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

W.A. NO. 106 OF 2012

T. BIMALA ……...Appellant

.Vrs.

C.M.C, CUTTACK & ORS. …….Respondents

A. CONSTITUTION OF INDIA, 1950 – ART, 226

Writ petition – Electrocution death – Claim for compensation - Maintainability – The language of Article 226 does not admit of any limitation on the powers of the High Court – Though there are certain guidelines and self imposed limitations but the same are not mandatory in all circumstances – However, power under Article 226 is wide enough to reach injustice wherever it is found – When a citizen approaches the High Court in writ petition that a wrong is caused, the High Court will step into protect him, whether the wrong was done by the State or any instrumentality of the State and it can not pull down the shutters – Held, the writ petition is maintainable when the undisputed facts clearly reveal the same.

B. TORTS – Electrocution death – Whether electricity authorities can deny liability on the ground that the death of the victim was due to the act of a third party ? Held, No.

A person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings – The basis of such liability is the foreseeable risk inherent in the very nature of such activity – The liability can cast on such person is known, in law as "strict liability" – Held, impugned order passed by the learned single Judge is set aside – Applying the principles of strict liability and res ipsa loquitor, this Court directed the respondents to pay interim compensation of Rs. 2,00,000/- to the appellant leaving her to workout her remedies in the Common Law forum for higher compensation. (Paras 13, 21)

Case Laws Referred to :-

1. (1999) 7 SCC 298: Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) and others v. Smt. Sukamani Das & Anr.
2. AIR 2005 SC 3971: S.D.O. Grid Corporation of Orissa Ltd. and Ors v.

Timudu Oram,
3. (2001) 8 SCC 151 : M.S. Grewal v. Deep Chand Sood.
4. AIR 2005 MP 2 : Ramesh Singh Pawar v. Madhya Pradesh Electricity Board and Ors.
5. AIR 1990 SC 1480 : Charan Lal Sahu v. Union of India.
6. AIR 1987 SC 1690 : Gujarat State Road Transport Corpn. V. Ramanbhai Prabhatbhai
7. AIR 2001 SC 485. : Kaushnuma Begum v. New India Assurance Co. Ltd.

For Appellant : Mr. S.S.Rao
For Respondents : Mr. P.K.Mohanty, Sr. Adv. & B.Dash.

Date of hearing : 15.12.2014
Date of Judgment:15.12.2014

JUDGMENT

DR. A.K. RATH, J.

This appeal has been preferred against the judgment and order dated 23.02.2012 passed by the learned Single Judge in W.P.(C) No.17413 of 2009, whereby and whereunder the writ application filed by the appellant claiming compensation for the death of her son in electrocution has been dismissed.

02. The unfortunate mother is the appellant. Her son T. Kailash Rao was working as a daily wage earner under the contractors of the Cuttack Municipal Corporation (hereinafter referred to as "the Corporation"). On 15.05.2009 on the instruction of the Junior Engineer of the Corporation, he was cleaning the drain near Sunshine Field, Cuttack. During such cleaning, he suddenly came in contact with the live electric wire and died at the spot due to electrocution. Immediately after the accidental death, the Mayor of the Corporation came to the spot and paid an ex gratia of Rs.10,000/-. Thereafter neither the Municipal authorities, nor the electricity authorities paid any compensation to the appellant. An F.I.R. was also lodged by the Sub-Divisional Officer, whereafter Purighat P.S. Case No.49(5) of 2009 was registered against one Babuli Sahoo under Sections 338/379/304(A), I.P.C. read with Section 135 of the Indian Electricity Act, 2003. When all the persuasion of the appellant to pay compensation ended in a fiasco, she filed the writ application claiming compensation of Rs.11,00,000/-.

03. Pursuant to issuance of notice, a counter affidavit has been filed by the respondent no.1-Corporation. Though the accident was admitted, but a stand was taken that the Corporation had no role to play.

04. Respondent nos.2 and 3 had also filed a counter affidavit. The sum and substance of the case of the respondent nos.2 and 3 is that they had taken all precautionary steps to avoid theft of electricity and to avoid any wrong to any person or animal. The electricity had been supplied to the consumers of that area through insulated cable. In spite of that one Sudhakar Sahoo of Upper Telenga Bazar without their knowledge committed theft by hooking and by concealing the hooking wires through that drain. The said theft was not in their knowledge. Thus they were not negligent in any manner. Further the deceased was guilty of contributory negligence as he had not taken proper care before cleaning the drain.

05. Learned Single Judge relying on two decisions of the apex Court in the case of ***Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) and others v. Smt. Sukamani Das and another,*** (1999) 7 SCC 298 and ***S.D.O. Grid Corporation of Orissa Ltd. and others v. Timudu Oram,*** AIR 2005 SC 3971 came to hold that since disputed questions of fact are involved, the writ application is not maintainable. T. Kailash Rao died as a result of act of a third party i.e. Sudhakar Sahoo, who had taken illegal connection of the electricity without the knowledge of the electricity authorities and in that view of the matter, it cannot be said that the officer of the CESU were in any manner negligent. Having held so, learned Single Judge dismissed the writ application.

06. Heard Mr. S.S. Rao, learned counsel for the appellant, Mr. P.K. Mohanty, learned Senior Advocate for the respondent no.1 and Mr. B. Dash, learned counsel for the respondent nos.2 and 3.

07. Having regard to the rival pleading of the parties and contentions advanced by the counsel for the parties, two points emerge for our consideration.

1) Whether a writ application under Article 226 of the Constitution of India is maintainable for payment of compensation when death is caused due to electrocution ?

2) Whether respondent nos.2 and 3 can deny the liability on the ground that the death of T. Kailash Rao was due to act of a third party.

08. The specific case of the appellant is that her son died due to electrocution on 15.5.2009 while cleaning the drain near Sunshine Field, Cuttack. Respondent no.1 admits the same. The Assistant Electrical Inspector, Cuttack conducted a preliminary enquiry on 16.5.2009 and submitted report vide Annexure-A/2 to the EIC-cum-PCEI, Orissa. The said report reveals that on 15.9.2009, 4/5 persons were engaged by the Corporation for cleaning the drain running adjacent to the pole. While cleaning, T. Kailah Rao was electrocuted by coming in contact with damaged hooking service wire, which was taken from the pole. The service wire was taken by one Sudhakar Sahu, who was a non-consumer. Service wire & electrical appliances of said Sahu were seized by the Police. The FIR lodged by the IIC, Purighat P.S. reveals that four nos. of labourers were engaged for cleaning drain, out of whom one came in contact with live wire and died. The post mortem report reveals that death of T. Kailash Rao was due to electrical injuries mentioned therein. The documents such as, FIR, post mortem report and report of the Assistant Electrical Inspector, Cuttack prima facie reveal that death of T. Kailash was due to electric shock.

Point No.1

09. The language of Article 226 of the Constitution does not admit of any limitation on the powers of the High Court for the exercise of jurisdiction thereunder. The power conferred upon the High Courts under Article 226 of the Constitution is wide enough to reach injustice wherever it is found. The apex Court in catena of the decisions laid down certain guidelines and self-imposed limitations have been put there subject to which the High Courts would exercise jurisdiction. Those guidelines cannot be mandatory in all circumstances. When a citizen approaches the High Court in writ petition that a wrong is caused, the High Court will step into protect him, whether that wrong was done by the State or an instrumentality of the State. The High Court cannot pull down the shutters.

10. In ***M.S. Grewal v. Deep Chand Sood,*** (2001) 8 SCC 151, the apex Court observed as under :

> "Next is the issue of "maintainability of the writ petition" before the High Court under Article 226 of the Constitution. The appellants though initially very strongly contended that while the negligence aspect has been dealt with under penal laws already, the claim for compensation cannot but be left to be adjudicated by the civil laws

and thus the Civil Court's jurisdiction ought to have been invoked rather than by way of a writ petition under Article 226 of the Constitution. This plea of non-maintainability of the writ petition though advanced at the initial stage of the submissions but subsequently the same was not pressed and as such we need not detain ourselves on that score, excepting however recording that the law Courts exist for the society and they have an obligation to meet the social aspirations of citizens since law Courts must also respond to the needs of the people. In this context, reference may be made to two decisions of this Court : the first in line is the decision in Nilabati Behera v. State of Orissa, (AIR 1993 SC 1960) wherein this Court relying upon the decision in Rudal Sah (Rudal Sah v. State of Bihar), (AIR 1983 SC 1086) decried the illegality and impropriety in awarding compensation in a proceeding in which the Court's power under Articles 32 and 226 of the Constitution stands involved and thus observed that it was a clear case for award of compensation to the petitioner for custodial death of her son. It is undoubtedly true, however, that in the present context, there is no infringement of the State's obligation, unless of course the State can also be termed to be joint tortfeasor, but since the case of the parties stands restricted and without imparting any liability on the State, we do not deem it expedient to deal with the issue any further except noting the two decisions of this Court as above and without expression of any opinion in regard thereto."

11. In this connection, we would like to profitably quote a paragraph from a decision of Madhya Pradesh High Court in the case of ***Ramesh Singh Pawar v. Madhya Pradesh Electricity Board and others,*** AIR 2005 MP 2. It is held as follows:

"Currently judicial attitude has taken a shift from the old doctrine concept and the traditional jurisprudentia system – affection of the people has been taken note of rather serious and the judicial concern thus stands on a footing to provide expeditious relief to an individual when needed rather than taking recourse to the old conservative doctrine of the Civil Court's obligation to award damages. As a matter of fact the decision in D.K. Basu has not only dealt with the issue in a manner apposite to the social need of the "Country but the learned Judge with his usual felicity of expression firmly established

> the current trend of justice-oriented approach". Law Courts will lose their efficacy if they cannot possibly respond to the need of the society – technicalities their might be many but the justice-oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice."

12. Thus we hold that a writ application for payment of compensation for the death of a person in electrocution is maintainable when the undisputed facts clearly reveal the same.

Point No.2

13. A person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability".

14. The doctrine of strict liability has its origin in English Common Law when it was propounded in the celebrated case of ***Rylands v. Fletcher,*** 1868 Law Reports (3) HL 330, Justice Blackburn had observed thus:

> "The rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does so he is prima facie answerable for all the damage which is the natural consequence of its escape."

15. There are seven exceptions formulated by means of case law to the said doctrine. One of the exceptions is that "Act of stranger i.e. if the escape was caused by the unforeceable act of a stranger, the rule does not apply". (Winfield on Tort, 15th Edn. Page 535).

16. The rule of strict liability has been approved and followed in many subsequent decisions in England and decisions of the apex Court are a legion to that effect. A Constitution Bench of the apex Court in ***Charan Lal Sahu v. Union of India,*** AIR 1990 SC 1480 and a Division Bench in ***Gujarat State Road Transport Corpn. V. Ramanbhai Prabhatbhai,*** AIR 1987 SC 1690 had followed with approval the principle in Rylands (supra). The same

principle was reiterated in ***Kaushnuma Begum v. New India Assurance Co. Ltd.,*** AIR 2001 SC 485.

17. Sukamani Das (supra), Timudu Oram (supra) on which reliance has been placed by the learned Single Judge, the question of a strict liability was not taken up in those cases.

18. Sukamani cannot be understood as laying a law that in every case of tortious liability recourse must be had to a suit. When there is negligence on the face of it and infringement of Article 21 is there, it cannot be said that there will be any bar to proceed under Article 226 of the Constitution, since right of life is one the basic human rights guaranteed under Article 21 of the Constitution.

19. In ***M.P. Electricity Board v. Shail Kumar and others,*** AIR 2002 SC 551, one Jogendra Singh, a workman in a factory, was returning from his factory on the night of 23.8.1997 riding on a bicycle. There was rain and hence the road was partially inundated with water. The cyclist did not notice the live wire on the road and hence he rode the vehicle over the wire which twitched and snatched him and he was instantaneously electrocuted. He fell down and died within minutes. When the action was brought by his widow and minor son, a plea was taken by the Board that one Hari Gaikwad had taken a wire from the main supply line in order to siphon the energy for his own use and the said act of pilferage was done clandestinely without even the notice of the Board and that the line got unfastened from the hook and it fell on the road over which the cycle ridden by the deceaseds slided resulting in the instantaneous electrocution. In paragraph 7, the apex Court held as follows:

> "It is an admitted fact that the responsibility to supply electric energy in the particular locality was statutorily conferred on the Board. If the energy so transmitted causes injury or death of a human, being, who gets unknowingly trapped into if the primary liability to compensate the sufferer is that of the supplier of the electric energy. So long as the voltage of electricity transmitted through the wires is potentially of dangerous dimension the managers of its supply have the added duty to take all safety measures to prevent escape of such energy or to see that the wire snapped would not remain live on the road as users of such road would be under peril. It is no defence on the part of the management of the Board that somebody committed mischief

by siphoning such energy of his private property and that the electrocution was from such diverted line. It is the look out the managers of the supply system to prevent such pilferage by installing necessary devices. At any rate, if any live wire got snapped and fell on the public road the electric current thereon should automatically have been disrupted. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps."

20. The principle of res ipsa loquitur is well known. It is explained in a very illustrative passage in ***Clerk & Lindsell on Torts,*** 16th Edn., pp. 568-569, which reads as follows:

"Doctrine of *res ipsa loquitur.* The onus of proof, which lies on a party alleging negligence is, as pointed out, that he should establish his case by a pre-ponderance of probabilities. This he will normally have to do by proving that the other party acted carelessly. Such evidence is not always forthcoming. It is possible, however, in certain cases for him to rely on the mere fact that something happened as affording *prima facie* evidence of want of due care on the other's part: '*res ipsa loquitur* is a principle which helps him to do so'. In effect, therefore, reliance on it is a confession by the plaintiff that he has no affirmative evidence of negligence. The classic statement of the circumstances in which he is able to do so is by *Erle,* C.J.:

'There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.'

It is no more than a rule of evidence and states no principle of law. "This convenient and succinct formula", said *Morris,* L.J., "possesses no magic qualities; nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin". It is only a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any

particular act or omission producing the result. The court hears only the plaintiff's side of the story, and if this makes it more probable than not that the occurrence was caused by the negligence of the defendant, the doctrine *res ipsa loquitur* is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability. It is not necessary for *res ipsa loquitur* to be specifically pleaded."

21. In view of the above, we have no option but to set aside the judgment and order dated 23.02.2012 passed by the learned Single Judge in W.P.(C) No.17413 of 2009. Applying the principles of strict liability and *res ipsa loquitur*, we direct the respondents to pay interim compensation of Rs.2,00,000/- (rupees two lakhs) to the appellant within two months leaving the appellant to workout her remedies in the common law forum for higher compensation. The Writ Appeal is allowed.

Appeal allowed.

2015 (II) ILR - CUT- 9

FULL BENCH

P.K.MOHANTY, J., DR. A.K.RATH, J. & B. MOHANTY J.

W.P.(C) NO. 10431 OF 2012

KALIA HATI & ORS. ..... Petitioners

.Vrs.

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

ODISHA INDUSTRIAL INFRASTRUCTURE DEVELOPMENT CORPORATION ACT, 1980 – Ss. 2(h), 2(i), 14, 15 & 31

Whether under the provisions of the OIIDCO Act, 1980, IDCO can cause acquisition of land only for the purpose of establishing industrial estate/industrial area and for no other purpose? Held, under the provisions of the OIIDCO Act, 1980 the Corporation can acquire

land not only for the purpose of establishing industrial estate/industrial area but also for other purposes. (Para 13)

Case Laws Referred to :-

1. 2012 (Sup-II) OLR 349 : Rajkumr Gunawant & Anr. -V- State of Orissa & Ors.
2. 2014 (II) ILR-CUT-64 : Sachalabala Sethy & Ors. -V- Chief Secy. & Chief Development Commission, Odisha & Ors.
3. AIR 1987 SC 1454 : Utkal Contractors & Joinery Pvt. Ltd. -V- State of Orissa.
4. AIR 1978 SC 995 : Punjab Beverages Pvt. Ltd. -V- Suresh Chand
5. OLR Full Bench (1990) 628 : Laxminarayan Sahu -V- State of Orissa & Ors.
6. AIR 1970 SC 2097 : Shiv Kirpal Singh -V- Shri V.V. Giri.
7. AIR 1945 PC 156 L : King Emperor -V- Sibnath Banerji.

For Petitioners : M/s. Samir Ku. Mishra, M.K.Pati, R.K.Mohapatra & B.P.Satpathy

For Opp. Parties : Mr. J.P.Patnaik (AGA), (for O.Ps. 1, 3, 4 & 7)
Mr. G.Mukherjee (for O.P. 2)
Mr. J. Das & S.S. Das, Sr. Adv. (for O.Ps. 5 & 6)

Date of hearing : 11. 05. 2015
Date of judgment : 30. 06. 2015

JUDGMENT

P.MOHANTY, J.

This Full Bench has been constituted on the basis of a reference made by a Division Bench of this Court by order dated 05.05.2015 to answer the following question:

> "Whether in the background of the entire Scheme of OIIDCO Act, 1980 would it be proper to say that as per the said Act, IDCO can cause acquisition of land only for the purpose of establishing industrial estate/industrial area and for no other purpose?"

2. The above reference has been made in view of the conflicting views expressed on the aforesaid issue by the two Division Benches of this Court in

Rajkumar Gunawant & another v. State of Orissa & others, 2012 (Sup-II) OLR 349 and ***Sachalabala Sethy & others v. Chief Secretary & Chief Development Commission, Odisha & others***, 2014 (II) ILR -CUT- 64.

3. In ***Rajkumar Gunawant*** (supra) a Division Bench of this Court held that on a reading of the objects and reasons of the preamble of the Orissa Industrial Infrastructure Development Corporation Act, 1980 (hereinafter referred to as "the Act 1980") and definitions of "Industrial Area" and "Industrial Estate" as defined in Sections 2(h) and 2(i) and provision of Sections 14, 15 and 31 of the said Act, the Corporation has to acquire land for any "industrial area" to form "industrial estate". Thus the Industrial Development Corporation of Orissa (hereinafter referred to as "the IDCO") can only cause acquisition of land for an "industrial area" in which an "industrial estate" can be established. In ***Sachalabala Sethy*** (supra) a coordinate Bench of this Court without referring to ***Rajkumar Gunawant*** came to hold that sub-section (i) of Section 14 of "the Act 1980" is independent and in no manner limited by the illustrations contained in sub-section (ii) of Section 14.

4. At this stage, it is apposite to glance through the relevant provisions of "the Act 1980", which was enacted by the State Legislature to provide for the establishment of a Corporation for the development of industrial infrastructure in the State of Odisha.

> Section 2(h) of "the Act 1980" defines "industrial area" to mean–
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> "(h) "**industrial area**" means any area declared to be an industrial area by the State Government by notification, which is to be developed and where industries, industrial housing and related services are to be accommodated"
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> "Industrial estate" is defined by Section 2(i) to mean –
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> "(i) "**industrial estate**" means any site selected by the State Government where the Corporation builds factories and other buildings, services and amenities and makes them available for any industry or class of industries"

5. Sections 14, 15 and 31 of "the Act 1980", which are hub of the issue, are quoted below;

"14. Functions. - The functions of the Corporation shall be –

(i) generally to promote and assist in the rapid and orderly establishment, growth and development of industries, trade and commerce in the State; and

(ii) in particular, and without prejudice to the generality of Clause (i) to-

(a) establish and manage industrial estates at places notified by the State Government;

(b) develop industrial areas notified by the State Government for the purpose and make them available for undertakings to establish themselves;

(c) undertake schemes or works, either jointly with other corporate bodies or institutions, or with Government or local authorities, or on an agency basis, in furtherance of the purposes for which the Corporation is established and all matters connected therewith;

(d) provide or cause to be provided amenities and common facilities in industrial estates and industrial areas and construct and maintain or cause to be maintained works and buildings thereof;

(e) make available buildings on hire or sale to industrialists or persons intending to start industrial undertakings;

(f) construct buildings for the housing of the employees of such industries and employees of the Corporation.

15. General powers of the Corporation. - Subject to the provisions of this Act, the Corporation shall have power :

(a) to acquire and hold such property, both movable and immovable, as the Corporation may deem necessary for the performance of any of its activities, and to lease, sell, exchange or otherwise transfer any property held by it on such conditions as may be deemed proper by the Corporation;

(b) to purchase by agreement or to take on lease or under any form of tenancy any land to erect such buildings and to execute such other works as may be necessary for the purpose of carrying out its duties and functions;

(c) to allot plots, factory sheds or buildings or part of buildings, including residential tenements, to suitable persons in the industrial estates established or developed by the Corporation;

(d) to modify or rescind such allotments, including the right and power to evict the allottees concerned on breach of any of the terms or conditions of the allotment;

(e) to constitute advisory committees to advise the Corporation;

(f) to engage suitable consultants or persons having special knowledge or skill to assist the Corporation in the performance of its functions;

(g) to enter into and perform all such contracts as it may consider necessary or expedient for carrying out any of its functions; and

(h) to do such other things and perform such acts as it may think necessary or expedient for the proper conduct of its functions and the carrying into effect the purposes of this Act.

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31. Acquisition of land. - (1) Whenever any land is required, by the Corporation for any purpose of furtherance of the objects of this Act, but the Corporation is unable to acquire it by agreement, the State Government may, upon an application of the Corporation in that behalf, order proceedings to be taken under the Land Acquisition Act, 1894 (1 of 1894) for acquiring the same on behalf of the Corporation as if such lands were needed for a public purpose within the meaning of that Act.

(2) The amount of compensation awarded and all other charges incurred in the acquisition of any such land shall be forthwith paid by the Corporation and thereupon, the land shall vest in the Corporation."

6. The basic approach to the interpretation of a statute has been succinctly put in the case of ***Utkal Contractors and Joinery Pvt. Ltd. v. State of Orissa***, AIR 1987 SC 1454. Paragraph-9 of the judgment is quoted hereunder:

> "……..A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute ? There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation."

7. All provisions of a statute have to be read harmoniously and any interpretation has to be *ex viseribus actus*. In ***Punjab Beverages Pvt. Ltd. v. Suresh Chand,*** AIR 1978 SC 995, the Supreme Court quoted with approval the immortal words of Lord Coke that "it is the most natural and genuine exposition of a statute, to construe one part of a statute by another part of the same statute, for that best expresseth meaning of the makers'.

8. A Full Bench of this Court in ***Laxminarayan Sahu v. State of Orissa and others***, 'OLR' Full Bench (1990) 628 observed that it is a cardinal rule of construction of statute that the construction must be put from the bare words of the Act itself, if the language used is clear and unambiguous. In the construction of a statute, the words must be interpreted in their ordinary grammatical sense, unless there be something in the context or in the object of the statute in which they occur or in the circumstances with reference to which they are used to show that they are used in a special sense different from their ordinary grammatical meaning.

9. In the backdrop of the aforesaid well settled principles with regard to the statutory interpretation, the provisions of "the Act 1980" quoted supra may be examined.

10. Section 14(i) of "the Act 1980" deals with functions of the Corporation. It provides that the functions of the Corporation shall be generally to promote and assist in the rapid and orderly establishment, growth and development of industries, trade and commerce in the State. Section 14(ii) starts with "in particular, and without prejudice to the generality of Clause (i)". Thereafter it provides various particular purposes for which acquisition can be made.

11. What is the meaning of the expression "in particular, and without prejudice to the generality" appearing in Section 14(ii) of "the Act 1980"?

In ***Shiv Kirpal Singh v. Shri V. V. Giri***, AIR 1970 SC 2097, the Supreme Court relying on the decision of the Privy Council in the case of ***King Emperor v. Sibnath Banerji***, AIR 1945 PC 156 held that when the expression "without prejudice to the generality of the provisions" is used anything contained in the provisions following the said expression is not intended to cut down the generality of the meaning of the preceding provision. For better appreciation, paragraphs 39 and 41 of the judgment are quoted hereunder:

> "**39.** Chapter IXA of the Penal Code which deals with offences relating to elections was introduced in the Code by the Indian Election Offences and Inquiries Act (XXXIX of 1920). Section 171A defines 'candidate' and 'electoral right'. An electoral right means the right of a person to stand or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election. Section 171C, which deals with the offences of undue influence reads as- under:
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> "(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.
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> (2) Without prejudice to the generality of the provisions of sub-section (1), whoever (a) threatens any candidate or voter, or any

person in whom a candidate or voter is interested, with injury of any kind, or (b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section(1)."

Sub-section (3) lays down that

"A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section."

Section 171F provides for the penalty for the offence of undue influence which is either imprisonment upto one year or with fine or both.

Section 171G provides:

"Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either, knows or believes to be false or does not believe to be true in relation to the personal character or conduct of any candidate shall be punished with fine."

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41. We do not think that the Legislature, while framing Chapter IXA of the Code ever contemplated such a dichotomy or intended to give such a narrow meaning to the freedom of franchise essential in a representative system of government. In our opinion the argument mentioned above is fallacious. It completely disregards the structure and the provisions of Section 171C. Section 171C is enacted in three parts. The first sub-section contains the definition of "undue influence". This is in wide terms and renders a person voluntarily interfering or attempting to interfere with the free exercise of any electoral right guilty of committing undue influence. That this is very wide is indicated by the opening sentence of sub-s. (2), i.e. "without prejudice to the generality of the provisions of sub-section (1)." It is

well-settled that when this expression is used anything contained in the provisions following this expression is not intended to cut down the generality of the meaning of the preceding provision. This was so held by the Privy Council in King-Emperor v. Sibnath Banerji, 1945 FCR 195 = (AIR 1545 PC 156)."

12. From the aforesaid, the conclusion is irresistible that sub-section (i) of Section 14 of "the Act 1980" is independent and is couched in broad terms. The same cannot be in any manner whittled down by the language of sub-section (ii) of Section 14 of "the Act 1980".

13. Thus, the observation made in ***Rajkumar Gunawant*** (supra) that the IDCO can only cause acquisition of land for an "Industrial Area" in which an "Industrial Estate" can be established is *per incuriam*. The functions and general powers of the Corporation as enumerated in Sections 14 and 15 of "the Act 1980" cannot be cabined, cribbed or confined by the language used in Section 14(ii) of "the Act 1980".

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

Reference answered.

2015 (II) ILR - CUT- 17

PRADIP MOHANTY, J. & K.R.MOHAPATRA, J

M.C. NO. 693 OF 2014
(ARISING OUT OF W.A. NO. 417 OF 2014)

ANCHAL BIHARI PATTNAIK & ANR. ..... Appellants

.Vrs.

M/S. INDIAN OIL CORPN. LTD. & ORS. ..... Respondents

LIMITATION ACT, 1963 – S.5

Application for condonation of delay – Delay of ninety five days – The Court considering the application has to carefully draw a distinction between delay and inordinate delay and sufficient cause

Should be a condition precedent for exercise of such power – However the approach should be liberal, pragmatic and justice oriented but the same should not be to legalise injustice.

In this case the petitioner-appellants assailed the impugned judgment before the Apex Court within time and sought permission to withdraw the SLP with liberty to file writ appeal before this Court – Cause shown was sufficient, bonafide and not intentional – Held, delay in filing the writ appeal is condoned subject to payment of cost of Rs. 3000/- (Paras 5, 6, 7)

Case Laws Referred to :-

1. (2013) 12 SCC 649 : Esha Bhattacharjee -v- Managing Committee of Raghunathpur Nafar Academy and others,
2. MANU/OR/0650/2014 : State of Orissa -v- Prafulla Ku. Swain.
3. (1987) 2 SCC 107 : Collector, Land Acquisition, Anantnag and Another –v- Mst. Katiji and Others,
4. (2012) 3 SCC 563 : Chief Post Master and others –v- Living Media India Ltd. & Anr

For Appellants : M/s. Amit Prasad Bose, N.Hota, S.S.Routray, Mrs. V.Kar, D.J.Sahoo & S.K.Dwibedi

For Respondents : Mr. Sanjit Mohanty (Senior Advocate) M/s. S.Nanda, J.K.Naik & I.A.Acharya

Date of order : 15.05.2015

O R D E R

K.R. MOHAPATRA, J.

This misc. case is filed for condonation of delay in filing W.A. No.417 of 2014. The writ appeal is filed assailing the judgment dated 06.08.2014 thereby dismissing W.P.(C) No.21775 of 2011. The Stamp Reporter has pointed out delay of ninety-five days in filing the writ appeal. It has been stated in Paragraphs-3 and 4 of the misc case that assailing the impugned judgment dated 06.08.2014, the petitioner-appellants had moved the Hon'ble Apex Court in S.L.P(C) No. 29334 of 2014, which was filed on 11.10.2014. However, by order dated 14.11.2014, the Hon'ble Apex Court permitted the said SLP to be withdrawn. It is also contended by the learned counsel for the petitioner-appellants that the case record was handed over to him on 01.12.2014 after obtaining the same from the learned counsel at New Delhi

and the aforesaid writ appeal was filed within three days thereafter. Thus, the delay occurred in filing the writ appeal was bona fide and not intentional. On the aforesaid contention, he has prayed for condonation of delay in filing the writ appeal and hearing the writ appeal on merit.

2. Learned counsel for the opposite party-respondents contested the petition for condonation of delay by filing a detailed counter affidavit. It was strenuously urged that SLP(C) No. 29334 of 2014 was filed at a very belated stage i.e. on 11.10.2014. There is no proper explanation for condonation of delay. The cause shown in the petition for condonation of delay is not sufficient and bona fide and there is a delay of more than three months, which is not justified. In support of his contention, learned counsel for the opposite party-respondents relied upon the decision in the case of ***Esha Bhattacharjee -v- Managing Committee of Raghunathpur Nafar Academy and others,*** *reported in (2013) 12 SCC 649* and drew attention to Paragraphs-21 and 22 of the said decision setting out the principles to be adhered for condonation of delay as follows:

"21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1 (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are

required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. (ix) The conduct, behavior and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12. (xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

22.1. (a) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2. (b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

22.3. (c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

22.4 (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters.

3. Learned counsel for the opposite party-respondents also relied upon the decision of this Court in the case of ***State of Orissa –v- Prafulla Ku. Swain*** reported in MANU/OR/0650/2014 in which reliance was placed on the decisions in the cases of ***State of Hariyana –v- Chandra Mani,*** reported in (1996) 3 SCC 132, ***Collector, Land Acquisition, Anantnag and Another –v- Mst. Katiji and Others,*** reported in (1987) 2 SCC 107, ***Chief Post Master and others –v- Living Media India Ltd. & Another,*** reported in (2012) 3 SCC 563.

4. In the case at hand, it is not disputed that the petitioner-appellants had approached the Hon'ble Apex Court in SLP(C) No. 29334 of 2014 assailing the impugned judgment in this writ appeal within the statutory period. However, learned counsel for the petitioner-appellants sought permission of the Hon'ble Apex Court to withdraw the said SLP with a liberty to file a writ appeal before this Court. Permission to withdraw the said SLP was granted vide order dated 14.11.2014. Thereafter, the case record was handed over to the learned counsel for the petitioner-appellants and he filed the present writ appeal.

5. The principles set-forth by the Hon'ble Apex Court in the case of ***Esha Bhattacharjee –v- R.N. Academy***, reported in (2013) 12 SCC 649 are followed in the cases of ***Brijesh Kumar and others –v- State of Haryana*** and ***H. Dohil Constructions Co. P. Ltd. –v- Nahar Exports Ltd***., reported in AIR 2014 SC 1612 and (2015) 1 SCC 680. It is observed in paragraph-11 in the case of Brijesh Kumar and others (supra) as follows:

> "The courts should not adopt an injustice-oriented approach in rejecting the application for condonation of delay. However, the court while allowing such application has to draw a distinction between delay and inordinate delay for want of bona fides of an inaction or negligence would deprive a party of the protection of Section 5 of the Limitation Act, 1963. Sufficient cause is a condition precedent for exercise of discretion by the Court for condoning the delay. This Court has time and again held that when mandatory provision is not complied with and that delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay on sympathic grounds alone".

As such, the Court considering the petition for condonation of delay has to carefully draw a distinction between delay and inordinate delay for want of bona fides of an inaction or negligence would deprive a party of the protection of Section 5 of the Limitation Act, 1963. Moreover, sufficient cause is a condition precedent for exercise of such discretion by the Court for condonation of delay. After careful scrutiny of the pleadings in the misc. case for condonation of delay, it is apparent that there is a delay in filing the aforesaid writ appeal, but at no stretch of imagination, it cannot be termed as 'inordinate delay' taking into consideration the facts and circumstances of the case.

6. It is the trite law that there should be a liberal, pragmatic, justice oriented and non-pedantic approach while dealing with the application for condonation of delay for the Courts, but the same should not be supposed to legalise injustice. As it appears, though the opposite party-respondents urged strenuously that the petition for condonation of delay is not bona fide and there is inordinate delay in filing the appeal, but no material was placed before the Court in support of the same. On the other hand, in order to protect their rights, the petitioner-appellants had approached the Hon'ble Apex Court in SLP (C) No. 29334 of 2014. Realizing that filing of the writ appeal would be proper to challenge the impugned judgment, he sought permission before the Hon'ble Apex Court to withdraw the said SLP and file a writ appeal before this Court.

7. In view of the above, the cause shown by the petitioner-appellants appears to be sufficient for condonation of delay and the delay caused in filing the writ appeal was bona fide and not intentional. Accordingly, the delay in filing the writ appeal is condoned subject to payment of cost of Rs.

3000/- (Rupees three thousand) to the learned counsel for the opposite party-respondents within a period of two weeks from today. The misc. case is accordingly disposed of.

Petition disposed of.

2015 (II) ILR - CUT- 23

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

JCRLA NO.37 OF 2006

NADU PANGI …….. Appellant

.Vrs.

STATE OF ORISSA ……...Respondent

(A) EVIDENCE ACT, 1872 – S. 106

Last seen theory – Death of wife in the mid night – Except the appellant -husband and children no body was present at the incident scene – It is not the defence of the appellant that any intruder has caused the death of his wife – Held, applying Section 106 of the Act it can safely be concluded that it is the appellant who had committed the murder of his wife. (Para 22)

B) CRIMINAL TRIAL – Appellant committed double murder at a short interval but at different times preceded by different facts – Learned trial judge should have framed murder charges against the appellant on both the counts and should have prosecuted him for both the offences by framing two different charges and would have convicted and sentenced him separately for each of the murders – For each crime the accused is required to be prosecuted and if guilt is proved they deserve to be punished for each separate offence un less the picadillo or lesser crime is a genus of graver crime and assimilated in it.

(Para 26)

For Appellant - Mrs. Pramila Mohanty
For Respondent - Mr. D.K. Mishra (Addl. Public Prosecutor)

Date of hearing : 12. 03.2015
Date of Judgment: 25.04.2015

JUDGMENT

VINOD PRASAD, J.

Challenge in this appeal by the solitary appellant Nandu Pangi is to the judgment of his conviction u/s 302 I.P.C. and order of sentence of life imprisonment with fine of Rs. 5000/ and in default in payment of fine to serve additional six months R.I. therefore, recorded by Ad-hoc Additional District and Sessions Judge, Fast Track Court, Malkangiri in Criminal Trial No. 5 of 2005, State versus Nandu Pangi, relating to G.R.Case No. 25 of 2005, P.S.Mudulipada, district Malkangiri.

2. Shorn of insignificant trivialities and stated laconically, prosecution case against the appellant, as was testified during the Sessions trial by fact witnesses, reveal that Chaula Khilla, (herein after referred to as D2), and his wife Indra Khilla/ PW4 resided in village Kandhaguda under the local jurisdiction of Mudulipada police Station district Malkangiri and the couple had a daughter Radha Pangi(herein after referred to as D1), who had married the appellant Nandu Pangi with whom they had three daughters and a son. Appellant was illitom son-in-law and resided in the same village of D2, his father-in-law, but in a separate one bedroom house situated at the southern side of the village road at a distance of hundred feet from his in-laws residence and carried on (D2's) agricultural activities. On the ill-fated occurrence night between 17/18.1.2005 at about 2 a.m. hearing weeping voice of their grandson, both D2 & PW4 woke up and they tramped to the house of D1 and the appellant only to witness their daughter D1 lying dead in a pool of blood and the appellant standing by her side with a Tangia. On query being made by the father, D2, as to why his daughter had been done to death, the appellant instead of replying, pushed father-in-law, D2, on the ground and dealt fatal Tangia blows on his chest causing his instantaneous death as well. The wife/widow/PW4 shrieked for help which attracted Matri Khilla, the informant/PW1, Sona Golari/PW3, Dinbandhu Golari/PW2 (the scribe of FIR), Kania Golari, Uday Khilla and many others at the incident scene who all saw present appellant accused holding a blood stained Tangia and sputtering proclaiming that he had murdered D1 & D2 and whosoever will come near will also face dire consequences of annihilation. Subsequently accused escaped from the occurrence spot.

3. Matri Khilla/PW1, s/o Pandu Khilla, cousin brother of D2, narrated the incident FIR arraigning the appellant as the sole perpetrator of the crime, which was taken down by Dinbandhu Golari/ PW2 and after verifying its contents that PW1 signed on it and then he carried his said FIR Ext.1 to Mudulipada police station at a distance of 18 Kms and lodged it on 18.1.2005 at 7 a.m., which was registered as crime no. 2 of 2005 u/s 302 I.P.C.

4. Jaya Soudo, O.I.C. Mudulipada police Station registered the FIR and immediately engineered the investigation, came to the incident spot and sketched site plan Ext. 8 and thereafter interrogated informant and other witnesses namely Indra Pangi, Padma Pangi, Dombu Golari, Abhi Khila, Laxman Golari, Malati Pangi, Kunia Golari, and Uday Khila, and slated down their statements u/s 161 Cr.P.C. Between 8.45 and 9.15 a.m. inquests on the corpse of both the deceased Radha Pangi/D1 and Chaula Khila/D2 were performed and inquest memos Ext.2 & 3 were prepared and thereafter both the dead bodies were dispatched to C.H.C. Khairaput through Constable M.Dhadia for autopsy examination. Ext. 9 is the command certificate and dead body chalan is Ext. 10. Carrying further investigation I.O. collected blood stained and sample earth and inked seizure lists Ext. 4 & 5. Accused appellant was arrested from village Bandhuguda on 19.1.2005 and his statement was recorded and same day at about 10 a.m., weapon of assault ie: blood stained Tangia(M.O.I) was seized from the possession of the appellant vide seizure list Ext.7. Wearing apparels of the appellant, a check lungi(M.O.II) and a shirt (M.O.III) were also seized same day vide Ext. 6 and on production of clothes of the deceased(M.O.IV to M.O.VI) by Constable M.Dhandia, the same were seized vide seizure list Ext 11. On 28.2.2005 post mortem examination reports of both the deceased were received by the I.O. and consequently on 17.3.2005 I.O. sought expert opinion regarding Tangia to be weapon of crime vide Exts.12 & 13. Recovered exhibits were sent for chemical examination to R.F.S.L. Berhampur through S.D.J.M. Malkangiri. Ext. 13 is the letter sent to R.F.S.L. Berhampur. Completing the investigation, accused appellant was charge sheeted on 16.5.2005 u/s 302 I.P.C.

5. Post mortem examinations on both the corpses were conducted by Dr. Suman Kumar Topno/ PW8 on 18.1.2005 vide autopsy examination reports Ext. 15(Radha Pangi) and Ext. 16 (Chaula Khila). This doctor had also submitted his expert opinion regarding Tangia as weapon of assault vide Exts. 12/2 & 12/3 dated 17.3.2005, opining that injuries sustained by both

the deceased could have been inflicted by the said Tangia. Concerning D1, doctor had noted that she had sustained following ante mortem injuries:-

"(i) *Below the angle of left mandible 3"x1"x2.5" diemension*

(ii) *at the mastoid process of left side 1"x1"x2.5" both the injuries are grievous in nature.*

(iii) *abrasion over the posterior aspect of right forearm 2"x 1/2"x1/2"in dimension. The said injury is simple in nature".*

On internal examination pleura, cartridges of larynx, ring of trachea, were found ruptured, both the right and left lungs were congested and showed petechidial hemorrhages, right half of heart was full of clotted blood, larynx and esophagus fractured and liver, spleen and Kidney congested and showed petechial hemorrhage. Sustained injuries were ante mortem in nature and were inflicted 12 hours before. The death had ensued because of rupture of esophagus and trachea which had caused anoxia vasovagal shock combined with veins congestion and cardio respiratory failure.

6. For deceased D2, doctor found following ante mortem physical injuries on his person:-

"(i) *Injury over the chest wall 2" x ½" x 4" in dimension.*

(ii) *Sternum cut longitudinally about 4" in length both the injuries were grievous in nature."*

On internal examination autopsy doctor has mentioned that the blood clots on both sides of the chest wall were present, pleura was ruptured with clotted blood, larynx and trachea were congested and showed oozing of blood, rupture of cartilage of larynx was detected and rings of trachea were cut, both the right and left lungs showed hemorrhage, lung is cut and ruptured, heart is cut and ruptured and is full of clotted blood. All the above injuries are ante mortem in nature and could have been caused within 12 hours from the date of his examination. Death was caused due to cutting open of esophagus and trachea. There was anoxia with vasovagal shock due to cutting open of heart and liver. There was also venous congestion and cardio respiratory arrest leading to death.

7. After observing statutory committal formalities, appellant's case was committed to Sessions Court for trial and the same was registered as Criminal Trial No. 5 of 2005, State versus Nandu Pangi.

Ad-Hoc Additional District & Sessions Judge, Fast Track Court, Malkangiri charged the appellant u/s 302 I.P.C, on 15.12.2005 and since that charge was abjured, the trial of the appellant commenced.

