keshab Adke(Dead) by LRs v. Govind Joti Chavare and others AIR 1975 S.C.915 and

Babu Verghese and others v. Bar Council of Kerala and others, AIR 1999 S.C.1281.

11. It is under the circumstances, it can be safely indicated that there was absolutely no enquiry involving the petitioner and as such there was no question of passing an order of termination which action is therefore

undoubtedly dehorse the provisions contained in the Rule 1988.The report submitted by the Registrar(Inspection and Enquiry),High Court of Orissa can not be termed as a report in terms of Rule,1988.

12. Under the facts narrated hereinabove and settled Legal position as well as the clear statutory provisions as contained in the Act, 1986 read with Rule 1988 the impugned order at Annexure-12 and the corrigendum vide Annexure-13 cannot be sustained in the eye of law.

13. However, there appear serious allegations against the President of the State Consumer Redressal Forum. A fact finding report is also there by the Registrar (Inspection and Enquiry), High Court of Orissa establishing the allegations. The petitioner on his own filed a document accompanied in the pending Misc. Case No.7994 of 2014 requesting this Court to take the documents accompanying therein as part of the Writ and be considered. It appended a note sheet obtained through Right to Information Act clearly disclosing that based on opinion of the then Law Secretary, the matter was placed before the Hon'ble Chief Minister for his recommending the particular case for an enquiry into similar set up allegations against the petitioner pending with it to the Hon'ble Chief Justice of the High Court following provisions contained in Rule 6(5) of Rule 1988 and in pursuance of which the Hon'ble Chief Minister at the relevant point of time on his approval send a D.O .letter vide UM-95/2010-416/CM dated 18.10.2010 addressed to the Hon'ble Chief Justice, High Court of Orissa making request therein. In the circumstances, even though this Court sets aside the impugned orders vide Annexures-12 and 13 for the findings recorded herein above and the position of law as noted herein above, this Court can not shut its eyes to such allegations. It appears that the petitioner has already been removed from the post immediately after the dismissal of the Civil Appeal asking the petitioner to approach this High Court and in the meanwhile by Order dated 24.11.2012, the post has been filled up by a new person. In considering the legal aspect in the matter of possibility of restart of the enquiry in view of attaining superannuation by the petitioner in the meanwhile, this aspect was also being considered by the Hon'ble Apex Court in Civil Appeal No.2641 of 2012 in the matter of ***State of West Bengal and others vrs. Pronab Chakraborty*** along with several other Civil Appeals, the Hon'ble Apex Court held as follows:

> "It is therefore apparent, that it is not only for pecuniary loss caused to the Government that proceedings can continue after the date of

> superannuation. An employee can be proceeded against, after the date of his retirement, on account of "…grave misconduct or negligence…". Therefore, even in the absence of any pecuniary loss caused to the Government, it is open to the employer to continue the departmental proceedings after the employee has retired from service. Obviously, if such grave misconduct or negligence, entails pecuniary loss to the Government, the loss can also be ordered to be recovered from the concerned employee. It was therefore not right for the High Court, while interpreting Rule 10(I) of the 1971 Rules to conclude, that proceedings after the date of superannuation could continue, only when the charges entailed pecuniary loss to the Government."

There exist serious allegations against the then President of the State Commission directly to the Government, further based on an order in the Public Interest Litigation a high level enquiry was undertaken by the High Court of Orissa through its Registrar (Inspection & Enquiry),who had undertaken a great level of pain in scrutinizing the case records of the Commission in as many as 167 cases out of which as many as 30 cases (Appeals) were allowed by the State Commission at Admission stage without issuing notice or affording opportunity to the party suffered by the said judgments/orders. Similarly equal number of cases (Appeals) were also dismissed at the Admission stage, even though these were all 1st appeals under the Act. However, the development through the other channel particularly involving the petitioner, the request of the Hon'ble Chief Minister to the Hon'ble Chief Justice of the State for holding an enquiry, including the observations made in the report submitted through the Registrar (Inspection & Enquiry) of this Court all these cannot lost sight of. It is, however, left open to the State Government to move in the above issue as it deems fit and proper and if any such action is taken that shall be strictly in terms of provisions contained in Rule 6 (5) (h) of the Rule, 1988.

14. Under the circumstance, this Court declares the orders vide Annexures-12 and 13 since not in terms of Rule-6 (5) (h) of the Rule, 1988 as bad in law and thus sets aside both the orders vide Annexures-12 and 13.

15. The Writ Petition stands allowed to the above extent. However there shall be no order as to cost.

Writ petition disposed of.

2015 (I) ILR - CUT-1224

B. RATH, J.

W.P.(C) NO.22037 OF 2013

DEBARCHAN PRADHAN .....Petitioner

.Vrs.

ODISHA FOREST DEVELOPMENT CORPN. LTD. & ORS. .....Opp.Parties

DISCIPLINARY PROCEEDING – Dismissal from service – Order confirmed in appeal – Action challenged – Enquiry by disciplinary authority is found to be incomplete and erroneous – The appeal order being based on such erroneous finding is also to suffer – Held, impugned orders are set aside – Matter is remitted back to the disciplinary Authority to conclude the probe initiated under Annexure-8 series – Since the petitioner is dismissed on erroneous and illegal conclusion of an unfinished disciplinary proceeding, he should be restored back to his service forthwith – As the petitioner was disengaged for the above illegal action direction issued to the management to pay 60% of back wages to him and his period of absence be treated as period in service for the purpose of his promotion and retiral benefits.

(Para 8)

For Petitioner - M/s. Janmejaya Katikia, A. Mohanty, P.Mohanty & S. Swain.
For Opp.Parties - M/s. S.K. Pattanaik.

Date of hearing : 28.08.2014
Date of Judgment : 24.09.2014

JUDGMENT

B. RATH, J.

By filing this writ petition, the petitioner has assailed the order no.35 dated 30.4.2012 under Annexure-7 passed by opposite party no.3 the disciplinary authority, the order dated 06.08.2013 passed by opposite party no.2 the Appellate authority under Annexure-11 and for issuing a writ of mandamus directing the opposite parties to reinstate the petitioner in service forthwith with payment of his arrear and other service benefits.

2. Facts involved in the case as narrated in the writ petition and as argued during the course of hearing is that the petitioner joined as a daily wage employer in the Odisha Forest Development Corporation Ltd. on 01.01.1982. After an uninterrupted service of nine years, the petitioner's service was regularized on 01.01.1991 in a vacancy in the post of Peon in the above organization as required and as directed the petitioner submitted School Leaving Certificate issued by Headmaster Naulipada M.E. School in the district of Sambalpur. It is based on the recording in the said School Leaving Certificate an entry on his date of birth was made in the service book showing his date of birth to be 21.08.1960.