8. Prosecution, in an effort to establish guilt of the appellant, rested its case on oral testimonies of eight witnesses and tendered seventeen papers and six material exhibits, relevant amongst those have already been mentioned herein above. Out of witnesses examined Matri Khilla/PW1 is the informant and inquest witness, Dinbadhu Golari/ PW2 is the scribe and witness of inquest on both the cadavers and had accompanied the informant to the police station to register the FIR, Sona Golari/PW3 is a witness of seizure where as Indra Khilla/PW4 is the wife of D2 and mother of D1, and mother-in- law of the appellant and she is the sole eye witness of murder of D2. Dambu Golari/ PW5, cousin brother of D1, is a witness to inquest and had accompanied the informant to the police station. Punia Golari/ PW6 is the witness of presence of the appellant at the incident spot and his proclaiming that he had committed both the murders. I.O. is PW7 and the autopsy doctor is PW8.

9. The defence of the appellant is of total denial of incriminating evidence and plea of innocence and false implication was put forth.

Learned trial court found the prosecution charge against the appellant convincingly anointed and his guilt established clear of all doubts, convicted him for the charge of murder and sentenced him as noted in the opening paragraph of this judgment and hence this appeal challenging the said verdict.

10. In the above stated background, Smt. Pramila Mohanty was heard for the appellant and Sri Dilip Kumar Mishra, Additional Government advocate was heard for the respondent State and we have perused the trial court record and evidences minutely.

11. Castigating impugned judgment, it is harangued by appellant's counsel that prosecution had not been able to establish motive for the crime, there is no eye witness to the murder of D1, there was no previous enmity for the appellant to commit double murder, for the annihilation of D2 there is testimony of a single eye witness whose evidence is not trustworthy, convincing and reliable, place of occurrence is disputed and medical report is incongruent and inconsistent with ocular version and therefore prosecution has failed to bring home the charge and consequently impugned judgment deserves to be set aside and appellant be acquitted and set at liberty.

12. Sri Mishra, learned Additional Government Advocate argued to the contrary as according to his submissions, conviction and sentence of the appellant are infallible and does not require any interference by this court as the prosecution had successfully established its charge and guilt of the appellant as the sole perpetrator of the crime and hence appeal sans merit and be dismissed with affirmation of impugned judgment and order.

13. Our pondering over rival contentions and scrutinizing of the trial court record makes it evident that some of the facts in this appeal are not in dispute and on those aspects, prosecution case is established convincingly. Registering admitted facts or, so to say, facts not challenged, makes it evident that relationships between the appellant and informant, deceased and the appellant has not been challenged and so is the date, time and place of the incident. Thus what is indisputable is that the appellant is the husband of D1, and son- in-law of D2 and PW4. It also remains proved that the incident had occurred in the night between 17/18 .1.2005 at 2 a.m. in village Kandhaguda, police station Mudulipoda, district Malkangiri at the residential house of the appellant as well as D1. Contention of appellant's counsel that place of incident is in dispute is against the weight of evidence of record as we have not been able to fathom out any material to support that snipping. Independent analysis of evidence by us indicates that informant PW1 is a post actual assault witness, but regarding date, time, place of the incident and presence of appellant holding a Tangia and asserting that he had committed murders of both the deceased and corpses of both the victims lying at the spot, he is an eye witness. Defence has not suggested any enmity to this witness to cast even the slightest doubt on his depositions which are convincing and corroborative of prosecution version. Presence of other witnesses at the spot has also been narrated by this witness who has proved his dictated FIR, Ext.1 and slating down of it by PW2. Informant/PW1 has also proved his signature on the inquest memos, Ext.2 &3. During his cross examination, nothing contrary or of vital significance to counter prosecution claim has been got extracted by the defence, and, on the contrary, what has not been stated in examination-in- chief has not been elicited in cross examination. PW1 admits D1 being his sister and his house situated at a distance of five hundred meters away from the incident spot and in between existence of three other houses. He was made known about the first murder by PW4 arraigning the appellant as the killer soon after it had occurred and this implicates the appellant with that killing as in such a small fragment of time, It is inconceivable that a rustic old lady will be able to create a

taradiddle implicating the appellant with a false charge. His entire cross examination concerns only suggestions put to him and nothing else. No challenge has been thrown to the contents of FIR and facts of the incident slated therein. Mere bald suggestions without any belying and refutable evidences to the contrary, does not make any dent in the otherwise convincing depositions of this witness. Appellant's counsel also failed to address us as to why we should discard the testimony of such a trustworthy witness.

14. Dinbadhu Golari/PW2, scribe of the FIR is also a co-villager and a neighbour and his house was only two houses away from the incident spot. He had arrived at incident scene immediately after the incident hearing the shrieks of Indra Khilla/ PW4, mother of D1 and wife (widow) of D2. He corroborated PW1 regarding all significant aspects of the incident including the presence of the appellant and his proclamation of his being the murderer and both the deceased lying dead at the spot. He has also narrated about the threats hurled by the appellant to act similarly if anybody approached him. He had accompanied informant to the police station and has proved his signature on the FIR as Ext. 1/2 and on inquest memos as Ext.2/2 and 3/2. He has also confirmed D1 being his Mausi(mother's sister). Cross examination of this witness paints even a more gloomy picture as nothing worthwhile was asked to this witness and therefore defence attracts identical criticism regarding him as that of PW1.

15. Sona Golari/ PW3 is a seizure witness of recovery of blood stained earth and plain earth from the spot vide seizure lists Exts. 4, &5, seizure of appellant's attires (A check lungi and a half shirt) vide seizure list Ext.6, and seizure of weapon of murder, a blood stained Tangia vide seizure list Ext. 7. He has proved his signature on these lists. This witness has refuted defence suggestion that Tangia was not seized from the appellant and besides that his laconic cross examination does not bring out any other significant aspect.

16. Indra Khilla/ PW4, who is mother of D1 and wife/widow of D2 corroborated her predecessor witnesses relating to the date, time, place of incident and presence of appellant and his claiming of being the perpetrator of the crime and threats hurled by him. She further, without any blemish, has stated that the incident had occurred at 2 a.m. in the night and when she along with her husband (D2) arrived at the house of the appellant, they found their daughter lying dead in a pool of blood and the appellant was present holding a Tangia. She further deposed that when her husband (D2) asked the

appellant as to why he had killed Radha Pangi (D1), the appellant pushed him on the ground and dealt a Tangia blow on his chest resulting in his instantaneous death and it was only thereafter that PW4 had cried for help, which had brought the informant and other witnesses at the incident scene. She has further deposed that on being questioned by her, the appellant had stated that he had killed Radha Pangi (D1). In her cross-examination, she has stated that the house of the appellant is at a distance of 100 feet from her house and when she arrived at the appellant's house, her daughter had already died. It was a dark night and the people had gathered hearing her crying. She in no certain terms denied the defence suggestion that the appellant had not killed her daughter and her husband and she was deposing false hood. From the statement of this witness, who was none else than mother-in-law of the appellant, the defence has failed to get elicited any statement worth the name which can even remotely demolish the prosecution charge and extricate the accused of the crime. The entire cross-examination is regarding trivial aspects having no deleterious effect on the crime committed by the appellant. In such a view, it is impossible to throw her evidence over board and assolizie the case in favour of the appellant. PW 4 though a related witness to both the deceased as the mother and the widow, but only for that reason neither her evidence can be discarded nor she can be bracketed as an untruthful witness. The too settled trite law is that merely because of relationships, the testimony of a person, who had no axe to grind against the accused, cannot be discarded and rejected. On this aspect, we refer to some of the decisions reported by the Hon'ble Apex court, which are as follows:-

In **Dhari and Ors. v. State of U. P.:AIR 2013 SC 308,** it has been held by the Apex Court as under:-

> *"9.It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon."*

In **Mookkiah and Anr. v. State, rep. by the Inspector of Police, Tamil Nadu: AIR 2013 SC 321** it has been observed by the Apex Court as under:-

> *"12. Ramaiah (PW-1), who is none else than the father-in-law of the deceased, even in his evidence has narrated before the court what*

he had stated in the complaint (Exh. P-1). He also identified M.O. I and M.O.II aruvals (billhooks). He further stated that with M.O. I small aruval, the accused Mookkiah was attacking and M.O. II-big aruval was used by accused Subbiah. He also noticed a pair of chappals (M.O. III), underwear (M.O. IV) near the corpse of his son-in-law. He also stated that it was he who preferred complaint to the police. The same was recorded by the Police Officer and attested by Kanaka Raj, Sudalaimuthu and Shanmugam. He also explained the statement made by Subbiah (A-2) one week prior to the incident warning him that his son-in-law called his wife for sex and he won't spare him for this. Even in lengthy cross-examination, he withstood his stand and reiterated that he along with two others saw the accused murdering his son-in-law. There is no reason to disbelieve his version. Though the trial Court has rejected his evidence because of his relationship, we are of the view that merely because a witness is related, his evidence cannot be eschewed. On the other hand, it is the duty of the Court to analyze his evidence cautiously and scrutinize the same with other corroborative evidence. The High Court has rightly relied on his evidence and we fully agree with the course adopted by the High Court in relying upon his evidence."

17. From analysis of evidence of this witness, which is in the nature of corroborative and confirming evidence of rest of the witnesses, there remain little or no doubt that it was the appellant, who had committed both the murders. No plausible defence has been pleaded by the appellant for creation of a feigned version against him by his own mother-in-law. No enmity or reason for harboring any ill feeling has been suggested to PW 4 and, therefore, we find her to be a reliable and trustworthy witness, who had narrated the entire episode without any fabrication, concoction or embellishment. There is no contradiction in her evidence as well as of predecessor witnesses confirming the prosecution allegations slated in the FIR Ext.1.

18. Turning to the evidence of Dombu Golari PW5, he was also a co-villager and like his earlier witnesses, he had also gone at the incident scene and had witnessed the appellant claiming that he had murdered D1 and D2. At that moment the appellant was holding a blood stained Tangia. Both the cadavers of D1 and D2 were spotted by him, which were lying in a pool of blood. Following day morning this witness had accompanied the informant to

the Police Station to get the FIR registered. This witness is also a witness to the inquest held on both the cadavers and has proved his signatures as Exts. 2/3 and 3/3. Though he is a cousin brother of Radha Pangi (D1), but his evidence cannot be discharged only for that reason. It has been elicited during his cross examination that he has spotted the appellant from a distance of five feet and the dead bodies were lying on the verandah of the house of the appellant. He has admitted not to have stated before the I.O. that the accused was standing at the scene of occurrence with a blood stained Tangia. He also denied the defence case that he had stated false hood.

19. Likewise Punia/Pukia Golari/PW6 a co-villager and resident of Bandhaguda has also narrated the same story. He has divulged that on interrogation PW4 had informed him that the accused had killed her daughter and the husband and at that moment the accused-appellant was standing at the spot by holding a blood stained Tangia and threatening others with dire consequence. On being permitted to ask leading question by the court, which was not objected to by the accused, PW 6 has averred that the appellant was proclaiming that he had killed his wife and father-in-law and who so ever will come to the rescue will be killed and he had heard that threat himself. He has also rejected the defence suggestion of stating false hood. No significant omission or contradiction has been found in the testimony of this witness as well which also had lend credence to the prosecution charge.

20. Jaya Gouda/PW7, who is the OIC of MuduliPada Police Station has narrated those very investigatory facts which have already been recorded hereinabove while describing the prosecution case and, therefore, to avoid repetition, the same is not recapitulated. From his entire cross-examination it becomes evident that the appellant had proclaimed himself as the offender voluntarily. Nothing worth mentioning or worth analyzing was asked during cross-examination of this witness and, therefore, there is nothing much for us to deliberate and trot tout except mentioning that from the testimony of this witness, prosecution version further gets credence and authentication without any contradictory evidence emerging from it.

21. Dr. Suman Kumar Topno, PW 8 lends support to the prosecution case and clearly confirms that it was the recovered Tangia by which the injuries sustained by both the deceased could have been inflicted. Thus, the last nail in the coffin of defence of the accused is struck by testimony of this expert doctor, which puts a stamp of authenticity on the prosecution version.

22. In view of the aforesaid evidences, when the castigation by the appellant's counsel is considered, it becomes more than apparent that none of the points raised by her has got any merit. At the outset, it is a case of an eyewitness account in respect of murder of D2, a clinching circumstantial evidence of the appellant being the killer of D1 also exists inasmuch as he was present at the spot with blood stained Tangia and claiming that he had murdered the deceased D1 and he also answered the query made by D2, when he was alive, that he had killed Randha Pangi. The cloud of doubt is obliterated on the face of such confirmed evidences that it was the appellant who had murderer D1. In such a view, the motive or *mens rea* was neither required to be established nor absence of it makes any inroad in the prosecution version. It is not a case of premeditation. It was for the accused to have divulged the case of premeditation for killing of D1, as was feebly suggested by the appellant's counsel, and since that had not been done, and to the contrary, appellant had preferred, to his own peril, to keep mum therefore, his conduct does not indicate at all that it is a case, where the crime can be less than murder. Further, merely because nobody has seen the actual assault on Radha Pangi/D1, is no reason for us to reject the prosecution version and absolve the appellant of that crime for the reasons already mentioned hereinabove. Answer and proclamation by the appellant and his murderous assault on father-in-law D2 with his subsequent proclamation heard by so many persons present at the scene of the incident clearly implicates him with the murder of both the deceased and, therefore, it does not matter that none of the persons had seen assault made on Radha Pangi/D1. The incident night was mid night. But for the appellant and Radha Pangi, there does not seem to be any other person present at the incident scene except the children. It is not the defence of the appellant that any other intruder has caused death of his wife and therefore, even applying Section 106 of the Evidence Act, it can be safely concluded that but for the appellant nobody else committed the murder of Radha Pangi/D1 and therefore, the criticism leveled by the counsel for the appellant that there is no eyewitness account regarding the murder of D1 is moldy and incipient and is hereby rejected out right.

23. Respecting second murder, PW4 is the sole eyewitness. The castigation that the prosecution case cannot be relied upon a single testimony, in our view, is a worthless and naff contention. Conviction on the testimony of a single witness can be recorded provided the evidence of such solitary witness is confidence inspiring, cogent, reliable and unblemished, which we find here in this appeal. The mother-in-law/widow/ wife had nothing in

personal for her to falsely implicate her own son-in-law in the murders of two of her closest relatives, the daughter and the husband. The defence has also not been able to suggest her any reason for her to depose falsely. In such view, the question of not accepting her testimony as being an unfaithful and un-reliable witness does not arise at all and we hereby repel the criticism leveled on this score by the appellant's counsel.

24. Furthermore, no evidence has surfaced to doubt the place of the incident from where the blood had also been collected. On perusal of the report of the RFSL, Berhampur dated 13.07.2005 it becomes more than evident that Tangia was stained with human blood and check Lungi and shirt of the appellant also were stained with blood albeit grouping could not been done. Defence failed to offer any explanation how on the attires of the appellant blood stains were detected. Human Blood stains on the Tangia again is a clinching evidence against the appellant of his being the culprit of the crime. As already stated, no incongruency or inconsistency has occurred in the evidence of the doctor vis-a-vis ocular version and both are in conformity with each other, and there is absolutely nothing on record to opine that the same are contradictory to each other. The criticism by the learned appellant's counsel does not hold good on this score as well and is hereby rejected.

25. On an overall view, without expanding this judgment any more, we are of the opinion that the impugned judgement of conviction and order of sentence of the appellant recorded by the learned trial judge for the charge of murder does not call for any interference, as the crime is too well anointed to be altered. We do not find any merit in this appeal for the aforesaid reason.

26. Before parting with the appeal we would like to observe one thing. According to the prosecution version, the appellant had committed double murder even though at a short interval, but at different times preceded by different facts and, therefore, the learned trial judge should have framed murder charges against the appellant on both the counts and should have prosecuted him for both the offences by framing two different charges and would have convicted and sentenced him separately for each of the murders. It has been noticed by us, through various judgments, that trial courts do not perform their responsibility of conducting a trial *ipso jure, (according to law)* assiduously. Sometimes trials are conducted in a inchoate slip shod manner. Henceforth, the learned trial judges are requested to keep in mind that for each crime the accused is required to be prosecuted and if guilt is proved they deserves to be punished for each separate offence unless the picadillo or

lesser crime is a genus of graver crime and assimilated in it. Registry of this Court is directed to inform to all the trial judges about this observation, so that in future no such discrepancy occurs as in the present case.

27. Since we find this present appeal to be without any merit, we hereby dismiss the same and confirm the conviction and sentence of the appellant as recorded in the impugned judgment and order.

28. The appellant is in jail. He shall remain in jail to serve out the remaining part of the sentence.

29. Let the trial court be informed.

Appeal dismissed.

2015 (II) ILR - CUT- 35

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

W.P.(C) NO. 11723 OF 2011

M/S. SRINIVAS TRADERS ……. Petitioner

.Vrs.

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

ODISHA SALES TAX ACT, 1947 – S.23

Whether in the absence of any appeal or cross appeal filed by the Revenue, the learned Sales Tax Tribunal is justified to restore assessment order disallowing the relief granted by the 1st Appellate Authority to the dealer-petitioner while adjudicating the appeal filed at the instance of the said dealer petitioner ? Held, in the absence of any appeal or cross appeal by the Revenue, the Tribunal ought not to travel beyond the dispute raised by the petitioner in its appeal – The Tribunal should not have disallowed the relief granted to the petitioner by the 1st Appellate Authority by restoring the assessment order when the Revenue has no grievance against grant of such relief to the petitioner by the 1st Appellate Authority – Impugned order passed by the Tribunal

is set aside and direction issued to the Tribunal to re-hear the matter and pass orders in accordance with law. (Paras 13, 14)

Case Laws Referred to :-

1. (1978) 42 STC 418 (SC) : State of Kerala vs. Vijaya Stores,
2. CCE, 1996 (88) ELT 641 (SC) : Reckitt & Colman of India Ltd. vs.
3. (1982) 51 STC 410 : State of Orissa vs. Voona Suru Patra & Sons,
4. (1994) 92 STC 28 : Shyamsunder Sahoo vs. State of Orissa

For Petitioner : M/s. Damodar Pati, S.K.Mishra & R.S.Das

For Opp. Parties : Mr. R.P.Kar (Standing Counsel)

Date of Judgment: 26.11.2014

JUDGMENT

***B.N. MAHAPATRA,* J.**

This writ petition has been filed with a prayer to quash the order dated 11.08.2010 (Annexure-1) passed by opposite party No.2-Orissa Sales Tax Tribunal, Cuttack (for short, 'the Tribunal) in S.A. No. 1539/2004-05 pertaining to the year 2002-03 on the ground that the said order suffers the vice of perversity as the grounds not taken either by the petitioner or by opposite party No.1-Commissioner of Commercial Taxes, Odisha, Cuttack have been considered and the order passed by opposite party No.3-Sales Tax Officer, Rourkela-I Circle, Rourkela (for short, 'STO-Rourkela') has been confirmed illegally.

2. Mr. D. Pati, learned counsel for the petitioner submitted that the petitioner is a proprietorship concern and is carrying on business in manufacturing and sale of corrugated cardboard boxes. The manufacturing unit of the petitioner is situated at CTS-34 Market, Basanti Colony, Rourkela, Dist: Sundargarh. The additional place of business is running at Rayagada in the name and style of "S.R.M. Industry". Opposite Party No.3-STO-Rourkela examined the books of accounts and passed the order of assessment on 06.02.2004 (Annexure-2) for the year 2002-03 raising a tax demand of Rs.1,78,396/-. The said extra demand of tax has been raised on the ground that the petitioner has not maintained stock account although it is a manufacturing unit and that it has obtained registration number in respect of additional place of business and has submitted returns to opposite party No.5-Sales Tax Officer, Koraput-II Circle, Rayagada (for short, 'STO-Koraput')

without obtaining permission from opposite party No.1 for filing the consolidated return. Ultimately, the Assessing Officer resorted to best judgment assessment by making addition of Rs.6,34,889.61 on account of sale of waste paper (scrap material) and making further addition on account of turnover of additional place of business. Accordingly, opposite party no. 3 determined the Gross Turnover and Taxable Turnover. Opposite Party No.4, the 1st Appellate Authority taking into consideration various material facts and evidence available on record held that same turnover cannot be taxed twice and accordingly allowed adjustment of tax amounting to Rs.1,04,733/- deposited by the petitioner at Rayagada and waived the levy of interest of Rs.153/- made under Section 12(4-a) of the Orissa Sales Tax Act (for short, 'OST Act'). Opposite party No.4 also restricted the addition of 2% of the gross sale value towards sale of scrap instead of 10% of the gross sale value as done by the Assessing Officer and accordingly passed the 1st Appellate order under Annexure-3.

Being aggrieved by the 1st Appellate order, the petitioner filed the 2nd Appeal before the opposite party No.2-Tribunal. Before the learned Tribunal, the petitioner raised dispute about the enhancement of turnover by 2% of the gross sale of the finished product towards sale of paper scrap and determination of sale price thereof. Opposite party No.2, after receipt of the appeal memo filed by the petitioner, issued notice to opposite party No.1 for filing of memorandum of cross objection in terms of Rule 57 of Orissa Sales Tax rules. Opposite Party No.1 has not filed any memorandum of cross objection. It has also not filed any appeal challenging the order dated 03.05.2004 passed by opposite party No.4, the 1st Appellate Authority. Opposite party No.2 issued notice of hearing to opposite party No.1 in terms of Rule 58 of OST Rules. The appeal was heard on 04.08.2009.

3. Mr. Pati vehemently argued that in absence of any appeal or cross objection filed by opposite party No.1, it was obligatory on the part of opposite party No.2-learned Tribunal to adjudicate the sole issue raised by the petitioner, i.e., regarding enhancement of turnover, but opposite party No.2 in a peculiar manner unknown to law and in excess of power conferred upon it passed the impugned order dated 11.08.2010 holding that two points arising out of assessment have not been dealt with properly by opposite party No.4 and passed the order ignoring the principles of natural justice. Such action of opposite party No.2 is illegal and arbitrary. Mr. Pati further submitted that though the appeal was heard on 04.08.2009 by opposite party

No.2, the impugned order was passed on 11.08.2010 i.e. after lapse of one year and two months. Concluding his argument, Mr. Pati submitted that the impugned order passed by the learned Tribunal may be set aside.

4. Mr.R.P. Kar, learned Standing Counsel for opposite parties supported the impugned order of the Tribunal passed under Annexure-1.

5. On the rival contentions of the parties, the only question that falls for consideration by this Court is whether in absence of any appeal or cross objection filed by the Revenue, the learned Sales Tax Tribunal is justified to restore assessment order disallowing the relief granted by the 1st Appellate Authority to the dealer-petitioner while adjudicating the appeal filed at the instance of the dealer-petitioner?

6. Undisputed facts are that the petitioner was assessed to extra tax demand of Rs.1,78,396/- by opposite party No.3-STO for the year 2002-03 vide Annexure-2. The 1st Appellate Authority allowed the appeal filed by the petitioner in part by reducing the assessment basically on two grounds, i.e., the same turnover cannot be taxed twice and therefore, the petitioner is entitled to adjustment of tax of Rs.1,04,733/- already paid in respect of turnover of the additional place of business situated at Rayagada and secondly limited the addition to 2% of the gross value of the finished product as against 10% adopted by the Assessing Officer towards sale price of scrap. The Revenue did not file any appeal before opposite party No.2-Tribunal challenging the order of the 1st Appellate Authority. It is the petitioner, who being not fully satisfied with the order passed by the 1st Appellate Authority has filed 2nd Appeal before the Tribunal on the limited ground that enhancement of turnover by 2% of gross value of the finished product towards sale of scrap paper and determination of price thereof are not correct. It is also pertinent to mention here that the Revenue after receipt of the appeal memo filed by the petitioner has not filed any cross objection. Therefore, the only issue that was left for adjudication by opposite party No.2-Tribunal is whether opposite party No.4 has rightly determined 2% of the sale value of the finished product as sale value of scrap paper.

7. At this juncture, it would be profitable to refer to the decisions of the Hon'ble Supreme Court and this Court.

8. The Hon'ble Supreme Court in the case of ***State of Kerala vs. Vijaya Stores, (1978) 42 STC 418 (SC),*** held as under:

> "…The normal rule that a party not appealing from a decision must be deemed to be satisfied with the decision, must be taken to have acquiesced therein and be bound by it and, therefore, cannot seek relief against a rival party in an appeal preferred by the latter, has not been deviated from in sub-section (4)(a)(t) above. In other words, in the absence of an appeal or cross-objections by the Department against the Appellate Assistant Commissioner's order the Appellate Tribunal will have no jurisdiction or power to enhance the assessment…."

9. The Hon'ble Supreme Court in the case of ***Reckitt & Colman of India Ltd. vs. CCE, 1996 (88) ELT 641 (SC),*** held that it is beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never canvassed and which the appellants had never been required to meet.

10. This Court in the case of ***State of Orissa vs. Voona Suru Patra & Sons, (1982) 51 STC 410,*** held as under:

> "It is well settled now that in second appeal by the assessee an advantage obtained by him from the first appellate authority in the absence of appeal or cross-objection by the revenue is not open to attack."

11. This Court in the case of ***Shyamsunder Sahoo vs. State of Orissa***, (1994) 92 STC 28, held as under:

> "5. The power of the Tribunal to enhance the assessment is relatable to an appeal or cross-objection filed by the Revenue. The normal rule that a party not appealing from a decision must be deemed to be satisfied with the decision, has to be taken to have acquiesced therein and must be bound by it, and, therefore, cannot seek relief against a rival party in an appeal preferred by the latter, has not been deviated from in Section 23(3)(c). The Tribunal has no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objection by the Revenue."

12. In ***M/s. Shiv Prasad Sahu vs. State of Orissa (2009) 19 VST 417 (Ori),*** this Court has held as under:

"Needless to say that the Tribunal is under a duty to decide all the questions of facts and law raised in the appeal before it. However, Tribunal on its own cannot make out a new case particularly when no such point was taken in the grounds of appeal argued before it.

13. In view of the above, we are of the considered opinion that in absence of any appeal or cross appeal by the Revenue, the Tribunal ought not to travel beyond the dispute raised by the petitioner in its appeal. Therefore, the Tribunal should not have disallowed the relief granted to the petitioner by the 1st Appellate Authority by restoring the assessment order when the Revenue has no grievance against grant of such relief to the petitioner by the Ist appellate Authority.

14 For the reasons stated above, the impugned order dated 11.08.2010 passed by opposite party No.2-Tribunal in SA No.1539/2004-05 is not sustainable in law and is liable to be quashed and accordingly, we quash the same. Opposite party No.2-Tribunal is directed to re-hear SA No.1539/2004-05 on the issue(s) raised by the petitioner and pass order in accordance with law within a period of eight weeks from today.

15. In the result, the writ petition is allowed.

Writ petition allowed.

2015 (II) ILR - CUT- 40

S.PANDA, J

W.P. (C) NO. 4866 OF 2012

BHARAT PETROLEUM CORPN., Ltd.
SIKHARPUR, CUTTACK ……..Petitioner

.Vrs.

SMT. ANJALI DAS & ORS. ……....Opp.Parties

ARBITRATION AND CONCILIATION ACT, 1996 – S.8

The words "a matter" in Section 8 of the Act indicate that the entire subject matter of the suit should be subject to arbitration agreement – There is no provision in the Act for bifurcating the suit in

to two parts, one to be referred to arbitration for adjudication and the other to be decided by Civil Court.

In this case the defendant No. 3 not being a party to the agreement and the plaintiff having filed her evidence on affidavit there is no error apparent on the face of the impugned order calling for interference by this Court. **(**Paras 6,7)

Case Laws Rreffered to :-

1. AIR. 2006 SC. 2800 : Rashtriya Ispa Nigam Ltd. & Anr.
2.AIR 2008 SC.1016 : Atul Sing & Ors.-V- Sunil Kumar Singh
3. (2003) 5.S.C.C. 531 : Sukanya Holdings Pvt. Ltd.

For petitioner - M/s. S. D. Das, H.S. Satapathy , A.N. Sahu M. Panda, M.M. Swain, S.Biswal & H.K. Behera.

For Opp. Parties - M/s. M.K.Mishra. P.K.Das, J.K. Mohapatra M/s. B.N.Udgata, S.M. Singh & C.K. jena

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Date of Judgment: 29.10.2014

JUDGMENT

S.PANDA, J.

Petitioner in this petition has challenged the order dated 6.12.2011 passed by learned Civil Judge (Sr.Divn.) 1st Court, Cuttack in C.S.(1) No. 193 of 2007 rejecting an application under Section 8(1) of the Arbitration and Conciliation Act, 1996 to refer the matter for arbitration as the application was filed two years after filing of the written statement.

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

The opposite party No.1 as plaintiff filed the suit for damages and compensation with a further prayer to declare the notice dated 26.4.2007 and 2.5.2007 as null and void and to declare the invocation of bank guarantee as illegal. The plaintiff further pleaded that the dispute arising out of an arbitration agreement entered into between the parties on 22.12.2006 and as per Clause-33 of the agreement it clearly manifests to refer any dispute or difference of any nature whatsoever to Arbitration for due decision in consonance with Arbitration and Conciliation Act, 1996 (hereinafter referred

to as the Act). However she has alleged being a Service Provider she was awarded with B.P. 'Ghar' retail outlet at Manakahani under Kendrapara Police Station by the petitioner with effect from 19.9.2001. She was operating the said outlet by executing fresh agreement from time to time. She has also furnished the bank guarantee to operate the said outlet for different agreement period. The opposite party No.3 is defendant No.2 who was the O.S.T.S. manager of the petitioner's company has imposed his own idea on the plaintiff for which she sustained heavy loss. As such the petitioner has issued a letter of intents to opposite party No.1 wherein the labour supply contract of the plaintiff was renewed from 19.11.2006 to 18.11.2007 with certain conditions and she was directed to furnish bank guarantee to the tune of Rs. 23 lakhs to operate the said outlet. The plaintiff expressed her inability to furnish such bank guarantee and she was informed for withdrawal of letter of intent and termination of operatorship, if she fails to furnish the bank guarantee. She has requested to exempt her from furnishing the bank guarantee. Accordingly, on 12.1.2007 the petitioner-company has reduced the amount of bank guarantee to Rs. 15.2 lakhs. However defendant No.2 instigated the people with false allegation hence she has wrote a letter for termination of the operatorship and to release the bank guarantee which she has filed in consonance with agreement from 19.11.2005 to 18.11.2006 for treatment of her ailment outside the State. After receiving the said letter the company requested her for production of statutory dues paid to the workmen for verification of the allegations with regard to non-payment of minimum wages to the employees and other benefits. As the company has took step for invocation of the bank guarantee she has filed the suit with aforesaid relief. After receiving the notice the defendant No.1- present petitioner filed the written statement traversing the plaint allegation and taken a stand that in view of the arbitration clause the suit is not maintainable. However defendant Nos. 1 and 2 have not filed any application under Section 8(1) of the Act to refer the matter for Arbitration at the first instance and they have filed such an application on 2.11.2011. The plaintiff filed her objection to the said application and took a specific stand that as per Section 5 of the above Act since the defendants have not filed their application on their first appearance the application liable to be dismissed. The court below by impugned order rejected the application with an observation that earlier similar application dated 5.9.2011 under Section 5 of the Arbitration and Conciliation Act was rejected on 12.9.2011 accordingly the present petition is also not maintainable. It further reveals that defendant Nos. 1 and 2 have filed their written statement on 27.1.2009 and they have filed an additional written

statement on 25.3.2009. Plaintiff has filed her evidence on affidavit on 14.5.2010. Thereafter defendants have filed the present application at a belated stage to refer the matter for arbitration.

3. Learned counsel for the petitioner submitted that in view of Clause-33 of the agreement between the parties the matter should have been referred to the arbitration instead of continuation of the suit which will takes time and also not convenient for the parties to proceed with the dispute. He further submitted that Section 5 of the Arbitration and Conciliation Act the bar for continuation of the suit as per clause in the arbitration of the agreement therefore the impugned order need be interfered with.

4. Learned counsel appearing for the opposite party submitted that the court below passed the impugned order taking into consideration the conduct of the petitioner and the agreement between the petitioner and the plaintiff whereas the plaintiff seeking relief against the defendant No.3 the bank who is not a party to the agreement. He further submitted that as the defendants have filed their written statement and plaintiff has filed her evidence on affidavit therefore in view of under Section 8(1) of the Act since the defendants have filed application to refer the matter for arbitration at a belated stage and they have not filed the application before filing of the written statement rightly the court below rejected the application. Therefore the impugned order need not be interfered with.

5. In support of their respective contention they have cited the decision reported in ***A.I.R. 2006 S.C. 2800, Rashtriya Ispat Nigam Limited and another V. M/s. Verma Transport Company*** wherein the Apex Court held that if an application is filed before actually filing the first statement on the substance of the dispute, in our opinion the party cannot be said to have waived his right or acquiesced himself to the jurisdiction of the Court. What is therefore material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of the 1996 Act may not be held wholly unmaintainable. By opposing the prayer for interim injunction the restriction contained in sub-section (1) of Section 8 was not attracted. Disclosure of a defence for the purpose of opposing a prayer for injunction would not necessarily mean that substance of the dispute has already been disclosed in the main proceeding. In such a situation Court has held that application under Section 8 of the Act was maintainable.

6. Further the Apex Court in the case of ***Atul Singh and others V. Sunil Kumar Singh reported in AIR 2008 SC 1016*** held that an application under Section 8(1) shall not be entertained unless it accompanied by the original arbitration agreement or a duly certified copy thereof and Court has to first decide whether there was an agreement between the parties to refer the matter for arbitration before filing of their first statement.

The Apex Court in the case of ***Sukanya Holdings Private Limited V. Jayesh H.Pandya and another reported in (2003) 5 S.C.C. 531*** held that where a suit is commenced in respect of a matter which falls partly within the arbitration agreement and partly outside and which involves parties some of whom are parties to the arbitration agreement while some are not so Section 8 is not attracted. The words "a matter" in Section 8 indicate that the entire subject-matter of the suit should be subject to arbitration agreement. There is no provision in the Act for bifurcating the suit into two parts, one to be referred to arbitration for adjudication and the other to be decided by civil court.

7. In view of the above settled position and after going through the record it appears that defendant No.3 is not a party to the agreement and plaintiff has already filed her evidence on affidavit therefore this Court is not inclined to interfere with the impugned order as there is no error apparent on face of the record. The court below is directed to dispose of the suit as expeditiously as possible since pleadings of the parties completed. Accordingly the writ petition is dismissed.

Writ petition dismissed.

2015 (II) ILR - CUT- 45

S. PANDA, J

C.M.P. NO. 334 OF 2015

SANKARSAN SAMANTARAY & ORS. ……..Petitioners

.Vrs.

JAYANTA ROUTRAY & ANR. ……Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-39, R-1&2

Temporary injuction – Confirming orders passed refusing the prayer – No material regarding possession of any of the parties over the suit land - Both the courts below failed to consider this aspect – Findings of the Courts below is an error apparent on the face of the record – Held, impugned orders are set aside – Direction issued to the parties to maintain status quo over the suit land till disposal of the suit. (Para 8, 9)

For Petitioner : M/s. Amiya Ku. Mishra, A.K.Sharma M.K.Dash, A.K.Ray & S.Mishra

For Opp. Parties : M/s. B.K.Ragada, L.N.Patel, N.K.Das and B.K.Pattnaik

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Date of Judgment :17.06.2015

JUDGMENT

S.PANDA, J.

This Civil Miscellaneous Petition has been filed by the petitioners challenging the judgment dated 21.2.2015 passed by the learned Addl. District Judge, Bhubaneswar in F.A.O No.18/58 of 2014/12 confirming the order dated 19.5.2012 passed by the learned Civil Judge (Senior Division), Bhubaneswar in I.A No.419 of 2010 arising out of C.S No.1002 of 2010 rejecting an application filed under Order 39, Rules 1 and 2 read with Section 151 of C.P.C for temporary injunction.

2. The brief facts of the case are that the petitioners as plaintiffs filed C.S No.1002 of 2010 before the learned Civil Judge (Senior Division), Bhubaneswar for declaration of right, title, interest over the suit land, to declare the Registered Power of Attorney No.435 dated 15.4.2009 executed by defendant no.1 in favour of defendant no.2 is illegal, to declare

that the Registered Sale Deed No.22257 dated 22.12.2009 executed in favour of defendant nos.3 and 4 as illegal, void and inoperative and for permanent injunction. In the plaint it was pleaded that the father of the petitioners namely Kailash Chandra Samantaray had filed an application under Section 26 (2) of the O.L.R Act before the Revenue Officer, Bhubaneswar to declare him as 'raiyat' in respect of the suit land. The Revenue Officer, Bhubaneswar by order dated 30.9.1969 declared him as 'raiyat' on payment of compensation which would be paid in five installments. Thereafter O.L.R Appeal No.35 of 19769 was preferred before the S.D.O., Bhubaneswar which was dropped vide order dated 07.10.1971. The father of the petitioners was in cultivating possession over the suit land and after him the petitioners are in possession over the suit land. The predecessors and after them the petitioners have got right, title and interest over the suit land and the suit land is agricultural in nature. Defendant nos.1 and 2 being the successors of the landlord namely Narendra Kishore Dash have got no authority to alienate the suit land in favour of defendant nos.3 and 4. Defendant nos.1 and 2 illegally sold the suit land in favour of defendant nos.3 and 4 vide Registered Sale Deed No.22257 dated 22.12.2009.

3. Opposite party nos.1 and 2 (defendant nos.3 and 4) appeared in the suit and filed their written statement contending inter alia that the suit is barred by limitation and is undervalued. It was stated that the defendants are in possession over the suit property since their date of their purchase. It was further stated that if a person is declared as per the provisions of Section 26 (2) of the O.L.R Act he must have obtained the said Certificate from the landlord and also send the Certificate to the competent authority to maintain the Records of Right and also he must have to show the acceptance of the compensation by the landlord and if fails to do so then the tenant ceased to have right to continue in cultivation hereof w.e.f. the date of expiry of the year next following the date of issue of the Certificate under Section 29 of the said Act. The landlord got the right to enter upon the land on the very next day. However, neither the landlord nor the authority concerned issued any Certificate and also not accepted the rent as well as cess relating to the suit scheduled property. Therefore, the plaintiffs have no right, title, interest and possession of the family property including the suit schedule property. Defendant nos.1 and 2 became the absolute owner of the suit property and they have every right to do so for the interest of their family and the plaintiffs are stopped to claim any equity against the true owners of the property. However, defendant nos.1 and 2 were set ex parte.

4. Along with the plaint the plaintiffs also filed an application under Order 39, Rules 1 and 2 read with Section 151 of C.P.C for temporary injunction restraining the defendants from evicting the petitioners from the suit land, which was registered as I.A No.419 of 2010. Defendant nos.3 and 4 filed their objection to the said application taking a stand that there is no cause of action to file the application. They are in possession over the suit property from the date of their purchase which is within the knowledge of the plaintiffs and general public in the locality. The plaintiffs did not obtain the Certificate from the competent authority and they have no right, title and interest over the suit property. The court below after hearing the parties by order dated 19.5.2012 rejected the application with a finding that the dispute is between the landlord and the tenant under the O.L.R Act and as per Section 41 of the Specific Relief Act, 1963 injunction cannot be granted under Section 41 (h) when equal efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust.

5. Being aggrieved the petitioners preferred F.A.O No.18/58 of 2014/12. The learned Addl. District Judge, Bhubaneswar by the impugned judgment confirmed the order of the trial court with a finding that the documents are showing prima facie in possession of the opposite parties over the suit land on the date of institution of the suit.

6. Learned counsel appearing for the petitioners submitted that the ancestors of the petitioners and after them the petitioners are in cultivating possession over the suit land, therefore, the finding of the lower appellate court that prima facie the opposite parties are in possession over the suit land is illegal. He further submitted that the opposite parties have not filed any document before the court below to the effect that the landlord has taken possession of the suit land from the petitioners in accordance with law. Hence the impugned judgment need be interfered with.

7. Learned counsel appearing for opposite party no.1 however, support the impugned judgment and submitted that mere assertion of the plaintiffs to have acquired title by adverse possession by long continuous possession is not sufficient unless his possession becomes tortuous and wrongful by his disloyal act and it must be open and continuous and notorious so as to preclude all doubts as to the character of his holding and want of knowledge on the part of the owner. He further submitted that though there is determination of compensation amount payable to the landlord, there is no pleading in the plaint as to when the compensation was deposited. He also

submitted that until the certificate is issued in favour of the tenant, the right of the landlord over the land continues to be with him. The tenant does not hold the land free from all encumbrances. Hence the impugned judgment need not be interfered with.

8. Considering the rival submission of learned counsel for the parties and after going through the materials available on record, it appears that both the courts below have not taken into consideration the order dated 30.9.1969 passed by the Revenue Officer, Bhubaneswar in O.L.R Case No.552 of 1966-67. In the said case the father of the petitioners had filed an application under Section 26 (2) of O.L.R Act for declaration that he is the 'raiyat' in respect of the disputed plots for more than last 30 years on bhag basis and has paid rajbhag. The Revenue Officer recorded a finding that the landlord stays in Cuttack Town is a absentee landlord and the applicant is a bhag tenant on the date, the O.L.R Act came into force. Accordingly, the Revenue Officer declared the applicant as 'raiyat', assessed the compensation and directed to pay the compensation in five installments. The said order was challenged by the landlord in O.L.R Appeal No.35 of 1969 before the Sub-Divisional Officer, Bhubaneswar. However, the said appeal was dropped by order dated 07.10.1971. Thereafter no document was produced by the present opposite parties that their vendor, the landlords in the aforesaid O.L.R proceeding have taken possession from the 'raiyat' or any materials to show that they are in possession over the land. However, the opposite parties, who are the purchasers have purchased the property in the year 2009 from the landlord. The question regarding entitlement over the land and the possession over it as pleaded by the parties are to be considered in the suit itself.