3. The petitioner alleged that based on frivolous complaint lodged by one Shri John Petor claiming to be the Vice-president of Youth Congress, Rairakhol, the opposite party no.3 went for enquiry on the question of veracity in the date of birth submitted by the petitioner. In the said process, the opposite party no.3 wrote a letter on 23.11.2010 to the Headmaster Naulipada M.E. School for his replying on the authenticity of the documents provided by the petitioner. It is further alleged by the petitioner that in response to the above letter, the Headmaster, Nakulipada M.E. School vide Reference No.172 dated 17.10.2009 wrote back to opposite party no.3 giving thereby a negative reply. It is based on the information that "it is verified from the school" and found that all the above information did not match to their school record (Annexure-E) in the meanwhile, opposite party no.3 vide letter no.3266 dated 23.11.2010 wrote the Headmaster Naulipada M.E. School to get a response as to whether the certificate produced by the petitioner at the time of his regularization is valid one. In response the Headmaster-in-charge Naulipada M.E. School by his letter dated 25.12.2010 (Annexure-4) intimated as follows:-

> "Regarding confirmation letter issued from school vide letter no.297 dated 22.12.2006 by our Ex-Headmaster, the office copy of which is not presently traceable in our office record. However, the seal and the signature is not found to be correct."

Again in very same letter, the Headmaster-in-charge also intimated as follows:-

> "In fact SLC No.52 dated 03.05.1975 has been actually not issued in favour of Shri Debarchan Pradhan on 03.05.1975 by our Ex-Headmaster from the school. But counter foil of the said T.C. and the connected documents are not traceable."

4. The petitioner further alleged that it is based on the aforesaid reports by issuing office memorandum dated 05.01.2011 (Annexure-5) he was intimated regarding setting up an enquiry to probe into the allegation in Annexure-1 enclosing therein the statement of implications of doubtful integrity and misconduct in support of article of charges as annexed Annexure-II and the list of documents are enclosed in Annexure-III. The petitioner was called upon to submit his written statement of his defence within thirty days of receipt of the above communication. The petitioner submitted his response vide Annexure-6. On conclusion of the aforesaid enquiry proceeding vide communication dated 30.04.2012 as appearing at Annexure-7 issued by opposite party no.3, the petitioner was dismissed from service on the charges of doubtful integrity and misconduct.

5. The petitioner further alleged that for vehement protest by the petitioner, the opposite party no.3 by letter no.1077 dated 16.05.2013 wrote a letter to the District Inspector of Schools, Deogarh requesting him to direct the Headmaster, Naulipada M.E. School to verify the records and the authenticity of SLC No.52 dated 03.05.1975 issued in favour of Shri Debarchan Pradhan and to send the report after counter signing the same by himself. In another communication no.1082 dated 16.05.2013 a similar letter was issued to the Headmaster requesting him to verify the documents concerning the petitioner and intimating the under signed regarding the authenticity of the SLC No.52 dated 03.05.1975 and the confirmation of entries made therein from the Headmaster's end. In response to the same, the District Inspector of Schools, Deogarh vide his letter no.1442 dated 13.06.2013 sent a response to the opposite party no.3 enclosing therein a copy of the letter of the Headmaster Naulipada M.E. School dated 05.06.2013 indicating therein that in spite of his best effort, the SLC (counter foil) register in which the SLC No.52 dated 03.05.1975 was issued was not found in the office**,** for which reason he was unable to give an appropriate report on the subject. Following the above development, the opposite party no.3 wrote to the District Inspector of Schools, Deogarh on 29.06.2013 by issuing a letter under reference No.1435 directing him to enquire into the matter and intimate the undersigned as to whether the Admission Register no.07(as mentioned in the SLC No.52) and the SLC book from where SLC No.52 was issued is available or not. Enclosing therein a copy of the report dated 25.12.2010 as submitted by Ex-Headmaster of the school which remain unattended as on date.

6. The opposite parties in their turn submitted a counter affidavit justifying their action and claimed that there is no illegality in the impugned order. In order to justify their action, the contesting opposite parties also filed a series of documents in proof of their detail probe in the matter. It is based on receipt of communications against the petitioner they have arrived at the impugned action.

7. On perusal of the record vide Annexures-1, 2, C, G, Annexure-8 series and Annexure-9, it appears that some of the records concerned Naulipada M.E. School vide Annexures-1 and 2 whereas other records give reference to Nakulipada. The record vide Annexure-4 indicates (counter foil) of the T.C. on SLC No.52 is not traceable and the Headmaster is trying to trace the old records. Similarly, a letter dated 05.06.2013 by another Headmaster of the said school Naulipada also indicates the SLC (counter foil) was not found in the office in which the SLC No.52 dated 03.05.1975 was issued for which he has expressed his inability to give a proper report regarding the authenticity of the SLC.

8. As appearing from documents vide Annexure-8 series a communication of the opposite party dated 16.05.2013, it appears that the investigation regarding the records to find out the authenticity of the School Leaving Certificate, was still not closed. Documents vide Annexure-9 a correspondence from the District Inspector of Schools clearly indicates that the Headmaster is failing to submit the Admission Register and counter foil slip T.C. and from the Headmaster's letter dated 05.06.2013 it also appears that the relevant documents are not traceable. In the above facts and situation, it is apparent that there is no material establishing the allegation against the petitioner regarding falsity in the information with regard to his date of birth. If the Enquiry Officer was satisfied with the records available with him and submitted a report to the satisfaction of the authority then there is no reason for the authority to further probe into the matter as appearing vide Annexures-8 series and 9. Since the investigation to find the authenticity in the furnishing of the date of birth by the petitioner remained under cloud, the probe should not have been allowed to be concluded. Perusal of all these documents though established that the department with good intention started corresponding to different ends to find out the correctness in the SLC produced by the petitioner but there is no material to establish that there was any logical end. Consequently, I hold the conclusion of enquiry by the disciplinary authority is incomplete, erroneous. The appeal order being based

on such erroneous finding is also to suffer. While setting aside both the impugned orders, I remit the matter back to the disciplinary authority to conclude their probe as initiated vide Annexure-8 series and the fate of the petitioner be decided depending on the fresh findings arrived at in the departmental probe. Since the petitioner is dismissed on the said erroneous and illegal conclusion of an unfinished disciplinary proceeding, he should be restored back to his service forthwith. Further since the petitioner remained disengaged for the aforesaid illegal action of the management but, keeping in mind the petitioner has not worked all through, I direct the management to pay 60% of back wages to the petitioner and treat his period of absence from service as period in service for purpose of his promotion and retiral benefits.