9. Since there are no materials available on record regarding possession of the opposite parties as well as their vendor over the disputed properties and as the courts below have not considered the order passed by the O.L.R authorities, the findings of the courts below is an error apparent on the face of the record and perverse. Accordingly, this Court while setting aside the impugned orders directs the parties to maintain *status quo* over the suit land till disposal of the suit. However, the learned Civil Judge (Senior Division), Bhubaneswar is directed to dispose of C.S No.1002 of 2010 in accordance with law, as expeditiously as possible. Parties are directed to cooperate before the court below for early disposal of the suit.

Petition disposed of

2015 (II) ILR - CUT- 49

B.P.RAY, J

CRLA NO.166 OF 1999

DILLIP KUMAR DAS ……...Appellant

.Vrs.

REPUBLIC OF INDIA ……Respondent

PREVENTION OF CORRUPTION ACT, 1988 – Ss 7, 13 (l) (d), 13 (2)

Trap Case – Allegation of false implication – P.W.1 was prosecuted departmentally and found guilty wherein the present appellant was the disciplinary authority – It is also against normal human conduct that the appellant being the highest authority would demand and accept bribe from P.W.1 who was a Mazdoor in presence of his driver and many others when the trap party were only ten feet away from the appellant – Strong motive for false implication – No credible evidence regarding demand of bribe by the appellant – Learned special Judge has lost sight of these aspects – Held, impugned judgment and order of conviction and sentence is setaside.

(Paras 10 to 17)

For Appellant : M/s. S.K.Mund.D.P.Das & J.K.Panda
For Respondent : Mr. V. Narasingh

Date of judgment : 03.06.2015

JUDGMENT

B.P.RAY, J.

The appellant has filed this appeal challenging the judgment and order of conviction and sentence dated 30.6.1999 passed by the learned Special Judge (C.B.I.), Bhubaneswar in T.R. Case No. 136/4 of 1999/98 convicting him under Sections 7 and 13(1)(d) read with section 13(2) of the Prevention of Corruption Act and sentencing him to undergo imprisonment for one year on each count and to pay fine of Rs. 1,000/- on each count, in default, to undergo R.I. for six months more on each count. Both the sentences are directed to run concurrently subject to benefit of set off.

2. The prosecution case, in nutshell, is that the appellant was working as Manager in Mines No. 3 of Orient Colliery, MCL at Jharsuguda and Mukteswar Choudhury (P.W.1) was a Majdoor under him. Due to long

absence of said Mukteswar Choudhury (P.W.1) due to his ailment as Leprosy and T.B., his case was to be referred to the Medical Board. It is alleged that despite the request of P.W. 1 and his adopted son Sekhar Naik (P.W. 2), the same was not done by the appellant, as a result of which, they approached him on many occasion. Ultimately, the appellant demanded Rs. 20,000/- for reference of P.W. 1 to the Medical Board and when inability was expressed to pay the amount at a time, they were told to pay Rs. 1000/- at the first instance for making the records ready. This was done ten to twelve days before the date of occurrence, i.e., 27.8.1997. Accordingly, the P.Ws 1 and 2 discussed the matter between themselves and decided to lodge F.I.R. before the S.P., C.B.I. Then the written report (Ext. 10) signed by both P.Ws 1 and 2 was taken by P.W. 2 to Bhubaneswar and on 25.8.1997 it was given to the S.P., C.B.I. Thereafter, the case was registered on the next day and trap was laid.

3. On 27.8.97 the raiding party arrived at Jharsuguda and sent for P.W.2 and two independent witnesses namely, Narottam Rath (P.W.3) and Pramod Kumar (P.W.4) who were Inspector, Customs and Central Excise and Development Officer of National Insurance, Jharsuguda respectively. In their presence in the Railway retiring room demonstration was made and P.W. 2 was introduced to them. They also went through the written report and the ten hundred rupee notes produced by P.W. 2 were tainted with phenolpthlien powder and the same was kept in an envelop and it was given to P.W. 2 to hand it over to accused on demand. At about 3 p.m. on that day they proceeded to the Quarters of the accused at Brajarajnagar and arrived there at about 4.15 p.m. Keeping the jeep 200 yards away from the house of accused they went to his quarters in batches of two and took their position near his quarter. At about 4.30 p.m. the jeep of the accused arrived and when accused came out of his house, P.W. 2 wished him and after the money was asked for he paid the same to the accused who after receiving it verified the notes by inserting his fingers inside the envelop and held it by his left hand. At that time seeing the signal of P.W. 2 the raiding party arrived and caught hold of the accused with the envelop (M.O.XV) in his hand. He was then taken to the nearby Police Station where his hand wash was collected and as it turned pink it was kept in two bottles (M.O.II and III). Thereafter the currency notes were brought out from M.O.XV and on comparison with the pre-trap memorandum (Ext.15) the same was found to have tallied with each other. Then the case was further investigated and after chemical test as the hand wash was found to have contained phenolpnaphaline, the accused was charge-sheeted as indicated above.

4. The plea of the appellant-accused is one of denial and false implication as the appellant did not oblige in their nefarious design of providing employment to P.W. 2. The further case of the appellant is that P.W. 1 was punished in a departmental inquiry for long unauthorized absence and was reverted to the post of Badli. Another departmental proceeding was also pending against the P.W. 1 and the appellant had issued him notice to show cause. The appellant had referred the case of P.W. 1 to the Deputy Chief Medical Officer on 22.3.1997 and it was the said authority to refer the case of P.W. 1 to the Medical Board. There was thus no occasion for the appellant to demand and accept bribe from P.W. 1. P.W. 2 handed over the envelope containing the alleged bribe money saying that the same was a letter sent by Sri P.K. Sahoo, Area Finance Manager and without knowing that the envelope contained currency notes, the appellant accepted the same when the C.B.I. officials pounced upon him all of a sudden.

5. In order to bring home the charge, prosecution has examined as many as ten witnesses, out of whom, P.W. 1 is the Mazdoor, who alleged demand of bribe, P.W. 2 is the so-called adopted son of P.W. 1, P.Ws 3 and 4 are independent witnesses associated with the trap, P.Ws 5 and 6 were the employees of Mahanadi Coal Fields, P.W. 7 was the driver of the appellant, who was allegedly present at the time of trap, P.W. 8 is the immediate authority of P.W. 1, P.W. 9 is the sanctioning authority and P.W. 10 is the Investigating Officer.

P.Ws. 1 and 2 stand on no better footing than accomplices and, as such, their evidence should have been subjected to such rigorous scrutiny as is warranted in such a case before the same is found fit for acceptance. The informant (P.W.1) stated in paragraph-9 of his deposition that he does not remember exactly the year when he first met the accused and also he could not remember the date and year when accused demanded Rs.20,000/- from him. He further stated that he met the appellant once in his office when he demanded the money.

However, contradicting this, P.W. 2 stated that along with P.W. 1 he met the appellant six times and the last demand was made on 24.8.1997. P.W. 2 has all along been described as the adopted son of P.W. 1. However, a scrutiny of the evidence will reveal that the said stand of P.Ws 1 and 2 is false. P.W. 1 admitted that he was trying to engage P.W. 2 in service in MCL and for that he was adopted by him. Both P.Ws 1 and 2 admitted that in all official documents as well as voter list, the name of the natural father of P.W.

2 is recorded. P.W. 2 could not be able to speak the name of the brother of the P.W.1's wife. He also admitted that he stays separately and not with P.W.1. P.W. 2 also stated in his deposition that he is aged about 28 years at the time of he deposed in the court in 1999. However, he stated in his deposition that he married in the year 1985 or 1988. In the unregistered deed of adoption, it is mentioned that P.W. 1 adopted P.W. 2 as there was no possibility of any male issue. However, the evidence on record discloses that after the so-called adoption, the daughters of P.W. 1 took birth. Therefore, the stand of the appellant is probablized that the present case is foisted falsely as the appellant refused to give job to P.W. 2 in view of the invalidity of P.W.1.

6. Mr. Das, learned counsel for the appellant submitted that in a case of trap, undisputedly, the demand of illegal gratification is a sine qua non for constitution of an offence under the provisions of the P.C. Act. In the instant case, there is absolutely no credible evidence of demand of bribe by the appellant. Admittedly, P.W. 1 was a long absentee for more than three years. In terms of the circular, a person after remaining absent for more than six months can join his duty only when he is found fit by the Medical Board. The appellant had referred the case of P.W. 1 as far back as 22.3.1997 under Ext. 11. P.W. 2, the informant has categorically admitted this fact. Subsequently, under Ext. 12, the Deputy Chief Medical Officer wrote back to the appellant for referring the case of P.W. 1 and two others to the Headquarters for further action. The letter was received by the appellant on 16.4.1997 and on the same day, the appellant endorsed it to the Deputy Personnel Manager under Ext. A. All these chronological events go to show that the appellant had acted with utmost dispatch in dealing with the case of the Mazdoor and not even a day, the case was kept pending with the appellant. Hence, these proved facts falsify the theory of demand of bribe by the appellant. Moreover, there being absolutely no evidence nor it being the case of the prosecution that the appellant had made any demand of bribe from P.W. 1 prior to referring his case under Ext.11, the very genesis of the prosecution case becomes doubtful and the story of demand as deposited by P.Ws 1 and 2 has been invented in order to harass the appellant by falsely implicating him. (See ***State of Maharashta v. Dyaneshwar Laxman Rao Wankhede,*** (2009) 15 SCC 200).

Mr. Das in support of his argument also relied upon the decision in ***Debananda Das v. State of Orissa***, 2011(II) OLR 603, wherein this Court has held as follows :-

"……..Law is well settled that in a trap case, the evidence of a decoy has to satisfy a double test. The evidence must be reliable and if this test is satisfied, it must be sufficiently corroborated".

In the case of ***Jadunath Khatua v. State*** reported in 1982 Cr.L.J. 952, this Court has held that the Court can act upon the uncorroborated testimony of a trap witness, if it is satisfied from facts and circumstances that the witness is a witness of truth.

In the case of ***State of Kerala and another v. C.P.Rao,*** (2011) 6 SCC 450, the Hon'ble apex Court has held that when there is no corroboration of testimony of complainant regarding demand of bribe by accused, it has to be accepted that complainant's version is not corroborated and, therefore, the evidence of the complainant cannot be relied on.

7. Mr. Narasingh, learned counsel for the respondent – C.B.I. submitted that if the plea of the defence as agitated before this Court regarding impossibility of performance is taken into account, then the Explanation (d) to section 7 of the P.C. Act would be rendered nugatory and in support of his aforesaid submission, he relied upon the decisions of the Hon'ble apex Court in the case of ***Chaturdas Bhagaban Das Patel v. State of Gujrat***, AIR 1976 SC 1497 and ***Syed Ahmed v. State of Karnataka*** , (2012)8 SCC 527.

Mr. Narasingh, learned counsel further submitted that the learned trial court has taken great care and caution to analyze the evidence of P.W. 2 the decoy and has clearly stated that he paid the money on demand. From the very nature of the transaction which took place, it will clearly establish that the appellant accepted the envelope and also verified the tainted currency notes which goes to establish beyond all reasonable doubt that the test of payment of demand of illegal gratification is amply established in this case.

In support of the aforesaid submission, he has also relied upon the decisions of the Hon'ble apex Court in the case of ***Trilok Chand Jain v. State o Delhi***, AIR 1977 SC 66 and ***M. Narasinga Rao v. State of A.P.,*** (2001)1 SCC 691. The learned counsel also submitted that the learned trial court in paragraph-10 of the impugned judgment has considered the case of the defence that the appellant is a victim of the conspiracy and arrived at the finding that such defence does not hold water as he has not adduced any evidence to the said effect.

8. Law is well settled that one infirm witness cannot corroborate with another witness of the same brand. The evidence is to be weighted and not to

be counted. In such view of the matter, P.Ws 1 and 2 cannot corroborate each other. There being no other evidence in support of the theory of demand of bribe by the appellant, the learned Special Judge should have disbelieved the theory of demand of bribe set up by P.Ws 1 and 2, particularly when, their evidence in this regard is hopelessly discrepant.

9. The allegation of not referring the case of the mazdoor to the Medical Board in spite of repeated approach is not only false but also wholly unfounded and contrary to the documentary evidence on record. In terms of the Circular under Ext. A/1, an employee retuning from long absence should be referred to the A.M.O. and the A.M.O. in his turn would refer to the C.M.O. who would constitute a Medical Board of concerned Specialist for examination of state of fitness. The appellant has no authority to refer the case of any person directly to the Medical Board for examination. In such circumstances, demand of bribe for referring the case to the mazdoor is nothing but a myth. Further, in view of the documentary evidence under Ext. A/1, no reliance should have been placed on the oral evidence which runs counter to it.

10 Admittedly, P.W. 1 was proceeded departmentally twice. In both the occasions, the articles of charges were proved against him. Punishment was imposed on him by reducing his permanent status to Badli. The appellant being the disciplinary authority had issued the second show cause notice to him. P.Ws 1 and 2 evidently bore grudge against him for the aforesaid reasons and were in search of an opportunity to take revenge. Since P.Ws 1 and 2 were carrying ill-feeling against the appellant and in view of the fact that there was no demand of any bribe when the case of the workmen was referred to under Ext.11, there is existed a strong motive for false implication which has come up only after the notice imposing punishment was issued. The learned Special Judge has lost sight of the most important circumstance which discredits the prosecution evidence to a great extent.

11. Law is also well settled that failure of the prosecution to prove the story of demand of bribe set up by it casts a cloud of doubt over the story of acceptance of bribe. There is absolutely no evidence that the appellant has accepted any bribe money consciously. Admittedly, the alleged bribe money concealed inside an envelope was handed over to the appellant while he was about to leave his residence in the official jeep. There is no credible evidence to show that the appellant had knowledge that the said envelope was containing any currency note. The theory of counting the aforesaid money

without bringing the same from out of the envelope is wholly untrue and improbable. If there was any demand from the side of the appellant, it was not necessary to conceal the money inside an envelope and pass on the same to the appellant. This is a telling circumstance which militates against the case of the prosecution. As it is aptly said, men may lie but circumstances do not.

12. The alleged acceptance of bribe by the appellant also goes against the normal human conduct and probability. The so-called money was allegedly given to the appellant when he came out of his house and was going to board the jeep. It hardly stands to reason that the appellant asked P.W.2 for the money and accepted the same in presence of many strangers and the driver of the jeep. It is against all probability and normal human conduct that the appellant being the highest authority of the mines would demand and accept bribe from a mazdoor not only in presence of a driver but in the presence of a large number of strangers as well.

13. Strangely enough, the members of the trap party were only ten feet away from the appellant when he allegedly demanded and accepted bribe from P.W.2. None of them, not even P. Ws.3 and 4, who were set up as independent witnesses and were supposed to see the transaction and overhear the conversation between the appellant and the decoy, heard the appellant asking P.W.2 for the bribe money. This deficiency in the case of the prosecution is tell-tale.

14. It is in the evidence of P.W. 7 that while the appellant was boarding the jeep a person handed over an envelope to him saying that one Sahoo Sahib had sent that letter. The learned Special Judge has grossly erred in rejecting the evidence of P.W. 7 without assigning any valid reason. Merely because the witness told a different sequence of event, his evidence cannot be rejected in toto. This witness is the most competent witness to throw light to the actual happening as he was only food apart from the appellant. P.W. 7 disclosed the real fact which was different from the story presented by the other witnesses. This certainly cannot be a ground to disbelieve the witness.

15. The learned Special Judge has grossly erred in drawing a presumption under Section 20 of the Prevention of Corruption Act when the prosecution failed to prove the demand and acceptance of the bribe money by the appellant. In absence of proof of demand, the question of raising the presumption would not arise. (See ***V. Venkata Subbarao v. State represented by Inspector of Police, Andhra Pradesh***, AIR 2007 SC 489). Admittedly, the

money was hidden inside an envelope and handed over to the appellant. There was no scope for the appellant to know its contents without bringing the contents out. Merely because, the appellant held it in his hand, the same can never be termed as acceptance of the bribe. Acceptance is a positive act which is done with consciousness. In absence of any prior knowledge of the contents of the envelope, mere holding the same would not amount to acceptance warranting a criminal prosecution.

16. The prosecution not having led any evidence to show that the envelope in which the alleged bribe money was put did not contain any trace of phenolphthalein powder and in view of the finding of the learned trial court that the envelope might have been soiled with phenolphthalein, while keeping the tainted notes in it, the learned Special Judge erred in utilizing the hand-wash as an incriminating circumstance against the appellant. None of the independent witnesses (P.Ws 3 and 4) having said that the appellant touched the tainted money, the fact that the hand-washes of the appellant turned pink was itself suggestive of the fact of false implication.

17. P.W. 1 was trying to take retirement on health ground so that an employment for P.W. 2 could have been secured. As the same was not achieved, P.W. 1 hatched an evil design in association with P.W. 2 to teach the appellant a good lesson for not yielding to their plan. This circumstance goes to show that P.Ws. 1 and 2 had animosity against the appellant.

18. For the aforesaid reasons, the impugned judgment and order of conviction dated 30.6.1999 passed by the learned Special Judge (C.B.I.) Bhubaneswar, in T.R. No. 136/4 of 1999/98 is set-aside.

19. In the result, the Criminal Appeal is allowed. The bail bonds are cancelled.

Appeal allowed.

2015 (II) ILR - CUT- 57

S.C.PARIJA, J

CRLMP NO. 1152 OF 2014
&
CRLMC NO. 5020 OF 2014

PRAKASH MISHRA …….Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226
r/w Section 482 Cr.P.C

Quashing of F.I.R. and Criminal Proceeding – Offence U/s 13 (2) r/w Section13 (1) (d) of the P.C. ACT., 1988 and Section 120-B of I.P.C. – No material that the petitioners had any dishonest intention in sanctioning 100% advance towards purchase of cement and steel – Preliminary enquiry not conducted properly – False and baseless allegations to implicate the petitioners – No notice was issued to the petitioners allowing them opportunity to put forth their cases – Willful inaction of the Director, Vigilance, in not ensuring free, fair and proper enquiry – Allegations made in the F.I.R and materials available in the case diary including the purported incriminating materials pointed out by the Vigilance Department do not constitute or disclose Commission of any cognizable offence so allowing continuance of the Criminal Proceeding against the present petitioners would be an abuse of the process of Court and result in serious miscarriage of Justice – Held, impugned Criminal Proceedings initiated against the petitioners are quashed.

For Petitioner : Mr. Sanjit Mohanty, Sr. Adv., with
M/s. S.P. Panda, R.R. Swain,
D.Panda, A. Panda, B.P.Das &
S.N. Das. Mr. R.K. Mohapatra, Govt. Adv.
Mr. L.N. Rao, Sr. Adv. with Srimanta Das,
Sr.Standing Counsel (Vigilance)
& Mr. S.K.Mund.
Mr. A.K. Bose, Assistant Solicitor General of India.
M/s. Aditya Ku. Mohapatra & S.J. Mohanty

For opposite party : Mr. Srimanta Das, Sr. Standing Counsel (Vigilance)
with S.K.Mund

Date of Judgment : 19.06.2015

JUDGMENT

S.C. PARIJA, J.

These two applications have been filed under Articles 226 and 227 of the Constitution of India and Section 482 Cr.P.C. respectively, for quashing of the F.I.R. registered as Bhubaneswar Vigilance P.S. Case No.35, dated 20.9.2014, under Section 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988 and Section 120-B of the Indian Penal Code, corresponding to V.G.R. Case No.35 of 2014, pending in the Court of the learned Special Judge, Vigilance, Bhubaneswar.

2. Shri S.K. Das Mohapatra, Deputy Superintendent of Police, Vigilance Cell, Cuttack, lodged a written report before the Superintendent of Police, Vigilance, Bhubaneswar, which was registered as Bhubaneswar Vigilance P.S. Case No.35, dated 20.9.2014, under Section 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988 ('P.C. Act' for short) and Section 120-B of the Indian Penal Code ('I.P.C.' for short), which reads as under:-

> "A Vigilance enquiry was taken up to verify the allegation that officials of Odisha State Police Housing & Welfare Corporation (OSPH & WC), Bhubaneswar, made 100% payment of the cost of cement and steel to different suppliers prior to the supply during the period from 2006-07 to 2009-10 without any security and without ensuring the delivery of the materials, and thereby allowed pecuniary advantages to the aforesaid suppliers by abusing their official positions.
>
> During enquiry, it is found that OSPH & WC, Bhubaneswar is a registered company under Indian Companies Act, 1956. Shri Prakash Mishra was then Chairman-cum-Managing Director from 1.9.2006 to 3.7.2009 and Shri Rabindra Kumar Patnaik was the Financial Advisor from 6.10.2005 to 2.9.2009 of OSPH & WC, Bhubaneswar.
>
> Shri Prakash Mishra, the then CMD of the OSPH & WC without any authority and without approval of the Board of Directors of OSPH & WC approved the proposal dtd.14.09.2006 and the minutes of the tender/purchase committee meeting of OSPH & WC Ltd. held on 20.10.2006 for issuance of supply order centrally from the

Head Office for procurement of steel and cement on 20.10.2006 & 29.10.2006, superseding the previous orders for issuance of supply order by the Project Managers of the Zonal Offices of OSPH & WC to show undue pecuniary favour to the suppliers Shri Mishra, again by abusing his official position and in connivance with Shri Rabindra Kumar Patnaik, Financial Advisor of OSPH & WC issued one Office Order No.7395/OPHWC dt.03.11.2006 with an intention to show undue official favour to the supplier companies of steel and cement by authorising the Financial Advisor to make full payment of price to the suppliers before supply of Steel and Cement, without obtaining any security from the suppliers and without prior or subsequent approval of the Board of Directors of OSPH & WC.

As per the orders of CMD and delegation of power to the Financial Advisor of OSPH & WC Shri Rabindra Kumar Patnaik sanctioned 100% payment of price to different suppliers of cement and steel as per the supply orders issued in favour of the suppliers.

Enquiry also revealed that the aforesaid payments were made to the suppliers against the supply orders which contained the following terms and conditions.

1) Supply of the materials should be despatched to sites immediately and delivery will be made within 7 days from the issue of the supply order.

2) Supply Bills along with challans after duly countersigned by Joint Manager/DM may be submitted to the Head Office for adjustment against advances.

Though the conditions of each supply order for supply of the materials within 7 days of receipt of the orders, it is alleged that some of the suppliers failed to supply the same within the stipulated time. On the other hand as per the orders of Shri Prakash Mishra, CMD, Shri Rabindra Kumar Patnaik, Financial Advisor of OSPH & WC, in abuse of their official position, continued to make further full payment of price to the cement and steel suppliers against further orders without ensuring the delivery of steel and cement for which full payments were made earlier.

Even by the end of the financial year 2006-07 Shri Prakash Mishra and Shri Rabindra Kumar Patnaik did not take steps to ensure that the different steel and cement suppliers, (to whom they have already made 100% payment of price of Rs.9,20,01,730/-), had actually supplied the ordered quantities of cement and steel. In a similar manner, Shri Prakash Mishra and Shri Rabindra Kumar Patnaik sanctioned 100% payment of price in advance to different suppliers of steel and cement as follows:- Rs.18,23,05,447/- for the year 2007-2008, Rs.26,69,78,952/- for the year 2008-2009 and Rs.3,73,18,127/- for the year 2009-2010 without any security and without ensuring that the ordered consignment were supplied to OSPH & WC.

Thus for the financial year from 2006-2007 to 2009-2010 Shri Prakash Mishra as CMD,OSPH & WC failed to ensure that the suppliers of cement and steel who had already received payment of full price of the consignments, had actually delivered those consignments. The advance payments of price remained un-reconciled and unadjusted even after the completion of the financial year. Consequently, Shri Prakash Mishra and Shri Rabindra Kumar Patnaik did not finalise the accounts for the financial years 2006-2007, 2007-2008, 2008-2009 and 2009-2010, within the stipulated period of six months after the completion of the corresponding financial year.

In this manner, a total sum of Rs.57,86,03, 256/- (19,84,05,290.00)(cement) + Rs.38, 01,97,966.00 (steel) was paid as 100% payment of price to the aforesaid cement and steel suppliers before supply of the quantity of steel and cement without keeping any security and thereby, the aforesaid amounts were released by means of cheques/DDs in favour of the suppliers, without supplies against the earlier payments made to the suppliers. It is alleged that taking advantage of such glaring omissions and commissions some suppliers have supplied the materials long after the receipt of the full payment, without adhering to the terms and conditions of supply orders, and thereby earned interest on full payment received from OSPH & WC. Furthermore, even after a lapse of 4 to 7 years, OSPH & WC failed to furnish the bills, vouchers and other vital details regarding the supply of the consignments against which full payment was already made and it is alleged that some of the suppliers may not have actually supplied the ordered quantities of cement and steel.

Thus, by acting in the aforesaid manner, without any authority, Shri Prakash Mishra and Shri Rabindra Kumar Patnaik abused their official position and allowed pecuniary advantage to the suppliers against the financial interests of OSPH & WC.

Enquiry further revealed that a Special Audit was conducted by the Finance Deptt., Govt. of Odisha from 25.10.2010 to 08.06.2011 as there were huge payments towards cement and steel supplied by different suppliers to OSPH & WC that remained un-reconciled for a very long time corresponding to the period from 2006-2007 to 2009-2010. The Special Audit revealed that even though 100 % payments were made to the cement and steel companies, there were no record of the receipt of the corresponding consignments for which full payments were already made, such advance payment remained un-reconciled for a long period even beyond the closure of the financial year and there is an outstanding amount of Rs.727.52 lakhs lying against the suppliers.

Thus it has been alleged that Shri Prakash Mishra, the then CMD, OSPH & WC, Bhubaneswar and Shri Rabindra Kumar Patnaik, the then Financial Advisor, OSPH & WC, Bhubaneswar entered into a criminal conspiracy and in pursuance to the said conspiracy abused their official positions, without prior or subsequent approval of the Board of Directors passed orders for 100% payment of price without any authority against the financial interests of OSPH & WC and thereby showed undue pecuniary advantage to the cement and steel suppliers and others and as such they are liable for committing offences of criminal conspiracy and criminal misconduct U/s. 13(2) r/w 13(1)(d) P.C. Act, 1988/120-B IPC.

It is, therefore, requested for registration of a Criminal case against Shri Prakash Mishra, Shri Rabindra Kumar Patnaik and others U/s. 13(2) r/w 13(1)(d) P.C. Act, 1988/120-B IPC for a detail investigation."

3. Shri Sanjit Mohanty, learned Senior Advocate appearing for the writ petitioner Prakash Mishra (in CRLMP No.1152 of 2014) submitted that the writ petitioner is a serving officer of Indian Police Service ('IPS' for short) of 1977 batch, belonging to the Orissa cadre, presently serving as the Director General of Central Reserve Police Force ('CRPF' for short), New Delhi.

During his illustrious career spanning over 36 years, the petitioner had served in various important and sensitive posts both under the Central Government and the State Government, which are as follows:-

Sl. No.	CENTRAL GOVERNMENT
1.	SP and DIG of CBI at Delhi, Bhuabneswar and Hyderabad.
2.	IG, Railway Protection Force, South Eastern Railway, Kolkata.
3.	Joint Director, National Police Academy, Hyderabad.
4.	Special DG, National Investigation Agency, New Delhi.
5.	DG, National Disaster Response Force, New Delhi.
	STATE GOVERNMENT
1.	SP of Districts of Mayurbhanj and Rourkela.
2.	AIG, State Police Headquarters, Cuttack.
3.	DIG, Bhuabneswar Range and DIG, Security to the Chief Minister, Orissa.
4.	IG, Headquarters, Cuttack.
5.	Chairman-cum-Managing Director, Orissa Police Housing and Welfare Corporation, Cuttack.
6.	Addl. DG, Headquarters, Cuttack.
7.	Additional DG and DG-cum-Director Intelligence, Anti Naxal Operations.
8.	D.G., Home Guard and Fire Services.
9.	DGP, Orissa.

4. It is submitted that while the writ petitioner was serving as the Director General, National Disaster Response Force, New Delhi, keeping in view his unimpeachable integrity and impeccable track record and his seniority in service, a request was made by the State Government for accepting the post of Director General of Police ('D.G.P.' for short), Orissa. Accepting such offer, the writ petitioner returned to the State and joined as the D.G.P., Orissa, in 2012. During his tenure as the D.G.P., Orissa, the writ petitioner took several measures to enhance the efficiency, preparedness and

morale of the Orissa Police to counter the serious problem of left wing extremism in the State. During his tenure as the D.G.P., the State could recover from severe reverses it had suffered earlier and large parts of the State were cleared of the Maoist problem.

5. Subsequently, during his tenure as D.G.P., Orissa, he came to realize that the ruling political establishment were not very happy with his strict and upright way of functioning and in order to avoid any clash with the political establishment in power, the writ petitioner applied to the State Government for being spared for central deputation to the Union of India. Accepting such request of the writ petitioner, the State Government vide letter dated 18.12.2013 recommended his name for deputation to the Union of India. However, due to ensuing general election in the State, the writ petitioner could not be relieved. Immediately after the election results were announced, the State Government vide its letter dated 28.5.2014, withdrew the recommendation for central deputation of the writ petitioner earlier made, on the plea that there is severe shortage of IPS officers in Orissa at the D.G. level and therefore it is not possible to spare the services of the writ petitioner for central deputation.

6. It is submitted that subsequently an enquiry was made by the Union of India regarding availability of the writ petitioner for being posted as the Special Secretary (Internal Security), in the Ministry of Home Affairs, Government of India. Immediately after receipt of such request, the writ petitioner was removed from the post of D.G.P., Orissa and posted as the Chairman-cum-Managing Director, Orissa State Road Transport Corporation, which is not even a post under the Police Department.

7. It is further submitted that on 9.7.2014, a letter was addressed by the State Government to the Ministry of Home Affairs, Government of India, wherein it was stated that the name of the writ petitioner has been removed from the offer list for central deputation and that there is a Vigilance enquiry pending against him. It is submitted that despite such communication from the State Government, on the insistence of the Ministry of Home Affairs, Government of India, the writ petitioner was relieved from the State and was posted as the Special Secretary (Internal Security), in the Ministry of Home Affairs, Government of India. Subsequently, he has been appointed as the Director General of CRPF, New Delhi, where he is continuing as such till date.

8. Learned counsel for the writ petitioner submitted that the main thrust of the allegation in the impugned F.I.R. is that while the writ petitioner was posted as the Chairman-cum-Managing Director ('CMD' for short), Odisha State Police Housing and Welfare Corporation ('Corporation' for short), Bhubaneswar, from 01.9.2006 to 03.7.2009, he had approved the payment of 100% advance towards cost of cement and steel to different suppliers prior to the supply during the period from 2006-07 to 2009-10, without any security and without ensuring the delivery of the materials and thereby allowed pecuniary advantage to the said suppliers by abusing his official position. It has also been alleged that the writ petitioner had entered into a criminal conspiracy with the other petitioner Rabindra Kumar Pattnaik (in CRLMC No.5020 of 2014) and in pursuance of such conspiracy, they have abused their official positions and passed orders for 100% payment of price without approval of the Board of Directors of the Corporation and thereby showed undue pecuniary advantage to the cement and steel suppliers and others and as such they are liable for commission of offences of criminal misconduct and criminal conspiracy under Section 13(2) r/w Section 13(1)(d) of the P.C. Act and Section 120-B I.P.C.

9. It is submitted that the aforesaid allegations are false and baseless and have been made with the mala fide intent and oblique motive of victimizing the writ petitioner, inasmuch as, the Vigilance Department in its subsequent counter affidavit filed pursuant to the direction of the Court, has admitted that the practice of making payment of 100% of the price of cement and steel to the manufactures/suppliers was in vogue since early Nineties and continued even after the writ petitioner left the Corporation. Learned counsel for the writ petitioner has relied upon paragraphs-12, 13 & 14 of the said counter affidavit filed by the Vigilance Department, which are extracted below:-

> "12. That with respect to the practice and procedure adopted by the Odisha State Police Housing and Welfare Corporation for procurement of cement before 01.9.2006, i.e. prior to the petitioner joining as CMD of the Corporation, has been ascertained by the Vigilance Department from the Corporation. Up to 28.10.2003, the cement was procured from IDCOL, L&T, ACC & OCL on company's offered price. Their offered price was inclusive of transportation and delivery at site. After receiving indent from the zonal offices the offers were collected from the above mentioned reputed companies. On finalization of rate the procurement was made

directly from the Cement Companies against the advance payment. The companies were paid 100% advance as per their terms of supply which was sanctioned at Head Office and paid to the companies along with supply order. The advance accounts was settled at Head Office after receipt of delivery challan and bills following due procedure. But on 27.10.2003 Shri B.B.Mohanty, the then CMD vide Office Order No.7066 on getting complaints from APM and DPM of the Corporation about receiving steel and cement in delay resulting in delay in execution of the project work and in order to expedite the construction work and ensuring commission of utilization certificate to prevent surrender of funds as huge amount of advances remained unadjusted ordered to the DPM and APM to procure the required cement and steel at approved rates and terms and conditions directly.

From 28.10.2003 onwards the central policy of procurement of cement was decentralized and Dy. Project Managers (Asst. Engineers) were allowed to purchase cement directly from the approved suppliers namely L&T, Lafarge, ACC and OCL. The lowest negotiated rates were finalized through tender process district wise and party wise respectively which included transportation charges. The advance was sanctioned at the Head Office and paid to the Dy. Project Managers, account basing on their requisition for purchase of cement for the project undertaken by them. The advance account was settled at Head Office after receipt of challan and bills following due procedure. Such practice continued up to 31.3.2006.

During beginning of financial year 2006-07 again tender committee invited offers from the reputed manufacturing companies like ACC, Lafarge, OCL and L & T etc. and rate were finalized district wise for supply of cement. But companies failed to supply the cement due to increase the rate of cement in the open market. Considering the situation, the rates were finalized by enhancing the rates of cement by obtaining offers from the companies in case to case basis. The advances were sanctioned at Head Office as per the terms and conditions offered by the Companies.

13. That so far as procedure and practice prevailed during the incumbency of the present petitioner from 01.9.2006 to 03.7.2009 in regard to procurement of Steel and Cement as well as payment of advance are concerned, it is submitted that to satisfy the top quality

requirement of cement and steel it was decided to procure the materials from reputed manufacturing company like SAIL, RINL (VIZAG) for steel rod and from M/s Lafarge India, M/s OCL, M/s Ultratech and M/s ACC Ltd. for cement. In this connection, the CMD has authorized the Financial Advisor to sanction advance payment to the cement and steel supplier. Approximately an amount of Rs.59.00 crores was paid to different steel and cement suppliers, out of which an amount of Rs.7.72 crores approximately remained unsettled/unadjusted as found by special audit.

14. That in regard to the practice and procedure adopted by the Corporation for procurement of Cement after the petitioner demitted office on 03.7.2009 onwards it is submitted here that during the middle of July 2009 (up to 13.7.2009) the system of central purchase was discontinued and Jt.Managers of the Division were authorized to purchase the cement from the approved suppliers in the approved rate. The advances were sanctioned by Joint Managers at Division level and the advance accounts were settled at the division level. However, the system for finalization of rates on quarterly basis continued at Head Office. Head Office of this Corporation continued to obtain offer from the approved suppliers and negotiate the rates district wise for a period of three months. The same system is continuing so far. Moreover to streamline the system, further instructions have been issued to field divisions on 15.10.2014."

10. It is submitted that in his capacity as CMD of the Corporation, the writ petitioner had taken a decision that all purchases of steel and cement would be made directly from the Head Office. It was also decided that purchase of steel shall be from public sector undertakings, like SAIL and RINL and cement from renowned branded manufacturers, like Ultratech, OCL, L&T, ACC etc. The said decision was taken in the best interest of the Corporation and to ensure quality and cost benefit. It is submitted that as the CMD of the Corporation, the writ petitioner had full financial power and authority to take such a decision. Moreover, all such purchases of steel and cement were made in a most transparent manner, after inviting tenders from the intending bidders and accepting the lowest price offered.

11. It is submitted that the decision to purchase steel and cement from the branded manufacturers directly at the most competitive price yielded excellent results and for the first time, the Corporation earned huge profits

and accumulated losses were wiped out. The Corporation continued to earn huge profits consistently during the tenure of the writ petitioner, which is evident from the Annual Reports of the Corporation for the relevant years.

12. It is accordingly submitted that the practice and procedure of making payment of 100% advance towards cost price of cement and steel was being followed much prior to the writ petitioner joining the Corporation and such practice continued even after the writ petitioner demitted office in July, 2009. The writ petitioner had only streamlined the procedure and made it more effective and transparent.

13. It is further submitted that the reconciliation of accounts of the Corporation pertaining to outstanding advances against the suppliers is not the responsibility of the writ petitioner, as the CMD of the Corporation. Moreover, as has been clarified by the Home Department, the findings in the audit report are based on the accounts maintained by the Corporation and such findings cannot be taken as final, unless the same are duly enquired into and established by the Corporation. In the present case, as the adjustment and reconciliation of the accounts of the Corporation for several years, including the tenure of the writ petitioner, is still under progress, the initiation of the criminal proceeding based on the observation made in the audit report cannot be sustained in law.

14. It is further submitted that prior to the lodging of the impugned F.I.R., a preliminary enquiry was undertaken by the Vigilance Department and during such enquiry, a query was made to the Home Department of the State Government, which is the Administrative Department of the Corporation, seeking clarification with regard to the observations made in the Special Audit Report pertaining to reconciliation of huge outstanding amount as advance against which supplies have not been made. It is submitted that the Home Department in its communication dated 24.09.2014 addressed to the Superintendent of Police, Vigilance Cell, Odisha, Cuttack, intimated that the findings of the audit team incorporated in the Special Audit Report are based on the accounts maintained by the Corporation at their level and such findings of an audit cannot be taken as final, unless the same are duly enquired and established by the auditee, i.e. the Corporation. The Home Department further clarified that it does not have any authority to suo motu initiate any action unless any specific reference is made by the Corporation to the Department/Government for intervention. However, even before receipt

of such clarification, the Vigilance authorities have rushed to register the impugned F.I.R. on 20.09.2014, for the reasons best known to them.

15. It is further submitted that the preliminary enquiry has been conducted by the Vigilance authorities in a most perfunctory manner, with the oblique motive of initiating a criminal proceeding against the writ petitioner, irrespective of the materials collected during such enquiry. In this regard, it is submitted that during enquiry, no statement of any witness has been recorded and even the writ petitioner has not been afforded an opportunity to produce the relevant records/documents and explain his position. Further, though the details of the advances received and supplies made by various manufacturers/suppliers had been sought for by the Enquiring Officer, without even waiting for their response, the impugned F.I.R. has been lodged in a most hurried manner, as if to meet a predetermined dead-line.

16. Learned counsel for the writ petitioner further submitted that the purported preliminary enquiry has been conducted by the Vigilance authorities in gross violation of the procedures and guidelines laid down in Circular Order No.6/96 of the Vigilance Department.

17. Learned counsel for the writ petitioner submitted that as the allegations made in the impugned F.I.R. are vague and baseless and does not disclose commission of any cognizable offence, the same is liable to be quashed. In support of his contention, learned counsel has relied upon a decision of the apex Court in ***State of West Bengal & others v. Swapan Kumar Guha & Others,*** AIR 1982 SC 949, wherein the Hon'ble Court has held that a F.I.R., which does not allege or disclose that the essential requirements of the penal provision are prima facie satisfied, cannot form the foundation or constitute the starting point of a lawful investigation.

18. In this regard, he has also relied upon the often quoted decision of the apex Court in ***State of Haryana and others v. Ch. Bhajan Lal and others***, AIR 1992 SC 604, wherein the Hon'ble Court has held that a FIR can be quashed at the initial stage where the allegations made, even if taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused. Hon'ble Court has further held that where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to

private and personal grudge, quashing of such a proceeding even at the initial stage is justified.

19. Coming to the allegation of criminal misconduct under Section 13(1)(d) of P.C. Act, learned counsel for the writ petitioner submits that the pecuniary advantage alleged to have been gained by the writ petitioner must be by (i) corrupt or illegal means, (ii) abuse of power and (iii) in the discharge of duty without any public interest. It is submitted that in the present case, the basic ingredients of the alleged offence of criminal misconduct is not made out, as has been held by the apex Court in ***C.K. Jaffer Sharief v. State (through CBI),*** (2013) 1 SCC 205. In this regard, it is submitted that the impugned F.I.R. does not disclose the names of the beneficiaries who have received the pecuniary advantage or the extent of such pecuniary gain and corresponding loss to the Corporation. Moreover, there is no allegation in the F.I.R. of any criminal intent or mens rea on the part of the writ petitioner, which is essential to make out the offence of criminal misconduct, as has been held by the apex Court in ***A.Subair v. State of Kerala*****,** (2009) 6 SCC 587. Further, the actus reus as alleged in the impugned F.I.R. does not satisfy the requirements of law laid down by the apex Court in ***R. Balakrishna Pillai v. State of Kerala,*** (2003) 9 SCC 700.

20. As regard the allegation of criminal conspiracy made in the F.I.R., learned counsel for the writ petitioner submits that except bald allegations, there is no material available on record to even suggest that there was any agreement or meeting of mind between the two petitioners to do an illegal act or an act by any illegal means and therefore, the offence of criminal conspiracy under Section 120-B I.P.C. is not made out at all.

21. It is accordingly submitted that as the impugned F.I.R. has been lodged on false, vague and baseless allegations with the mala fide intent and oblique motive to cause harm and damage to the reputation of the writ petitioner and as the allegations made therein and the evidence collected in support of the same do not make out a case against the petitioners, the continuance of the same would be an abuse of the process of the Court and therefore, the same is liable to be quashed.

22. Shri A.K. Mohapatra, learned counsel appearing for the petitioner Rabindra Kumar Pattnaik (in CRLMC No.5020 of 2014) submitted that the petitioner is a 1986 batch officer of Orissa Financial Service ('OFS' for short) and was posted as Financial Advisor of the Corporation with effect from 06.10.2005 and continued till 02.09.2009. Thereafter, he was posted as

the Director, Madhusudan Das Regional Academy of Financial Management, Govt. of Orissa and at present he has been posted as Addl. Secretary in the School and Mass Education Department of the State Government. He has an unblemished service career with outstanding CCRs and his name has been recommended for selection/promotion to the Indian Administrative Service ('IAS' for short) by the Finance Department of the State Government.

23. As regard the allegations made in the impugned F.I.R., learned counsel for the petitioner submits that the same are solely based on the observations made in the Special Audit Report and admittedly, unreconciled and/or unadjusted outstanding advance amounts reflected in the said audit report has been mechanically replicated in the F.I.R., which is not supported by any materials on record. In this regard, it is submitted that subsequent to the Special Audit Report, there has been further reconciliation of the accounts pertaining to outstanding advances to steel and cement suppliers and as per the compliance report of the year 2014, the outstanding advance against the said suppliers has been shown as Rs.494.79 lakhs. In this regard, he has also referred to the clarification given by the Home Department, which is the Administrative Department of the Corporation, wherein it has been categorically stated that the findings of the audit incorporated in the audit report are based on the account maintained by the Corporation at their level and that the findings of the audit report cannot be taken as final, unless the same are duly enquired and established by the auditee, i.e. the Corporation.

24. It is submitted that in a meeting chaired by the writ petitioner, it was decided that the procurement shall be done centrally by the Corporation as per the indent placed by the Project Managers of different zones. Accordingly, offers were invited from reputed manufacturers and the Tender Committee considered those offers and accepted the minimum price offered by such manufacturers, which is a non-trade price, i.e. much less than the market price. Further, the manufactures/suppliers were required to supply the materials directly to the work site in different zones and on receipt of such materials, compliance was required to be furnished to the Head Office. It is because of non-compliance by the zonal offices with regard to the reconciliation of the accounts, the outstanding has been pointed out in the Special Audit Report. It is submitted that the process of adjustment and/or reconciliation of the accounts of the Corporation for past years pertaining to payment of advance towards cost price to manufactures /suppliers of steel and cement, in respect of different projects is still under progress and the same is yet to be finalized.

25. Learned counsel for the petitioner further submits that similar practice has been followed even after 2009, but the Vigilance authorities have chosen not to take note of such fact while lodging the impugned F.I.R., and they have intentionally confined it to the period covering the tenure of the petitioners only. It is accordingly submitted that as the allegations made in the F.I.R. do not prima facie constitute any offence and the same appears to have been lodged in utmost haste and with oblique motive, the continuance of the criminal proceeding would be an abuse of the process of Court.

26. Learned counsel for the petitioner while reiterating the legal stand taken by the writ petitioner, has relied upon the decision of the apex Court in ***Rajiv Thapar and others v. Madan Lal Kapoor***, (2013) 3 SCC 330, wherein the Hon'ble Court has laid down the steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power of the High Court under Section 482 Cr.P.C. He has also relied upon the decision of the apex Court in ***Rishipal Singh v. State of Uttar Pradesh and another,*** (2014) 7 SCC 215, in support of his contention that the High Court in exercise of its inherent power under Section 482 Cr.P.C., should not allow a vexatious complaint to continue, which would be a pure abuse of the process of the law and the same has to be interdicted at the threshold.

27. Coming to the allegation under Section 13(1)(d) of the P.C. Act, it is submitted that in order to make a person criminally accountable, it must be proved that an act, which is forbidden in law, has been caused by his conduct and that act was accompanied by a legally blameworthy attitude of mind. It is accordingly submitted, the dishonest intention, which is the gist of the offence under Section 13(1)(d) of the P.C. Act is implicit in the words used i.e. corrupt or illegal means and abuse of position as a public servant.

28. It is accordingly submitted that in the instant case, there being no material on record to prima facie establish the fact that petitioners had any criminal intention or mens rea while sanctioning payment of full price to the manufacturers/suppliers of cement and steel, no offence can be attributed to them.

29. In response, Shri L.N. Rao, learned Senior Advocate appearing for the Vigilance Department submits that after unearthing prima facie material during the preliminary enquiry, disclosing cognizable offences under Section 13(2) r/w Section 13(1)(d) of the P.C. Act and Section 120-B of I.P.C., the impugned F.I.R. has been lodged and therefore no interference is warranted

at this initial stage. It is further submitted that a perusal of the allegations made in the F.I.R. clearly establishes the complicity of the petitioners in the said offences and as the F.I.R. prima facie makes out commission of cognizable offences by the petitioners, no interference is warranted at this stage. In this regard, learned counsel for the Vigilance Department has relied upon the decision of the apex Court in *Bhajanlal (supra)* and reiterates that the power of quashing a criminal proceeding at the stage of F.I.R. should be exercised very sparingly and with circumspection and that too in the rarest of the rare cases, only when the allegations made in the F.I.R., even if they are taken at their face value and accepted in its entirety do not prima facie constitute an offence. The Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R.

30. Learned counsel has also relied upon the decision of the apex Court in ***Indian Oil Corpn. v. NEPC India Ltd. and others***, (2006) 6 SCC 736, in support of his contention that the complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Further, neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint is warranted while examining the prayer for quashing of a complaint.

31. Relying upon a decision of the apex Court in ***Superintendent of Police, C.B.I. and others v. Tapan Kumar Singh,*** (2003) 6 SCC 175, learned counsel submits that the true test at the stage of F.I.R. is whether the information furnished provided a reason to suspect the commission of a cognizable offence and not that the police officer recording it must be convinced/satisfied that a cognizable offence has been committed. It is further submitted that the High Court should not go into the merits and demerits of the allegations made in the F.I.R. merely because the accused alleges malus animus against the author of F.I.R.

32. Learned counsel has also relied upon the decision of the apex Court in ***State of Madhya Pradesh v. Awadh Kishore Gupta and Others,*** (2004) 1 SCC 691, wherein the Hon'ble Court has held that at the stage of quashing of F.I.R., it is not permissible for the High Court to look into the materials, the acceptability of which is essentially a matter for trial. While exercising

inherent jurisdiction under Section 482 Cr.P.C., it is not permissible for the Court to act as if it was a trial Judge.

33. Reference has also been made to the decision of the apex Court in ***R. Kalyani v. Janak C. Mehta and others,*** (2009) 1 SCC 516, in support of his contention that if the allegations made in the F.I.R. disclosed commission of an offence, the Court shall not go beyond the F.I.R. and pass an order in favour of the accused.

34. Coming to the contention of the petitioners that in the absence of criminal intention or mens rea, no offence can be attributed to them, learned counsel for the Vigilance Department has relied upon a decision of the apex Court in ***Ajoy Acharya v. State Bureau of Investigation against Economic Offences***, (2013) 11 SCALE 496, wherein the apex Court has held that the question of abuse of office and whether any pecuniary advantage has flown to the public servant under Section 13(1)(d) of the P.C. Act, which are a mixed question of law and fact should be decided at the time of trial. It is submitted by the learned counsel that the apex Court while returning such finding, has taken note of its earlier decision in *C.K. Jaffer Sharief (supra),* which has been heavily relied upon by the learned counsels for the petitioners.

35. Learned counsel for the Vigilance Department submits that during investigation several incriminating materials have been found on scrutiny of various documents during preliminary enquiry, which support the allegations made in the F.I.R., which are as follows :-

"I. Note sheet dated 23.4.2007 of the corporation prepared by its officials which related to making advance payments to the supplier companies. The Note Sheet showed that intimation was given by the Deputy Project Manager, Jeypore for the delay in supply of materials by Ultratech Cement Co. though full payment was made in advance to them. This was brought to the notice of the accused no.1 who was CMD of the Corporation at the relevant time. However, inspite of the above, no action was taken by him in this regard.

In addition to above, the accused no.2 who was authorized by accused no.1 to make advance payments went on to approve another round of advance payment to Ultratech Cement Co.

II. AG Audit Reports for the year 2008-09 (for the period 2007-08), and for the year 2009-10 (for the period 2008-09) wherein the AG has severely criticized and demanded explanations for huge outstanding of advances to steel and cement suppliers. The reports also note that undue favours had been made to the cement suppliers by the Corporation.

Although it has been argued that all the outstandings mentioned in the AG Audit Reports have been settled, that claim stands falsified by letter dated 11.11.2014 (filed by accused no.1) which discloses the position of outstanding as on 30.9.2014.

III. It was also found out that no verification of performances of the supplier companies was done after huge advances was forwarded to them.

IV. Though the petitioner decided to make 100% advance payments to the supplier companies before supply of materials, adequate policies/guidelines were not framed to prevent non-supply or delayed supply thereby ensuring supply within the time specified.

V. Proper accounts for the Corporation were not maintained during the tenure of accused no.1 as CMD of the Corporation.

VI. No periodical verification of stock was conducted by the Corporation officials to ensure that the supplies against which 100% advance payment had been made were received.

VII. Accused no.1 during his tenure did not inform the Board of Directors of the huge outstanding towards the advances made to the suppliers.

VIII. Timely audit of the accounts of the Corporation during the tenure of accused no.1 was not ensured."

36. It is accordingly submitted that as there are sufficient materials to prima facie establish the allegations made in the F.I.R., which constitute cognizable offences, no interference is warranted at this initial stage when the investigation is under progress and all facts are yet to come on record.

37. Learned Government Advocate appearing for the State with reference to the affidavit filed by the Home Department submits that the Superintendent of Police, Vigilance Cell, Cuttack, vide his letter dtd. 08.09.2014 (Annexure-A/1) had sought for clarification on the points detailed

in the questionnaire. It is submitted that the Home Department vide letter dated 24.09.2014 (Annexure-B/1) furnished its clarification, which reads as follows:

	Questionnaire	**Reply**
1.	Please state which is the Administrative Control Department of Odisha State Police Housing & Welfare Corporation.	The Odisha State Police Housing & Welfare Corporation Limited was established in the year 1980 having the status of a state owned Public Sector Undertaking incorporated under the Companies Act, 1956. Share capital has been invested by Govt. in Home Department with the Corporation for carrying out the objectives for which it was established. The definition of "Administrative Department" has not been defined in the AOA of the OSPH & WC Ltd. in Article 1(g) of the AOA, "The Government" has been defined as the Government of Odisha. As per the practice which is being followed, it is established that the Home Department is the Administrative Department so far as the OSPH & WC is concerned.
2.	Under which Financial Rules and Guidelines the OSPH & WC Ltd. functions.	OSPH & WC is guided as per the MOA and AOA of the Corporation. The bye-laws and rules framed thereunder adopted by the BOD and delegation of powers thereof shall be regulating rules of the Corporation.
3.	Whether the Corporation can make advance payment for purchase/supply of building construction materials. If so, under which financial rules?	The authority conferred with delegation of powers and authorization as defined in Clause III (B) (8), (10) of MOA and Article 93(18) of the AOA subject to the norms specified by the BOD expedient for or in relation to the business of the Company can exercise making advance payment for purchase/supply of building construction materials. The General limitation on powers to sanction expenditure has been clearly defined under Rule 6 of the Delegation of Financial Powers Rules, 1978. The provision contained under sub-rule (3) and sub-rule (5) of Rule 6 of the DFPR would be relevant for examination of the transactions of OSPH & WC.

4.	As administrative Department, has the Home Department issued circular/ guidelines relating to financial functioning of the Corporation?	The corporation is authorized under the MOA & AOA to carry out its objectives in the manner prescribed therein. Normally the Government in Home Department do not interfere or intervene in the management of affairs of the Corporation. Where it become expedient and necessary to coordinate between the Controlling Officers (Police, Prison, Fire & Courts) with the Corporation for dissipation of conflict resolutions facilitating achievement of overall objectives, instructions are issued. As per the Resolution of Government in P.E. Department vide No.1320, dated 14.03.2011, the "Corporate Governance Manual for the State PSU's has been introduced. A MOU has been signed between the Government in Home Department with the Corporation defining the General working procedure for the set out mission & vision. The copy of the MOU for the year 2014-2015 is enclosed for reference.
5.	If the OSPH & WC is to function as per their Memorandum of Association and Articles of Association. What are the relevant points of the MOA and AOA the OPSH & WC should adhere to relating to making advance payment for purchase of building construction materials?	OSPH & WC being a legal entity incorporated under the Companies Act, 1956 is empowered to pursue its objectives to regulate the business as defined in the MOA and AOA of the Company (Article 93 of the AOA). The authority appointed under Article 95 of the AOA conferred with delegation of powers authorized by the BOD in pursuance to Article 93(19) is competent to exercise the powers to regulate the business. The guiding principles for making advance payment for purchase of building construction materials shall be as per the resolution adopted by the BOD and delegation of financial powers conferred for making the transactions. Maintenance of proper Books of Accounts has been prescribed in Article 132 of the AOA. The procedure for execution of works with reference to procurement of Materials has been described in Chapter – 4, Para 4.8.4 and procurement of Goods dealt in Chapter – 5 of the Operation and Accounts Manual of the Corporation. The payment of advance to the supplier shall always be as per terms and conditions of the contract approved by the competent authority of the Corporation in exercise of powers vested under delegation.

6.	Whether OGFR is applicable to the OSPH & WC. If applicable under what rule they can make advance payment of building construction materials and what are the violation made by the OSPH & WC in payment of such huge advances to different companies for supply of steel and cement.	The Rules contained in OGFR are essentially applicable to authorities subordinate to the state government which should be followed by them in securing and spending of funds necessary for discharge of functions entrusted to them. Departmental authorities should follow these rules, supplemented or modified by the special rules and instructions, if any, contained in their departmental regulations and other special orders applicable to them. The rules contained in OGFR may not be applicable as such to the Corporation but is applicable to the extent it is modified and adopted by the BOD consistent with the AOA and MOA of the Corporation for regulating their business.
7.	It is found that the Special Audit team audited the accounts of OSPH & WC Ltd. during 2010-2011, in their report the audit team has advised the administrative department to ensure and see the reconciliation of huge outstanding of the advances against which supplies have not been made. In this connection what steps have been taken/directives issued by the administrative department to OSPH & WC Ltd. for reconciliation of the advances?	A special audit on accounts of advances for procurement of Steel and Cement pertaining to the period 2005-2006 to 2008-2009 was conducted by the Efficiency Audit organization of Finance Department as per the report of the CMD which was resolved in the 102nd meeting of the BOD of the Corporation. The special audit was completed on dated 08.6.2011 and the EAR No.10 of 2012 was communicated in FD Letter No.32559 dated 12.9.2012 addressed to Home Department with a copy to the CMD of OSPH & WC Ltd. An amount of Rs.772.52 lakhs has been shown as unadjusted outstanding advance in the EAR. The CMD of the Corporation has been intimated in Home Department Letter No.40732 dated 16.10.2012 followed by reminder No. 30256, dated 17.08.2013, No.37179 dated 05.10.2013, No.25976 dated 09.7.2014 and No.32289 dated 25.8.2014 for submission of compliance. Factual compliance on the EAR is still awaited from the Corporation. The findings of audit incorporated in the EAR are based on the accounts maintained by the corporation at their level. The findings of an audit cannot be taken as final unless the same are duly inquired and established by the auditee. The authorities of the Corporation are under obligation to verify the factual correctness of the audit findings for taking appropriate action at their end and furnish compliance to Home Department and the audit organization. Home Department do not have any stake suo motu for initiating any action unless any specific reference is made by the Corporation to the Department/ Government for intervention.

38. Learned Government Advocate fairly submits that the impugned F.I.R. appears to have been lodged even prior to the receipt of the reply/clarification of the Home Department, which had been sought for by the Vigilance authorities.

39. The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the tests to be applied by the Court are as to whether the uncontroverted allegations as made prima facie establish the offence. Section 482 does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *"quando lex aliauid alicui concedit, concedere videtur et id sine guo res ipsae esse non potest"* (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of the process of court, to allow any action which would result in injustice and prevent promotion of justice and in exercise of such powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of

justice. When no offence is disclosed by the report or the complaint, the court may examine the question of fact. When a report or complaint is sought to be quashed, it is permissible to look into the materials to assess what the report has alleged and whether any offence is made out even if the allegations are accepted in toto.

40. In the case of ***State of Karnataka v. L. Muniswamy & others***, AIR 1977 SC 1489, the Supreme Court has observed that the wholesome power under section 482 Cr.P.C. entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. The Supreme Court observed in that case that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature. The aforesaid ratio of the case has been followed in a large number of subsequent cases of apex Court and other Courts.

41. In the case of ***Madhavrao Jiwajirao Scindia & another v. Sambhajirao Chandrojirao Angre and others***, AIR 1988 SC 709, the Supreme Court has observed as follows:-

> "7. The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilized for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

42. The scope of exercise of power under Article 226 of the Constitution and Section 482 of the Code and the categories of cases where the High

Court may exercise its power under it relating to cognizable offences to prevent abuse of the process of any Court or otherwise to secure the ends of justice were set out in some detail by the Supreme Court in the case of *Bhajan Lal (supra),* the Hon'ble Court made it clear that it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list to myriad kinds of cases wherein such power should be exercised:

"(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under S. 156(1) of the Code except under an order of a Magistrate within the purview of S. 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under S. 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior

motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

43. In the case of ***M/s. Zandu Pharmaceutical Works Ltd. & Others v. Md. Sharaful Haque & others***, AIR 2005 SC 9, the Supreme Court has observed as follows:-

> "It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, Court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the Court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

44. In the case of *Rajiv Thapar* (supra), the Hon'ble Court while considering the scope and ambit of the inherent jurisdiction of the High Court under Section 482 Cr.P.C., has held as under:-

> "29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stage before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 Cr.P.C., at the stages referred to hereinabove, would have far-reaching consequences inasmuch as it would negate the prosecution's/ complainant's case without allowing the prosecution/ complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 Cr.P.C. the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as

would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 Cr.P.C;

30.1.Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2.Step two: whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3.Step three: whether the material relied upon by the accused has not been refuted by the prosecution/ complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4.Step four: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5.Step five: If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under

Section 482 Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would other wise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused."

45. In ***Satish Mehra v. State (NCT of Delhi) and another*****,** (2012) 13 SCC 614, while considering its earlier decisions with regard to the exercise of inherent power by the High Court under Section 482 Cr.P.C., the apex Court has held as under:-

"14. The power to interdict a proceeding either at the threshold or an intermediate stage of the trial is inherent in a High Court on the broad principle that in case the allegations made in the FIR or the criminal complaint, as may be, prima facie do not disclose a triable offence, there can be reason as to why the accused should be made to suffer the agony of a legal proceeding that more often than not gets protracted. A prosecution which is bound to become lame or a sham ought to be interdicted in the interest of justice as continuance thereof will amount to an abuse of the process of the law. This is the core basis on which the power to interfere with a pending criminal proceeding has been recognized to be inherent in every High Court. The power, though available, being extraordinary in nature has to be exercised sparingly and only if the attending facts and circumstances satisfy the narrow test indicated above, namely, that even accepting all the allegations leveled by the prosecution, no offence is disclosed. However, if so warranted, such power would be available for exercise not only at the threshold of a criminal proceeding but also at a relatively advanced stage thereof, namely, after framing of the charge against the accused. In fact the power to quash a proceeding after framing of charge would appear to be somewhat wider as, at that stage, the materials revealed by the investigation carried out usually come on record and such materials can be looked into, not for the purpose of determining the guilt or innocence of the accused but for the purpose of drawing satisfaction that such materials, even if accepted in their entirety, do not, in any manner, disclose the commission of the offence alleged against the accused."

46. In the case of *Rishipal (supra)*, while dealing with the inherent power of the High Court under Section 482 Cr.P.C., the apex Court has held as follows:-

> "13. What emerges from the above judgments is that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made in the complaint prima facie establish the case. The courts have to see whether the continuation of the complaint amounts to abuse of process of law and whether continuance of the criminal proceeding results in miscarriage of justice or when the court comes to a conclusion that quashing these proceedings would otherwise serve the ends of justice, then the court can exercise the power under Section 482 Cr.P.C. While exercising the power under the provision, the courts have to only look at the uncontroverted allegation in the complaint whether prima facie discloses an offence or not, but it should not convert itself to that of a trial court and dwell into the disputed questions of fact."

47. Section 13 of the P.C. Act provides for criminal misconduct by a public servant. Such an offence of criminal misconduct by a public servant can be said to have been committed if in terms of Section 13(1)(d), a public servant abuses its position and obtains for himself or for any other person any valuable thing or pecuniary advantage; or while holding offence as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest. Sub-Section (2) of Section 13 provides that any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.

48. In *A. Subair (supra)*, while dealing with the essential ingredients of Section 13(1)(d) of P.C. Act, the apex Court has held as under:-

"14. Insofar as Section 13(1)(d) of the Act is concerned, its essential ingredients are:

i) that he should have been a public servant;

(ii) that he should have used corrupt or illegal means or otherwise abused his position as such public servant, and

(iii) at he should have obtained a valuable thing or pecuniary advantage for himself or for any other person.

15. In ***C.K. Damodaran Nair v. Govt. of India***, (1997) 9 SCC 477, this Court had an occasion to consider the word "obtained" used in Section 5(1)(d) of Prevention of Corruption Act, 1947 (now Section 13(1)(d) of the Act, 1988), and it was held : (SCC p.483 para 12)

> "12.The position will, however, be different so far as an offence under Section 5(1)(d) read with Section 5(2) of the Act is concerned. For such an offence prosecution has to prove that the accused 'obtained' the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the Act as it is available only in respect of offences under Sections 5(1)(a) and (b) – and not under Sections 5(1)(c), (d) or (e) of the Act. 'Obtain' means to secure or gain (something) as the result of request or effort (*Shorter Oxford Dictionary*). In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1)(d) of the Act unlike an offence under Section 161 IPC, which, as noticed above, can be, established by proof of either 'acceptance' or 'obtainment'."
>
> The legal position is no more res integra that primary requisite of an offence under Section 13(1)(d) of the Act is proof of a demand or request of a valuable thing or pecuniary advantage from the public servant. In other words, in the absence of proof of demand or request from the public servant for a valuable thing or pecuniary advantage, the offence under Section 13(1)(d) cannot be held to be established."

49. In *R. Balakrishna Pillai (supra),* the apex Court while considering the provisions of Section 5(1)(d) of P.C. Act, 1947, which is similar to Section 13(1)(d) of P.C. Act, has observed as under:-

> "43. To consider yet another aspect, the general principle of criminal jurisprudence is that element of mens rea and intention must accompany the culpable act or conduct of the accused. In

respect of this mental element generally, Blackstone's Criminal Practice (ibid., A-2.1, p-18) describes it as under:

"In addition to proving that the accused satisfied the definition of the actus reus of the particular crime charged, the prosecution must also prove mens rea i.e. that the accused had the necessary mental state or degree of fault at the relevant time. Lord Hailsham of St. Marylebone said in Director of Public Prosecutions v. Morgan, (1976 AC 182), AC at p. 213: 'The beginning of wisdom in all the "mens rea" cases … is as was pointed out by Stephen, J. in Tolson (R. v. Tolson, (1889) 23 QBD 168), QBD at p. 185, that "mens rea" means a number of quite different things in relation to different crimes.' Thus one must turn to the definition of particular crimes to ascertain the precise mens rea required for specific offences."

The author then comments:

"Criminal offences vary in that some may require intention as the mens rea, some require only recklessness or some other state of mind and some are even satisfied by negligence. The variety in fact goes considerably further than this in that not only do different offences make use of different types of mental element, but also they utilise those elements in different ways."

It is clear thus that the accused must have the mental state or degree of fault at the relevant time. It may of course differ from crime to crime according to the definition thereof. The matter of degrees may also differ. That is to say, generally the mental state and the criminal act must coincide. The criminal act may be one which may be intended by the wrongdoer. It is as well known that mere intention is not punishable except when it is accompanied by an act or conduct of commission or omission on the part of the accused. As indicated earlier, situation varies in respect of different kinds of crimes as in some of them even negligence or careless act may constitute an offence or there may be cases of presumptions and putting the accused to proof to the contrary. In the case in hand we have found that there is no sale of energy to M/s GIL by KSEB nor had the appellants any say in price fixation for M/s GIL by KEB. In this light we may pass on to J.C. Smith & Brian Hogan: Criminal Law (Smith, J.C. and Hogan, B.:Criminal Law, 6th Edn., P.31), where the proposition of law is put as follows:

"It is a general principle of criminal law that a person may be convicted of a crime unless the prosecution have proved beyond reasonable doubt both (a) that he caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law, and (b) that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs. The event, or state of affairs, is called the actus reus and the state of mind the mens rea of the crime."

44. We further find the said principle of criminal jurisprudence stated in Criminal Law by K.D. Gaur (Gaur, K.D.: Criminal Law-Cases and Materials, 3rd Edn., p.23), wherein it is stated as follows:

"Criminal guilt would attach to a man for violations of criminal law. However, the rule is not absolute and is subject to limitations indicated in the Latin maxim, actus non facit reum, nisi mens sit rea. It signifies that there can be no crime without a guilty mind. To make a person criminally accountable, it must be proved that an act, which is forbidden by law, has been caused by his conduct, and that the conduct was accompanied by a legally blameworthy attitude of mind. Thus, there are two components of every crime, a physical element and a mental element, usually called actus reus and mens rea respectively."

xxx xxx xxx

46. Thus, looking to the definition of the crime in the case in hand, namely, clause (d) of sub-section (1) of Section 5 of the Act, according to the principle indicated above, it is necessary that the act must have been done illegally abusing his position as a public servant for obtaining benefit, pecuniary or otherwise, for himself or for someone else. This is an offence which would require an intention to accompany the act. The element of mental state would be necessary to do a conscious act to get the required result of pecuniary advantage or to obtain any valuable thing, even if it is for someone else, then too element of mental state must be there at the relevant time. xxx."

50. In *C.K. Jaffer Sharief (supra),* the apex Court while reiterating the essential ingredients of Section 13(1)(d) of the P.C. Act, has observed as follows:-

> "17. xx xx xx. If in the process, the rules or norms applicable were violated or the decision taken shows an extravagant display of redundance it is the conduct and action of the appellant which may have been improper or contrary to departmental norms. But to say that the same was actuated by a dishonest intention to obtain an undue pecuniary advantage will not be correct. That dishonest intention is the gist of the offence under Section 13(1)(d) is implicit in the words used i.e. corrupt or illegal means and abuse of position as a public servant. A similar view has also been expressed by this Court in ***M. Narayanan Nambiar v. State of Kerala***, AIR 1963 SC 1116, while considering the provisions of Section 5 of the 1947 Act."

51. In the instant case, no materials have been produced before this Court to show that the petitioners had any dishonest intention in sanctioning 100% advance towards purchase of cement and steel from the manufacturers/suppliers. Moreover, as has been admitted in the subsequent counter affidavit filed by the Vigilance Department, the practice and procedure of payment of 100% advance towards price of cement and steel was in vogue much before the petitioners joined the Corporation and continued even after they left the service of the Corporation. Further, taking a bonafide decision in the best interest of the Corporation to procure steel from public sector undertakings, like SAIL and RINL and branded cement from renowned manufacturers like Ultratech, Lafarge, ACC, L & T, OCC etc. through a transparent procedure at non-trade price, which is much lesser than the market price, cannot be said to be an improper or illegal decision taken with dishonest interest, which would amount to criminal misconduct. Merely because some of the manufactures/suppliers had failed to supply the materials in time or there has been some delay in such supply, the same cannot be the basis for implicating the petitioners for criminal misconduct. Therefore, there being no violation of the existing procedure and practice, which were being followed by the Corporation much prior to the petitioners joining and there being no extravagant display of redundance or any improper or illegal exercise of power, no dishonest intention can be attributed to the petitioners in order to implicate them for the alleged offence under Section 13(1)(d) of the P.C.Act.

52. Further, neither the F.I.R. nor the materials available in the case diary reveals any particulars of the steel and cement manufacturers/suppliers who have failed to supply the required materials and the exact amount of pecuniary advantage gained by them at the cost of the Corporation. Rather,

the statement of witnesses recorded during investigation under Section 161 Cr.P.C. clearly shows that the policy adopted by the writ petitioner to procure steel from public sector undertakings and branded cement from renowned manufacturers, to ensure quality product at minimum price has yielded excellent result for the Corporation.

53. Coming to the charge of criminal conspiracy, the same has been defined in Section 120-A I.P.C., which provides that when two or more persons agree to do or cause to be done (i) an illegal act or (ii) an act which is not illegal by illegal means, such agreement is designated a criminal conspiracy. The apex Court in ***K. R. Purushothaman v. State of Kerala,*** (2005) 12 SCC 631, has held that in order to constitute a criminal conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is sine qua non for constituting offence under the Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the plan would not per se constitute conspiracy.

54. In the present case, no material has been produced by the Vigilance authorities to substantiate the allegation of criminal conspiracy against the present petitioners. Except the bald allegations made in the impugned F.I.R., none of the witnesses examined during investigation have even whispered anything about the prior meeting of mind and unlawful agreement between the two petitioners to constitute the offence of criminal conspiracy under Section 120-B I.P.C.

55. Coming to the preliminary enquiry conducted by the Vigilance authorities prior to the lodging of the impugned F.I.R., on a perusal of the relevant records and the affidavit submitted by the Vigilance Department, it is seen that on receipt of a petition from some individual (details of which have been withheld on the plea of confidentiality, purportedly to protect the identity of the individual), containing various allegations against the writ petitioner Prakash Mishra, erstwhile CMD of the Corporation, the same was marked by the Chief Minister to the Director, Vigilance, to conduct an enquiry and submit report. The records further reveal that the said petition was received by the Superintendent of Police, Vigilance Cell, Cuttack, who put up a note to the Director, Vigilance, for orders to conduct an open

enquiry into the matter. The Director, Vigilance, merely put his initial in the note sheet dated 05.7.2014, pursuant to which, the Superintendent of Police, Vigilance Cell, Cuttack, opened Vigilance Cell File No.12/2014 and entrusted Shri S.K. Das Mohapatra, Deputy Superintendent of Police, Vigilance Cell, Cuttack, to conduct an open enquiry into the allegations made in the petition.

56. The records further reveals that during enquiry, the Enquiring Officer collected copies of documents from the Corporation, including the Special Audit Report and Annual Reports of the Corporation for the years 2006-07 to 2009-10. However, no witnesses were examined and no statements were recorded during the enquiry. Further, no notice was issued to the petitioners, providing them an opportunity to put forth their case. It is further seen that the Enquiry Officer issued requisitions vide letters dated 11.9.2014 to various manufacturers/suppliers of steel and cement, seeking informations/ documents relating to the advance received by them towards supply of steel and cement against different supply orders, supply of steel and cement against each supply order and to which site of the Corporation such supplies have been made, along with the vouchers and bills submitted at the site and acknowledgement receipt of such supplies.

57. The records further reveal that though all such requisitions had been sent to various manufacturers/suppliers of steel and cement vide letter dated 11.9.2014, seeking details of the advance received and supplies made by them to different sites of the Corporation, the Enquiry Officer has proceeded to conclude the enquiry on the very day and has submitted the final report on the same day, i.e. 11.9.2014, with the findings that the petitioners have abused their official position and shown undue favour to the suppliers by entering into criminal conspiracy, for which, they are liable under Section 13(2) r/w Section 13(1)(d) of the P.C. Act and Section 120-B I.P.C. and accordingly recommended for registration of criminal case against the petitioners for the said offences.

58. Further, as has already been noted above, during pendency of the preliminary enquiry, the Superintendent of Police, Vigilance Cell, Cuttack, vide his letter dated 08.9.2014 had sent a questionnaire to the Home Department, which is the Administrative Department of the Corporation, seeking clarification on various points with regard to the working of the Corporation. However, before receipt of the same, the preliminary enquiry had been concluded and even the impugned F.I.R. had been lodged.

59. There is nothing on record to show as to who considered the final report submitted by the Enquiry Officer and accepted the same, on the basis of which, approval was sought for from the State Government for registration of criminal case against the petitioners. From the note sheet, it appears that approval of the State Government for registration of criminal case was received on 20.9.2014 and on the same day the impugned F.I.R. has been registered against the present petitioners.

60. In the aforesaid background of the present case, it is apt to refer to a decision of the apex Court in ***P. Sirajuddin etc. v. The State of Madras etc.***, AIR 1971 SC 520, where in a near similar situation, the Hon'ble Court has held as under:-

> "17. In our view the procedure adopted against the appellant before the laying of the first information report though not in terms forbidden by law, was so unprecedented and outrageous as to shock one's sense of justice and fairplay. …. Before a public servant, what ever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. …. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable. In ordinary departmental proceedings against a Government servant charged with delinquency, the normal practice before the issue of a charge sheet is for some one in authority to take down statements of persons involved in the matter and to examine documents which have a bearing on the issue involved. It is only thereafter that a charge sheet is submitted and a full-scale enquiry is launched. When the enquiry is to be held for the purpose of finding

out whether criminal proceedings are to be resorted to the scope thereof must be limited to the examination of persons who have knowledge of the affairs of the delinquent officer and documents bearing on the same to find out whether there is prima facie evidence of guilt of the officer. Thereafter the ordinary law of the land must take its course and further inquiry be proceeded with in terms of the Code of Criminal Procedure by lodging a first information report."

61. From the facts detailed above, there is no manner of doubt that the Vigilance authorities have proceeded in the matter with a predetermined agenda to implicate the petitioners, more specifically the writ petitioner Prakash Mishra, irrespective of whether any material is available to substantiate the allegations. The Enquiry Officer has conducted the preliminary enquiry in a most perfunctory manner, in brazen disregard of all established norms of justice and fair play. The manner in which the preliminary enquiry has been conducted and method adopted by the Enquiry Officer in concluding the enquiry post-haste, without even verifying the relevant documents and examining any witness, clearly goes to show that he was bent upon implicating the petitioners and thereby facilitate registration of the F.I.R. against them. Hence, the entire action of the Vigilance authorities smacks of arbitrary and mala fide exercise of power with the oblique motive to harass the petitioners and damage their reputation.

62. It is no doubt the duty of the State to track down and punish all delinquent officers but it is certainly not in accordance with justice and fair play that their conviction should be sought for by such questionable means, which is bound to cause incalculable harm and damage to the reputation of the officers concerned.

63. Detraction from a man's reputation is an injury to his personality, and thus an injury to reputation is a personal injury, that is, an injury to an absolute personal right.

64. In ***D.F. Marion v. Davis***, 55 American Law Reports, page 171, it was held :

"The right to the enjoyment of a private reputation, unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty, and property."

65. It is thus amply clear that one is entitled to have and preserve one's reputation and one also has a right to protect it. In case any authority in discharge of its duties fastened upon it under the law, travels into the realm of personal reputation adversely affecting him, it must provide a chance to him to have his say in the matter. In such circumstances, right of an individual to have the safeguard of the principles of natural justice before being adversely commented upon is statutorily recognized and violation of the same will have to bear the scrutiny of judicial review. (*See*- ***State of Maharashtra v. Public Concern for Governance Trust and Ors.,*** AIR 2007 SC 777)

66. It is not very uncommon in our country that honest and upright public servants with unimpeachable integrity and having impeccable track record are often hounded by the ruling political establishment for extraneous consideration. In the present case, what is more disturbing is that the Director, Vigilance, to whom the file was marked by the Chief Minister for conducting an enquiry, has abdicated his duty and responsibility by displaying studied indifference and allowing the Superintendent of Police, Vigilance Cell, Cuttack, to deal with the matter and entrust the enquiry to an officer of the rank of Deputy Superintendent of Police, inspite of the fact that the enquiry was being conducted against the writ petitioner, who was the former D.G.P. of the State and is one of the senior most IPS officers of repute in the country, presently posted as Director General, CRPF, New Delhi. The action or rather the willful inaction of the Director, Vigilance, in not ensuring free, fair and proper enquiry into the matter and allowing the report of a sham enquiry to be accepted and giving his consent for seeking approval of the State Government for registration of criminal case against the petitioners clearly shows that he was more concerned in exhibiting his loyalty to the ruling political establishment, akin to the old British adage of "more loyal than the King".

67. Applying the principles of law as discussed above to the facts of the present case, the conclusion is irresistible that the allegations made in the impugned FIR and the materials available in the case diary and even the purported incriminating materials pointed out by the learned counsel for the Vigilance Department, as detailed above, do not constitute or disclose commission of any cognizable offence and therefore, allowing continuance of the criminal proceeding against the present petitioners would be an abuse of the process of Court and result in serious miscarriage of justice.

68. For the reasons as aforestated, the criminal proceeding initiated against the petitioners in Bhubaneswar Vigilance P.S. Case No.35, dated 20.9.2014, under Section 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988 and Section 120-B of the Indian Penal Code, corresponding to V.G.R. Case No.35 of 2014, pending in the Court of the learned Special Judge, Vigilance, Bhubaneswar, and all consequential criminal proceedings are hereby quashed. CRLMP and CRLMC are accordingly allowed. No costs.

Applications allowed.

2015 (II) ILR - CUT- 94

B.K. NAYAK, J

W.P. (C) NO. 16425 OF 2013

SARAT CHANDRA PARIDA ……. Petitioner

.Vrs.

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

ODISHA AIDED EDUCATIONAL INSTITUTIONS EMPLOYEES RETIREMENT BENEFIT RULES, 1981 – RULE-3

Provision under Rule-3 is applicable to all the teaching and non-teaching staff of non-Government aided Colleges, receiving their salary under the direct payment system – Admittedly SVM College, where the petitioner was working is an aided College, coming under the direct payment scheme – Since the petitioner's appointment was approved under the grant-in-aid order 2009 and he being a non-teaching staff his appointment was approved against an admissible post, i.e, Library Attendant and he having been allowed grant-in-aid in the nature of block grant, he can not be denied the benefits of 1981 Rules – Held, the impugned order passed by the Director refusing pensionary benefits to the petitioner is quashed – Direction issued to consider the pension case of the petitioner and dispose of the same in accordance with 1981 Rules. (Para 9)

Case Laws Referred to :-

1. 2011 (Supp.-I) OLR 761 : M/s. Sterlite Energy Limited v. State of Orissa & Ors

For Petitioner : M/s. Sameer Ku. Das & S.K.Mishra
For Opp. Parties : Additional Standing Counsel

Date of hearing : 25.03.2014
Date of judgment: 08.05.2014

JUDGMENT

B.K.NAYAK, J.

In this writ petition the petitioner has prayed for quashing the order dated 03.06.2013 under Annexure-9 passed by the Director, Higher Education, Orissa, Bhubaneswar, with a further prayer to direct the opposite parties to sanction and pay the pensionary benefits to him.

2. The petitioner's case is that vide order dated 15.07.1975 of the Governing Body of Swami Vivekananda Memorial College, Jagatsinghpur, he was appointed as a Peon (Cycle Stand Guard) by the Governing Body following due process of selection. Vide office order dated 25.02.1982 (Annexure-3) the petitioner was appointed against a substantive post of Peon in the scale of pay of Rs.200-2-202-3-250. After such appointment, he was directed to work in the College Library as Library Attendant as per order dated 25.02.1982 under Annexure-4. It is the further case of the petitioner that Swami Vivekananda Memorial College, Jagatsinghpur was established in 1962 and while receiving grant-in-aid, it came to the direct payment fold of the Government from the year 1974 and as such, it is an aided educational Institution within the meaning of Section 3 (b) of the Orissa Education Act. It is further stated that as per grant-in-aid principles of the State Government for the aided colleges, though the petitioner should have received grant-in-aid after five years of appointment and proposal in that regard was submitted by the College to the Government from time to time, he was not paid regular grant-in-aid. After much persuasion his appointment was approved by the Director, Higher Education, Orissa by order no.48465 dated 06.12.2012 (Annexure-6) against the post of Library Attendant from his initial date of joining dated 16.07.1975. In the said approval order the petitioner was granted block grant with effect from 01.02.2009 as per Grant-In-Aid Order 2009. While so continuing the petitioner was retired from service on

attaining the age of superannuation with effect from 30.04.2010 as per order under Annexure-7.

3. It is stated that even though the petitioner is entitled to pensionary benefits in terms of Rule-3 of the Orissa Aided Educational Institutions' Employees Retirement Benefit Rules,1981 (in short 'the 1981 Rules'), he was not paid any pension for which he made a representation to the Director on 15.10.2010. Since no action was taken on his representation, he was compelled to file W.P.(C) No.8541 of 2013 before this Court, which was disposed of on 22.04.2013 with a direction to the Director, Higher Education, Orissa to consider the representation of the petitioner and pass appropriate order for disbursement of pension, if the petitioner was found entitled to the same or any part thereof, within a period of two months. The said representation has been rejected by the Director by the impugned order under Annexure-9 on the ground that since the 1981 Rules was applicable to the staff of non-government aided colleges, which are coming under the direct payment system, and that the petitioner was in receipt of block grant with effect from 01.02.2009 in terms of the Grant-In-Aid Order,2009, he is not entitled to pensionary benefits under the said Rules.

4. It was urged by the learned counsel for the petitioner that as per Rule-3 of the 1981 Rules the provisions of the said Rules apply to all the teaching and non-teaching staff of non-government colleges, which come under the direct payment system and that the Swami Vivekananda Memorial College, Jagatsinghpur, where the petitioner was working, being an aided college, brought under the direct payment system and there being nothing in the Rules that staff of such colleges, who are in receipt of block grant will not get the benefit of the Rules, the order of the Director (Annexure-9) is bad in law and liable to be set aside. It is also his submission that the Director by his order under Annexure-6 having approved the services of the petitioner with effect from the date of his joining, could not have denied the pensionary benefit.