9. The writ petition succeeds to the extent directed above, however, there shall not order as to cost.

Writ petition disposed of.

2015 (I) ILR - CUT-1228

S. K. SAHOO, J.

JCRLA NO. 86 OF 2006

SUNIL @ JAI SINGH RAUTIA .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

CRIMINAL PROCEDURE CODE, 1973 – S.154

Delay of seven days in lodging F.I.R. – Child rape case – It not only involves the reputation and prestige of the family but also life and career of the victim – So it is not unnatural on the part of the family members to have a deliberation among themselves to decide whether to lodge F.I.R. or not – Held, in this case delay is not material as it is explained properly. (Para 6)

PENAL CODE, 1860 – S.376(2)(f)

Child rape case – Victim examined in open court – She remained silent – Examination of the victim in the open court is illegal – As a matter of fact When she was recalled by the prosecution U/s. 311 Cr.P.C and re-examined in camera, she was comfortable and narrated the incident in detail – Though seized articles had been dispatched, chemical examination report not received – The statement of the victim is truthful and reliable and the same is corroborated by the testimony of her parents as well as medical evidence – Held, impugned judgment and order of conviction of the appellant U/s. 376 (2)(f) I.P.C. is confirmed. (Paras 8, 9)

Case Laws Referred to :-

1. AIR 1996 SC 1393 : State of Punjab -V- Gurmit Singh
2. AIR 2004 SC 3566 : Sakshi -V- Union of India

For Appellant - Mr. Divya Jeevan Mishra
For Respondent - Mr. A.K.Mishra, Standing Counsel

Date of Hearing : 30.03.2015
Date of Judgment: 06.04.2015

JUDGMENT

S.K.SAHOO, J.

It is said, "Trust takes years to build, seconds to break and forever to repair."

Here is a case of a girl child who was left by her mother in the company of a neighbour on trust for watching a festival but betraying the trust, the minor girl was ravished by the neighbour in an isolated place on the way to the festival site. The thing that is worse than death is betrayal.

The appellant faced trial in the Court of Adhoc Addl. Sessions Judge, Fast Track Court, Rourkela in S.T. Case No.51/12 of 2006 for offence punishable under Section 376 (2) (f) Indian Penal Code for committing rape on a minor girl aged about 7 years namely, Miss 'K' (hereafter for short 'the victim') on 14.01.2006 in between 11.00 a.m. to 12.30 p.m.

The appellant was found guilty by the learned trial Court vide impugned judgment and order dated 30.6.2006 under Section 376 (2) (f)

Indian Penal Code and accordingly convicted of such offence and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.30,000/-, in default of payment of fine, to undergo further rigorous imprisonment for a period of one year more.

2. The prosecution case as per the First Information Report lodged by one Lalu Kerketta (P.W.1) on 20.1.2006 before Inspector-in-charge, Mahila Police Station, Rourkela is that the informant along with his family members were residing near Jalda in Block 'C'. The informant had three daughters and two sons who were also staying with him. On 14.1.2006 during the morning hours, P.W.1 had been to his duty and at about 11.00 a.m., the appellant who was his neighbour came to his house and took away the victim who is one of the daughters of the informant as well as one of his sons Ramesh who was aged about three and half years in a cycle to watch Makar Festival. In between 12.00 to 12.30 p.m., the children returned back home. On 17.1.2006 the victim stated before her mother regarding feeling pain at the time of passing urine. When the mother of the victim asked her as to why she was limping since last two days, the victim disclosed that on the day when she had been to watch Makar Festival along with the appellant and her brother Ramesh, she was taken near a canal where Ramesh was asked to sit and the appellant took her towards the canal and after opening her pant, she was raped by the appellant. The informant returned from his duties and his wife narrated about the incident at about 10.30 p.m. in the night. The victim got up in the morning and the informant also asked her about the incident. The victim confirmed that she had been raped by the appellant. The informant called his brother-in-law who was staying at Biramitrapur but as he did not come, the informant himself went there to Biramitrapur and narrated everything before his brother-in-law and thereafter the report was lodged at the Police Station.

The oral report which was given by the informant was reduced to writing and ultimately Rourkela Mahila P.S. Case No. 5 of 2006 was registered on 20.1.2006 under Section 376 (2) (f) Indian Penal Code against the appellant.

P.W.13 Nalita Modi who was the Sub-Inspector of Police, Mahila Police Station took up investigation of the case. She examined the victim, the informant and other persons and recorded their statements, seized the wearing apparels of the victim under seizure list Ext.2. She visited the spot and prepared the spot map Ext.7. The victim was sent for medical examination to

Rourkela Government Hospital. The Investigating Officer searched for the appellant and apprehended him on 20.1.2006. The appellant was also sent for medical examination and his wearing apparels were seized under seizure list Ext.6. The I.O. received the medical examination report of the victim. The Station Diary of Jalda Police Outpost was seized. The I.O. received the medical examination report of the appellant. The biological samples of the victim as well as the appellant which were collected by the Medical Officer were also seized under seizure list Ext.5. The seized materials were sent for chemical examination to R.F.S.L., Sambalpur through learned S.D.J.M., Panposh and after completion of investigation, charge-sheet was submitted.

3. The defence plea is one of denial.

4. In order to prove its case, the prosecution examined thirteen witnesses.

P.W.1 Lalu Kerketta is the informant in the case and he is the father of the victim. He stated about the occurrence what he had heard from his wife and the victim.

P.W.2 Etwa Nag is the brother-in-law of P.W.1 who heard about the incident from P.W.1 and suggested him to lodge the report before Police. He is also a witness to the seizure of the wearing apparels of the victim under seizure list Ext.2.

P.W.3 Vinsari Kerketta is the mother of the victim who stated about the victim being taken by the appellant for watching Makar Festival and also about the victim narrating the incident before her. She also informed her husband P.W.1 about the incident.

P.W.4 Suresh Chandra Patel who was the ASI of Police attached to Jalda Police Outpost stated to have made a Station Diary Entry after receipt of information from P.W.1 regarding rape on the victim.

P.W.5 Santosh Kumar Swain was the Police Constable who stated about the seizure of Station Diary of Jalda Police Outpost under seizure list Ext.3.

P.W.6 Dr. Sudharani Pradhan examined the victim on police requisition and proved her report Ext.4.

P.W.7 is the victim of rape who stated about the occurrence.

P.W.8 Alis Lugun stated about the appellant taking the victim to watch Makar Festival on a bicycle.

P.W.9 Smt. Jema Bhagat was the neighbour of the appellant who stated to have heard from the mother of the victim about the appellant taking the victim and her brother to watch Makar Festival on his bicycle.