5. A counter affidavit has been filed by opposite party nos.1 and 2. In paragraph-4 of the counter, it has been admitted that Swami Vivekananda Memorial College, Jagatsinghpur is an aided college, which is in receipt of aid from the State Government in respect of its +2 and +3 wings even prior to promulgation of Grant-In-Aid Order,1994 and as such, it is category-I college as per the definition contained in paragraph-4 (A) (I) of Grant-in-Aid Order,1994. Also the salary component of the eligible employees of the said college, is being guided under the provisions of Section 7(c) of Orissa

Education Act,1969. It is further admitted that the eligible employees appointed against admissible posts of the college after completing five years of qualifying service by 01.06.1994 have been approved under the grant-in-aid scheme of the Government as per paragraph-9 (2) (B) of the Grant-In-Aid Order,1994 and have been extended grant-in-aid under direct payment scheme at par with other State Government employees.

It is further stated that the Grant-In-Aid Order,1994 was repealed by the new Grant-In-Aid Order,2004 wherein the provision of grant-in-aid under direct payment scheme was curtailed and in its place a fixed bulk amount in shape of block grant was paid to the eligible left out employees with effect from 01.01.2004, who were otherwise eligible to receive grant-in-aid as per the Grant-In-Aid Order,1994. This was done in view of financial constraints of the State Government for which the Government decided to take away payment of grant-in-aid from the employees of non-government colleges under the direct payment system and only to give block grant to the college concerned. Under the block grant system a fixed aid which is not at par with the salary under the direct payment scheme was placed with the college authority.

It is further stated in paragraph-6 of the counter affidavit that the Government introduced again the Grant-In-Aid Order,2009 with effect from 01.02.2009 giving coverage to all categories of left out employees of 488 non-government aided colleges in the State, who were continuing against admissible posts after 01.06.1989 and within 01.04.1998 and such employees were extended with block grant @ 100% with effect from 01.02.2009. It is stated that the petitioner being a non-teaching staff continued against an inadmissible post of Peon (Cycle Stand Guard) and his appointment was approved under Grant-In-Aid Order 2009 and he was extended with block grant @ 100%. It is further stated in paragraph-7 of the counter affidavit that the petitioner was covered under Grant-in-Aid Order,2009 and his appointment was approved against the post of Library Attendant since the said post was admissible to the Swami Vivekananda Memorial College, Jagatsinghpur after 01.06.1989 and within 01.04.1998.

It is stated that since the petitioner is only receiving block grant which has no linkage with the salary and allowance as is being paid to the employees, who are in receipt of grant-in-aid under direct payment scheme, the petitioner is not covered under 1981 Rules and hence not entitled to the pensionary benefits under the said Rules.

6. The 1981 Rules have been framed by the State Government with the object of providing social security to the staff of aided educational institutions. The Rules came into force on 01.04.1982 vide S.R.O. No.118/82 published in Orissa Gazette Ext. No.234 dated 20.02.1982.

Rule-3 speaks about the applicability of the Rules which is extracted hereunder :

> "**3. Application of the rules:-** These rules shall apply to teaching and non-teaching staff of all recognized non-Government Colleges, High Schools, Senior Basic Schools and M.E. Schools which come under the direct payment system and all non-Government Primary Schools including Sanskrit Tols and Junior Basic Schools fully aided Government in Education and Youth Services Department directly through Panchayat Samities constituted under the Orissa Panchayat Samiti Act,1959 or through a Notified Area Council or Municipal constituted under the Orissa Municipal Act,1950.
>
> Provided that Government may, by general or special order may be issued in that behalf, specify and other educational institutions or category or institutions and the staff working therein to whom the rules shall apply."

7. With regard to the principles of the interpretation of statute, a Division Bench of this Court in the case of ***M/s. Sterlite Energy Limited v. State of Orissa and others :2011 (Supp.-I) OLR 761*** after examining a number of judicial pronouncements of the Hon'ble apex Court held as follows :

> "On an analysis of the judicial pronouncements relating to the rules of interpretation, as discussed above, the legal position that emerges is that in interpreting a statute the Court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When the language is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself and it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. The words used in a statute must be interpreted in their plain grammatical

> meaning and it is only when such words are capable of two constructions, the Court would prefer to adopt the construction which is likely to assist the achievement of the policy and purpose of the Act."

8. For application of 1981 Rules to the staff of recognized non-government colleges, Rule-3 thereof requires that the college concerned must have come under the "direct payment system". This apart there is no other requirement. The plain language of Rule-3 makes it clear that irrespective of the nature of grant-in-aid given by the Government to various staff of a college, once the college has required status of one coming under the direct payment system then even if a staff is not getting full salary from the Government under the direct payment system or getting only some aid in whatever form including 'block grant', he will be covered under the Rules and be entitled to pensionary benefits under the Rules taking into account the amount of aid he receives from the Government as salary and the period of his qualifying service. It is apparent from a plain reading of Rule-3 that the expression, "come under the direct payment system" qualifies the institution (college/school) concerned and not a particular staff of the institution. Had it been the intention of the legislature that the expression would qualify the 'staff', then it could have simply said that the staff of aided institutions who are/were receiving their salary under the direct payment system will be covered under the 1981 Rules.

9. It is admitted by the opposite parties in their counter affidavit that SVM College, where the petitioner was working, is an aided college which came under the direct payment scheme. It is also admitted that petitioner's appointment was approved under the Grant-in-Aid Order 2009 against the post of Library Attendant from the date it became admissible and he was extended block grant @ 100%. Since the petitioner is a non-teaching staff whose appointment has been approved against an admissible post (Library Attendant) and he has been allowed grant-in-aid in the nature of block grant, he cannot be denied the benefits of 1981 Rules. Therefore, the order of the Director under Annexure-9 refusing pensionary benefits to the petitioner is unsustainable and the same is hereby quashed. It is directed that the pension case of the petitioner be considered in accordance with the 1981 Rules and disposed of within a period of four months. The writ petition is disposed of. No costs.

Writ petition disposed of.

2015 (II) ILR - CUT- 100

S.K. MISHRA, J

CRLREV NO. 915 OF 2010

RAMA CHANDRA RATH ……..Petitioner

.Vrs.

STATE OF ORISSA ……Opp.Party

PREVENTION OF CORRUPTION ACT, 1988 – S.19

Sanction for prosecution – Sanctioning Authority must apply its own independent mind whether to accord or refuse sanction and such discretion should not be under pressure form any quarter.

In this case the learned Special Judge (Vigilance) written to the S.P. Vigilance for obtaining sanction – Sanctioning Authority was thus compelled to act mechanically to sanction prosecution – Order of according sanction is bad and can not be sustained – Held, impugned order taking cognizance of the offence U/s13 (i) (d) r/w Section 13 (2) and 7 of the P.C. Act is setaside and the petitioner is discharged form the charge for the aforesaid offence. (Paras 10, 12)

Case Laws Rreffered to :-

1. 1998 CRI. L. J. 3520 : Krishandutt Sharma -V- State of Rajasthan,
2. AIR 1968 SC : Abhinanadna Jha -V- Dinesh Mishra
3. 1989 (2) SCC 132 : India Carat Private Ltd.-V- State of Karnataka
4. 2013 (54) OCR (SC) 561 : Vinay Tyagi vs. Irshad Ali @ Deepak & Ors.

For Petitioner : M/s. D.P.Dhal, S.K.Tripathy S.K.Dash, B.S.Dasparida & S.D.Routray

For Opp.Parties: M/s. Savitri Ratho, Standing Counsel (vigilance)

Date of Judgment :16.07.2014

JUDGMENT

S.K.MISHRA, J.

The petitioner, being the accused in V.G.R. No.13 of 2007 of the court of Special Judge (Vigilance), Balasore assails the order dated 15.4.2010 passed by that court taking cognizance of the offence under

Section 13(1)(d) read with Section 13(2) and Section 7 of the Prevention of Corruption Act, 1988 (for short 'the P.C. Act') and issuing process against the petitioner.

2. The facts are not in dispute. It may be summarized as follows:

On 27.04.2007, Balasore Vigilance P.S. Case No.13 of 2007 was registered under Section 7 of the P.C. Act on the information of one Rounak Bibi against the petitioner-Ram Chandra Rath, ASI of Police, Permitghat Outpost, Balasore for demanding illegal gratification of Rs.500/-. The informant has stated that she had lodged FIR and Balasore P.S. Case No.40 of 2007 has been registered. Investigation of the case was entrusted to the accused-petitioner. The petitioner demanded bribe to make a strong against the accused persons in the case. H.K. Behera, DSP of Vigilance, Balasore was directed to take up investigation. On 27.04.2007, a trap was laid and in presence of overhearing witness, the petitioner accepted bribe from the complainant. Thereafter, the Vigilance Police arrested him and on 28.04.2007, the accused was forwarded to the court. On 03.05.2007, he was released on bail. On 29.08.2007, statement of overhearing witness-Purna Chandra Sethi was recorded under Section 164 Cr.P.C by the learned JMFC, Balasore. On 20.09.2007, the Investigating Officer submitted DR recommending case for charge-sheet against the accused for the offence under Sections 7 and 13(2) read with Section 13(1)(d) of the P.C. Act. On 22.09.2007, Special Public Prosecutor gave opinion for filing of charge-sheet. On 29.09.2007, order was received from the Directorate, Vigilance for returning the case as FRT and to move the authority for initiation of departmental action against the accused.

On 29.09.2007, F.R.T. No.37 dated 29.09.2007 under Sections 7 and 13(2) read with Section 13(1)(d) of the P.C. Act was filed. On 08.11.2007, the said F.R.T. was received in the court of CJM. Case record was sent to the court of Special Judge (Vigilance), Balasore for action. On 08.11.2007 itself, notice was issued to the complainant by the learned Special Judge for filing protest petition. On 19.01.2008, protest petition was filed by Rounak Bibi. The learned Special Judge held that sanction has not been obtained. So, he directed for investigation and to obtain sanction from the competent authority. On 26.02.2009, the learned Special Judge wrote a letter to the Superintendent of Police (Vigilance), Balasore for submission of sanction order in the case.

3. For better appreciation of the case, the entire letter issued by the learned Special Judge is quoted hereunder.

"OFFICE OF THE SPECIAL JUDGE (VIGILANCE): BALASORE.
No.115/dt.26.02.09

From:

Sri B.S. Mohapatra,
Spl. Judge, (Vigilance),Balasore

To

The Superintendent of Police,
(Vigilance), Balasore

Sub: Submission of sanction order in V.G.R. Case No.13/07.

Sir,

I am to state that in the aforesaid case, final report has been submitted against which the informant has filed protest petition. On perusal of the case record, it reveals that there are materials against the accused person who is a government servant.

Therefore, I would like to request you to obtain sanction order from the competent authority and send the same to this court by 19.3.2009 in absence of which progress in the case cannot be achieved.

Treat it as most urgent.

Yours faithfully,
Spl. Judge (Vigilance), Balasore"

4. On 13.11.2009, the DCP, Vigilance, Bhubaneswar sent a telegram to the SP, Vigilance for deputing I.O. to the office on 16.11.2009 for discussion of pre-sanction. On 16.11.2009, sanction was accorded for prosecuting the petitioner. On 17.11.2009, sanction order was sent to the court. On 06.02.2010, sanction order was received in the court of Special Judge (Vigilance) and the case stood adjourned to 15.04.2010. On that date, the learned Special Judge after perusing the FIR, case diary, sanction order and other relevant papers including the protest petition found a *prima facie* case under Section 13(1)(d) read with Sections 13(2) and 7 of the P.C. Act against the accused and took cognizance and issued summons. This order is assailed in this revision.

5. In course of hearing, the learned counsel for the petitioner relying upon the case of ***Krishandutt Sharma vs. State of Rajasthan,*** 1998 CRI. L. J. 3520 has contended that when the Investigating Officer has filed final report against the petitioner, the order passed by the learned Magistrate for further investigation and getting sanction is not proper.

On the other hand, the learned Standing counsel for the Vigilance Department submitted that issuing of letter is not proper but the competent authority has accorded sanction after perusal of the record and it reveals that a *prima facie* case against the accused and informant has filed the protest petition and not agreed with the final report. In the interest of justice, the order of cognizance should not be interfered with. Alternatively, it is submitted by her that the accused is still in service and the police can still direct to further investigation of the case after obtaining the sanction and ignoring the letter of the learned Special Judge in that regard. She further submitted that the Hon'ble Supreme Court in a number of decisions has interfered where the court tried to control the manner of investigation and set aside the portion of the direction but allowed further investigation to be conducted.

6. In the case of ***Abhinanadna Jha vs. Dinesh Mishra,*** AIR 1968 SC 177, the Apex Court held that the protest petition of the complainant could have been treated as complaint and the direction of the Magistrate to file charge-sheet was set aside. In the reported case, the final report was submitted and the complainant filed (in two cases) protest petitions and it was not clear whether the Magistrate had adopted suitable procedure indicated in the Code when he takes cognizance of offence on a complaint made to him. Therefore, the Apex Court held that the order of the Magistrate in each of the cases directing the police to file charge-sheet is without jurisdiction. It was made clear that it is open to the Magistrate to treat the protest petition as complaint and take further proceeding according to law and in the light of the views expressed by the Supreme Court in the reported case.

7. In the case of ***India Carat Private Ltd. Vs. State of Karnataka,*** 1989 (2) SCC 132, the Investigating Officer took up investigation and submitted report that further investigation was not required as the case was of a civil nature. When the Magistrate was approached to set aside the said report, he directed for registering a case and issue summons. The aggrieved parties approached the High Court, which set aside the order of Magistrate. The

order of the High Court was challenged in the Apex *Court.* The Apex Court in the aforesaid case has held as follows:

> *" The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer; and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(b) though it is open to him to act under Section 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.*
>
> *The fact that this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner. Even if the appellant had preferred a complaint before the learned Magistrate and the Magistrate had ordered investigation under Section 156(3), the police would have had to submit a report under Section 173(2). It has been held in* ***Tula Ram & Ors. V. Kishore Singh****, [1978] 1 SCR 615 that if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of a case under Section 190(1)(b) and issue process or in the alternative he can take cognizance of the*

> *original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he is of opinion that the case should be proceeded with. In the light of our conclusion, the appeal succeeds and the order of the High Court is set aside. The order of the Second Additional Chief Metropolitan Magistrate, Bangalore will stand restored and the case against the second respondent will be proceeded further in accordance with law."*

8. In ***UPSC vs. S. Papiah,*** 1997(7) SCC 614, the Hon'ble Supreme Court held that the procedure adopted by the Magistrate in accepting the final report of the CBI and closing the case without any notice to the appellant (informant) and behind its back is irregular and the order was set aside.

9. In the case of ***Vinay Tyagi vs. Irshad Ali @ Deepak and others,*** 2013 (54) OCR (SC) 561, the Hon'ble Supreme Court analyzed the provisions of the Code and various judgments and has come to the following conclusions in regard to the powers of the Magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Cr.P.C.

> "1. The Magistrate has no power to direct 'reinvestigation' or 'fresh investigation' (*de novo*) in the case initiated on the basis of a police report.
>
> 2. A Magistrate has the power to direct 'further investigation' after filing of a police report in terms of Section 173(6) of the Code.
>
> 3. The view expressed in (2) above is in conformity with the principle of law stated in *Bhagwant Sing's* case (supra) by a three Judge Bench and thus in conformity with the doctrine of precedence.
>
> 4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).
>
> 5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even

> after filing a report, but intended to curtail the power of the Court to the extent that even where the facts of the case and the ends of justice demand, the Court can still not direct the investigating agency to conduct further investigation which it could do on its own.
>
> 6. It has been a procedure of proprietary that the police as to seek permission of the Court to continue 'further investigation' and file supplementary charge-sheet. This approach has been approved by this Court in a number of judgments. This as such would support the view that we are taking in the present case."

10. Thus, it is abundantly clear from the aforesaid cases that the Magistrate or the court taking cognizance of the offence has no power to take cognizance of offence as well as the jurisdiction to direct further investigation. Now, the question remains whether the court can specifically direct the investigating agency by writing a letter to it to obtain sanction in the case and file charge-sheet. This question has been answered by the Single Judge of Rajasthan High Court in the case of Krishandutt Sharma (supra). In that reported case, a trap was laid by Dy. S.P., A.C.O.P., Nagaur while the petitioner was posted as B.D.O. in Panchayat Samiti, Ladnu in the district of Nagpur. Investigation of the case was subsequently handed over to the Addl. S.P., A.C.D., Ajmer under the direction of D.G.P., Jajpur. After investigation, a final report was submitted before the trial court. The final report was duly endorsed by D.G.P. A.C.D., Jaipur. The trial court without discussing the material on record returned the final report to the investigating officer for prosecution against the petitioner. Hence, the order was challenged before the Rajasthan High Court and came for disposal before the Single Judge. The only question was required to determine in that case is whether the Court could have asked the Investigating Agency to get the sanction for prosecution. Relying upon the case of ***Mansukhlal Vithaldas Chauhan vs. State of Gujarat,*** AIR 1997 SC 3400, the court came to the conclusion that giving sanction for prosecution is exclusive domain of the authority. The court cannot issue mandatory direction for according sanction. In the case of Mansukhlal Vithaldas Chauhan case (supra), the Apex Court held that the sanctioning authority is to apply its own independent mind for the generation of genuine satisfaction and whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it for taking a decision one way or other. The Apex Court further held that such discretion to grant or not to grant sanction

vests absolutely in the sanctioning authority and discretion should be shown to have not been affected by extraneous consideration.

The Apex Court in the case of Mansukhlal Vithaldas (supra) further held that if sanctioning authority was unable to apply its independent mind for reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, then the order will be bad for the reason that the discretion of the authority (not to sanction) was taken away and it was compelled to act mechanically to sanction the prosecution.

11. In the case of Abhinandan Jha (supra) the Apex Court has held that there is no power, expressly or impliedly conferred, under the Code, on a Magistrate to call upon the police to submit a charge sheet, when a final report has been submitted. The Magistrate may or may not accept the report and take suitable action according to law. However, he cannot impinge upon jurisdiction of the police, by compelling them to change the opinion so as to accord with his view. The Hon'ble Supreme Court further observed that the formation of the opinion by the police, is the final step in the investigation and that final step is to be taken by the police and no other authority.

12. In the present case, after going through the investigation, the materials were placed before the sanctioning authority by the Directorate of Vigilance. The Directorate of Vigilance has taken a decision that the final report should be submitted and due enquiry should be initiated against the petitioner. Therefore, the conduct of the learned Special Judge (Vigilance) in directing to obtain sanction and letter written to the S.P. of Vigilance to obtain sanction has put pressure on the sanctioning authority and therefore, the discretion of the sanctioning authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution.

In that view of the matter, this Court comes to the conclusion that the order impugned cannot be sustained and the revision has to be allowed. In the result, the revision is allowed. The order dated 15.04.2010 passed by the learned Special Judge (Vigilance), Balasore in V.G.R. No.13 of 2007 is set aside and the petitioner is discharged from the charge for the aforesaid offence. The revision application is disposed of accordingly.

Revision disposed of.

2015 (II) ILR - CUT- 108

R,DASH, J

RVWPET NO. 62 OF 2OO3

BIDYADHAR HOTA (DEAD) BY HIS L.R. SANTOSH HOTA .....Petitioner

.Vrs.

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

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

Review of judgment – Scope – Power of review may be exercised when some mistake or error apparent on the face of the record is found.

In this case it is found from the pleadings in the W.S. that D.2. has never made any admission that he has been in possession of the suit land but the impugned judgment has been passed by this Court solely on the misconception that there is such an admission in the pleadings of D-2 which has completely been ignored by the learned Courts below – The Second Appeal has been dismissed solely on this erroneous assumption – This being a mistake on the part of the Court as well as an error apparent on the face of the record which, if allowed to continue, shall result in miscarriage of justice – Held, the application for review is allowed – Since the dismissal of the second appeal is solely based on the said erroneous finding, the impugned judgment is setaside. (Paras 11 to 14)

For Petitioner : M/s S.K.Nayak, A.K.Baral, K.Ray, R.K.Kar, J.K.Khuntia & S.Nayak

For Opp. Parties : M/s. H.S.Mishra,Dr. A.K.Tripathy & A.Panda & A.S.C,

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Date of hearing : 30.10.2014
Date of judgment : 11.11.2014

JUDGMENT

R. DASH, J.

This Review Petition under Order 47 Rule 1 of C.P.C. is in respect of the judgment dated 11.10.2002 passed by this Court in Second Appeal No.143 of 1993.

2. The petitioner is the appellant, O.P.No.2 series are the L.Rs. of the deceased Respondent No.2 and O.P.No.1, the State of Orissa, is Respondent No.1 in the Second Appeal.

3. Respondent No.2, late Sambhu Prasad Hota, filed the suit for a decree for recovery of possession of a piece of land measuring 0.115 decimal appertaining to Plot No.2488/48 situate in Ward No.10 of Bolangir Municipality claiming that he got it on lease in Revenue Case No.16/39 of 1963-64 alleging that the State Government could not give delivery of possession of the land as it was found to be in the possession of Defendant No.2.

4. D.2 filed W.S. claiming, inter alia, that he has no idea about any settlement in favour of the plaintiff and what is the piece of land in respect of which the alleged settlement has been made. But so far the land under his possession is concerned his vendor Ganeshram Sahoo, the recorded owner of Plot No.2483/9 of holding No.68 of Bolangir Nazul had transferred 1000 sq. ft. of land marked as 2483/9/A with houses standing thereon under a registered sale deed executed in February, 1965 and after taking over possession thereof, D.2 has mutated the land in his name and has been in possession thereof along with some adjoining Government land which is being used by him as his backyard. D.2 also took an alternative plea stating that if the suit land is found to be in his possession then he has acquired title there-over by way of adverse possession. Learned trial court decreed the suit allowing plaintiff's prayer for damages but refused to grant the main relief, i.e., recovery of possession, observing that the plaintiff failed to establish the identity of the land claimed by him to be in forcible possession of the defendant. Learned lower appellate court also recorded a finding that there is no acceptable evidence from the side of the plaintiff to show that Defendant No.2 was in possession of the suit property as stated by the plaintiff. However, observing, inter alia, that Defendant No.2 has admitted the plaintiff's title over the suit land by asserting that he (Defendant No.2) has acquired title over the suit land by way of adverse possession, but the period of such possession falling short of the statutory period, allowed the appeal and decreed the plaintiff's suit against Defendant No.2 directing recovery of possession.

5. The review of the impugned judgment is sought for on the sole ground that the observation made in the last part of paragraph No.8 of the impugned judgment that the Defendant No.2 has admitted in his written

statement that he has been in forcible possession over the suit land and that learned both the Courts below have completely ignored such admission and thereby erroneously held that defendant No.2 was not in possession of the suit land is a mistake on the face of record. This, according to the Review-petitioner, is as a result of misrepresentation of the pleadings of Defendant No.2 inasmuch as no where in the written statement D.2 has admitted his possession over the disputed land. Rather, it is submitted, throughout the pleadings the consistent stand taken by D.2 is that the suit land is not specific and that the burden is on the plaintiff to establish that the defendant is, in fact, in possession of the suit land which the plaintiff claims to have got on lease in Revenue Case No.16/39 of 1963-64. Defendant No.2, it is further submitted, has taken an alternative plea claiming that if at all the suit land or any part thereof is found to be in his possession then he has acquired title over it by way of adverse possession.

6. On a perusal of the written statement the submission made by the learned counsel for the review-petitioner that nowhere D-2 admitted that he has been in forcible possession over the suit land is found to be correct. Rather, pleadings in the written statement reveal that the defendants' defence is based on alleged lack of identity or improper description of the suit land. The defendant has put the burden on the plaintiff to connect the land he claims to have got on lease with the land he (D-2) has been in possession. No doubt he admits that together with his purchased land he is also in possession of a piece of government land adjoining to his purchased land. But, he does not admit that the piece of government land under his possession is the suit land. He has taken the stand that he himself has no idea if he is in possession of the suit land or any portion thereof and that the plaintiff having not supplied any map in respect of the suit land he does not know if he is in possession of the suit land. D-2 reserved his right to file additional W.S. on the event a map of the suit land was supplied to him. However, in the alternative, D-2 has taken the stand that if the Court finds that he is in possession of the suit land then since he has been in possession of the "suit site" for more than the statutory period, he has acquired title over the suit land by way of adverse possession.

7. The Second Appeal was admitted on the following substantial question of law:

(i) Whether the learned lower appellate court committed any error of record so far as identity of the suit land is concerned?

(ii) Whether the learned lower appellate court is justified by directing recovery of possession of the suit land from the appellant in absence of any evidence to the effect that the land in possession of the appellant is the suit land?

It is seen that both the questions are on the proper identification of the suit land.

8. While disposing of the Second Appeal vide impugned judgment dated 11.10.2002, this Court dismissed the appeal with observation that in the written statement the defendant has admitted his possession over the disputed land but the learned courts below appear to have completely ignored such admission in the W.S. of D-2 and erroneously the courts below have held that defendant No.2 is not proved to be in possession of the suit land.

9. Learned counsel for the review-petitioner submits that when there is no admission in the W.S. that D-2 has been in possession of the suit land the observation of this Court that D-2 has made such admission in his W.S. is an error apparent on the face of record and such finding is based on misrepresentation of pleadings contained in the written statement of D-2/review-petitioner.

On a reading of the written statement in its entirety it cannot be said that D-2 has admitted that he has been in possession of the suit land, i.e., the land measuring 0.115 decimal appertaining to plot No.2488/48 in Ward No.10 of Bolangir Municipality in respect of which lease has been granted in his favour in Revenue Case No.16/39 of 1963-64. The consistent stand taken by D-2 is that description of the suit property made in the plaint is quite insufficient to identify the suit land and though he (D-2) has been unauthorizedly possessing a piece of government land adjoining to his purchased land, the same could not be correlated with the land appertaining to plot No.2488/48 and if at all it is found by the court that the land appertaining to plot No.2488/48 corresponds to the land which is under unauthorized occupation of D-2, then he has perfected his title over that piece of land by way of adverse possession. In fact both the courts below have found that the plaintiff has failed to establish that the defendant No.2 is in possession of the suit land appertaining to plot No.2488/48. Therefore, the Review-petitioner has raised a sustainable contention that afore stated observation of this Court in the impugned judgment on the alleged admission in the W.S. is an error apparent on the face of record.

10. In ***Board of Control for Cricket, India v. Netaji Cricket Club***, reported in ***AIR 2005 Supreme Court 592*** it is observed that Order 47, R.1 of the Code provides for filing an application for review which would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason. Furthermore, referring to ***Lily Thomas v. Union of India***, reported in ***(2000) 6 SCC 224*** law laid down in that case has been extracted as follows:

> "Law has to bend before justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice nothing would preclude the Court from rectifying the error……"

11. In Civil Appeal No.4584 of 2009 arising out of SLP (Civil) No.19736 of 2006 (a printed copy down loaded from the website http://indiankanoon.org is filed) it is observed that power of review may be exercised when some mistake or error apparent on the face of the record is found. But that error must be such which strikes one on mere looking at the record and would not require any long drawn process of reasoning on the points where there may be conceivable two opinions.

Some more decisions have been cited by the learned counsels but the principle laid down in those decisions are on the scope and ambit of the power of review under Order 47, R.1, C.P.C. over which there is no difference of opinion. Therefore, those are not referred herein to lengthen the order unnecessary.

12. In the case in hand, it is found from the pleadings in the W.S. that D-2 has never made any admission that he has been in possession of the suit land. But, the impugned judgment has been passed by this Court solely on the misconception that there is such an admission in the pleadings of D-2 which has completely been ignored by the learned courts below. The Second Appeal has been dismissed solely on this erroneous assumption. This is a mistake on the part of the Court as well as an error apparent on the face of the record which, if allowed to continue, shall result in miscarriage of justice.

13. In view of the discussion made above, the application for review is allowed on contest but in the facts and circumstances without cost.

14. Since the dismissal of the Second Appeal is solely based on the said erroneous finding, the impugned judgment dated 11.10.2002 passed in the Second Appeal No.143 of 1993 by this Court is set aside. Registry to make necessary noting in the register concerned. A copy of this order be communicated to the learned trial court/executing court.

Review petition allowed.

2015 (II) ILR - CUT- 113

A.K.RATH, J

W.P. (C) NO. 4275 OF 2012

SUSANTA DALEI ……..Petitioner

.Vrs.

UNION OF INDIA & ORS. ……...Opp. Parties

DICIPLINARY PROCEEDING – Petitioner, a constable (driver) in CRPF – He overstayed for a period of 223 days without sanction of leave by the competent authority – Removal from service – Punishment confirmed by appellant authority – Hence the writ petition – Petitioner admitted his guilt in course of enquiry – He submitted number of medical certificates showing that he was ill and suffering from vertigo which has been brushed aside by the disciplinary authority on jejune grounds – Held, punishment being shocking and disproportionate to the charge are quashed – Matter is remitted back for consideration afresh keeping in view the ailment of the petitioner.

(Paras 7,8)

For petitioner : Miss. S. Mohapatra.

For Opp. Parties : Mr. S K. Das (Central Govt. Counsel)

Date of hearing : 26.03.2.15
Date of judgment : 26.03.2.15

DR. A.K. RATH, J.

In this writ petition under Article 226 of the Constitution, the petitioner, who was a Constable, assails the order of punishment dated 24.06.2011 removing him from service, imposed by the Commandant, 52-BN, CRPF, Rangreth, Budgaon, Srinagar, opposite party no.4 as well as the order dated 24.10.2011 passed by the D.I.G. of Police, CRPF, Bhubaneswar, under Annexures-4 and 6 respectively.

2. The case of the petitioner is that he was appointed as a Constable (Driver) in the CRPF Group Center, Bhubaneswar in the year 2006. After completion of training, he was posted at Srinagar, Rangreth, Budgaon. He applied for leave in the month of August 2010 before opposite party no.4 on the ground of illness of his wife. The opposite party no.4 allowed the application for leave, whereafter he left the camp on 02.10.2010. Due to his illness, he could not join on duty and intimated the opposite party no.4 along with relevant medical papers and certificates. He over stayed for a period of 223 days. A departmental proceeding was initiated against him. After conduct an enquiry, the Enquiry Officer submitted report, whereafter the opposite party no.4 removed the petitioner from service. He unsuccessfully challenged the same before the D.I.G. opposite party no.3. The appellate authority confirmed the order passed by the disciplinary authority.

3. Pursuant to issuance of notice, a counter affidavit has been filed by opposite parties. The sum and substance of the case of the opposite parties is that the petitioner was appointed as a Driver on 30.04.2007 in CRPF. He had reported in this Unit on 07.10.2008. On 02.10.2010 he had deserted from Headquarters/52 Bn. Rangreth (J & K) without any permission/sanction of leave from the competent authority. An F.I.R. was lodged against him in Sadar P.S., Srinagar, Budgam (J & K) on 02.10.2010. He was directed to report on duty immediately vide Office letter dated 02.10.2010 but he did not pay any heed. Consequently, the OC Headquarter had filed a complaint under Section 9(f) of the CRPF Act 1949 in the court of learned Chief Judicial Magistrate on 04.10.2010. A warrant of arrest was issued against him on 04.10.2010. He could not be apprehended by the police. Subsequently as per the provisions of the CRPF Rules, 1955, an enquiry was ordered vide office order dated 22.11.2010. On the recommendation of the COI, he was declared deserter from Force with effect from 02.10.2010 vide office order dated 28.12.2010. Accordingly he was charge-sheeted on 29.01.2011 on the following charges :-

> "That the said No.075040041 CT/DVR Susanta Dalai of Hqr @ Bn. CRPF, while functioning as CT/Dvr as Rangreth, Budgam, Srinagar (J&K) has committed an act or disobedience of orders/neglect of duty/remissness in the discharge of his duty/other misconduct or misbehaviour in his capacity as a member of the force under Section 11(1) of CRPF Act, 1949 in that he deserted from highly sensitive operational area of HQr/52 Bn, CRPF Camp, Rangreth, Budgam, Srinagar (J&K) without any prior permission of competent authority w.e.f. 02.10.2010 (A/N) which is prejudicial to the good order and discipline of the Force".

4. While the departmental enquiry was going on, he reported at Battalion headquarter on 13.05.2011. After remain absent for 223 days, he pleaded the guilty of charge. After recording the statement of the witnesses and affording opportunity of hearing, the Enquiry Officer submitted a report holding there charge was proved. A copy of the enquiry report was served to the petitioner on 27.05.2011. It is further stated that during the short span of 3½ years of service, the petitioner had overstayed for two occasions without any sanction of leave from the competent authority. Considering the gravity of offence, the disciplinary authority awarded the punishment of removal from service which commensurates with the gravity of the offence. It is further stated that the petitioner managed some medical documents to conceal his misconduct. Further the appellate authority did not find any extenuating circumstances to differ with the findings of the disciplinary authority and accordingly the appeal was dismissed.

5. Heard Miss S. Mohapatra, learned counsel for the petitioner and Mr. S.K. Das, learned counsel for the opposite parties.

6. In ***B.C. Chaturvedi –vrs.- Union of India,*** AIR 1996 SC 484, the apex Court in paragraph-18 of the report held that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it

would appropriately mould the relief, either directing the disciplinary/ appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

7. It is a settled principle of law that scanning of evidence is beyond the purview of writ court, unless the same is perverse. Further, the High Court under Article 227 of the Constitution of India does not sit as an appellate authority. It is a fact that in course of enquiry, the petitioner had admitted his guilt. But then the material record shows that he was ill suffering from Vertigo. He had filed number of medical certificates to that effect. The same was brushed aside by the disciplinary authority on jejune grounds. The punishment of removal from service awarded by the disciplinary authority and confirmed by the appellate authority is disproportionate to the charge and shocking.

8. In view of the same, the orders dated 26.06.2011 and 24.10.2011 respectively passed by the Commandant, 52-BN, CRPF, Rangreth, Budgaon, Srinagar (J & K), vide Annexure-4 and Dy. Inspector General of Police, CRPF, Bhubaneswar Range, vide Annexure-6 are hereby quashed. The matter is remitted back to the Commandant, 52-BN, CRPF, Rangreth, Budgaon, Srinagar (J & K), opposite party no.4 to pass an order afresh on the question of punishment keeping in view the ailment of the petitioner. The writ petition is accordingly disposed of.

Writ petition disposed of.

2015 (II) ILR - CUT- 117

FULL BENCH

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

W.P. (C) NO. 22753 OF 2010

ANATHA BANDHU MANDAL ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS. …….Opp.Parties

ORISSA FOREST ACT, 1972 – S.56

Whether the Orissa Forest (Detection, Enquiry and Disposal of Forest Offences), Rules1980 have any application to the proceeding before the Authorised Officer U/s 56 of the Orissa Forest Act, 1972 ? – Held, No.

In the present Case "The 1980 Rules" is a piece of delegated legislation, mainly connected with Section 72 of the Act – It is totally Silent on confiscation proceeding to be conducted by Authorised Officer, provisions for which have been made clearly in Sub- Sections (2-a), (2-b) & 2 (c) of Section 56 of the Act – Held, "The 1980 Rules" have no application to the proceeding before the Authorised Officer U/s. 56 of the Act – To be more clear since the Authorised Officer U/s 56 of the Act deals mainly with the confiscation proceeding "the 1980 Rules" have no application to such proceeding.

Case Laws Rreffered to :-

1. 2008 (II) OLR 592 : Rabinarayan Sahu v. Forest Range Officer, Sorada and Ors.
2. AIR 1961 SC 372 : Calcutta Discount Co. v. Income Tax Officer.
3. AIR 1962 SC 316, : Collector of Customs v. Sampath Chetty.
4. AIR 1962 SC 1559 : Pukharaj v. D.R. Kohili
5. AIR 1985 SC 989 : Dr. Pratap Singh v. Director Enforcement
6. 1990 (70) CLT 613 :Jogendra Singh v. State of Orissa
7. AIR 1993 SC 1167 : Jyoti Prasad v. State of Haryana
8. AIR 1994 SC 2663 : N. Nagendra Rao and Co. v. State of Andhra Pradesh
9. AIR 2005 SC 648 : Nathi Devi v. Radha Devi Gupta
10. 2013 (Sup-I) OLR : 589 Puspa Ranjan Sahoo v. Assistant Director of Income Tax.
11. 2008 (II) OLR 592 : Rabinarayan Sahu v. Forest Range Office of

Sorada Range and Ors.
12. 2012 (I) OLR 229 : Sukanta Kumar Jena v. State of Orissa & Anr.
13. AIR 1950 SC 468 : MPV Sundararamier and Co. v. State of A.P.& Anr.
14. AIR 2014 SC 1716 : Amarendra Kumar Mohapatra & Ors v. State of Orissa & Ors.

For Petitioner : M/s Debi Prasad Dhal, K.Dash, S.K.Dash & B.S.Dasparida
For Opp. Parties : Mr. B.P.Pradhan

Date of Judgment: 18.06.2015

JUDGMENT

BISWAJIT MOHANTY, J.

The question that has been referred to be answered by this Full Bench is as follows;

"Whether the Orissa Forest (Detection, Enquiry and Disposal of Forest Offence), Rules 1980 have any application to the proceeding before the Authorised Officer under Section 56 of the Orissa Forest Act, 1972 ?"

2. The short facts of the case are as follows;

On 23.8.2009 while one K.C. Dalabehera, Forester and other forest staffs were performing night patrolling duty, they intercepted a truck bearing registration No.WB-33-A-5229 near Khandadhip bridge at Rairakhol on suspicion that the truck was used for transporting Kendu Leaves. On checking the vehicle, it was found that it contained 924 bundles of processed Kendu leaves covered with rice bran (kunda) and tarpaulin. On being asked, the driver of the truck, namely, Ajit Prasad and helper - Chiranjit Patra could not produce any document or authority in support of transportation of Kendu leaves. Accordingly, the vehicle along with Kendu leaves were seized in presence of witnesses. On the basis of aforesaid detection, the driver and helper of the vehicle were taken into custody and forwarded to the court of the learned S.D.J.M., Rairakhol along with advance Prosecution Report for committing offences under Rules - 4 and 21 of the O.T.T. Rules, 1980 and Section-14 of the Orissa Kendu Leaves (Control and Trade) Act, 1961 and further confiscation proceeding in respect of the aforesaid vehicle and Kendu leaves under Section-56 of the Orissa Forest Act, 1972, for short "the Act" was initiated. Vide order dated 18.6.2010, the Authorised Officer-cum-Assistant Conservator of Forest, Rairakhol Division on consideration of

materials on record, passed the order for confiscation of the truck, Kendu leaves and other accessories. Against the order of the Authorised Officer, the petitioner moved the learned District Judge, Sambalpur in F.A.O. No.29 of 2010 and on 24.11.2010, learned District Judge dismissed the said appeal. Challenging both the above noted orders, the present writ application was filed. While hearing this writ application, there was a cleavage of opinion between the two Hon'ble Judges of this Court constituting the Division Bench regarding applicability of the Orissa Forest (Detection, Enquiry and Disposal of Forest Offence) Rules, 1980, for short "the 1980 Rules" to the proceeding before the Authorised Officer under Section-56 of "the Act". Accordingly, this matter has come before this Full Bench for an answer to the above noted dispute/question. While Hon'ble Justice C.R. Dash has held that "the 1980 Rules" apply to compounding proceedings alone and the same have nothing to do with the confiscation proceeding before the Authorised Officer or trial proceeding before the Magistrate; Hon'ble Justice L. Mohapatra (as His Lordship then was) relying on the decision in the case of **Rabinarayan Sahu** v. **Forest Range Officer, Sorada and others** reported in 2008 (II) OLR 592 disagreed with the view taken by Hon'ble Justice C.R. Dash. However, Hon'ble Justice L. Mohapatra observed that there existed no reference to the confiscation proceeding in "the 1980 Rules". In such background, Hon'ble Justice L. Mohapatra was of the view that the question as to whether the above 1980 Rules had any application to the proceeding before the Authorised Officer under Section-56 of the Orissa Forest Act or not be referred to a Larger Bench or the view of a third Hon'ble Judge be taken on the matter. Accordingly, this matter has come before this Full Bench.

3. In order to appreciate the things properly, let us first refer to the relevant statutory provisions of "the Act" & its later amending Acts and "the 1980 Rules" in its entirety.

RELEVANT PROVISIONS OF "THE ACT" as it stood prior to Orissa Act 9 of 1983 also known as the Orissa Forest (Amendment) Act, 1982.

> "**56**. **Seizure of property liable to confiscation**- (1) When there is reason to believe that a forest offence has been committed in respect of any forest produce, such produce, together with all tools, ropes, chains, boats, vehicles or cattle used in committing any such offence may be seized by any Forest Officer or Police Officer.

(2) Every officer seizing any property under this Section shall place, on such property a mark indicating that the same has been so seized and shall as soon as may be, except where the offender agrees in writing to get the offence compounded, make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made:

Provided that, when the forest produce with respect to which such offence is believed to have been committed is the property of Government, and the offender is unknown, it shall be sufficient if the officer makes, as soon as may be, a report of the circumstances to his official superior and the Divisional Forest Officer.

(3) The property seized under this section shall be kept in the custody of a Forest Officer or with any third party, until the compensation for compounding the offence, is paid or until an order of the Magistrate directing its disposal is received.

Explanation:- For the purposes of this section and Section 59, cattle shall not include buffaloes, bulls, cows, calves and oxen.

58. Action after seizure:- Upon the receipt of any such report the Magistrate shall, except where the offence has been compounded, with all convenient dispatch, take such measures as may be necessary for the arrest and trial of the offender and the disposal of the property according to law.

59. Forest produce, tools, etc. liable to confiscation: (1) All timber or forest produce, which is not the property of Government and in respect of which a forest offence has been committed, and all tools, ropes, chains, boats, vehicles and cattle used in committing any forest offence, shall be liable to confiscation

(2) Such confiscation may be in addition to any other punishment provided for such offence.

60. **Disposal on conclusion of trial for forest offence of produce in respect of which it was committed:** - When the trial of any forest offence is concluded, any forest produce in respect of which such offence has been committed shall, if it is the property of Government or has been confiscated, be taken charge of by or under the authority

of the Divisional Forest Officer, and in any other case, may be disposed of in such manner as the Court may direct.

64. **Property when to vest in Government:**- When an order for the confiscation of any property has been passed under Section 59 or Section 61, as the case may be, and the period limited by Section 63 for filing an appeal from such order has elapsed, and no such appeal has been preferred or when, on such an appeal being preferred, the appellate Court confirms such order in respect of the whole or a portion of such property, such property or such portion thereof, as the case may be, shall vest in the State Government free from all encumbrances.

71. Power to try offence summarily- Any Management of the First Class specially empowered in this behalf by the State Government may try summarily under the Code of Criminal Procedure, 1898, any forest offence punishable with imprisonment for a term not exceeding one year, or with fine not exceeding one thousand rupees, or with both.

72. **Power to compound of offences**- (1) Any Forest Officer specially empowered in this behalf by the State Government may accept as compensation from any person who committed or in respect of whom it can be reasonably inferred that he has committed, any forest offence other than an offence under Section 66 or Section 67 –

(*i*) a sum of money not exceeding fifty rupees where such offences is of a trivial nature and involves forest produce the market value of which does not exceed twenty –five rupees;

(*ii*) a sum of money which shall not in any case be less than the market value of the forest produce, or more than four times such value as estimated by such Forest Officer, in addition to the market value of the forest produce, where such offence involves any forest produce which in the opinion of the Forest Officer may be released;

(*iii*) a sum of money which shall not in any case be less than the market value of the forest produce, or more than four times such value as estimated by such Forest Officer, where such offence involves forest produce which in the opinion of the Forest Officer should be retained by the Government:

(2) On receipt of the sum of money referred to in Sub-section (1) by such officer –

(*i*) the accused person, if in custody, shall be discharged;

(*ii*) the property seized shall, if it is not to be so retained, be released; and

(*iii*) no further proceedings shall be taken against such person or property;

82. Additional powers to make rules- (1) The State Government may make rules - (a) to prescribe and limit the powers and duties of any Forest Officer under this Act:

(b) to regulate the rewards to be paid to officers and informants out of the proceeds of fines and confiscations under this act;

(c) for the preservation, reproduction and disposal of trees and timber belonging to Government, but grown on lands belonging to or in the occupation of private persons; and

(d) generally, to carry out the provisions of this Act.

(2) All rules made under this Act shall, as soon as may be after, they are made, be laid before the State legislature for a total period of fourteen days which may be comprised in one session or in two or more successive sessions and if during the said period, the State legislature makes modifications, if any, therein, the rules shall thereafter have effect only in such modified form so, however, that such modifications shall be without prejudice to the validity of anything previously done under the rules."

RELEVANT PROVISIONS OF THE ORISSA FOREST (AMENDMENT) ACT, 1982, which is also known as Orissa Act 9 of 1983, for short "the 1983 Act".

"**8. Amendment of section 56** - In section 56 of the Principal Act,-

(a) in sub-section (2), after the words and comma "to get the offence compounded", the following words and brackets shall be inserted, namely:- "either produce the property seized before an officer not below the rank of an Assistant Conservator of Forest authorized by the State government in this behalf by notification (hereinafter referred to as the 'authorised officer') or";

(b) after sub-section (2), the following new sub-sections shall be inserted, namely:-

"(2-a) Where an authorized officer seizes any forest produce under sub-section (1) or where any such forest produce is produced before him under sub-section (2) and he is satisfied that a forest offence has been committed in respect thereof, he may order confiscation of the forest produce so seized or produced together with all tools, ropes, chains, boats, vehicles or cattle used in committing such offence.

(2-b) No order confiscating any property shall be made under sub-section (2-a) unless the person from whom the property is seized is given-

(a) a notice in writing informing him of the grounds on which it is proposed to confiscate such property;

(b) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation; and

(c) a reasonable opportunity of being heard in the matter.

(2-c) Without prejudice to the provisions of sub-section (2-b), no order of confiscation under sub-section (2-a) of any tool, rope, chain, boat, vehicle or cattle shall be made if the owner thereof proves to the satisfaction of the authorized officer that it was used without his knowledge or connivance or the knowledge or connivance of his agent, if any, or the person in charge of the tool, rope, chain, boat, vehicle or cattle, in committing the offence and that each of them had taken all reasonable and necessary precautions against such use.

(2-d) Any forest officer below the rank of a Conservator of Forests empowered by the Government in this behalf by notification, may within thirty days from the date of the order of confiscation by the authorized officer under sub-section (2-a), either suo motu or on application, call for and examine the records of the case and may make such inquiry or such inquiry to be made and pass such orders as he may think fit.:

Provided that no order prejudicial to any person shall be passed without giving him an opportunity of being heard.

(2-e). Any person aggrieved by an order passed under sub-section (2-a) or sub-section (2-d) may, within thirty days from the date of communication to him of such order, appeal to the District Judge

having jurisdiction over the area in which the property has been seized, and the District Judge shall after giving an opportunity to the parties to be heard, pass such order as he may think fit and the order of the District Judge so passed shall be final.".

10. Amendment of section 59 - In section 59 of the Principal Act, in sub-section (1), the words and figure "unless an order of confiscation has already been passed in respect thereof under section 56" shall be added at the end.

11. Amendment of section 64 – In Section 64 of the Principal Act, shall be re-numbered as sub-section (1) thereof and after sub-section (1) as so re-numbered, the following new sub-section shall be added, namely;- "When an order of confiscation of any property passed under section 56 has been become final under that section in respect of the whole or any portion of the property, such property or the portion thereof as the case may be, shall vest in the State Government free from all encumbrances.".

12. Insertion of new section 64-A - After section 64 of the principal Act, the following new section shall be inserted, namely:-

"64-A. Confiscation to be no bar to imposition of other penalty - An order of confiscation made under section 56 shall not act as a bar to the imposition of any other penalty to which the offender is liable under this Act or the rules made thereunder".

14. Amendment of section 72 - In section 72 of the Principal Act, in sub-section (1),-

(a) for the words and figures "any forest offence other than an offence under section 66 or section 67", the words, figures and brackets "any forest offence (other than an offence under section 66 or section 67 or an offence in committing which a vehicle has been used)," shall be substituted;

(b) the following proviso shall be added at the end, namely:- "Provided that no such offence as is referred to in clause (ii) or clause (iii) shall be compounded if the market value of the forest produce involved exceeds one hundred rupees."

RELEVANT PROVISIONS OF THE ORISSA FOREST (AMENDMENT) ACT, 2000, which is also known as Orissa Act 12 of 2003, for short "the 2003 Act".

"8 – Amendment of Section 56: In Section 56 of the principal Act:

(a) In Sub-section (2), after the words, "offence compounded", the words and figure "under Section 72" shall be inserted;

(b) In Sub-section (2-a), for the words "he may" the words "he shall" shall be substituted; and

(c) To Sub-section (3), the following proviso shall be added, namely :

"Provided that the seized property shall not be released during pendency of the confiscation proceeding or trial even on the application of the owner of the property for such release."

13 – Amendment of Sections 71 & 77 : In Section 71 and in clause (c) of Sub-section (1) of Section 7 of the principal Act:

(a) for the figure "1898", the figure "1973" shall be substituted; and

(b) for the marginal references "5 of 1898" and "45 of 1898" the marginal references "2 of 1974" shall be substituted."

RELEVANT PROVISIONS OF THE ORISSA FOREST (AMENDMENT) ACT, 2010, which is also known as Orissa Act 9 of 2011, for short "the 2011 Act".

"2. Amendment of Section 72 – In Section 72 of the Orissa Forest Act, 1972, in the proviso to Sub-section (1), for the words "one hundred rupees", the words "five thousand rupees" shall be substituted."

RELEVANT PROVISIONS OF "THE ACT" AS THOSE STAND TODAY.

"**56. Seizure of property liable to confiscation** — (1) When there is reason to believe that a forest offence has been committed in respect of any forest produce, such produce, together with all tools, ropes, chains, boats, vehicles or cattle used in committing any such offence may be seized by any Forest Officer or Police Officer.

(2) Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized and shall, as soon as may be, except where the offender agrees in writing to get the offence compounded, under Section 72 either produce the property seized before an officer not below the rank of an Assistant Conservator of Forests authorised by the State Government in this behalf by notification (hereinafter referred to as the authorised

officer) or make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made:

Provided that, when the forest produce with respect to which such offence is believed to have been committed is the property of Government, and the offender is unknown, it shall be sufficient if the officer makes, as soon as may be, a report of the circumstances to his official superior and the Divisional Forest Officer.

(2-a) When an authorised officer seizes any forest produce under sub-section (1) or where any such forest-produce is produced before him under sub-section (2) and he is satisfied that a forest offence has been committed in respect thereof, he shall order confiscation of the forest produce so seized or produced together with all tools, ropes, chains, boats, vehicles or cattle used in committing such offence.

(2-b) No order confiscating any property shall be made under sub-section (2-a) unless the person from whom the property is seized is given—

(a) a notice in writing informing him of the grounds, on which it is proposed to confiscate such property;

(b) an opportunity of making a representation in writing within such reasonable times as may be specified in the notice against the grounds for confiscation; and

(c) a reasonable opportunity of being heard in the manner.

(2-c) Without prejudice to the provisions of sub-section (2-b), no order of confiscation under sub-section (2-a) of any tool, rope, chain, boat, vehicle or cattle shall be made if the owner thereof proves to the satisfaction of the authorised officer that it was used without his knowledge or connivance or the knowledge or connivance of his agent, if any, or the person in charge of the tool, rope, chain, boat, vehicle or cattle, in committing the offences and that each of them had taken all reasonable and necessary precautions against such use.

(2-d) Any Forest Officer not below the rank of a Conservator of Forests empowered by the Government in this behalf by notification, may, within thirty days from the date of the order of confiscation by the authorised officer under sub-section (2-a), either suo motu or on

application, call for and examine the records of the case and may make such inquiry or cause such enquiry to be made and pass such order as he may think fit:

Provided, that no order prejudicial to any person shall be passed without giving him an opportunity of being heard.

(2-e) Any person aggrieved by an order passed under sub-section (2-a) or sub-section (2-d) may, within thirty days from the date of communication to him of such order, appeal to the District Judge having jurisdiction over the area in which the property has been seized, and the District Judge shall after giving an opportunity to the parties to be heard, pass such order as he may think fit and the order of the District Judge so passed shall be final.

(3) The property seized under this section shall be kept in the custody of a Forest Officer or with any third party, until the compensation for compounding the offence is paid or until an order of the Magistrate directing its disposal is received.

Provided that the seized property shall not be released during pendency of the confiscation proceeding or trial even on the application of the owner of the property for such release.

Explanation.—For the purposes of this section and Section 59, cattle shall not include buffaloes, bulls, cows, calves and oxen.

58. Action after seizure— Upon the receipt of any such report the Magistrate shall, except where the offence has been compounded, with all convenient despatch, take such measures as may be necessary for the arrest and trial of the offender and the disposal of the property according to law.

59. Forest produce, tools, etc., liable to confiscation — (1) All timber or forest produce which is not the property of Government and in respect of which a forest offence has been committed, and all tools, ropes, chains, boats, vehicles and cattle used in committing any forest offence, shall be liable to confiscation unless an order of confiscation has already been passed in respect thereof under Section 56,

(2) Such confiscation may be in addition to any other punishment provided for such offence.

60. Disposal on conclusion of trial for forest offence of produce in respect of which it was committed — When the trial of any forest offence is concluded, any forest produce in respect of which such offence has been committed shall, if it is the property of Government or has been confiscated be taken charge of by or under the authority of the Divisional Forest Officer, and in any other case, may be disposed of in such manner as the Court may direct.

64. Property when to vest in Government— (1) When an order for the confiscation of any property has been passed under Section 59 or Section 61, as the case may be, and the period limited by Section 63 for filing an appeal from such order has elapsed, and no such appeal has been preferred or when, on such an appeal being preferred, the Appellate Court confirms such order in respect of the whole or a portion of such property, such property or such portion thereof, as the case may be, shall vest in the State Government free from all encumbrances.

(2) When an order of confiscation of any property passed under Section 56 has become final under that section in respect of the whole or any portion of the property, such property or the portion thereof, as the case may be, shall vest in the State Government free from encumbrances.

64-A. Confiscation to be no bar to imposition of other penalty—An order of confiscation made under Section 56 shall not act as a bar to the imposition of any other penalty to which the offender is liable under this Act or the rules made thereunder.

71. Power to try offences summarily - Any Magistrate of the First Class specially empowered to this behalf by the State Government may try summarily under the Code of Criminal Procedure, 1973, (2 of 1974) any forest offence punishable with imprisonment for a term not exceeding one year, or with fine not exceeding one thousand rupees, or with both.

72. Power to compound of offences - (1) Any Forest Officer specially empowered in this behalf by the State Government may accept as compensation from any person who committed or in respect of whom it can be reasonably inferred that he has committed any

forest offence (other than an offence under Section 66 or Section 67 or an offence in committing which a vehicle has been used)-

(i) a sum of money not exceeding fifty rupees where such offence is of a trivial nature and involves forest produce the market value of which does not exceed twenty-five rupees;

(ii) a sum of money which shall not in any case be less than the market value of the forest produce, or more than four times such value as estimated by such Forest Officer, in addition to the market value of the forest produce, where such offence involves any forest produce which in the opinion of the Forest Officer may be released;

(iii) a sum of money which shall not in any case be less than the market value of the forest produce, or more than four times such value as estimated by such Forest Officer, where such offence involves forest produce which in the opinion of the Forest Officer should be retained by the Government:

Provided that no such offence as is referred to in Clause (ii) or Clause (iii) shall be compounded if the market value of the forest produce involved exceeds five thousand rupees.

(2) On receipt of the sum of money referred to in sub-section (1) by such officer-

(i) the accused person, if in custody, shall be discharged;

(ii) the property seized shall, if it is not to be so retained, be released; and

(iii) no further proceedings shall be taken against such person or property.

82. Additional powers to make rules — (1) The State Government may make rules—

(a) to prescribe and limit the powers and duties of any Forest Officer under this Act;

(b) to regulate the reward to be paid to officers and informants out of the proceeds of fines and confiscations under this Act;

(c) for the preservation, reproduction and disposal of trees and timber belonging to Government, but grown on lands belonging to or in the occupation of private persons; and

(d) generally, to carry out the provisions of this Act.

(2) All rules made under this Act shall, as soon as may be after, they are made, be laid before the State Legislature for a total period of fourteen days which may be comprised in one session or in two or more successive sessions and if during the said period, the State Legislature makes modifications, if any, therein, the rules shall thereafter have effect only in such modified form, or, however, that such modifications shall be without prejudice to the validity of anything previously done under the rules.

THE RELEVANT PROVISIONS OF "THE 1980 RULES"

"S.R.O. No.56/80-In exercise of the powers conferred by clause (d) of sub-section (1) of Section 82 of the Orissa Forest Act, 1972 (Orissa Act 14 of 1972), the State Government do hereby make the following rules, namely:-

1. (1) These rules may be called the Orissa Forest (Detection, Enquiry and Disposal of Forest offence) Rules, 1980.

(2) They shall come into force on the date of their publication in the Official Gazette

2.(1) In these rules, unless the context otherwise requires,-

(i) "Act" means the Orissa Forest Act, 1972;

(ii) "Accused" means any person who committed or in respect of whom it may be reasonably inferred that he has committed or abetted the commission of a forest offence;

(iii) "Case record" means the records of a case relating to any forest offence maintained by a Forest Officer under these Rules;

(iv) "Form" means a form appended to these rules.

(2) All words and expressions used but not defined in these rules shall have the meanings, respectively assigned to them in the Act.

3 (1) When a forest offence is detected and booked it shall be dealt with in the manner hereinafter provided.

(2) The forest officer who detects any forest offence under any of the provisions of the Act, shall draw a report in Form No.1 which shall form a part of the case record.

(3) A list in duplicate of articles seized shall be prepared by the officer detecting the offence, in Form No.II, and a copy of the seizure list shall be made over to the accused person, where the accused is known and his signature shall be obtained in the duplicate copy of the said seizure list. The duplicate copy of the seizure list shall form a part of the case record.

(4) The report of seizure required to be made to the Magistrate under sub-section (2) of Section 56 of the Act shall be in Form No.III, and a copy of the report shall be retained in the case record when the report is so made.

4.(1) When a forest offence is detected, a preliminary enquiry may be held by a Forester in charge of the Section, who shall forward his enquiry report along with the Report in Form No.1 to the Range Officer concerned, soon after his preliminary enquiry is completed :

Provided that no enquiry may be held by any such Officer, if the accused who has committed a forest offence, other than an offence under Sections 66 and 67 of the Act agrees, and files a petition to that effect in Form No.4 to get the offence compounded under Section 72 of the Act and to pay compensation therefore. Such application in Form No.IV shall also form a part of the case record.

(2) An enquiry into the forest offence shall thereafter be held by an officer not below the rank of a Range Officer.

(3) The enquiry report together with the case record shall be submitted to the Divisional Forest Officer by the Range Officer in all cases in which the Divisional Forest Officer is not competent to compound under Rule 7 and where the accused persons do not opt to compound the offence.

5. Every accused who agrees under Rule 4 to get the offence compounded shall immediately deposit in advance an amount as

determined by the Forest Officer not below the rank of a Forester towards the probable compensation within the meaning of Section 72 of the Act. On receipt of such amount the forest officer concerned shall issue a receipt in Form No.V duly signed by him.

Provided that the acceptance of any amount as aforesaid by the Forest Officer shall be without prejudice to any decision that may be taken by the Forest Officer specially empower under Section 72 of the Act having regard to the quantum of compensation in conformity with the clauses (i) to (iii) of sub-section (1) of the said Section.

6. Any forest produce seized from an accused shall not immediately be released on receipt of the amount of advance towards probable compensation under Rule 5 but shall be retained with the Forest Officer concerned until an order in this behalf is issued by the competent authority under Section 72 of the Act.

7. Where the accused files the petition under Rule 4, the Forest Officer specially empowered under Section 72 of the Act may compound the case by passing an order in this behalf in Form No.VI. The order shall in all such cases be communicated to the accused immediately by or through the Range Officer, as the case may be.

8. When the Forest Officer empowered under Section 72 refused to compound an offence, the amount that was received as advance towards probable compensation from the accused under Rule 5 shall be refunded to him by the Range Officer on receipt of the order in that behalf from such Forest Officer.

9. The compounding order once passed shall be final and no appeal shall lie against such order.

10. (1) In the event where the amount of compensation ordered under Rule 7 becomes higher than the amount deposited under Rule5, the differential amount shall be paid by the accused to the concerned Range Officer within thirty days from the date of issue of the compounding order.

(2) In case of default in such payment under sub-rule (1), the Divisional Forest Officer shall take action to recover the balance amount as provided under Section 87 of the Act.

11. Where the accused does not opt to compounded the offence or the Forest Officer empowered refused to compound the offence and for all cases under Sections 66 and 67 of the Act, the Divisional Forest Officer may forward the offence report in Form No.VII along with the report in Form No.1 to the Magistrate having jurisdiction for prosecution of the offender.

12. All rules corresponding to these rules and in force prior to the commencement of these rules are hereby repealed.

Provided that orders made, notices issues, compensation levied, imposed or assessed, proceeding instituted and sent for prosecution and all actions taken and things done under any of the provisions of the rules so repealed shall be deemed to have been respectively made, issued, levied, imposed or assessed, instituted, taken or done under these rules."

4. The entire purpose of quoting the relevant provisions of "the Act" as those stood prior to their amendments in 1983 is to show that when "the 1980 Rules" came into force, at that point of time a reading of Section-58, unamended Section-59 & unamended Section-64 of "the Act" would show that only the Magistrate was empowered to order confiscation in addition to imposition of any punishment provided for the offence. At that point of time, there was no provision in "the Act" empowering Authorised Officer to order confiscation of forest produce along with all tools, chains, ropes, vehicles, etc. used in committing forest offence. The detailed provisions for confiscation proceeding before the Authorised Officer were introduced later only by way of an amendment by "the 1983 Act", i.e., much after coming into force of "the 1980 Rules". Till date there is also no reference to "the 1980 Rules" in Section 56 of "the Act". Secondly, "the 1980 Rules" are also totally silent on confiscation proceeding of any type.

5. Before referring to the submissions of the learned counsel for the parties, let us re-visit the question, which is required to be answered by this

Full Bench. The question is whether "the 1980 Rules" have any application to the proceeding before the Authorised Officer under Section-56 of the Act ? It is important to note here that the proceeding before the Authorised Officer under Section-56 of "the Act" as it stands now or as it stood on the date of occurrence is only a confiscation proceeding. Therefore, we have to see whether "the 1980 Rules" have any application to the confiscation proceeding before the Authorised Officer under Section 56 of "the Act" or not as it stands now. This is also clear from the Additional Note of Submission dated 25.6.2014 filed by the petitioner

6. Now to the submissions of the learned counsel for the parties.

7. Mr. D.P. Dhal, learned counsel for the petitioner put much emphasis on the phrase "reason to believe" as appearing in sub-section (1) of Section-56 of "the Act". According to him though the phrase "reason to believe" has been used as above, however, as to what constitutes "reason to believe" has not been made clear in "the Act". According to him, in order to give a clear meaning to the phrase "reason to believe", the State Government in its wisdom has framed "the 1980 Rules" in exercise of its power conferred under Section-82(1)(d) of "the Act" which clearly empowered the State Government to make rules generally to carry out the provisions of "the Act". According to Mr. Dhal, a combined reading of Section-56 of "the Act" and Rules - 3 and 4 of "the 1980 Rules" would show that Government has taken care of the intricacies to be followed while detecting a forest offence under the provisions of "the Act". To make things more clear and transparent, "the 1980 Rules" provided for enquiry by a senior officer to carry out the mandate of provisions like confiscation proceeding as contained in Section 56 of "the Act". Thus, according to him "the 1980 Rules" have been framed only with an intention to give a clear meaning to the phrase "reason to believe" by providing for an enquiry under Rule-4 in order to arrive at a conclusion that forest offence has been committed in respect of any forest produce, before initiation of confiscation proceeding under Section – 56 of "the Act", though, this has not been stated in clear terms either in "the Act" or in "the 1980 Rules". Accordingly, Mr. Dhal contended that an enquiry under Rule-4 of "the 1980 Rules" is a must prior to initiation of confiscation proceeding under sub-section (2-a) of Section-56 of "the Act". Thus, "the 1980 Rules" have full application to the confiscation proceeding to be carried out by the Authorised Officer. On the meaning of the phrase "reason to believe", Mr. Dhal relied on the decisions in the cases of **Calcutta Discount Co.** v. **Income**

Tax Officer reported in **AIR 1961 SC 372**, **Collector of Customs** v. **Sampath Chetty** reported in **AIR 1962 SC 316**, **Pukharaj** v. **D.R. Kohili** reported in **AIR 1962 SC 1559**, **Dr. Pratap Singh** v. **Director Enforcement** reported in **AIR 1985 SC 989**, **Jogendra Singh** v. **State of Orissa** reported in **1990 (70) CLT 613**, **Jyoti Prasad** v. **State of Haryana** reported in **AIR 1993 SC 1167** and **N. Nagendra Rao and Co.** v. **State of Andhra Pradesh** reported in **AIR 1994 SC 2663** in order to emphasize the point that the concept of "reason to believe" was not synonymous with subjective satisfaction of the officer. It contemplated existence of reasons for holding such a belief. In other words the officer must have information at his disposal for such a belief.

Secondly, Mr. Dhal contended that where the language of the statute was plain and unambiguous and held out a clear and definite meaning, there was no occasion for resorting to the rules of statutory interpretation. According to him the words Detection, Enquiry and Disposal of Forest Offence involved three contingencies envisaged under "the 1980 Rules" and since "the 1980 Rules" provided the procedure for each such contingencies, the attempt to give any other meaning would amount to enacting a new statute. "Detection", "Enquiry" & "Disposal of Forest Offence" connoted distinct meanings and accordingly those were to be interpreted. Accordingly, the 1980 Rules could not be interpreted so as to confine it to facilitating the compounding of forest offence only. Such an interpretation would fly in the face of Rules - 8 & 11 of "the 1980 Rules" which covered the cases where offender did not opt to compound the offences. According to Mr. Dhal, a rule cannot be interpreted differently for different persons. He relied on the decisions in the cases of **Nathi Devi** v. **Radha Devi Gupta** reported in **AIR 2005 SC 648** and **Puspa Ranjan Sahoo** v. **Assistant Director of Income Tax** reported in **2013 (Sup-I) OLR 589** to highlight the position of law that the court should harmoniously interpret all the provisions and each and every word of the statute should be given effect to.

Thirdly, Mr. Dhal relied on the decisions in the cases of **Rabinarayan Sahu v. Forest Range Office of Sorada Range and others** reported in **2008 (II) OLR 592** and **Sukanta Kumar Jena** v. **State of Orissa and another** reported in **2012 (I) OLR 229** to press his point that "the 1980 Rules" applied to the confiscation proceeding under Section-56 of the Act.

Fourthly, Mr. Dhal submitted that true nature of law has to be determined not by the label given to it by the statue but on its substance. In this context, he relied on the decisions in the cases of **MPV Sundararamier and Co.** v. **State of A.P. and another** reported in **AIR 1950 SC 468** and **Amarendra Kumar Mohapatra and others** v. **State of Orissa and others** reported in **AIR 2014 SC 1716.**

Fifthly, Mr. Dhal submitted that the term "Disposal" was of wide import and would take within its ambit confiscation proceeding, which could be considered as one of the methods in which forest offence could be disposed of. For interpreting the word "disposal", he relied on the case of **Tata Engineering & Locomotive Co. Ltd.** v. **State of Bihar** reported in **(2000) 5 SCC 346**. Further he submitted a conjoint reading of Rules 4,8 & 11 of "the 1980 Rules" made it clear that "the 1980 Rules" also would apply to confiscation proceeding.

Sixthly, Mr. Dhal submitted that even under Section - 56(2-a) of "the Act", the Authorised Officer has to be satisfied that a forest offence has been committed in order to move further in the matter. Such satisfaction of the Authorised Officer was not a mere formality. He could not satisfy himself about commission of forest offence without possessing necessary facts. For this an enquiry under Rule 4 of "the 1980 Rules" was a must.

Lastly, Mr. Dhal submitted that the rule of last antecedent was not an absolute rule and the same was subordinate to the contextual background. Requirement of context thus should not be forgotten. Here according to Mr. Dhal the context suggested that "the 1980 Rules" have been made to give effect to the provisions of "the Act" more particularly, sub-sections (2-a), (2-b), (2-c) & (2-d) of Section-56 of "the Act". Therefore, the Rules could not be confined to compounding of offence only and term "enquiry" could not be restricted by the subsequent phrase. In this context he relied on the decision in the case of **Regional Provident Fund Commissioner, Bombay** v. **Shree Krishna Metal Manufacturing Co., Bhandra** reported in **AIR 1962 SC 1536**.

8. Per contra, Mr. B.P. Pradhan, learned Additional Government Advocate for the State contended that "the 1980 Rules" has no application to the confiscation proceeding before the Authorised Officer as envisaged under sub-sections- (2-a), (2-b) and (2-c) of Section-56 of the Act. According to him, these provisions were inserted by way of an amendment in 1983 vide

"the 1983 Act". Much prior to these amendments, "the 1980 Rules" were holding the field. When "the 1980 Rules" came into force, there were two modes of disposal of forest offence cases under "the Act". One was by compounding and another by prosecution. Thus, when "the 1980 Rules" came into existence, there was no provision under the Act for confiscation by the Authorised Officer. The only way confiscation at that point of time could be ordered was after conclusion of trial following Section-58, unamended Section-59, Section-60 and unamended Section-64 of "the Act". Since confiscation at the end of the trial was provided under "the Act" itself, no provision was made under "the 1980 Rules" dealing with confiscation proceeding by anybody else. Had "the 1980 Rules" made provisions for dealing with confiscation proceeding by any one else other than the Magistrate, these would have run contrary to the provisions of "the Act" and it would have been ultravires "the Act". Therefore, "the 1980 Rules" were never meant to be applied to confiscation proceeding and it was only meant for compounding of the offence failing which the offence report was to be forwarded to the Magistrate having jurisdiction for prosecution of the offender. Thus, "the 1980 Rules" has no application to confiscation proceeding as the same was supposed to be taken up after conclusion of trial. According to him a conjoint reading of provisions of "the Act" and "the 1980 Rules" made clear that trial would start after forwarding of the offence report under Rule 11 of "the 1980 Rules".

Secondly, Mr. Pradhan contended that the question "the 1980 Rules" being made applicable to confiscation proceeding before the Authorised Officer did not arise as the said Rule till date was totally silent with regard to its application to confiscation proceeding before the Authorised Officer. Had it been the intention of the authorities to make "the 1980 Rules" applicable to the confiscation proceeding before the Authorised Officer, State Government would have suitably amended "the 1980 Rules" after insertion of sub-sections (2-a), (2-b) and (2-c) of Section-56 of "the Act" after coming into force of "the 1980 Rules". This having not been done, "the 1980 Rules" have no application whatsoever to the proceeding before the Authorised Officer under sub-sections (2-a), (2-b) and (2-c) of Section-56 of "the Act". Mr. Pradhan reiterated that the entire scheme of "the 1980 Rules" dealt mainly with compounding of forest offences, failing which the offence report was to be sent to the jurisdictional Magistrate for prosecution of the offender.

Thirdly, Mr. Pradhan submitted that confiscation proceeding was distinct from trial of the offender for committing forest offence. While confiscation proceeding was a proceeding against the forest produce together with all tools used in committing the forest offence; the trial was mainly directed against the offender, who was either to be punished or to be acquitted at the end of the trial. In this context, Mr. Pradhan relied on the decision in the case of **Divisional Forest Officer and another** v. **G.V. Sudhakar Rao and others** reported in **(1985) 4 SCC 573**.

Fourthly, Mr. Pradhan submitted that for detection of forest offence and for satisfaction of the Autorised Officer under sub-section (2-a) of Section-56 of "the Act" that a forest offence had been committed, no rule requiring detailed enquiry was needed. The term "forest offence" has been defined under Section 2 (e) of "the Act" and a trained Forest Officer or a Police Officer or an Authorised Officer would have no difficulty in detecting prima facie that a forest offence had been committed as in the present case. He also reiterated that "the 1980 Rules" have been introduced providing for enquiry for disposal of forest offence by way of compounding and have no application to a confiscation proceeding before the Authorised Officer under Section- 56 of "the Act". Fifthly, Mr. Pradhan submitted that a plain reading of Rule-4 of "the 1980 Rules" would also show that the enquiry envisaged therein was an "enquiry" into the forest offence and not an enquiry with regard to confiscation proceeding. Therefore, he submitted that applicability of "the 1980 Rules" to a confiscation proceeding before the Autorised Officer could not be read into "the 1980 Rules" without doing violence to the language of "the 1980 Rules". "The 1980 Rules" could only be made applicable to confiscation proceeding before the Authorised Officer by reading words into "the 1980 Rules", which was otherwise not permissible under law. Lastly, Mr. Pradhan contended that the provisions relating to confiscation proceeding as provided under Section-56 of "the Act" presented a complete code by themselves and were self-contained and there was no need to import "the 1980 Rules" to make those provisions operational. Rather, he submitted that "the 1980 Rules" was relevant vis-à-vis Section-72 of the Act dealing with power to compound forest offences. Actually "the 1980 Rules" elaborated the procedure of compounding and helped to carry out the provisions of Section-72 of the Act. In such background Mr. Pradhan submitted that the referred question may be answered in negative.

9. With regard to first submission of Mr. Dhal, learned counsel for the petitioner in connection with phrase "reason to believe" and "the 1980 Rules" helping to understand the meaning of above phrase by providing for enquiry under Rule-4 of "the 1980 Rules", this Court is of the opinion that such submission lacks substance. It seems Mr. Dhal has missed the fact that the phrase "reason to believe" occurs at sub-section (1) of Section 56 of "the Act" dealing with seizure of property, whereas the confiscation proceeding comes at a much later stage when the offender does not agree to get the offence compounded. The provision covering confiscation proceeding are dealt with by sub-sections (2-a), (2-b) & (2-c) of Section 56 of "the Act". After production of the property seized, if the Authorised Officer is satisfied that a forest offence has been committed in respect of the same, he can initiate the confiscation proceeding. At this stage the phrase "reason to believe" has no role to play. Therefore, the decision cited by Mr. Dhal explaining the meaning of the phrase "reason to believe" though are unexceptionable, are of no use to the petitioner. Further, by the time sub-section (2-a) of Section 56 of "the Act" comes into play, the forest produce along with all tools, ropes, chains, vehicles, etc. used in committing forest offence must have been seized under Section 56(1) of "the Act" much earlier and should have been produced before the Authorised Officer. Thus, by the time the stage under sub-section (2-a) of Section 56 of "the Act" arrives, the Authorised Officer must have got with him report of seizure and seizure list. The report is ordinarily expected to contain facts of the case and nature of forest offence. From this the Authorised Officer can be satisfied that whether a forest offence has been committed with regard to forest produce produced before him. For this, no enquiry is necessary. And if he Authorised Officer himself is the officer, who has seized the forest produce then at the time of seizure he must have been prima facie satisfied that a forest offence has been committed. He can make use of such satisfaction when the stage of sub-sections (2-a) of Section 56 "the Act" is reached, for initiating a confiscation proceeding. Thus, either way a detailed enquiry is not necessary. Even otherwise the enquiry under Rule 4 of "the1980 Rules" can not be pressed into service as the language used therein refers to post-detection enquiry and not an enquiry to detect forest offence. Detection of a forest offence itself pre-supposes, the existence of a forest offence. Therefore, such an enquiry cannot be said to be a must in order to come to a conclusion that a forest offence has been committed. Thus, neither for sub-section (1) of Section 56 of "the Act" nor for sub-section (2-a) of Section 56 of "the Act" such an

enquiry has any relevance. That enquiry is to be confined for the limited purpose of the operation of "the 1980 Rules" to which we will advert a little later. With regard to argument of Mr. Dhal that "the 1980 Rules" being a rule promulgated under Section 82(1)(d) of "the Act" help in carrying out the provisions of "the Act", we are of the view that when "the 1980 Rules" came into force, the sub-sections (2-a), (2-b)& (2-c) of Section 56 of "the Act" dealing with confiscation proceeding had no existence. These came much after in 1983 vide "the 1983 Act". Thus, these rules as Mr. Pradhan rightly contended cannot have any application for carrying out the mandate of sub-sections sections (2-a), (2-b)& (2-c) of Section 56 of "the Act". Having regard to language used in "the 1980 Rules", it can only be interpreted as a rule, whose main aim is to carry out the objectives of Section 72 of "the Act" as the said rules mainly deal with procedure for compounding the forest offence and steps to be taken when such compounding is not possible. For all these reasons, "the 1980 Rules" cannot have any application to a confiscation proceeding before he Authorised Officer under Section 56 of "the Act".

10. With regard to the second, fourth, fifth and last submissions of Mr. Dhal, learned counsel for the petitioner to the effect that the words – "Detection", "Enquiry" and " Disposal of Forest Office" used in "the 1980 Rules" cover three different contingencies and therefore, "the 1980 Rules" cannot be interpreted so as to confine the same to facilitate the compounding only, rather all the above words and phrase should be given full effect and that true nature of a statute ought to be determined not by label of the statute but by its substance and further that the term "disposal" is of wide import, which would take within its ambit confiscation proceeding, which can be considered as one of the methods in which a forest offence is disposed of and that the meaning of term "enquiry" cannot be restricted by subsequent phrase "disposal of forest offence" and thus enquiry under "the 1980 Rules" is a must prior to initiation of confiscation proceeding, our answer is that there is no dispute that true nature of a statute ought to be determined not by it's label but by it's substance. Similarly, there is no dispute over the proposition that all the provisions of statute should be harmoniously interpreted and that each and every word of the statute has to be given effect to by taking a holistic view. In such background, let us scan "the 1980 Rules" so as to find out about the true meaning/interpretation of the terms "enquiry" and "disposal" and as to whether by taking a clue from their meaning it can be held that "the 1980 Rules" would apply to confiscation proceeding before the Authorised

Officer under Section 56 of "the Act". At the cost of repetition, it may be stated that the provisions like Sub-sections (2-a), (2-b)& (2-c) of Section 56 of "the Act" were not there when "the 1980 Rules" were promulgated. At that point of time only the jurisdictional Magistrate having power to try the forest offence had the power to order confiscation at the conclusion of trial following the mandate of Section 58, unamended Sections 59 and 61 of "the Act". Further, "the 1980 Rules" nowhere refers to the word confiscation. This is because to our mind at that point of time State Government was well aware that enough provisions were there in "the Act" to take care of confiscation proceeding. Had the intention of the State Government been otherwise, they would have made some provisions in "the 1980 Rules" itself indicating their applicability in a certain way to confiscation proceeding then undertaken by the jurisdictional Magistrate. Further there was also no attempt to indicate about applicability of "the 1980 Rules" when "the Act" was amended in 1983 (vide "the 1983 Act"), introducing the provision for confiscation proceeding before the Authorised Officer nor "the 1980 Rules" were amended after 1983 to indicate about the applicability of the said Rules to the confiscation proceeding before the Authorised Officer. Even as on date neither Section 56 of "the Act" refers to "the 1980 Rules" nor the "the 1980 Rules" make any reference to any confiscation proceeding. It is in this background, we have to understand the meaning of the words "enquiry" and "disposal". A scanning of "the 1980 Rules" makes it clear that the same covers the subjects of detection of forest offence, enquiry into forest offence and disposal of forest offence. It mainly lays down the procedure on the above subjects. Rule 3 of "the 1980 Rules" indicates what procedure are to be followed once a forest offence has been detected and booked. Rule 4(1) of "the 1980 Rules" mainly speaks of preliminary enquiry by the Forester into forest offence after detection of the same when the offender does not agree for compounding of offence and payment of compensation. Rule 4(2) of "the 1980 Rules" speaks of "enquiry into the forest offence" thereafter by an officer not below the rank of a Range Officer and Rule 4(3) of "the 1980 Rules" speaks of submission of enquiry report and case record before the Divisional Forest Officer by Range Officer in all cases where D.F.O. is not competent to compound the offence and where the accused persons do not opt to compound the offence. Rules 5,6,7,9 and 10 of "the 1980 Rules" mainly deal with various procedural aspect relating to compounding proceeding. Rules 8 and 11 of "the 1980 Rules" deal with eventualities when the forest offence is not compounded. The plain language of Rule 4 makes it

clear that the enquiry envisaged therein is in the nature of post-detection enquiry into a forest offence, where the matter is not legally compounded. Thus at the stage of activation of Rule 4 of "the 1980 Rules", there is no doubt about existence of a forest offence. Therefore, the enquiry envisaged under Rule 4 of "the 1980 Rules" cannot be treated as an enquiry to detect forest offence. Had it been the case then the proviso to Rule 4 would not have contained a provision for compounding. The existence of the proviso at that stage confirms at least prima facie existence of forest offence. Therefore, at the cost of repetition, we may say that enquiry under Rule 4 of "the 1980 Rules" is a post-detection enquiry into forest offence when there is no compounding and the enquiry report pursuant to such enquiry and case records are to be finally submitted to the Divisional Forest Officer, who ultimately forwards the offence report to the Magistrate under Rule 11 of "the 1980 Rules" for prosecution of the offender. Thus enquiry into forest offence under Rule 4 is a prelude to launching of prosecution and Rule 4 should be read along with Rule 11 in a harmonious manner to get a complete picture as described above. Thus, even if the word "enquiry" is given an independent interpretation, it no way helps the case of the petitioner. Therefore, such an enquiry cannot be sine qua non prior to initiation of confiscation proceeding as the enquiry proceeds on the assumption of existence of forest offence. Once existence of forest offence is not disputed, the Authorised Officer can proceed for confiscation of forest produce with all tools, chains, vehicles, etc. Besides, since sections (2-a), (2-b)& (2-c) of Section 56 of "the Act" came much later, on this ground also "the 1980 Rules" cannot be made applicable to confiscation proceeding before the Authorised Officer. With regard to submission of Mr. Dhal, learned counsel for the petitioner that the word "disposal" is of wide import and would take within its ambit confiscation proceeding, which can be considered as one of the methods in which forest offence can be disposed of, we are of view that a scanning of "the 1980 Rules" both in its letter and spirit do not support such contention. Firstly, the above rule nowhere makes any reference to any "confiscation proceeding". Secondly acceptance of such submission would mean reading something into the statute, which is not permissible, Moreover the word "disposal" has to be read in the context in which it is used, i.e., disposal of forest offence not disposal of confiscation proceeding. Further a conclusion of confiscation proceeding before an Authorised Officer cannot dispose of the matter relating to forest offence. Specific provisions for disposal of matter relating to forest offence has been provided either by way of trial as per Sections 58, 59(2),71

of "the Act" or by way of compounding the offence as per Section 72 of "the Act" read with Rules 5,6,7 & 10 of "the 1980 Rules". Therefore, the submission that disposal of forest offence can be done by way of confiscation is without any merit. The decision cited by Mr. Dhal in **Tata Engineering & Locomotive Co. Ltd**. v. **State of Bihar** (*supra*) are factually distinguishable. In that case, the Hon'ble Supreme Court was dealing with provisions of Bihar Saw Mills (Regulation) Act, 1990 in the background of claim of the appellant that the provisions of the above noted Act and Rules made there under were not applicable to them and they were not liable to take out any licence under the Act and Rules for running saw mills as such activity was ancillary to their main business by manufacturing of vehicles and that by running such saw mills, the appellant company was not involved in the timber trade itself and used the timber for its own use. There the State contended that the above noted Act was enacted for regulating the trade by sawing and the establishment and operation of saw mills and saw pits and protection and conversation of forests and environment and thus the provisions of the Act required liberal construction so that the object of protecting the forest could be furthered. In such background, the Hon'ble Supreme Court held that to be too literal in interpretating the words would amount to see the skin and miss the soul and the context and the scheme should be kept in mind. Accordingly, the Hon'ble Supreme Court held that the appellant being a bulk consumer of huge quantity of timber and wood, which it utilized in its saw mill, it was necessary for the appellant to obtain licence so that the Forest Department could effectively keep track of their purchases and utilization and thereby ensuring that their activities in no manner helped/encouraged even indirectly illicit felling of trees. It is in this context, the Hon'ble Supreme Curt gave a wide meaning to the word "disposal" used in Rule 7 and refused to accept the interpretation of the appellant that it would only mean disposal by way of sale goods. Here the text and context of "the 1980 Rules" are totally different. The word "disposal" has been used in the phrase "disposal of forest offence" and therefore, the same cannot be read to mean disposal of confiscation proceeding. Further, as indicated earlier "the 1980 Rules" itself nowhere refers to any confiscation proceeding. Therefore, the word disposal cannot be given a broad meaning to take within its sweep disposal of confiscation proceeding. Further, it is well settled as per the decision of the Hon'ble Supreme Court as rendered in **Divisional Forest Officer** v. **G.V. Sudhakar Rao** reported in **(1985) 4 SCC 573** that a confiscation proceeding is distinct and different from trial of an accused before a Court for commission of forest

offence and the power of confiscation is not dependent upon whether a criminal prosecution has been launched or not. To be more clear while disposal of forest offence by way of trial before the Court mainly deals with the offender; the confiscation proceeding by way of a departmental action only deals with confiscation of property seized. Thus, the confiscation proceeding is an independent proceeding. In such background, disposal of forest offence cannot be read to mean disposal of confiscation proceeding. Further a reading of "the 1980 Rules" makes it clear that it mainly provides the procedure for disposal of forest offence by compounding, where such compounding is permissible under law and where such compounding is not possible, it permits a post-detection enquiry of forest offence, ultimately leading to submission of offence report to the jurisdictional Magistrate for trial. As indicated earlier, it is totally silent on any confiscation proceedings. Thus, the text and context do not permit here to give a goby to the rule of literal interpretation. In this way the decision cited by Mr. Dhal, i.e., in **Regional Provident Fund's** case (*supra*) is factually distinguishable. Further that case involved an interpretation of a beneficial legislation unlike the present case. Thus "the 1980 Rules" have no application to the confiscation proceeding before the Authroised Officer conducted under Section 56 of "the Act".