P.W.10 Smt. Draupadi Singh stated to have heard about the incident.

P.W.11 Janhabi Seth was the Police Constable attached to Mahila Police Station, Rourkela who stated about the seizure of vaginal swab and pubic hair in a glass vial by the Investigating Officer under seizure list Ext.5.

P.W.12 Biswambar Sara was the constable attached to Mahila Police Station, Rourkela who stated about the seizure of wearing apparels of the appellant under seizure list Ext.6.

P.W.13 Nalita Modi is the Investigating Officer.

The prosecution exhibited 12 documents. Ext.1 is the written report, Exts.2, 3, 5 and 6 are the seizure lists, Ext.4 is the medical examination report, Ext.7 is the spot map, Ext.8 is the requisition of P.W.13 for medical examination of I.O., Ext.9 is the zimanama, Ext.10 is the prayer of P.W.13 for dispatch of the seized materials for chemical examination, Ext.11 is the forwarding report to R.F.S.L. Sambalpur and Ext.12 is the true copy of the Station Diary Entry.

No witness was examined on behalf of the witness.

5. The learned trial Court relying upon the statement of the victim, medical evidence and other corroborative evidence found the appellant guilty under Section 376 (2) (f) Indian Penal Code.

The learned counsel for the appellant Mr. Divya Jeevan Mishra submitted that there was inordinate delay in lodging the FIR and the possibility of tutoring of the victim is not ruled out. He further submitted that at the first instance, when the victim was examined by the learned trial Court, she was found not competent to depose and accordingly the learned trial Court did not record her statement and thereafter she should not have been recalled at the instance of the prosecution for re-examination. He further contended that the chemical examination report having not been produced, serious prejudice has been caused to the appellant.

The learned counsel for the State Mr. A. K. Mishra submitted that in a case of this nature, the delay in lodging the FIR cannot be given much importance particularly when the family members of the victim become very apprehensive about the future of the victim as well as the prestige of the family and it is only after a long deliberation, they decide to lodge a report. The learned counsel further contended that the evidence of the victim is not only corroborated by the evidence of her family members but also from the medical evidence and therefore the learned trial Court was quite justified in acting upon such evidence to convict the appellant.

6. In the present case, the incident took place on 14.1.2006 in between 11.00 a.m. to 12.30 p.m. and the FIR was lodged on 20.1.2006. In the first information report, an explanation has been given that it is only on 17.1.2006 that the mother of the victim first came to know about the incident from the victim and on the very day she told the informant about the incident after the informant returned from his duties in the night. On the next day, the informant got confirmed about the incident from the victim and then he consulted his brother-in-law and then the FIR was lodged.

In the evidence, P.W.1 has stated that on 18.1.2006 he sent information to his brother-in-law to come to his house and when he did not come, he went to his house on 20.1.2006. P.W.2 who is the brother-in-law of the victim also corroborated the evidence of P.W.1 that after hearing about the incident from P.W.1, he suggested him to report the matter before Police. P.W.3 who is the mother of the victim has also corroborated the evidence of P.W.1 and she stated that she came to know about the incident from the victim and thereafter informed her husband P.W.1. Thus the evidence on record indicates that the offence was detected after three days of the occurrence when the victim for the first time disclosed about the same before her mother and then some time was taken for deliberation as to whether to lodge the FIR at all and ultimately P.W.1 lodged the FIR. In such a situation, it cannot be said that the prosecution has failed to offer any explanation regarding delay in lodging the FIR.

In a case of child rape, the reputation and the prestige of the family and the career and life of a young child is involved. Ordinarily the family of the victim would not intend to get a stigma attached to the victim. It is not at all unnatural on the part of the family members to have a deliberation among themselves to decide whether to lodge the FIR or not. Delay in lodging the First Information Report in a case of this nature is a normal phenomenon.

7. Coming to the evidence of the victim, I find that at the first instance when she was examined on 11.05.2006, the learned trial Court after preliminary examination found her to be not competent to depose. The reasoning assigned by the learned trial Court was that she was unable to answer the questions put to her rationally and was unable to say about the distinction between truth and falsehood and when she was asked about the incident by the learned trial Court, she remained silent and did not answer.

It appears that on 20.6.2006 a petition was filed on behalf of the prosecution under Section 311 Cr.P.C. to recall the victim girl P.W.7 for re-examination as she could not give her evidence properly being frightened as her examination was conducted in open Court. The learned trial Court allowed the prayer of the prosecution and recalled P.W.7.

On 23.06.2006 the statement of the victim was recorded in camera and before recording her evidence, the learned trial Court again put some formal questions which she answered satisfactorily. The learned trial Court put a pertinent question as to whether on the previous occasion she did not tell anything in the Court out of fear, the victim replied in affirmative by nodding her head. After such examination, the learned trial Court was of the view that the victim was competent to depose in the Court. The recall order dated 20.06.2006 passed by the learned trial Court was not challenged by the defence and in pursuance to such unchallenged order when the Court re-examined the victim invoking its power under Section 311 Cr.P.C. and on re-examination found the victim to be competent to testify as she was understanding the questions put to her and giving rational answer to those questions, it cannot be said that any illegality has been committed by the learned trial Court in re-examining the victim.

The approach of the learned trial Court to record the statement of the minor girl who is a victim of rape in open Court at the first instance was certainly unwarranted and illegal. That was perhaps the reason why the victim got frightened and did not answer anything. When on the second instance, the statement was recorded in camera; she narrated the incident in detail.

In **State of Punjab** v. **Gurmit Singh reported in AIR 1996 SC 1393,** the Hon'ble Supreme Court highlighted the importance of provisions of section 327 (2) and (3) Cr.P.C. and a direction was issued not to ignore the mandate of the aforesaid provisions and to hold the trial of rape cases in

camera. It was also pointed out that such a trial in camera would enable the victim of crime to be a little comfortable and answer the questions with greater ease and thereby improve the quality of evidence of a prosecutrix because there she would not be so hesitant or bashful to depose frankly as she may be in an open Court, under the gaze of the public.

In case of **Sakshi –V- Union of India reported in AIR 2004 SC 3566,** it is held as follows:-

> "34. The writ petition is accordingly disposed of with the following directions.
>
> (1) The provisions of sub-section (2) of section 327 Cr.P.C. shall, in addition to the offences mentioned in the sub-section, would also apply in inquiry or trial of offences under Sections 354 and 377 IPC.
>
> (2) In holding trial of child sex abuse or rape:
>
> (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
>
> (ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
>
> (iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.
>
> These directions are in addition to those given in **State of Punjab –v- Gurmit Singh**."