11. With regard to third submission of Mr. Dhal, leaned counsel for the petitioner, it would be sufficient to say in both cases referred to by Mr. Dhal, namely, **Rabi Narayan** (*supra*) and **Sukanta Kumar Jena** (*supra*), the applicability of "the 1980 Rules" was never disputed. Both the cases proceeded on the assumption that "the 1980 Rules" applied to confiscation proceeding under Section 56 of "the Act". But we have already indicated how "the 1980 Rules" have no application to confiscation proceeding under Section 56 of "the Act".

12. With regard to the sixth submission of Mr. Dhal that even under Section 56 (2-a) of "the Act", the Authorised Officer has to be satisfied that a forest offence has been committed in order to move further and for this purpose enquiry under Rule 4 of "the 1980 Rules" is a must in order to arrive at the above conclusion, our view is that as indicated earlier the enquiry envisaged under Rule 4 is not an enquiry to detect a forest offence but a post-offence-detection enquiry. A harmonious reading of Rule 4 with Rule 11 of "the 1980 Rules" would indicate that ultimately such enquiry report can be used by the Divisional Forest Officer while forwarding of the offence report

to the jurisdictional Magistrate for prosecution of the offender where compounding has not been done as required under law. Thus the enquiry under Rule 4 pre-supposes existence of a forest offence as it covers an enquiry into the forest offence after the same is detected. This being the position, it cannot be contended that an enquiry under Rule-4 is a must in order to satisfy that the Authorised Officer that a forest offence has been committed. In such background it cannot be contended that Rule 4 of "the 1980 Rules" or any other provision of "the 1980 Rules" can have any application to the confiscation proceeding under Section 56 of the Act. Even otherwise for reaching the prima facie satisfaction that forest offence has been committed the report of seizure prepared at post-detection stage and the seizure list would be good enough for an experienced officer belonging to the rank of Assistant Conservator of Forest and above in reaching the conclusion as to whether a forest offence has been committed prima facie or not. For this no detailed enquiry is necessary. Thereafter if satisfied, he can start confiscation proceeding

13. Further, it is to be noted that "the 1980 Rules" is a piece of delegated legislation, mainly connected with Section-72 of the Act. It is totally silent on confiscation proceeding to be conducted by Authorised Officer, provisions for which have been made clearly in sub-sections (2-a), (2-b) & (2-c) of Section 56 of "the Act". In such background, also "the 1980 Rules" cannot have any application to the confiscation proceeding before the Authorized Officer.

14. At the cost of repetition, it can also be stated that nothing prevented the legislature from making "the 1980 Rules" applicable to confiscation proceeding as contained in sub-sections (2-a), (2-b) and (2-c) of Section-56 of "the Act" which were brought in much later by making suitable amendments. Further, had there been any reference in the provisions under Section-56 of "the Act" dealing with the confiscation proceeding to "the 1980 Rules" then the things could have been different. But the very fact that though provisions for confiscation proceeding were introduced later on and the legislature have though it fit not to make reference therein to "the 1980 Rules", for the purpose of confiscation proceeding also is an indicator of the fact that the said Rule has no application to the confiscation proceeding.

15. For all these reasons, this Court holds that "the 1980 Rules" have no application to the proceeding before the Authorised Officer under Section-56

of "the Act". To be more clear since the Authorized Officer under Section-56 of "the Act" deals mainly with the confiscation proceeding, "the 1980 Rules" have no application to such confiscation proceeding.

16. Accordingly, the question referred to has been answered. This matter be placed before the appropriate Bench for disposal of the same on merits.

Reference answered.

2015 (II) ILR - CUT- 146

B. R. SARANGI, J

W.P. (C) NO.9724 OF 2010

SHRADHA KAR BEHERA ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS ……Opp. Parties

SERVICE LAW – Promotion – Adverse remarks for the year 2007-08 Communicated to the petitioner on 10.05.2010, just five days before the order of promotion passed on 15.05.2010 – Authority could not have acted upon such un communicated adverse remarks and deprived the petitioner of getting the benefit of promotion – Matter remitted back to O.P.2 to reconsider the case of his promotion to the post of Asst. Engineer (Civil) from the date his juniors have been promoted – Direction issued to the authority not to act upon the un-Communicated CCR for such purpose and extend all consequential service benefits as admissible to the petitioner in conformity with the provisions of law if the petitioner is otherwise found suitable for promotion. (Para 17)

For petitioner - M/s. G.K. Mishra G.N.Mishra, S.C.Sahoo B.Priyadarshini

For Opp. Parties - M/s. L.Samantray, U.K.Barik R.Pradhan, S.Swain, J. Samantray, B.Pradhan R.L.Pradhan , G,Das, S.Das.
M/s. B.K. Sharma ,K.K. Mohapatra & B.Panda

Date of hearing : 12.01.2015
Date of judgment: 29.01.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who is working as Junior Engineer (Civil) under the Orissa Lift Irrigation Corporation Ltd. has filed this application seeking to quash the order of promotion under Annexures-3 and 4 dated 15.05.2010.

2. The short fact involved in this case is that the petitioner joined as a Junior Engineer, Civil (Diploma Holder) under opposite party no.2-Orissa Lift Irrigation Corporation Ltd on 09.02.1984 under S.C. category and has passed all departmental examination conducted by the authority. Accordingly, he was placed at serial no.69 in the common gradation list of Junior Engineers prepared by the Corporation as on 30.11.2002 whereas opposite party nos. 3 to 10 were placed at serial nos. 70, 72, 77, 79, 80, 82, 84 and 85 respectively. As per the decision of the Corporation as approved by the Government, 27 post of Assistant Engineers (Civil) in the Corporation were sought to be filled up through promotion from the cadre of Junior Engineers (Civil) and accordingly a list of senior most Junior Engineers was forwarded to the Government by the Corporation in its letter dated 11.03.2010 for consideration by the Departmental Promotion Committee at the Government level. The petitioner has figured at serial no. 27 of the said list whereas opposite party nos. 3 to 10 figured at serial nos. 28, 30, 33, 34, 35, 37, 39 and 40 respectively of the said list. Pursuant to letter dated 13.04.2010, the Corporation furnished to the State Government Bio-data along with information on Departmental proceeding against those 81 senior most Junior Engineers as required by the State Government wherein it was indicated that no departmental inquiry was pending against the petitioner. Therefore, the petitioner is entitled to get promotion from Junior Engineer to Assistant Engineer. Non-extension of the same has given rise to the present application.

3. Mr. G.K. Mishra, learned counsel for the petitioner vehemently urged that since the petitioner is well within the zone of consideration for promotion and vacancy are/were available, instead of promoting him the said benefit has been extended to his juniors.

4. Mr. B.K. Sharma, learned counsel for the opposite party-Corporation states that the promotion has been given on the basis of merit and suitability of the officers in all respect with due regard to the seniority. Since there is adverse remark in the C.C.R. of the petitioner pertaining to the period from 16.06.2007 to 31.03.2008, which was placed before the departmental promotion committee and on consideration of the same, the petitioner has not been given promotion.

5. On the basis of the above facts pleaded and after hearing learned counsel for the parties and going through the records, it appears that the petitioner has been denied the promotion due to adverse remarks in the CCR for the year 2007-08 which was admitted and communicated on 10.05.2010. Therefore, it is to be considered whether the opposite party-authorities are justified in their action in not considering the case of the petitioner for promotion to the post of Asst. Engineer (Civil) on the basis of the adverse entry made in the C.C.R. for the year 2007-08 communicated on 10.05.2010.

6. The object of maintenance of Confidential Character Roll is to secure continuance record of the efficiency, integrity, performance and general conduct of an employee. Assessment of performance and conduct of an employee has made and recorded by his superiors authority in his character roll serve as data for judging his comparative merits when question arises:

1) for his confirmation in service;

2) for his crossing of E.B.;

3) for his promotion to the higher post or grade;

4) for his continuance in service beyond service age/completion of service years of service.

The system of confidential character roll has two principal object. The first and foremost object is to improve the performance of the subordinate in his work. The second one is to assess the potentialities and provide his appropriate feed back and guidance for creating his deficiency and improve his standard, performance and conduct. The confidential character roll is not meant to be fault finding tools. Its objective is to develop an employee, so that he realizes his true potential.

7. The petitioner being an employee of the Corporation, on query being made by this Court with regard to the applicability of the Govt. Rules, Mr. B.K. Sharma, learned counsel for the opposite party states that in absence of any rules and regulations governing the field, the State Government rules are applicable to the employees of the Corporation.

8. Admittedly, no guidelines or rules have been framed by the Corporation with regard to maintenance of CCR of its employees. Therefore, in absence of any rules and guidelines framed by the Corporation with regard to maintenance of CCR, the guidelines formulated by the State Government are applicable to the employees of the Corporation.

9. This being the position. It is appropriate to go through Book Circular No.29 issued by the Government of Orissa in Home (Reforms) Department vide Memo No. 142 (51)-Reforms dated 19.02.1953 addressed to the all Departments of Government and all Heads of Departments. Clause-(b) reads as follows:

> "(b)There should be as little delay as possible in conveying the adverse remarks to the officers concerned. Such remarks should be communicated to the officers before the end of December of the year in which they are recorded in the Character Rolls and the officers conveying these remarks should intimate the Home Department that he has done so in the month of January of the following year."

10. In view of the aforesaid provision, the adverse remarks should be communicated to the employee before the end of December of the year in which they are recorded in the Character Roll. Similarly, Book Circular No. 46 has been issued by Govt. of Orissa in General Administration Department (S.E.) Department vide Memo No. 741-PRO-11/81 (SE) dated 5.2.1982 to all Departments of Government, all Heads of Departments and all Collectors evolving the guidelines on the subject – Confidential Character Rolls of non-government employees of the Government, procedure for their record, maintenance, communication of adverse remarks and disposal of representations. Clause-(v) therefore deals with the date lines or submission of C.C.Rs, which is as follows:-

> "(v)Date lines or submission of C.C.Rs – The reporting authority shall initiate the C.C.R. immediately after 31st March and submit it in duplicate to the countersigned authority by 30th April. The countersigning authority will record his own assessment and forward it by 15th May, to the accepting authority. The accepting authority will record his assessment and forward the C.C.Rs. to the appointing authority by 31st May. When the C.C.Rs are written in the midst of the report period as a result of transfer, it is expected that the C.C.Rs. will reach the office of the appointing authority within two months from the date of transfer."

11. Clause-(xiv) deals with communication of adverse remarks, as follows:-

> "(xiv)Communication of adverse remarks- The C.Rs. on receipt, will be scrutinized in the office of the appointing authority and all adverse remarks will be communicated to the employee by the officer entrusted with the maintenance of C.Rs. The purpose of communication is to ensure that the employee rectifies the defect at the earliest. Hence, the utmost priority should be given to communication of adverse remarks. All such communications should normally issue before 31st December immediately following the report period."

12. Clause-(xvii) deals with consultation with the author of adverse remarks. The same reads as follows:-

> "(xvii) Consultation with the author of adverse remarks – The authority competent to dispose of representations may consult the officer, who recorded the adverse comments and ask him to substantiate his remarks, but he is not expected to wait indefinitely for his opinion. Only a month need be allowed. When substantiation reports are called for from an officer, copies of the C.Rs. in question and the representation will be forwarded to him."

13. The above mentioned provisions of the Book Circular No. 49 makes it clear that the respective officer has to initiate the CCR by immediately after 31st March and submit it in duplicate to the countersigning authority by 30th April. The countersigning authority will record his own assessment and

forward it by 15th May to the accepting authority. If any adverse remarks is there then the same has to be communicated before 31st December immediately following the report period so that the employee can make representation to the competent authority, which should be considered in accordance with law.

14. This is the procedure to be followed for maintenance of CCR. As it appears, the same has not been complied with so far as it relates to the CCR of the petitioner. Admittedly, the adverse entries in the CCR for the year 2007-08 has been communicated to the petitioner only on 11.05.2010.

15 In ***Gurdial Singh Fijji v. State of Punjab and others***, AIR 1979 SC 1622, the apex Court held as follows:

> "17.The principle is well-settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. Unfortunately, for one reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the Government has not been able to consider his explanation and decide whether the report was justified. ……"

16. Similar view has also been taken in ***Union of India and others v. E.G. Nambudiri***, AIR 1991 SC 1216 taking into account the ratio decided in ***Gurdial Singh Fijji*** case (supra).

17. Considering the above guidelines as well as the law laid down by the apex Court and applying the same to the present context, it appears that the adverse remarks of the year 2007-08 having been communicated to the petitioner only on 11.05.2010 just five days before the order of promotion was passed in Annexures-3 and 4 dated 15.05.2010, the authority could not have acted upon on such un-communicated adverse remarks and deprived the petitioner of getting the benefit of promotion. Therefore, this Court remits

the matter back to opposite party no.2 to reconsider the case of the petitioner for promotion to the post of Asst. Engineer (Civil) from the date his juniors have been promoted. It is further directed that the authority will not act upon the un-communicated CCR for such purpose and extend all the consequential service benefits as due admissible to the petitioner in conformity with the provisions of law within a period of three months from the date of receipt of a copy of the judgment, if the petitioner is otherwise found suitable for promotion.

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

Writ petition disposed of.

2015 (II) ILR - CUT- 152

B. R. SARANGI, J

W.P. (C) NO.12604 OF 2003

AKRURA MISHRA ……..Petitioner

.Vrs.

O.U.A.T., BHUBANESWAR & ANR. **……**Opp.Parties

SERVICE LAW – Vacancies which occurred prior to coming into force of the amended rules would be governed by old rules and not by amended rules – Petitioner's retrenchment as casual labourer having been declared illegal and upheld by the Apex Court, he is entitled to get continuity in service – His case should have been considered on the basis of rules which were in force when his juniors were considered for promotion but not by virtue of VAW Rules, 1993 which came into existence much after the promotion of his juniors – Held, impugned order Dt. 1.8.2003 declaring the petitioner unsuitable for the post of VAW is quashed – As the petitioner was denied promotion erroneously, the same should be given to him with retrospective effect from the date his juniors were promoted – Since the petitioner is superannuated from service he cannot hold the

promotional post but he is entitled to monetary benefits from the date he approached this court by filing the present writ petition.

(Paras 6,7, 8)

For Petitioner : M/s. Dr.M.R.Panda, M.K.Nayak,
B.P.Bahali. C.Mohapatra, Ms. M.Panda

For Opp. Parties: M/s. Ashok Mishra, Sr. Adv.
S.C.Rath

Date of hearing : 11.03.2015
Date of judgment: 24.03.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who was working under the opposite party no.2, has filed this application assailing the order dated 1.8.2003 vide Annexure-1 declaring him unsuitable for the post of VAW and further claims for promotion to the post of VAW in accordance with the provisions of Pre-1993 Rules under which his juniors were considered for promotion and grant of all consequential benefits admissible in accordance with law.

2. The factual matrix of the case in hand is that the petitioner was engaged as a casual labourer in Gambharipalli Seeds Production Firm under the Orissa University of Agriculture and Technology (hereinafter referred to as the 'OUAT') on 15.9.1979. Thereafter, the petitioner was retrenched from service on 19.6.1982. Challenging the said order of retrenchment, the petitioner approached the Industrial Tribunal, Bhubaneswar by filing I.D. Case No. 62 of 1983. After due adjudication, the learned Tribunal passed an award declaring the retrenchment of the petitioner as illegal and directed to reinstate the petitioner in service with full back wages with all service benefits. Challenging the said award, opposite parties approached this Court by filing OJC No. 344 of 1985, which was dismissed on 13.3.1991. Against the said order of this Court, the opposite parties filed S.L.P. (Civil) No. 13316 of 1991 before the apex Court, which was also dismissed. Consequentially, the petitioner was reinstated in service, but he was not extended with the benefits admissible to the post by giving due promotion. As a result, the petitioner approached this Court by filing OJC No. 14570 of 1997 seeking for promotion to the post of VAW, which was disposed of vide order dated 16.2.2001 with a direction to the opposite party no.1 to consider

the case of the petitioner for promotion and if he is found suitable for being promoted, such promotion order shall be given effect from the date his juniors were promoted. The order of this Court dated 16.2.2001 was not complied with, therefore the petitioner approached this Court by filing contempt application bearing Original Criminal Misc. Case No. 54 of 2002 and while such contempt proceeding was pending, the opposite parties issued a letter to the petitioner on 9.5.2003 to appear before the selection committee on 21.5.2003 for consideration of his case for promotion to the post of VAW. Thereafter, the opposite parties vide letter dated 1.8.2003 under Annexure-1 communicated the petitioner that he is not found suitable for selection to the post of VAW and his case for promotion was rejected as he could not qualify in the written test and satisfy the statutory requirement of swimming. It is stated that though the petitioner possesses requisite qualification and seniority for promotion to the post of VAW, the opposite parties without considering the same in proper perspective have denied him promotion to the said post though his juniors like Santosh Nayak, Ramakanta Pradhan, Jay Krushna Behera, Fagu Chand and Brajabandhu Chand were promoted to the post of F.M.D. (T) without inviting any application or conducting any interview during the period from 22.1.1980 to 13.3.1981. Hence, this application.

3. Ms. Madhumita Panda, learned counsel for the petitioner strenuously urged that the petitioner should have been considered on the basis of the Rule, regulation and guidelines available prior to commencement VAW Rules, 1993 and when his juniors have been considered for promotion instead of considering the case of the petitioner in accordance with Pre-1993 Rules have declared him unsuitable which is arbitrary, unreasonable and discriminatory one. Therefore, this Court should interfere with the same and the petitioner should be extended with the benefits of promotion from the date his juniors have been promoted with all consequential benefits as per the Pre-1993 Rules. In order to substantiate her contention, she relied upon the judgments in ***Y.V. Rangaiah and others v. J. Sreenivasa Rao and others***, AIR 1983 SC 852, ***State of Kerala and others, E.K. Bhaskaran Pillai***, AIR 2007 SC 2645 and ***State of U.P. and others v. Dr. B.B.S. Rathore***, Civil Appeal No.3041 of 2010 with other connected matters, disposed of on 24.7.2014.

4. Mr. Ashok Mishra, learned Senior Counsel appearing for the opposite parties, strenuously urged that the petitioner prepared a comparative table showing the placement of his juniors who were appointed as Literate Labourer and subsequently regularized/appointed as Field Man Demonstrator (Trainee) FMD (T) in the year 1980 and promoted to Village Agriculture Worker (VAW) in the year 1986. It is stated that after the direction of this Court, the petitioner was regularized as permanent labourer on 11.7.1995 and promoted to the post of Laboratory Attendant on 6.12.2006 and in the meantime, the petitioner as well as the so called juniors to the petitioner against whom the petitioner claims benefits have already been superannuated from service on attaining the age of superannuation. Therefore, the relief sought for by the petitioner cannot be granted at this stage and accordingly he seeks for dismissal of the writ application.

5. It is the admitted fact that the petitioner was engaged as a casual labourer initially on 15.9.1979 and was retrenched from service on 19.6.1982. Against such order of illegal retrenchment, the petitioner approached the Industrial Tribunal by filing I.D. Case No. 62 of 1983 and after due adjudication, the learned Tribunal declared the retrenchment of the petitioner illegal and directed to reinstate him in service with full back wages. Against such order of the learned Tribunal, the opposite parties preferred writ application before this Court by filing OJC No. 344 of 1985, which was dismissed on 13.3.1991. Against the order passed by this Court, the opposite parties preferred S.L.P. (Civil) No. 13316 of 1991 before the apex Court, which was also dismissed. Consequentially the retrenchment of the petitioner having been declared illegal, he is entitled to get continuity in service, meaning thereby, the retrenchment made on 19.6.1982 being illegal, the petitioner is deemed to be continuing in service w.e.f. 15.9.1979. Once the petitioner continued in service, question arises for consideration why he has not been given promotion as mentioned in paragraph-15 of the writ petition. There is no dispute that the persons named in paragraph-15 have been given promotion by the opposite parties to the post of F.M.D. (T) without inviting any application or conducting any interview during the period from 22.1.1980 to 13.3.1981. Therefore, petitioner having continued in service, he should have also been considered for such promotion along with his co-workers, those who have already got promotion during the period mentioned i.e. 22.01.1980 to 13.03.1981. Thereafter, the petitioner filed OJC No. 5163 of 1993 seeking for regularization of service with consequential benefits. Despite dismissal of the SLP by the apex Court since the petitioner

was not regularized, this Court vide order dated 12.12.1994 directed the opposite parties to consider the case of the petitioner for absorption against the cadre post in Class-IV on regular basis after finding out his suitability to hold the post in question. Consequentially he was called upon to appear before the committee for selection on 3.7.1995 and the petitioner appeared before the committee and having been found suitable for regularization, he was regularized in the post of watchman and permanent labourer vide order dated 10.7.1995 and he joined on 11.7.1995. The extension of benefit of regularization w.e.f. 10.7.1995 is contrary to the finding of the learned Industrial Tribunal, which has been confirmed by this Court as well as by the apex Court. Once the order of retrenchment has been declared illegal, the petitioner is entitled to be reinstated with all consequential benefits. Therefore, regularization of services of the petitioner w.e.f. 10.7.1995 is contrary to the finding of the learned Tribunal. But at this point of time, since the petitioner was deprived of getting promotion, he approached this Court once again by filing OJC No. 14570 of 1997 and this Court vide order 16.2.2001 directed the opposite party no.1 to consider the case of the petitioner for promotion taking recourse to VAW Rules, 1993. Pursuant to the same, the petitioner's case was considered and he was found unsuitable vide impugned order Annexure-1, which has been challenged by the petitioner in the present writ petition.

6. Once the retrenchment of the petitioner is declared as illegal, which has been upheld by the apex Court, he is entitled to continuity in service. Therefore the authority should have given him the benefit of the seniority and consequential benefits of promotion at par with his juniors, those who have already got promotion prior to the impugned order was passed by the authority. Non-consideration of the case of the petitioner at due time and consideration of the same subsequently with reference to the prevailing rules and declaring him unsuitable cannot be sustained in the eye of law.

7. In ***Y.V. Rangaiah and others*** (supra), the apex Court held that the vacancies which occurred prior to coming into force of the amended rules would be governed by old rules and not by amended rules. Therefore, applying the said principle to the present context, if the petitioner's retrenchment has been held to be illegal and as a result of which he got continuity in service, his case should be considered on the basis of rules which were in force when his juniors were considered for promotion and not

by virtue of the VAW Rules, 1993, which come to existence much after the promotion of his juniors. Therefore, declaring the petitioner unsuitable in accordance with the subsequent Rules, 1993 cannot be sustained in the eye of law.

8. In that view of the matter, this Court is of the considered opinion that the impugned order dated 1.8.2003 vide Annexure-1 has been passed contrary to the provisions of law. Accordingly, the same can not be sustained in the eye of law. Consequentially, the impugned order dated 1.8.2003 vide Annexure-1 is hereby quashed. It is directed that the petitioner is entitled to get consequential service benefits at par with his juniors those who have already got promotion much prior to the petitioner. As the petitioner was denied promotion erroneously, the same should be given to him with retrospective effect from the date his juniors were promoted. As in the meantime the petitioner has already superannuated from service, he cannot hold the promotional post for all practical purpose, but he should be promoted with retrospective effect from the date his juniors have been promoted and his salary in the promotional post should be fixed accordingly. The petitioner should be given monetary benefit on account of such retrospective promotion from the date he approached this Court by filing the present writ petition in view of the ratio decided by the apex Court in ***State of Kerala and others*** mentioned (supra) within a period of three months from the date of receipt of a copy of this judgment.

9. With the above observation and direction, the writ petition is disposed of. However, there is no order to costs.

Writ petition disposed of.

2015 (II) ILR - CUT- 158

DR. B.R.SARANGI, J

O.J.C. NO. 14267 OF 2001

RASMITA GAMANG ……..Petitioner

.Vrs.

BERHAMPUR UNIVERSITY, & ORS. ……..Opp. Parties

EDUCATION – Admission to MBA Course 2001-2002 – Common entrance test – Petitioner stood first amongst S.T. Candidates – She could not be able to take admission for the fault of the authorities – Petitioner deprived of her higher study – Violation of fundamental right as enshrined in the Constitution of India – Court can award damages to caution the authorities not to repeat the same in future – Direction issued to the University to pay Rs. 2,00,00/- as damages to the petitioner which shall be deducted from the salary of the erring officers, responsible for causing such loss to the petitioner.

(Paras 15,16)

Case Laws Rreffered to :-

1. AIR 1999 SC 2979 : A Registered Society & Ors.-V- Union of India & Ors.
2. AIR 1988 SC 1621= (1988) 3 SCC 449 : State of Rajastan -V- M/s. Hindustan Sugar Mills Ltd. & Ors.
3. AIR 1994 SC 988 : Union of India & Ors. -V- Hndustan Development Corporation & Ors.
4. 2008 (II) OLR 976 : Rajashree Samal -V- State of Orissa & Ors.

For Petitioner : M/s. C.A.Rao,Sr.Adv. & A.Tripathy
For Opp.Parties : M/s B.S.Mishra(2), Mr.Mishra, A.P.Dhir Samanta & A.R.Mishra

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Date of hearing : 22.04.2015
Date of judgment: 12.05.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who is a Scheduled Tribe woman candidate has filed this application assailing the communication vide Annexure-6 dated 27.09.2001, made by the Head of the Department of Business

Administration, Berhampur University for not admitting her into MBA Course for the academic Session 2001-2002 & returning her original documents along with Bank Drafts though she was selected and placed in Sl. No.1 on the merit list of the S.T. category and Sl. No.57 out of 84 of merit list without assigning any reasons.

2. The short fact of the case in hand is that the petitioner passed B.Sc. with Second Class Honours with Distinction. Berhampur University issued an advertisement inviting application from eligible candidates for admission into MBA Course (MBA-CAT-2001) for the session 2001-2002. In response to the same, the petitioner having got requisite qualification applied for the said course and after due scrutiny she was allotted Index No.439 by opposite party no.3 on 14.07.2001. The Department of MBA, Berhampur University issued Admit Card vide letter No.316 dated 31.07.2001 with Admission Test Roll No.390 to be held at the P.G. Department, Berhampur University on 16.08.2001 at 10.30 A.M. Pursuant to which the petitioner appeared in the said test and was selected for admission to MBA course for the session 2001-2002 having stood first amongst S.T. candidates. Accordingly, she was intimated vide letter No.379 dated 10.09.2001 to send a Draft of Rs.1286/- drawn on the S.B.I. towards admission fees and sessional charges and documents mentioned in Sl.No.1 to 11 and declaration etc. so as to reach opposite party no.3 on or before 25.09.2001. Accordingly, the petitioner sent all the documents as per the list and a Bank draft of Rs.1,286/- issued by S.B.I., Gunupur dated 20.09.2001 by Registered Post which was received by the authority within the time fixed. Opposite party no.3 again issued another Registered letter bearing No.402/MBA/BU/2001 dated 22.09.2001 to the petitioner indicating that she has submitted only one Bank Draft of Rs.1,286/- and she has to send two more Bank Drafts amounting to Rs.6,000/- and Rs.1,600/- in favour of H.O.D., MBA to be drawn at S.B.I. Bhanja Bihar (Code 2107) so as to reach on or before 25.09.2001 otherwise her candidature will be rejected which she received on 24.09.2001 at Gunupur. After receipt of the said letter, immediately she prepared two Bank Drafts amounting to Rs.6,000/- and Rs.1,600/- each from S.B.I. Gunupur and sent the same on the same day in favour of the H.O.D., MBA to be drawn at S.B.I. Bhanja Bihar (Code No.2107) by Dolphin Courier Service from Gunupur so as to reach opposite party no.3 by 25.09.2015. But, she was intimated by opposite party no.3 that she has not been admitted to the said course for the academic session 2001-2002 and the original documents along with Bank drafts were returned on 27.09.2001 vide Annexure-6. On receipt

of the said letter immediately the petitioner and her father met Vice Chancellor of Berhampur University and brought it to his notice that though she stood first in the merit list of S.T. category and fulfilled all the requirement as intimated to her, opposite party no.3 returned her all original documents by Registered post with A.D. On consideration of her grievance, the Vice Chancellor assured her that he will look into the matter and directed her to come afterwards. Though the petitioner met Vice Chancellor and Head of the Department on 12.10.2001, she was intimated that seats have been filled up and as such they had no power to extend the seats. Consequentially, she has been denied to prosecute her study in MBA course during the session 2001-2002 even if she stood first in the merit list amongst the S.T. candidates. Hence this application.

3. Mr. C.A. Rao, learned Senior Counsel appearing for the petitioner fairly submits that the petitioner filed this writ petition seeking for issuance of a writ of mandamus or certiorari or any other writ to quash Annexure-6 dated 27.09.2001 and directing the opposite parties to admit her in MBA Course for the session 2001-2002 as per selection of the merit list, if necessary by extending a seat for her and/or "any other order/direction as may be deemed fit and proper". He further submits that during pendency of this writ petition since the academic session 2001-2002 for the aforesaid Course has already been over and though the writ petition has effectually infructuous which is being heard in the year 2015 after lapse of fifteen years in the meantime, the petitioner claims that "any other order/direction" be extended to her and essentially she claims that for latches of the authority since the petitioner who is as a S.T. has lost his career by being deprived of her higher study, she should be granted relief within the meaning of "any other order/direction as deemed fit and proper" by this Court. In order to substantiate his case, Mr. C.A. Rao, learned Senior Counsel appearing for the petitioner has relied upon the case of ***A Registered Society and other v. Union of India and others***, AIR 1999 SC 2979 claiming damages for the loss sustained by the petitioner due to arbitrary and oppressive action taken by the authority.

4. Mr. B.S. Mishra-2, learned counsel appearing for opposite party nos.1 to 3 submits that Berhampur University imparts education in two years course of MBA and admission to the said course is made by taking into consideration the marks secured by the candidates in the common admission test along with the career marks (i.e. the percentage of marks secured by the

candidates from H.S.C. to Graduation). It is admitted that pursuant to applications invited from the eligible candidates, the petitioner applied for admission to MBA course and participated in the common examination test and taking into consideration her career marks as well as marks secured by her in the common admission test she was in 252nd position out of 521 candidates in the select list. However, she had secured first position in the merit list of the candidates belonging to Scheduled Tribe category. It is further admitted that the petitioner has been intimated by opposite party no.3 on 10.09.2001 for submission of necessary documents along with Bank drafts by 25.09.1991 for taking admission to the MBA course. It is also admitted that though the petitioner submitted Bank draft of Rs.1,286/- towards admission fee in favour of the Administrative Officer of the University, she had not submitted two other Bank drafts of Rs.6,000/- and Rs.1,600/- each in Business Administration Department of the University though such mention was made in the prospectus which shall be collected for development fees and Seminar charges of the University. Therefore, she was intimated vide letter dated 22.09.2001 to deposit the said two Bank drafts by 25.09.2001, failing which her candidature will be rejected which the petitioner received on 24.09.2015 and immediately she prepared two Bank drafts amounting to Rs.6,000/- and Rs.1,600/- each and sent the same to the University authorities which the University authorities received on 26.09.2001 which is one day after the last date i.e. 25.09.2001. Therefore, the petitioner having not satisfied the requirement within the time fixed and the classes had to begin on 27.09.2001, the authorities admitted Sri Siba Prasad Sabar, the next candidate belonging to the same category (S.T.). Since the seats had already been filled up even if the Bank drafts of Rs.6,000/- and Rs.1,600/- each reached one day late, the petitioner could not be admitted consequently she was deprived of prosecuting her studies. Therefore, no illegality and irregularity has been committed by the opposite parties in admitting the second candidate in the list belonging to S.T. category on 25.09.2001 and allowing him to prosecute his study in MBA Course for the session 2001-2002. The number of seats for MBA Course is 30 as approved by the A.I.C.T.E and the University cannot admit students beyond the approved strength.

5. Considering the above facts pleaded by the parties and after going through the records, it is seen that admittedly the petitioner stood first amongst the ST candidates and therefore she has got legitimate expectation to prosecute her study in MBA Course for the session 2001-2002 by getting

herself admitted to the said course. As per the intimation letter dated 10.09.2001 the petitioner complied with all the conditions stipulated therein by providing original documents and also required Bank draft amounting to Rs.1,286/- drawn in favour of the Administrative Officer of the University and supplied the documents mentioned therein. The University communicated on 22.09.2001 by Registered Post with A.D. to send two other bank drafts of Rs.6,000/- and Rs.1,600 which the petitioner received on 24.09.2001. In compliance with the same, without causing any delay she immediately on the very same day i.e. on 24.09.2001 prepared two Bank drafts from S.B.I., Gunupur and sent the same through Courier with a belief that it will reach by 25.09.2001 which was the last date of submission of documents for admission to the said course. But, unfortunately the same was received on 26.09.2001 after the cutoff date for which the petitioner could not get admission to the said course whereas the second candidate, namely, Siba Prasad Sabar was admitted to the said course on 25.09.2001 and allowed to attend the classes with effect from 27.09.2001. When the petitioner caused an inquiry about her admission, she was informed that the seat has already been filled up. Therefore, she made a representation to the authority and since no action was taken she approached this Court. This Court by order dated 20.11.2001 issued notice by Special Messenger directing to keep one seat vacant if there is still any vacancy in the M.B.A. course until further orders. On receipt of the same on 24.11.2001 vide Annexure-E/2, opposite party no.3 allowed the petitioner to attend the class till disposal of the writ petition. But, on 01.12.2001 vide Annexure-F/3 she was denied by the authority to attend the classes taking the plea that this Court had not passed any specific order allowing her to attend the classes in the Department. As it appears, there were 32 seats in the MBA Course of the University for the session 2001-2002 vide Annexure-C/3 and only 30 candidates were admitted to the said course and two seats were lying vacant, therefore, the petitioner could have been allowed to prosecute her study. The petitioner was residing at Gunupur which is far away from Berhampur University. In any case, if there was any requirement of other Bank drafts, then the authority could have called upon the petitioner to appear in person on the date fixed. Instead of doing so, she was intimated to send the Bank drafts so as to reach by 25.09.2001. The petitioner responded well to the letter communicated to her on 22.09.2001 and prepared two Bank drafts immediately on receipt of the said letter on 24.09.2001 and tried her level best to reach the said two Bank drafts well within the time by sending it

through Courier, but unfortunately the same was received one day after the last date. Therefore, she was deprived of getting admission to MBA Course even though she stood first in the merit list of ST category. If the documents including the other two Bank drafts of the petitioner did not reach on the date of admission, how the second candidate was admitted immediately i.e. on 25.09.2001 and the authority allowed him to continue his classes from 27.09.2001 on the very next date which creates suspicion reason being if the seat admissible to the petitioner could not be filled up, then second candidate had to be intimated by the University to get admission to the said course. But, the opposite parties have neither stated the said fact in the counter affidavit nor in the subsequent additional affidavit filed in compliance with the order dated 10.02.2015 which is just repetition of the counter affidavit filed by opposite party no.3. Therefore, if any seat was lying vacant because of non-admission of the first candidate how the second candidate could be admitted without prior intimation and allowed to prosecute his study on 27.09.2001 on the very next date that casts doubt on the conduct of the authorities. Admittedly, the petitioner deposited admission fees drawn in favour of the Administrative Officer amounting Rs. 1,286/-. If she would have been admitted on that basis it would not have caused any prejudice to anybody. The further amount which the petitioner was called upon to deposit by way of two drafts of Rs.6,000/- and Rs.1,600/- each drawn in favour of the Head of the Department, MBA was only meant for development fees and Seminar charges. The same could have been deposited after the admission was over. Therefore, the action of opposite party no.3 creates suspicion in the mind of this Court that in order to extend the benefit of getting admission to Siba Prasad Sabar who was not eligible to get admission, according to his position in the merit list, the petitioner was debarred to take admission. So, the petitioner was deprived of her legitimate right to prosecute her higher study. This action of the authorities is arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

6. The petitioner being an woman candidate belonging to ST category having passed B.Sc. degree with Second Class Honours with Distinction and qualified in the selection test has got legitimate expectation to go for higher studies i.e. MBA for the session 2001-2002, but by the arbitrary and unreasonable action of the authorities she was deprived of prosecuting her higher study. Therefore, 'loss' caused to her life by not allowing her to go for higher study for no fault of her own cannot be compensated in any manner. The dream of the petitioner was vanished due to such arbitrary and

unreasonable action of the authorities. Even though this Court directed vide order dated 20.11.2001 that if there is still any vacancy in the MBA course, one seat be kept vacant until further orders pursuant to which the petitioner was allowed to prosecute her study and subsequently, vide letter dated 01.12.2001 she was denied to attend the classes when two seats were lying vacant that itself amounts denial of prosecuting higher studies by the University.

7. Mr. B.S. Mishra-2, learned counsel appearing for opposite party no.3 submits that since the academic session 2001-2002 has already been over long since, the writ petition has become infructuous and the petitioner is not entitled to get any relief. Mr. C.A. Rao, learned Senior Counsel appearing for the petitioner submits that due to arbitrary and unreasonable action of the University authorities, the petitioner was deprived of prosecuting her higher study, therefore, she may be granted any other relief by passing "any other order/direction as may be deemed fit and proper".

8. Considering such contentions raised by the parties, even if admission to MBA Course for the session 2001-2002 has been over long since, but since due to arbitrary and unreasonable action of the authorities, the legitimate expectation of the petitioner to prosecute her study has been jeopardized, this Court thinks it proper to consider if "any other order/direction as may be deemed fit and proper" in the circumstances of the case in hand can be granted.

9. The apex Court in the case of ***State of Rajasthan v. M/s. Hindustan Sugar Mills Ltd. & others***, AIR 1988 SC 1621=(1988) 3 SCC 449 held that the High Court was exercising high prerogative jurisdiction under Article 226 could have moulded the relief in a just and fair manner as required by the demands of the situation. In exercise of such power under Article 226 of the Constitution of India even though no specific prayer has been made in the writ petition taking into consideration the facts and circumstances of the case, this Court is inclined to mould the relief and pass order/direction as deemed fit and proper as prayed for by the learned Senior Counsel for the petitioner in the present writ petition.

10. The petitioner having been selected and stood first in the merit list amongst the ST category candidate she had every legitimate expectation to prosecute her studies and as such she has complied all the conditions stipulated in the letter communicated to her but depriving her to prosecute

her studies because of non-receipt of two other drafts amounting Rs.6,000/- and Rs.1,600/- in time was illegal.