In view of the settled position of law, when the learned trial Court did not record the statement of the victim in camera at the first instance and when the mistake committed by him was brought to his notice by the prosecutor by filing a petition under section 311 Cr.P.C., he allowed such petition and re-examined the victim in camera. The contention of the learned counsel for the appellant that the victim of rape should not have been recalled at the instance of the prosecution for re-examination when she was declared incompetent to testify at the first instance is not acceptable.

The evidence of a child witness can be considered in view of the provisions under Section 118 of Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The Court has to take precaution while assessing the evidence of a child witness that he/she is a reliable witness and his/her demeanour reveals like any other competent witness and there was no likelihood of being tutored.

The victim on her re-examination has stated that the appellant took her and her brother Ramesh to see Makar Festival in a cycle and on the way the appellant raped her. The learned trial Court put a pertinent question to the victim as to what did she mean by "rape"? The victim replied that the appellant penetrated his private part in her private part and showed her private part where the penetration took place. She further stated that the appellant removed his pant and then removed her pant and then inserted his private part inside her private part. The learned trial Court put a question to the victim whether she felt any pain at that time; the victim replied that she cried.

The learned counsel for the appellant challenged the evidence of the victim that she had been tutored to depose against the appellant. I am not able to accept the contention inasmuch as there was no earthly reason on the part of her family members to falsely implicate the appellant in a case of rape of their minor daughter. The victim stated that she heard the word 'rape' from her mother and her mother told her to depose in the Court. From this line of statement of the victim, it is very difficult to come to a conclusion that she was tutored by her family members to depose against the appellant. To a question put by the Court, she has stated that her mother told her to depose truth. She has denied to the suggestion of the defence that the appellant had not committed sexual intercourse and that there was no such occurrence and that being tutored by her mother and police, she was deposing falsely. The learned trial Court marked her demeanour wherein it is mentioned that the victim repeatedly told in the Court that the appellant raped her.

P.W.6 is the doctor who examined the victim on 20.1.2006 at Rourkela Government Hospital on police requisition. She found redness over the inner part of labia minora on both side and the hymen was admitting 3/4 finger. She further stated that the possibility of sexual intercourse within seven days cannot be ruled out. She further stated that as there was

congestion redness in the inner part of labia minora, she was of the conclusion that there was sexual intercourse with the victim within seven days. The doctor denied the suggestion of the defence that congestion redness was possible either by infection or by nail mark. She has further stated that the injury found on the private part of the victim girl was possible due to slight penetration. The medical examination report of the victim has been marked as Ext.4.

The statement of the victim is also corroborated by P.W.1 as well as P.W.3 who are the parents of the victim. No infirmity is found either in the evidence of the victim or in the medical evidence. Nothing has been elicited in the cross-examination to discredit the version of any of these witnesses.

The evidence of a child witness cannot be discarded merely because it is not corroborated by other evidence though as a matter of prudence the Court requires such corroboration. Where the statement of the child witness inspires confidence of the Court and there is no embellishment or improvement in her statement, the evidence of the child witness even though uncorroborated can be acted upon.

In case of **State of Punjab –v- Gurmit Singh reported in AIR 1996 SC 1393**, the Hon'ble Supreme Court has given guidance to the Courts how to appreciate the evidence of prosecutrix in cases of rape.

> "20……..We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of the victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulders a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence

> which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with case involving sexual molestations."

In the instant case, I found that the evidence of the victim P.W.7 is not only reliable and truthful but it is corroborated by other evidence and therefore I am of the view that the learned trial Court was justified in acting upon the evidence led by the prosecution to convict the appellant.

8. No doubt the wearing apparels of the appellant as well as the victim and sealed packet containing semen and pubic hair of the appellant as well as virginal swab of the victim were sent for chemical examination on 15.2.2006 to the Deputy Director, R.F.S.L., Ainthapali, Sambalpur through the learned S.D.J.M., Panposh, Rourkela but the chemical examination report was not furnished by the Deputy Director till the conclusion of the trial. It appears from the order sheet of the learned trial Court that neither the prosecution took any step to obtain the chemical examination report nor the learned trial Court suo motu called for such a report even though there were materials available on record that seized articles had been dispatched for chemical examination which was an important piece of uneschewable evidence.

It is the duty of the Magistrate to supply the chemical examination report to the accused along with police papers at the time of commitment of the case to the Court of Sessions in view of section 207 Cr.P.C. and Rule 50 of the G.R.C.O. (Criminal) of High Court of Judicature, Orissa if the same is available on record. If the same is not available on record and not supplied to the accused before commitment, it is the duty of the prosecutor as well as the trial Court to see that the chemical examination report is made available even before the charges are framed and copy of such report is furnished to the accused. The trial Court has also a duty and responsibility to send reminder to the Director/Dy. Director of the Forensic Science Laboratory to send the chemical examination report and in spite of such reminder, if no report is furnished, the Court should take concrete steps against the erring officials for non-production of such report in the interest of justice. The Director/Deputy Director of the Forensic Science Laboratories should send the chemical examination report to the concerned Court within a reasonable period preferably in two months of the receipt of seized exhibits for analysis.

Forensic Science plays a vital role in criminal justice delivery system providing the investigators with scientific based information through analysis of physical evidence. Unfortunately the police and the prosecutors often fail to obtain results from laboratories quickly enough to determine the accusations against a person. Instances are not unknown where the doctors conducting post mortem reserve their final opinion regarding cause of death of the deceased awaiting viscera report. In such situations, non-receipt of the report or delayed receipt of report creates obstacles in arriving at truth and hamper the course of justice. Nobody has a right to play with the lives of the persons who are facing trial for a serious charge and also to deprive the victims from getting proper justice. The reports of the Government scientific experts can be used as evidence in view of the provisions under section 294 Cr.P.C. Non-availability of a chemical examination report before the trial Court can have a far reaching consequence in a criminal trial and can cause serious judgmental errors. It is submitted by the learned counsel for the State that due to shortage of Scientific Officers/ Analysts in the Forensic Science Laboratories and huge number of pendency of cases for analysis, there use to be delay in giving the chemical examination report. It is the duty of the State Government to provide sufficient staff and competent officers for examination of the seized exhibits in the Forensic Science Laboratories for speedy and effective analysis and to furnish accurate forensic reports for the proper dispensation of justice delivery system.

In this case even though non-availability of chemical examination report was not raised during trial and it was raised for the first time before this Court in appeal but since in the meantime more than nine years have already passed since the date of dispatch of the articles for chemical examination, I do not think it proper to call for such report from the concerned Forensic Science Laboratory.

9. Even in absence of chemical examination report, I find that the statement of the victim is reliable and truthful and the same is corroborated by the evidence of her parents as well as by the medical evidence and accordingly I am of the view that the prosecution has successfully established the case against the appellant beyond all reasonable doubt and there is no infirmity in the impugned judgment and order of conviction passed by the learned trial Court. The learned trial Court has imposed the minimum sentence prescribed for such heinous offence. The measure of punishment in a case of rape depends upon the conduct of the accused, the state and age of the sexually

assaulted female and the gravity of the criminal act. The learned trial Court considered all the relevant facts and circumstance bearing on the question of sentence and proceeded to impose the minimum sentence commensurate with the gravity of the offence. Though the section provided for imposition of lesser sentence than ten years for any adequate and special reasons but the learned trial Court found no extenuating or mitigating circumstances available on the record to justify imposition of any sentence less than the prescribed minimum to the appellant. To show mercy in a case of a heinous crime like this would be travesty of justice and the plea for leniency would be wholly misplaced.

In the result, the impugned judgment and order of conviction of the appellant for offence under Section 376 (2) (f) Indian Penal Code and the sentence of R.I. for a period of ten years and payment of fine of Rs.30,000/-, in default of payment of fine to undergo further R.I. for a period of one year more as was imposed by the learned trial Court is hereby confirmed.

Accordingly, the appeal stands dismissed.

Let a copy of the judgment be sent to the learned Registrar General of this Court for onward communication to all the learned District and Sessions Judges for their information and necessary action at their end with reference to the observations made in paragraph 8 above who in turn are expected to communicate to all the trial Courts under their respective jurisdiction about the same. A copy of the judgment be also sent to the Chief Secretary of State of Odisha for taking immediate remedial steps for appointing sufficient staff and competent analysts in the Forensic Science Laboratories for speedy and effective examination of seized exhibits and furnishing accurate forensic reports within a reasonable period of time to facilitate dispensation of justice.

Appeal dismissed.

2015 (I) ILR - CUT-1241

S.N. PRASAD, J.

O.J.C. NO. 13973 OF 1999

TRAILOKYANATH BEHERA .....Petitioner

.Vrs.

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

SERVICE LAW – Pension – Right to receive pension is recognized as a right to property – Deduction of Rs.2500/- form the pensionary benefit of the petitioner without holding any inquiry as provided under the relevant statute – Action is illegal and unjustified – Held, direction issued to the opposite parties to release Rs. 25, 000/- in favour of the petitioner along with 5% interest P.A. from the date it was deducted. (Paras 5 to 9)

For Petitioner : M/s. M.R.Mohapatra, S.C.Das,B.K.Nayak-3 and S.S.Swain
For Opp. Parties : Addl. Government Advocate

Date of hearing : 3.4.2015
Date of judgment: 3.4.2015

JUDGMENT

S.N.PRASAD, J.

The petitioner has filed this writ petition for refund of sum of Rs.25,000/- which was deducted by the opposite party no.2.

2. The grievance of the petitioner is that he has already retired from the Corporation service on 31.07.1995 and before that he was working as Assistant Manager in charge of Unit Office, Paradeep and after retirement when the retirement benefit has not been released to the petitioner had approached this Court being OJC No.4904 of 1996, wherein the direction was issued to release the retirement benefits and pension of the petitioner together with interest thereon at the rate of 12% per annum, but when the said amount has not been inclined to release the retirement benefits of the petitioner, the petitioner approached this Hon'ble Court by filing successive petition and during the course of pendency of the contempt petition retirement benefit has been released by submitting the cheque only for retirement benefit but did

not inclined to pay the deducting amount of Rs.25,000/-. Accordingly, the said amount could not have been deducted by the management payable to the petitioner but when this Court has been pleased to direct to release the retirement benefit the opposite party had no option but to release the entire amount which the petitioner was legally entitled to be paid.

3. Learned counsel for the petitioner has submits that the opposite party no.2 filed a money suit in the court of Civil Judge (Senior Division) 1st Court, Cuttack against the petitioner bearing Money Suit No. 152 of 1998 to realise Rs. 1, 30, 257/- from the petitioner which is pending for adjudication by the Civil Court hence any deduction before adjudication of the said civil suit is illegal and as such the writ petition has been filed for the direction to the opposite party to release the said amount of Rs. 25,000/- along with interest.

4. After hearing the parties at length the fact which is not disputed is that the opposite party had filed a money suit before the court of the Civil Judge (Senior Division) 1st Court, Cuttack bearing Money Suit No. 152 of 1998 to realise Rs. 1, 30, 257/-. It is also not disputed that Rs.25,000/- has been deducted from the pensionary benefit of the petitioner which the opposite party has not empowered to without initiation of any proceeding as provided under the statute.

5. This aspect of the matter has been settled by the Hon'ble Supreme Court in the case of **State of Jharkhand & others vrs. Jitendra Kumar Srivastava & others reported in (2013) 12 SCC 210** wherein at Paras- 14 and 16 which is being reproduced herein below:-

> "The right to receive pension was recognized as a right to property by the Constitution Bench judgment of this Court in Deokinandan Prasad vrs. State of Bihar, as is apparent from the following discussion: (SCC) pp. 342-43, paras 27-33).
>
> "27. The last question to be considered, is, whether the right to receive pension by a government servant is property, so as to attract Articles 19(1) (f) and 31 (1) of the Constitution. This question falls to be decided in order to consider whether the writ petition is maintainable under Article 32. To this aspect, we have already adverted to earlier and we now proceed to consider the same.
>
> 28. According to the petitioner the right to receive pension is property and the respondents by an executive order dated 12-6-1968

have wrongfully withheld his pension. That order affects his fundamental rights under Articles 19(1)(f) and 31(1) of the Constitution. The respondents, as we have already indicated, do not dispute the right of the petitioner to get pension, but for the order passed on 5-8-1996. There is only a bald averment in the counter-affidavit that no question of any fundamental right arises for consideration. Mr. Jha, learned counsel for the respondents, was not prepared to take up the position that the right to receive pension can not be considered to be property under any circumstances. According to him, in this case, no order has been passed by the State granting pension. We understand the learned counsel to urge that if the State had passed an order granting pension and later on resiles from the order, the later order may be considered to affect the petitioner's right regarding property so as to Attracts 19(1)(f) and 31 (1) of the Constitution.

29. We are not inclined to accept the contention of the learned counsel for the respondents. By a reference to the material provision in the Pension Rules, we have already indicated that the grant of pension does not depend upon an order being passed by the authorities to that effect. It may be that for the purposes of qualifying the amount having regard to the period of service and other allied matters, it may be necessary for the authorities to pass an order to that effect, but the right to receive pension flows to an officer not because of the said order but by virtue of the rules. The rules, we have already pointed out, clearly recognize the right of person like the petitioners to receive pension under the circumstances mentioned therein.

30. The question whether the pension granted to a public servant is property attracting Articles 31(1) came up for consideration before the Punjab High Court in Bhagwant Singh v. Union of India. It was held that such a right constitutes 'property' and any interference will be a breach of Article 31(1) of the constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive pension. This decision was given by a learned Single Judge. This decision was taken up in letters patent appeal by the Union of India. The Letters Patent Bench in its decision in Union of India v/s Bhagwant Singh approved the decision of the learned Single Judge. The Letters Patent

Bench held that the pension granted to a public servant on his retirement is 'property' within the meaning of Article 31(1) of the Constitution and he could not be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as 'property' cannot possibly undergo such mutation at the whim of a particular person or authority.

31. The matter again came up before a Full Bench of the Punjab and Haryana High Court in K.R. Erry v. State of Punjab. The High Court had to consider the nature of the right of an officer to get pension. The majority quoted with approval the principles laid down in the two earlier decisions of the same High Court, referred to above, and held that the pension is not to be treated as a bounty payable on the sweet will and pleasure of the Government and that the right to superannuation pension including its amount is a valuable right vesting in a government servant. It was further held by the majority that even though an opportunity had already been afforded to the officer on an earlier occasion for showing cause against the imposition of penalty for lapse or misconduct on his part and he has been found guilty, nevertheless, when a cut is sought to be imposed in the quantum of pension payable to an officer on the basis of misconduct already proved against him, a further opportunity to show cause in that regard must be given to the officer. This view regarding the giving of further opportunity was expressed by the learned Judges on the basis of the relevant Punjab Civil Service Rules. But the learned Chief Justice in his dissenting judgment was not prepared to agree with the majority that under such circumstances a further opportunity should be given to an officer when a reduction in the amount of pension payable is made by the State. It is not necessary for us in the case on hand, to consider the question whether before taking action by way of reducing or denying the pension on the basis of disciplinary action already taken, a further notice to show cause should be given to an officer. That question does not arise for consideration before us. Nor are we concerned with the further question regarding the procedure, if any, to be adopted by the authorities before reducing or withholding the pension for the first time after the retirement of an officer. Hence we express no opinion regarding the views expressed by the majority and the minority

Judges in the above Punjab High Court decision on this aspect. But we agree with the view of the majority when it has approved its earlier decision that pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a government servant.

32. This Court in State of M.P. v. Ranojirao Shinde had to consider the question whether a 'cash grant' is 'property' within the meaning of that expression in Articles 19(1)(f) and 31(1) of the Constitution. This Court held that it was property, observing 'it is obvious that a right to sum of money is property.'

33. Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Article 31 (1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by clause(5) of Article 19. Therefore, it follows that the order dated 12.6.1968, denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1) of the Constitution, and as such the writ petition under Article 32 is maintainable. It may be that under the Pension Act (23 of 1871) there is a bar against a civil court entertaining any suit relating to the matters mentioned therein. That does not stand in the way of writ of mandamus being issued to the State to properly consider the claim of the petitioner for payment of pension according to law."

fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognized as a right in "Property". Article 300-A of the Constitution of India reads as under:-

"300-A. Persons not to be deprived of property save by authority of law.- No person shall be deprived of his property save by authority of law".

Once we proceed on that premise, the answer to the question posed by us in the beginning o this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the constitutional mandate enshrined in Article 300-A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any

statutory provision and under the umbrage of administrative instruction cannot be countenanced."

6. Thus, it has been settled by the Hon'ble Supreme Court that the amount from the pentionary benefit cannot be recovered without holding any enquiry as provided under the statute.

7. Although certain amount has been released and a sum of Rs. 25,000/- has been deducted from the retirement benefit, which is absolutely unjustified decision of the opposite party without initiating any proceeding or even issuing any notice to the petitioner.

8. Moreover, since the opposite parties have already filed a money suit for recovery a sum of Rs.1, 30, 257/- in that view of the matter also there is no justifiable deduction a sum of Rs.25,000/- from the salary petitioner.

9. Hence, in view of the ratio as decided by the Hon'ble Supreme Court as referred above and in view of the facts and circumstances of this case the opposite parties are hereby directed to release a sum of Rs. 25,000/- along with 5% interest from the date of realization within the period of 8 weeks from the date of receipt of copy of this order if it has not already been released in favour of the petitioner.

10. It is made clear that this order shall not come in any way in the money suit pending before the Court of the Civil Judge (Senior Division) 1st Court, Cuttack bearing Money Suit No. 152 of 1998 to realise Rs. 1, 30, 257/-. With such observation and direction the writ application is disposed of.

Writ petition disposed of.

2015 (I) ILR - CUT-1247

K.R. MOHAPATRA, J.

F.A.O. NO. 325 OF 2014

PRATIMA NANDA .....Appellant

.Vrs.

M/S. ECOS EYE HOSPITAL & ANR. .....Respondents

CIVIL PROCEDURE CODE, 1908 – O-39, R-1 & 2

Temporary Injuction – To obtain such equitable relief plaintiff has to satisfy all the ingredients like prima facie case, balance of convenience and irreparable loss – Mere proof of one of the three conditions does not entitle him to obtain temporary injuction.

In this case plaintiff alleged that due to demolition of old house and construction of new house by the defendants there was damage to his house for which he filed the suit for damages – Though he is to establish the same by cogent evidence it can be said that there is a prima facie case in her favour – Secondly by the time plaintiff filed the suit the building work is almost completed and if now defendants will be restrained they will be put to more inconvenience than that of the plaintiff so balance of convenience does not lie in favour of the plaintiff – Lastly since the plaintiff has quantified the damages in terms of money she can not be said to have sustained irreparable loss if injuction is refused – Held, when the plaintiff-appellant fails to satisfy the ingredients like balance of convenience and irreparable loss, she is not entitled to temporary injuction – The impugned order needs no interference by this Court. (Para 5 to 9)

Date of Judgment: 05.05.2015

JUDGMENT

K.R. MOHAPATRA, J.

Order dated 22.04.2014 passed by the learned Civil Judge (Senior Division), Berhampur in I.A. No. 92 of 2013 arising out C.S. No. 361 of 2013 dismissing the interlocutory application filed under Order 39 Rule 1 and 2 read with Section 151 of the C.P.C. by the plaintiff is under challenge in this appeal.

2. In this appeal, the plaintiff is the appellant and the defendants are the respondents. The appellant filed C.S. No. 361 of 2013 in the court of learned Civil Judge (Senior Division), Berhampur on 14.06.2013 for a decree of specific performance of contract executed between the appellant and respondents, or in the alternative, to pass a decree directing the defendants to pay a sum of Rs.15,73,000/- towards construction and labour charges as per the estimation of the Civil Engineer and for mental agony of the plaintiff. She further claimed Rs. 50,000/- towards litigation expenses and also prayed for a decree of permanent injunction against the respondents not to proceed with the construction work causing damage to the appellant's building and common joint wall.

3. The case of the appellant as enumerated in gist is that one Prafulla Kumar Nanda (father-in-law of the appellant) and his brother (Prabodh Kumar Nanda) were the joint owners of a building which includes the suit plot. By virtue of a registered deed of partition bearing no. 939 dated 24.06.1967, there was a partition between two brothers and the entire building was partitioned between two brothers by constructing a common wall in between. While the matter stood thus, after the death of Prabodh Kumar Nanda in the year 2000, his legal heirs sold their share of the plot and building standing thereon to the respondent no. 1 by virtue of a registered sale deed in the year, 2003. It is alleged that on 28.7.2012, the respondents started demolition of the old structure of the building by using bulldozer which caused damage to the portion of the building fell to the share of the appellant. When the appellant protested the same, the respondent no. 2 gave a declaration in writing on 31.7.2012 that he would reimburse the damage or loss, if any, caused to the building properly. As there was damage to the common wall, the appellant repaired the same by spending a sum of Rs.4,900/-. Subsequently, the respondents reimbursed the same on 09.05.2013. Since the dissension continued between the parties with regard to demolition and damage caused to the building of the appellant, the respondent no. 2 gave a further declaration in writing on 14.06.2013 that he would reimburse the entire loss, if any, caused to the building for demolition of the old structure they had purchased and construction of a new building thereon. The appellant got the loss and damage caused to her building assessed by a competent Civil Engineer, who computed the same to be Rs.5,73,000/-. As the respondents did not keep their promise, the appellant filed the aforesaid suit.

4. The appellant also filed I.A. No. 92 of 2013 under Order 39 Rule 1 and 2 read with Section 151 of the C.P.C. for an order of temporary injunction restraining the respondents from making further construction of the building they have undertaken. The respondents contested the said petition and filed their objection pleading, inter alia, that they are absolute owners of the property situated to the north side of the suit house of the appellant and they have started construction after obtaining prior approval from the Berhampur Development Authority in the month of May, 2013. They have taken all precautionary measure to avoid any loss or damage of the suit house of the appellant. The appellant is in no way affected and there is no loss or damage to the suit house for the construction work they have undertaken. The respondents have undertaken the construction to run an Eye Hospital, which is for the larger interest of the public. The appellant filed the suit along with the misc. case belatedly for extracting money from the respondents. As such, she has no prima facie case, the balance of convenience does not lean in her favour and she would not suffer any loss or damage, much less any irreparable loss, if the respondents proceeded with the construction of the building. On the other hand, if the respondents are restrained from completing construction of the building in the midway, they would suffer irreparable loss and substantial injury. Hence, they prayed for dismissal of the said petition.

5. The lis is essentially a suit for damage quantifying the same to be Rs. 15,73,000/- along with litigation expenses of Rs. 50,000/-. Though the appellant alleged that damage to the suit house caused due to demolition of the old structure purchased by the respondents and construction of a new building in the said space, the respondents strongly refuted the same. As such, it is a matter of adjudication by leading cogent and convincing evidence by the parties. Hence, there is a fair issue to be decided in the suit. Thus, the appellant has a prima facie case in her favour.

5. It is alleged by the appellant that the respondents started demolition of the old structure on 28.7.2012 by using bulldozer for which there was a damage to the common wall and she repaired the same by spending a sum of Rs. 4900/-. Subsequently, the respondents reimbursed the same on 09.05.2013. It is also not disputed that the appellant started construction in the month of May, 2013 after obtaining due permission and approval of the plan from Berhampur Development Authority. It is further alleged by the

respondents that after proceeding with the construction of the new building substantially for opening an Eye Hospital, the appellant filed the aforesaid suit along with an application under Order 39 Rule 1 and 2 read with Section 151 of the C.P.C. restraining the respondents from proceeding with the construction work.

7. During course of hearing, learned counsel for the respondents submitted that construction work of the building is almost completed and finishing of the interior part of the building is going on. The appellant did not show her promptness in approaching the civil court either at the time when demolition of the old structure was started or when the construction work was started by the respondents in the month of May, 2013, she filed the suit on 26.12.2013. At this stage, if the respondents are restrained from proceeding with the construction work, then they will be put to more inconvenience than that of the appellant. Moreover, it would be for the benefit of none, if the construction work is stopped in the midway, more particularly when the respondents gave a declaration on 14.6.2013 to reimburse any loss or damage caused to the appellant for the construction they have undertaken. As such, the balance of convenience does not lie in favour of the appellant.

8. The appellant has sought for a decree of Rs. 15,73,000/- towards loss and damage caused to her building and has thus quantified the loss in terms of money. Thus, loss, if any, caused to the suit house can never be said to be an irreparable loss.

9. This Court in the case of ***Shyama Kishore Bal -v- Kishore Talkies at Nanpur and others***, reported in 79 (1995) CLT 252, laid down the principles on which grant of temporary injuction rests. Those are ;

"4(i) In the facts and circumstances of each individual case there must exist a strong probability that the petitioner has an ultimate chance of success in the suit. This concept is what is usually known as a prima facie case.

(ii) As the injunction is granted during the pendency of the suit, the Court will interfere to protect the plaintiff from injuries which are irreparable. The expression "irreparable injury" means that it must be material one which cannot be adequately compensated for in damages. The injury need not be actual, but may be apprehended.

(iii) The Court is to balance and weigh the mischief or inconvenience to either side before issuing or withholding the injunction. This principle is otherwise expressed by saying that the court is to look to the balance of convenience.

With the first condition as sine qua non other two conditions should be satisfied by the petitioner conjunctively and mere proof of one of the three conditions does not entitle a person to obtain temporary injunction."

In view of the settled position of law, when the appellant fails to satisfy the ingredients so far as the balance of convenience and irrepairable loss are concerned, she is not entitled to equitable relief or temporary injuction by restraining the respondents from proceeding with the construction work. The impugned order passed by the learned Civil Judge (Senior Division), Berhampur, therefore, needs no interference by this Court. As a result, the appeal fails and the same is accordingly dismissed, but in the circumstance, no order as to cost.

Appeal dismissed.