11. The doctrine of legitimate expectation was evolved in England, but has been followed in English Speaking countries including India by application of which the Court insists a duty to her upon an administrative authority in cases where otherwise, the affected individual had no right to be heard. While the common law rule of natural justice applied only to (a) the exercise of statutory power, and (b) to the prejudice of existing legal rights or interests, the doctrine of legitimate expectation extends this protection of natural justice to (a) the exercise of non-statutory administrative power as well, (b) where the interest affected is only a privilege or benefit and it is not existing but prospective. (See (1984) 2 All E.R. 935 **(C.C.S.U. v. Min.).** This doctrine of legitimate expectation can be considered to be an off-shoot of the general doctrine that every public authority must act fairly. In England, it has been held that the plea of legitimate expectation provides a sufficient interest to a person to enable him to have judicial review in a case where he cannot point to the existence of a substantive right. (See (1983) 3 All E.R. 801 (***Findlay v. Secy. Of State***). Of course, a mere hope of a person that he would obtain or enjoy the benefits would not suffice the doctrine. In order to constitute a legitimate expectation, the same must have a reasonable basis. In the case of **T.C.I. v. K.C.F.I**., (1993) 1 SCC 71, the Supreme Court held that mere reasonable or legitimate expectation of a citizen, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. In the case of **Union of India and others v. Hindustan Development Corporation and others**, AIR 1994 SC 988, the Supreme Court elaborately dealt with the doctrine of legitimate expectation. The Supreme Court held that the concept of legitimate expectation in administrative law has now undoubtedly gained sufficient importance. "*Legitimate expectation*" is the latest recruit to a long list of concepts fashioned by the Courts for the review of administrative action and this creation takes its place besides such principle as the rules of natural justice, unreasonableness, the fiduciary duty of legal authorities and 'in future perhaps, the principles of proportionality". While dealing with the

doctrine, the Supreme Court also held that the legitimate expectation may come in various forms and owe their existence to different kind of circumstances and it is not possible to give an exhaustive list in the context of vast and fact expansion of the governmental activities. Thus observing, the Supreme Court also concluded that after a denial of legitimate expectation in a given case whether it amounts to denial of rights guaranteed or is arbitrary, discriminatory, unfair or baised, gross abuse of power or violations of principles of natural justice, the same can be questioned on the well known grounds attracting Article 14 of the Constitution, but a claim based on a mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the Court must lift the veil and see whether the decision is violative of these principles warranting interference and it depends very much on the facts and the recognized general principle of administrative law applicable to such facts and the concept of legitimate expectation is "not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the Court out of review on the merits.

12. Taking into consideration the above facts, this Court in ***Rajashree Samal v. State of Orissa and others***, 2008 (II) OLR 976, in a similar circumstance where the petitioner in that case was deprived of taking admission into the MDS course for the session 2008-2009 and a person below her rank was allowed to prosecute his studies, set aside the illegal admission. The judgment of the single Judge was challenged in a writ appeal. The Division Bench of this Court also rejected the said appeal against which order the State as well as the person aggrieved approached the apex Court and the same appeal was also dismissed by the apex Court and justice was delivered to the person who had been selected by following due procedure of selection.

13. As the session 2001-2002 has already been over, now the question of allowing the petitioner to prosecute her study following the principle decided in ***Rajashree Samal*** as discussed above at this point of time may not arise. But, the relief can be granted at this stage is the most disturbing issue to be decided at this point of time. Certainly, the candidate having been selected and stood first in the merit list of S.T has got legitimate expectation with high ambition to earn livelihood by prosecuting higher study create better avenue by joining in service in future. By depriving of such lucrative

position, she is deprived of getting higher studies and also maintaining better life style and as such, 'loss' caused to her for no fault of her own but due to arbitrary and unreasonable action of the authorities should be compensated.

14. Let me now come to the question of 'loss' which has been caused to the petitioner due to non-granting of the admission by opposite party no.3. In ***Consumer Unity and Trust Society, Jaipur v. Chairman and Managing Director, Bank of Borada, Calcutta and another***, 1995 (2) SCC 150 it is held that 'loss' is a generic term. It signifies some detriment or deprivation or damage, injury too means any damages or wrong. It means "invasion of any legally protected interest of another".

15. The pain and suffering sustained by the petitioner throughout her life and mental distress and agony caused due to the act of the authority depriving the petitioner to prosecute her higher studies cannot be compensated in any manner. The 6th Edition of Black law Dictionary at page 389 defines 'damage' to mean as follows:

> " A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another. Money compensation sought or awarded as a remedy for a breach of contract or for tortuous acts. In other words, the word "damage" is simply a sum of money given as compensation for loss or harm of any kind. Further simplify the same "damage" means the harm or loss suffered or presumed to be suffered by a person as a result of some wrongful act and a sum of money given to compensate the damage is called 'damages'.

The apex Court considering the facts of the respective cases decided and granted compensation to the person aggrieved for loss and wrong done by the authority. In ***Registered Society*** mentioned (supra) the apex Court held that the Court can award 'damages' against the public authorities to compensate loss or injury caused to the petitioner provided the case involves violation of fundamental rights by the authorities or their action is wholly arbitrary or oppressive in violation of Article-14 or breach of statutory duty and is not a purely private matter directed against the private individual.

16. Applying the said principle to the present context, it appears that due to arbitrary exercise of power by the authorities, the petitioner has been deprived of prosecuting her higher study it violates the fundamental right of the petitioner as enshrined in the Constitution. Therefore, taking into consideration the status, mental loss, agony and deprivation of a better future prospects and to caution the opposite parties not to act such a manner in future, this Court considers it appropriate to award damages of Rs.2,00,000/- which shall be paid to the petitioner by the University which will be deducted the same from the salary of erring officers at the helm of affairs responsible for causing such loss to the petitioner.

17. With the above observation and direction, the writ petition is allowed in part.

Writ petition allowed in part

2015 (II) ILR - CUT- 168

D. DASH, J

CRIMINAL APPEAL NO. 222 OF 1994

KHAGESWAR KUNAR & ORS. …….. Appellants

.Vrs.

STATE OF ORISSA …….. Respondent

S.C. & S.T. (PREVENTION OF ATROCITIES) ACT, 1989 – S.3(i)(x) & (xi)

Conviction for the offence U/s. 3(i)(x) & (xi) of the Act – To attract the offence prosecution has to establish that the victim belongs to member of scheduled caste and the incident must have viewed by public.

In this case there is no evidence that the victim and her brother belong to scheduled caste and the caste "Dhobani" is also not found in any of the entries in the Constitution (Scheduled Caste) Order 1980 as amended from time to time – The view of the learned trial court that since the incident took place either in a public place or near a public

place or within the visible range from the public place, it attracts the charge U/s. 3(i)(x) & (xi) of the Act is not correct – Held, conviction of the appellant U/s. 3(i)(x) & (xi) of the Act is unsustainable – The impugned conviction and sentence is set aside.

(Paras 5, 6, 7)

For Appellants : M/s. D.P.Dhal, S.K.Nayak, A.K.Acharya
For Respondent : Additional Standing Counsel

Date of hearing : 24.04.2015
Date of judgment: 08.05.2015

JUDGMENT

D. DASH, J

Appellants having been convicted by the learned Sessions Judge, Balasore in S.T. No. 201 of 1993 (G.R. Case No. 987 of 1992 for offence under Section 3 (i) (x) & (xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and having been sentenced to undergo rigorous imprisonment for a period of one year have filed this appeal.

2. The prosecution case is that on 1.9.1992 around 10 to 10.30 AM, when Kanchan (P.W.1) was coming from the river side in search her goats near the land of one Kumuda Kunar, accused Khageswar abused her uttering "Sali, Ghodagehi Dhobani etc." and caught hold of the hair tuft and assaulted making her lie on the ground. It is stated that when P.W. 1 raised alarm other accused persons came and assaulted by giving blows and kicks when accused Lambodar also caused injury on her left wrist by a sickle. Brother of P.W.1 namely, Narahari also assaulted when accused Kumuda pulled the wearing sari of P.W. 1 making her naked. At this point of time, local Gramarakhi arrived and seeing them, the accused persons fled away. The informant (P.W.1) and her brother (P.W.6) were medically examined and they reported the matter in writing at Amarda Police Out-Post vide Ext.1. The case having been registered, investigation commenced, incriminating articles such as blouse and stick etc. were seized and finally on completion of investigation, the charge sheet was submitted

The accused persons faced the trial wherein they pleaded their innocence and false implication on account of prior rivalry.

3. The trial court having recorded the evidence of eight witnesses examined from the side of the prosecution which includes the victim informant (P.W.1), her brother (P.W.6), the other injured and eye witness

P.W.2 and other official witnesses such as medical officer and police officer sat over to decide the complicity of the accused persons and to find out as to how far the prosecution has been able to establish the charges against the accused persons.

On evaluation of evidence, the trial court has ultimately arrived at a conclusion that the appellants are liable for commission of offence under Section 3 (x) and (xi) of the Act and accordingly holding them guilty of the said offence, the sentence as stated above has been imposed.

4. Learned counsel for the appellants at the outset submits that the very first foundational fact as regards the establishment of the charge under any of the limbs of Section 3 of the Act that the informant and her brother (P.Ws. 1 and 6) are members of Scheduled Caste has not been established. It is further submitted that in order to attract the offence under Section 3 (1) (x) of the Act, the prosecution has failed to prove that the incident occurred in a place within public view. Therefore, he urges that the order of conviction and sentence are unsustainable in the eye of law.

Learned counsel for the State supports the finding of the trial court and also the ultimate order of conviction and sentence.

5. Admittedly, in this case no such documentary evidence has been tendered proving the caste of the informant and her brother (P.Ws. 1 and 6) that they are the members of Scheduled Caste. It is stated in the FIR that the informant was abused by accused Khageswar and he had hurled the abusive words those are "Sali Dhobani Ghoda Gehi etc." The trial court as it appears has taken into consideration that as the accused persons nowhere claim of the exemption of being member of SC and ST which provides them immunity of prosecution under the Act, on the face of the evidence of P.W.1 receiving corroboration from the FIR she is to be held to be a member of Scheduled Caste as prosecution version is that she was insulted by calling her caste. The view of the trial court that simply because of the evidence on record that accused Khageswar abused P.W. 1 stating as 'Dhobani', the same is enough to hold P.W. 1 as a member of Scheduled Caste, in my considered view is not sustainable in the eye of law in a prosecution for offence under the Act. The prosecution is always under legal obligation to prove that the victim belongs to a caste which specifically finds place in the list of Scheduled Caste or Scheduled Tribe as the case may be in any of the entry specified in the Presidential Order promulgated in exercise of the power conferred by

clause-I of Article 342 of the Constitution of India. Here accepting for a moment that the accused Khageswar had abused informant (P.W. 1) uttering 'Dhobani', then also 'Dhobani' is not found to be there in any of the entries in the Constitution (Scheduled Caste) Order, 1950 as amended from time to time. Therefore, this Court is led to accept the submission of the learned counsel for the appellants that here is a case where the foundational fact to attract any of the offences provided under the Act as regards the victim being a member of Scheduled Caste has not been established by acceptable evidence when it is specifically denied by the accused persons during their examination under Section 313 of the Code of Criminal Procedure and when even P.W. 1 has not stated her caste on oath that as such that she is a member of Scheduled Caste community.

6. Next submission of the learned counsel for the appellants also appears to be having the force. The trial court as it is found considering the distance of the place of occurrence from the public road to be around 100 cubits apart has concluded that P.Ws. 1 and 6 were intentionally insulted in the place within public view. In this connection, it may be stated that the trial court has proceeded with a view that when the incident take place either in a public place or near a public place in a close or reasonable vicinity or within a visible range from the public place, the same satisfies the condition precedent for establishment of the charge under Section 3(1) (x) of the Act that it was in a place within public view. In my considered opinion such a view is not universally acceptable. The legislature having specifically employed the words "in any place within public view" and when emphasis is on the word 'within public view', burden lies on the prosecution to prove that such insult or intimidation with was in fact viewed by the public and an incident taking place in any place being not viewed by public and simply holding that it could have been so viewed, cannot lead the Court to say that the insult or intimidation had taken in a place within the public view. So, for the purpose it has to be proved that in fact public have viewed the incident so as to say that such insult or intimidation to the member of the Scheduled Caste or Scheduled Tribe in the place was within public view. The place need not necessarily be a public place and whether it is in public place or not, it does not matter. But what it matters is that it must have been viewed by public. So finding of the trial court on this score is unsustainable. For the aforesaid, the accused persons are not found to be liable for offence under Section 3 (i)(x) and (xi) of the Act.

Thus, I hold that the conviction of the appellants for commission of offence under Section 3 (x) and (xi) of the Act are unsustainable in the eye of law.

7. In the wake of aforesaid, the appeal stands allowed. The order of conviction and sentence passed by the leaned Sessions Judge, Balasore for offence under Section 3 (i) (x) and (xi) of the Act are hereby set aside. The bail bonds executed by the accused persons shall accordingly stand discharged.

Appeal allowed.

2015 (II) ILR - CUT- 172

S. PUJAHARI,J

CRLA NOs. 487 & 369 OF 2009

DEBADAS DIARI ……..Appellant

.Vrs

SATE OF ORISSA ……Respondent

CRIMINAL TRIAL – Offence U/ss. 366 & 376 I.P.C. – Non-reporting of the matter to police – Serious Contradiction in the evidence of material witnesses – Trial Court Convicted the appellant solely basing on the testimony of the victim, which is without any corroboration and not wholly reliable – Trial court erred in convicting the appellant – Held, impugned judgment of conviction and Sentence is setaside and the appellant is entitled to an order of acquittal.

(Para 8 to 10)

For Petitioner : M/s. P.K. Satpathy , R.N.Parija
A.K.Rout & S.P.Nayak

For Opp. Parties : Mr. S.Zafarulla
Addl. Standing Counsel

Date of Hearing : 27.3. 2015
Date of Judgment : 27.3. 2015

JUDGMENT

S.PUJAHARI, J.

The appellants in both the appeals, call in question the judgment of conviction and order of sentence passed against them by the learned Additional Sessions Judge, Fast Track Court, Bhawanipatna in Sessions Case

No.127/95 of 2008. The trial court vide the impugned judgment and order held the appellants guilty of charge under Section 366/34 of the Indian Penal Code (for short "the I.P.C.") and sentenced each of them to undergo R.I. for three years and to pay a fine of Rs.5,000/- i.d. each of them to undergo R.I. for six months more and further held the appellant, namely, Debadas Diari in CRLA No.487 of 2009 guilty of charge under Section 376 of the I.P.C. and sentenced him to undergo R.I. for seven years and to pay a fine of Rs.5,000/- i.d. to undergo R.I. for one year more.

2. The prosecution placed before the trial court a case that when the victim (P.W.4) was going to Rengalipali weekly market on her way she was abducted by the appellants in a jeep at the point of knife to village Jhariguda where she was kept in confinement in a house. There the appellant-Debadas Diari committed sexual intercourse on her forcibly several times. A week thereafter when her father (P.W.3) knowing about her confinement, came there along with other villagers and requested the appellant Debadas Diari to leave the victim, but the appellants did not pay any heed to their request and driven them out without allowing them to meet the victim. The appellant Debadas Diari thereafter took the victim to another village where he kept her in the night and in the next morning left the victim at village Bimala which is nearer to the village of the victim. The victim then went to her home and narrated the entire incident before her father which was reported to the police, but as the police did not take any action, a complaint was made before the learned S.D.J.M., Dharamgarh which was registered as I.C.C. No.41 of 2006. Learned S.D.J.M., Dharamgarh thereafter recording the initial statement of the complainant-victim and also examining other witnesses took cognizance of commission of offences under Sections 366/ 376/ 34 of the I.P.C. and committed the case to the court of Session to face their trial.

3. Relying on the materials placed, the trial court framed charges as stated earlier against the appellants. The appellants pleaded not guilty of the charges. It appears that during the trial, prosecution examined four witnesses including the complainant-victim and her father (P.W.3) and two other independent witnesses to bring home the charges. The appellants had taken the plea of denial and false implication, but adduced no evidence in support of their plea.

4. On conclusion of the trial, the trial court relying on the evidence adduced by the prosecution, more particularly the victim, held the appellants guilty and returned the judgment of conviction and order of sentence, as stated earlier.

5. Assailing the aforesaid, learned counsel for the appellants submits that the impugned judgment of conviction and order of sentence are unsustainable in the eye of law inasmuch as there is no cogent and acceptable evidence on record to come to a conclusion that the victim was abducted by the appellants and she was subjected to forcible sexual intercourse. Rather, the materials on record would go to show that it was a case of elopement and consensual sexual intercourse. In such premises, the trial court should not have convicted the appellants. Hence, he submits to set aside the judgment of conviction and order of sentence and acquit the appellants of the charges.

6. Learned counsel for the State, however, defends the judgment of conviction and order of sentence with the submission that since it emerges from the evidence of the victim that she was abducted by the appellants and the appellant Debadas Diari kept her in confinement where he forcibly committed sexual intercourse on her and in her cross-examination nothing having been elicited disclosing that the same was a case of elopement and the victim had consensual sexual intercourse with the appellant Debadas Diari, the judgment of conviction and order of sentence cannot be found fault with.

7. Before appreciating the contention of the counsel for the parties vis-à-vis the impugned judgment of conviction and order of sentence and also other materials on record, it would be proper to have a look to an oft-quoted decision of the Hon'ble Apex Court in the case of **Bharwada Bhoginbhai Hirjibhai vrs. State of Gujarat, reported in AIR 1983 S.C. 73,** wherein their Lordships in the Hon'ble Apex Court with regard to appreciation of evidence of the victim of rape have been pleased to hold that in the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of a girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society" ..... Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society and its profile.". At paragraph-11 of the said decision, it has been held as follows;

> "11. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the western world (obeisance to which has perhaps become a habit presumably on account of the colonial hang-over). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification: Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities factor' is found to be out of tune."

8. Keeping in mind the aforesaid, when the case in hand is addressed, it is seen that the trial court in this case placing reliance on the sole testimony of the victim found the appellants to be guilty of the charge and has convicted them and sentenced them. The evidence of the victim would go to show that while she was going to Renganpali Weekly market, the present appellants forcibly took her in a jeep on the point of knife and kept her in a house where appellant – Debadas Diari said to have had forcibly sexual intercourse with her keeping her in confinement for about seven days. When the father of the victim knowing the aforesaid fact came there along with his other villagers, appellant – Debadas Diari also did not allow them to meet her, but the on the

next day took her to another village and left her there. Such theory of forcible abduction of the victim and also sexual intercourse with her requires to be taken with pinch of salt, even though nothing has been elicited in the cross-examination, inasmuch as on account of inherent improbability in her such version and the probabilities factors militating against the same. There is no material that the victim was kept in a close watch during those seven days by the appellants. In such premises, when no evidence has been adduced by the victim to have made any effort to escape from them and also reported the matter to any other villagers complaining such an offence to have committed by the appellants, in the absence of any threat extended to her by appellant – Debadas Diari and others, such version of the victim appears to be untrustworthy. The same is more so for the reasons that the independent witnesses, such P.Ws.1 and 2 examined in this case have deposed that the father of the victim stated before them that the victim had fled away from the village along with appellant – Debadas Diari and staying in village- Jhariguda and, as such, they accompanied him in a jeep to village- Jhariguda in order to bring back the victim. Furthermore, non-reporting of the matter immediately to the police, even if the victim who had been to the market did not return, by the father of the victim also casts a cloud on such version of the victim that she was abducted. It also transpires from the evidence of P.W.3, the father of the victim that soon after his return from village- Jhariguda, he went to Jaipatna Police Station and reported the matter, but the police did not take any action, appears to be contrary to the evidence of the victim (P.W.4), who stated that on her return she along with her father went to the Police Station and reported the matter, but the police did not take any action on it. The same casts a serious doubt on their version regarding inaction of the police in not registering the case and, as such, they are coming to the court and lodging the complaint. There is no manner of doubt that even a person without going to the police can approach straight to the Magistrate and for that, a case of the prosecution cannot be discarded. But, when the evidence on record discloses that the complainant herself went to the Police Station, but the police did not take any action and the same is found to be untrustworthy, that impeach the credibility of the evidence of the witnesses in this regard. Non-reporting of such heinous and serious offence to the police and making a complaint at a belated stage also corrode the credibility in the version of the witnesses, such as, P.Ws.3 and 4 with regard to the victim being abducted and subjected to sexual intercourse forcibly, more so when there is delay in making the complaint which appears to have not been explained properly, more so with

regard to the victim staying in the company of appellant – Debadas Diari. It is, according to the victim, appellant – Debadas Diari kept her for seven days, whereas according to the father of the victim, after two months, the victim came back and then she was pregnant. All these aforesaid factors corrode the credibility in the version of the victim. Rather, the aforesaid would go to show a case of elopement and consensual sexual intercourse wherein appellants in CRLA No.369 of 2009 appear to have helped.

> **9.** Hence, on reappraisal of the evidence on record, this Court is of the view that the trial court erred in appreciating of the material evidence on record and recording a conviction solely basing on the testimony of the victim which is not wholly reliable, without any corroboration. Therefore, this Court is of the view that there being no cogent acceptable evidence to record the finding of guilt against the appellants, they are entitled to an order of acquittal.

10. Resultantly, for the foregoing reasons, both the criminal appeals are allowed. The impugned judgment and order dated 19.8.2009 passed by the learned Additional Sessions Judge, Fast Track Court, Bhawanipatna in Sessions Case No.127/95 of 2008 convicting all the appellants in both the appeals for commission of offence under Section 366/34 of the I.P.C. and sentencing each of them to undergo R.I. for three years and to pay a fine of Rs.5,000/- i.d. each of them to undergo R.I. for six months more and further convicting the appellant, namely, Debadas Diari in CRLA No.487 of 2009 under Section 376 of the I.P.C. and convicting him to undergo R.I. for seven years and to pay a fine of Rs.5,000/- i.d. to undergo R.I. for one year more are set aside. All the appellants in both the appeals are acquitted of the said charges.

Since the appellant, namely, Debadas Diari in CRLA No.487 of 2009 is in jail custody, he be set at liberty forthwith, unless his detention is required in connection with any other case.

Appeals allowed.

2015 (II) ILR - CUT- 178

BISWANATH RATH, J.

W.P. (C) NO.7054 OF 2005

MOHAN DAKUA & ORS. ……..Petitioners

.Vrs.

STEEL AUTHORITY OF INDIA LTD. & ANR. ……..Opp.Parties

PAYMENT OF GRATUITY ACT, 1972 – S.7 (3-A)

Payment of gratuity – It is to be released within a period of 30 days from the date it becomes payable – Delay in payment – No latches on the part of the employee – Employer has also not obtained permission from the Controlling Authority for delayed payment – Held, direction issued to opposite party (SAIL) to pay 10% interest to the petitioners, independently calculating for the delayed period only.

(Paras 6,8)

For Petitioners - M/s. S.K. Sanganeria, P.C. Patnaik, P. Sinha.
For Opp.Parties - M/s. A.A. Das, M.B. Roy, S. Mohanty, B.R. Swain & B. Sahu.

Date of hearing : 31.10.2014
Date of Judgment : 31.10.2014

JUDGMENT

BISWANATH RATH, J.

This is a case at the instance of the employees Rourkela Steel Plant claiming interest for delayed payment of gratuity. The petitioners justify that their claim for interest relying on provision contained in Section 7 (3) and Section 7 (3-A) of the Payment of Gratuity Act, 1972.

(2) Petitioners' case is that even though their V.R. applications were accepted and they have all retired from particular dates, the Gratuity as due against them was not released in time. There is no dispute that the petitioners have all retired by taking VR. There is also no dispute that there is delay in the payment of gratuity as against the petitioners. Pursuant to the direction of this Court in W.P.(C) No.4351/2003. Petitioners filed representations under

Annexure-2(Series) to the writ petition. The petitioners have quoted the order passed by the competent Authority at Annexure-3(Series) on disposal of the one of the representation at the instance of the petitioner No.1 (Mohan Dakua). The plea taken by the management in rejecting the request for grant of interest is that there were about 2000 and odd persons applied for VR. Many of them did not vacate quarters on their retirement for which clarifications were sought for from the competent authority. It is for this reason, the gratuity as against the petitioners could not be released in time and since the delay was bona-fide, there should not be charging of any interest.

(3) Learned counsel appearing for the opposite parties brought some documents to my notice as well as the documents filed by the opposite parties in their counter. In filing the counter, the S.A.I.L Authority has just repeated the ground taken in the order of rejection of the representation of the petitioners.

(4) In order to appreciate the above contentions urged, it is necessary to notice the provisions of the payment of Gratuity Act, 1972 (for short "the Act") to the extent they are relevant. They are extracted below:

> "7. Determination of the amount of gratuity. – (1) A person who is eligible for payment of gratuity under this Act or any person authorized, in writing, to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.
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> (2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.
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> * * * * * *
>
> (3-A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground."

(5) Reading of Sub-section 3 of Section 7 gives a clear indication for release of the gratuity within a period of thirty days from the date it becomes payable to the person to whom the gratuity is payable. Similarly in Sub-section (3-A) of Section 7, there is a statutory mandate that in case the gratuity is not released within the time framed, the employer is required to pay the simple interest at such rate not exceeding the rate notified in the notification by the Central Government from time to time for repayment of long term deposit as the Government may be certified by such notification.

(6) From the pleadings of the parties, it appears that there is no latches on the part of the petitioners in the matter of release of the gratuity. I find force in the submissions of the petitioners which is not only supported by the statutory provisions as at Sub-section 3, (3-A) of Section 7 but also covered by a decision decided by Hon'ble Apex Court in case of **"H. Gangahanume Gowda Versus Karnataka Agro Industries Corporation Ltd." as reported in "(2003) 3 Supreme Court Cases 40".** By deciding similar matter, the Hon'ble Apex Court was pleased to grant interest for the delayed period @ 10% as available in para-9 & 10 of the said decision. The petitioners' case is squarely covered under the above decision of the Hon'ble Apex Court.

(7) Further, the petitioners have also referred to the statutory provisions as recorded to hereinabove and they are entitled to interest for delayed payment of Gratuity under the statute also.

(8) Under the circumstances, I allow the writ petition directing the opposite party (S.A.I.L) to calculate the interest @ 10% to be paid to each of petitioners independently. Calculation as directed be made within a period of four weeks from the date of communication of the order and payment as calculated be released in favour of each of the petitioner within a period of two weeks thereafter.

The Writ petition succeeds to the above extent. However, there shall be no order as to cost.

Writ petition allowed.

2015 (II) ILR - CUT- 181

BISWANATH RATH, J

W.P.(C) NO. 8105 OF 2010

A. SUDHA ……. Petitioner

.Vrs.

M/S. NALCO. LTD. & ORS. ……Opp. Parties

TORTS – Drowning of a child in the sewerage tank belonging to NALCO – Compensation – Post mortem report reveals that the cause of death of the deceased was due to hophyxia resulting from drowning – Negligence on the part of the authorities – Both contractor and NALCO are responsible for the wrong – Held, direction issued for payment of Rs. 3,50,000/- as ex-gratia by NALCO to the bereaved family.

(Para 5)

Case Laws Referred to :-

1. AIR 1999 SC 3412 : Chairman Grid Corporation of Orissa Ltd. (GRIDCO) & Anr v. Smt.Sukamani Das &Anr.

For Petitioner : M/s. A.Kanungo, C.Nayak & A.Panigrahi

For Opp. Parties : M/s. B.K.Sharma & A.U.Senapati (O.P.1)

Date of Hearing : 03.12.2014
Date of Judgment : 11.12.2014

BISWANATH RATH, J

This writ petition has been filed by the petitioner, the mother of a dead child seeking a direction to the opposite parties for payment on account of compensation on death of her child due to fall in a trench/hole in connection with a sewerage system inside Surakhya Vihar Playground at CISF Colony under National Aluminum Company Limited (for short "NALCO"). The petitioner claims that her husband, who is working as a Constable in CISF Unit, Damanjodi, is residing in the residential CISF Colony, established and maintained by NALCO. She had three children of her own out of the same, the eldest one is a daughter, the eldest son is a physically and mentally retarded child being affected by Cerbral Pulsi. It is claimed that their youngest son, who has a good physical and mental condition was aged about five years old at the time of accident. The petitioner further submitted that

his youngest son at about 2.30 P.M. on 14.6.2008 fell into a trench/hole of the sewerage system lying uncovered at the relevant time. The accident had taken place while the son of the petitioner was playing with his friend, namely, Sai Manikanta Raghuraman in front of the house. Based on an F.I.R., a U.D. Case No. 4 of 2008 was initiated. On completion of investigation, a final report was submitted establishing the death of the child by drowning. Petitioner also averred that a post mortem was also undertaken on the body of her son. The post mortem report also confirmed the death by drowning. It is alleged by the petitioner that in spite of her repeated approach to the NALCO authorities for appropriate compensation for their negligence she has lost her only able child, the NALCO authorities are not paying any heed. Consequently, the petitioner has filed this writ petition claiming a sum of Rs.25,00,000/- (Rupees twenty five lakhs).

2. The NALCO authorities on their appearance have filed a counter affidavit stating therein that even though the fact of accident as well as the death of the son of the petitioner is correct, but very strongly objected the claim of the petitioner on the allegation of negligence by NALCO. The NALCO Authorities pleaded that maintenance of the external water supply, sewerage line and allied work within the said colony was awarded to contractor M/s. S.K.Swain for a period of two years i.e. from 1.9.2006 to 31.8.2008 and it is only the said contractor, who is responsible for any lapses, on the plea that the incident place is far away from the residential area and at least 15" away from the play ground, they also attached the responsibility on the child. Alleging that the writ petition involves disputed question of fact and seriously disputing the negligence attributed on the contractor, the NALCO authorities objected the claim made by the petitioner and prayed for rejection of the writ petition. In support of his contention learned counsel for the NALCO has cited a decision rendered in the case of ***Chairman Grid Corporation of Orissa Ltd. (GRIDCO) and another v. Smt.Sukamani Das and another*** as reported in AIR 1999 Supreme Court 3412, In view of peculiar facts and circumstances involved in the case, I do not find the decision cited by NALCO has any application to the present case.

3. Heard learned counsel for the parties. While considering the submissions of the respective parties I had an occasion to go through the final report submitted in the U.D. Case which established the fact that the deceased fell into water and got drowned. The inquiry of the police also reveals that the police authority after holding the inquest over the dead body sent the dead

body to DHH, Koraput for post mortem and the post mortem report also reveals that the cause of death of the deceased is due to hophyxia resulting from drowning. Thus the post mortem report also confirms the above.

4. There is no dispute as regard to the death of the minor child of the petitioner. There is also no dispute that the death of the minor child is on account of drowning in a place under the custody of the NALCO. NALCO Authorities also cannot shift their responsibility on the plea that the responsibility of maintenance of the water system as well as the sewerage system was lying with the contractor. In any case there was no impediment on NALCO to make payment of appropriate compensation to the bereaved family, which may not be on the head of compensation but by way of ex-gratia and by holding an inquiry NALCO could have fixed responsibility on the contractor and recovered the amount from the contractor thereafter. As appears from the case record, the incident had taken place on 14.6.2008 and this writ petition is taken up for hearing at the end of 2014. Even assuming that there is no strong material directly holding the NALCO negligent for the incident, the petitioner cannot be asked now to file a civil suit, as the same will be grossly barred by time.

5. Under the above circumstances, considering that the death has taken place due to drowning of a minor child in a sewerage tank belonging to NALCO and further since the NALCO Authorities have not taken any effective steps to at least come to fix the responsibility on the contractor at the appropriate time, I held both contractor and NALCO are responsible for the incident. Consequently, since this a death of a minor child, I direct that at least a sum of Rs.3,50,000/- (Rupees three lakhs and fifty thousand) be given as ex-gratia by NALCO to the bereaved family, which amount shall be paid within a period of one month from the date of the judgment.

6. The writ petition succeeds to the above extent. However, there shall be no order as to cost.

Writ petition allowed.

2015 (II) ILR - CUT- 184

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

CONTC NO. 957 OF 2013

SARAT KUMAR PAIKARAY .....Petitioner

.Vrs.

SATYAKAMA MISHRA,
DIRECTOR OF HIGHER EDUCATION .....Opp. Party

CONTEMPT OF COURTS ACT, 1971 – S.12

CONTEMPT OF COURT – Person who complains breach of court's order has to prove willful and deliberate disobedience of the judgment or order of the court – Disobedience of Court's order strikes at the very root of rule of law on which our system of governance is based – Power to punish for contempt is necessary for maintaining effective legal system but it must always be exercised cautiously and a contemnor must always be given an opportunity to repent.

In the present case there was no willful delay and laches on the part of the opposite party while complying the orders of this Court and he has also tendered unqualified apology for the delay – Held, this court finds no ground to proceed against the opposite party for contempt of the order of the court.

(Para 05)

Case Laws Referred to :-

1. AIR 1999 SC 3215 Kapildeo Prasad Sah & Ors. -V- State of Bihar & Ors.

For Petitioner : M/s. Deepali Mohapatra, S.Parida
For Opp. Parties : M/s. Dillip Kumar Mishra, (Addl Govt. Adv.)

Date of hearing :19.03.2015
Date of Judgment :19.03.2015

JUDGMENT

S. K. SAHOO, J.

The petitioner approached this Court earlier in W.P.(C) No.23532 of 2012 challenging the action of opposite parties for not including the First Post of English into the grant-in-aid fold as per Orissa (Non-Government

Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-aid Order, 2008 and praying for a direction to the opposite parties to approve the post of English and to release Grant-in-aid in favour of the petitioner.

The writ application was disposed of vide order dated 10.04.2013. The relevant portion of the directions are quoted hereinbelow:-

"**10.04.2013**

xx xx xx

4. Considering the submissions as made above and without going into the merits of the claim of the petitioner, the writ petition is disposed of granting liberty to the petitioner to make a representation before the Director of Higher Education, Orissa, Bhubaneswar (O.P. No.2) within a period of two weeks hence. If such a representation is made, the opposite party no.2 shall do well to issue notice to the opposite party no.3 to produce the relevant records and extend opportunity of hearing to the petitioner and any other necessary party and ultimately decide the claim of the petitioner within a period of eight weeks from the date of filing of such representation. Needless to say that, while considering claim of the petitioner, the Director of Higher Education shall keep in mind, the principles/guidelines formulated by the State of Orissa for Women's College, vis-à-vis Grant-in-aid.

5. The writ petition was disposed of with the aforesaid direction and observation".

2. The learned counsel for the petitioner submitted that though in pursuance to the order dated 10.4.2013 passed in W.P.(C) No.23532 of 2012, the petitioner submitted his representation before the opposite party on 24.4.2013 but no order was passed thereunder. The petitioner filed an application under the provisions of the Right to Information Act, 2005 to know about the position of his representation and reply was furnished by the Br. PIO-cum-Dy. Director (NGC-II) that no action has been taken in the matter. Since the representation was not considered within the stipulated period of time as fixed by this Court vide order dated 10.04.2013, this contempt application has been filed.

3. Notice was issued to the contemnor-opposite party on 4.8.2014 asking him to explain as to why he shall not be punished under the contempt of

Courts Act for flouting the order of this Court. In pursuance to such notice, show cause was filed by the Director of Higher Education, Odisha indicating therein that after receiving the representation of the petitioner on 24.04.2013, the concerned record was duly processed and in obedience to the order dated 10.4.2013 of this Court, necessary communication was made on 2.8.2014 to the office of the Principal, Mohan Mahila Junior Mahavidhyalaya, Chandpur who was opposite party no.3 in W.P.(C) No.23532 of 2012 intimating the date of hearing as 20.08.2014 at 11.30 a.m. It was directed to the Principal to produce the relevant records/documents and it was also requested to the Principal to intimate the petitioner to attend the hearing on the said date. It is further stated in the show cause affidavit that in response to the letter dated 2.08.2014, the petitioner as well as the Principal of the said College appeared before the deponent on 20.08.2014 and participated in the process of hearing and the Principal also produced relevant documents before the deponent and after hearing the parties and perusing the materials on record diligently, the deponent passed a reasoned order on 28.08.2014 rejecting the claim of the petitioner. The deponent further submitted in the show-cause affidavit that the delay caused in disposal of the representation was unintentional and bonafide and he deeply regretted for the time taken to comply the orders of this Court and also tendered unqualified apology.

4. In case of **Kapildeo Prasad Sah & Ors. –V- State of Bihar & Ors. reported in AIR 1999 SC 3215**, it is held as follows:-

> "9.For holding the respondents to have committed contempt, civil contempt at that, it has to be shown that there has been wilful disobedience of the judgment or order of the Court. Power to punish for contempt is to be resorted to when there is clear violation of the Court's order. Since notice of contempt and punishment for contempt is of far-reaching consequence, these powers should be invoked only when a clear case of wilful disobedience of the court's order has been made out. Whether disobedience is wilful in a particular case depends on the facts and circumstances of that case. Judicial orders are to be properly understood and complied. Even negligence and carelessness can amount to disobedience particularly when attention of the person is drawn to the Court's orders and its implication. Disobedience of Court's order strikes at the very root of rule of law on which our system of governance is based. Power to punish for contempt is

necessary for the maintenance of effective legal system. It is exercised to prevent perversion of the course of justice.

xx xx xx

11. No person can defy Court's order. Wilful would exclude casual, accidental bona fide or unintentional acts or genuine inability to comply with the terms of the order. A petitioner who complains breach of Court's order must allege deliberate or contumacious disobedience of the Court's order.

5. After hearing the learned counsels for the petitioner as well as the opposite party and perusing the show-cause affidavit filed by the opposite party, we are of the view that though there is delay in disposal of the representation filed by the petitioner and in the fitness of things, extension of time should have been sought for by the opposite party before this Court to decide the claim of the petitioner but since for processing the file and granting opportunity of hearing to the respective parties, some more time was consumed, it cannot be said that there was willful delay or laches on the part of the opposite party in complying the orders of this Court dated 10.04.2013 in W.P.(C) No.23532 of 2012. Moreover the deponent has tendered unqualified apology for the delay caused in disposal of the representation.

Power to punish for contempt should always be exercised cautiously, wisely and with circumspection in as much as indiscriminate use of this power would not help to sustain the majesty of law or dignity of the Court, but may affect it adversely. A contemnor must always be given an opportunity to repent. The repentance on the part of the contemnor and tendering of unqualified apology should be permitted to help him escape from punishment. The courts cannot be unduly touchy on the issue of contempt where orders have not been implemented not within stipulated period of time but at a little delayed stage due to exigencies of the situation. However this is not meant to be a licence for violation of an order till it subsists.

Accordingly, we do not find any ground to proceed against the opposite party for the contempt of the order of the Court. Therefore, the petition for contempt is dismissed.

Petition dismissed.

2015 (II) ILR - CUT- 188

S. N. PRASAD, J

O.J.C. NO. 14562 OF 1999

SANGITRAO POLA RAMCHANDRADU ……..Petitioner

.Vrs.

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

ODISHA CIVIL SERVICES (PENSION) RULES, 1992 – RULE 34(2)

Petitioner joined Government Service as Clerk from 14.07.1955 to 05.08.1965 – There after he resigned and joined as Asst. Teacher in aided High School w.e.f. 09.08.1965 till 30.04.1990 and retired – Petitioner has been given pension under Odisha Aided Educational Institutions and Employees Retirement Pension Rules, 1981 – Petitioner claimed to count his past service for the purpose of full pension – Claim rejected – Hence the writ petition – Orissa Pension Rules 1977 is not applicable as in the meantime 1992 Rules came into operation and Rule 23(2)(iv) of 1977 Rules is parimateria to Rule 34(2) of the 1992 Rules – Held, in view of the specific bar under Rule 34(2) of the 1992 Rules there is no illegality in rejecting the claim of the petitioner. (Para 22)

For Petitioner : M/s. Basudev Pujari & R.Mohanty
For Opp. Parties : Addl. Standing Counsel

Date of hearing : 05.05.2015
Date of judgment : 05.05.2015

JUDGMENT

S. N. PRASAD, J.

Heard learned counsels for the petitioner, the opposite party nos.1 to 4 and opposite party no.5.

2. The petitioner being aggrieved with the order dated 30.04.1997 issued by the Deputy Director to the Government of Odisha, School and Mass Education Department by which:-

(i) The claim of the petitioner for counting of the period of past service rendered by the petitioner in the Government School has been rejected.

(ii) For quashing the order dated 21.01.1999 by which the claim of the petitioner for getting pension by counting service of the petitioner which he has rendered under the Government from 14.7.1955 to 4.8.1965 has been rejected in view of the provision of Rule 23 (2) (iv) of the Orissa Pension Rules, 1977.

3. The brief fact of the case is that the petitioner had joined his service on 14.07.1955 in the Office of the Collectorate, Ganjam as Clerk remained thereof to 5.8.1965. Thereafter the petitioner resigned from the said post to join as Assistant Teacher in the High School at Padmanabhapur under Ganjam district and accordingly his resignation was accepted.

4. The petitioner after being relieved on 5.8.1965 has joined as Assistant Teacher w.e.f. 9.8.1965 and retired from the said post on 30.04.1990.

5. After superannuation from service as an Assistant Teacher from an aided High School at Padmanabhapur, the petitioner was granted pension vide P.P.O. No. 7718 of 12/92.

6. The petitioner thereafter has made a claim before the authorities to count the period of service which he has rendered as Clerk in the Office of the Collectorate, Ganjam from 14.07.1955 to 5.8.1965 after granting full pension, the same has been finalized being rejected against which the petitioner has filed this writ petition.

7. It has been submitted that the case of the petitioner has been looked into by the Government as it would evident from Annexure - 3 wherein although the claim of the petitioner has been rejected but the Director, Secondary Education, Odisha has been asked to examine the fact as to whether the incumbent for entitlement for pension for the period of service rendered under Government and if so, steps may be taken up accordingly.

8. According to the said direction the Inspector of Schools has communicated to the Deputy Director vide communication dated 21.1.1999 (Annexure-4) wherein he has expressed his opinion for consideration of the petitioner for pension. Further he has referred he has already been paid pension for the aided period for 23 years by the Controller of Accounts.

9. The representation of the petitioner has been rejected by the Deputy Director, Government of Orissa vide memo no. 28584 dated 22.07.1999 on

the ground that the petitioner is not entitled to get the benefit of pension which he has claimed in view of the provision of Rule 23(2)(iv) of the Orissa Pension Rules, 1977.

10. Being aggrieved with the decision of the Deputy Director, the petitioner has filed this writ petition on the ground as follows:-

(i) Since the petitioner has performed his service as a Clerk in the Office of the Collectorate, Ganjam for the period of more than 10 years and as such this period ought to have been considered for the purpose of counting entire service period for fixing full pension.

(ii) The Inspector of Schools has expressed his opinion that the case of the petitioner for separate pension but that has not taken into consideration by the Deputy Director, who has issued Annexure-5 dated 21.1.1999 rejecting the claim of the petitioner.

11. On the other hand, learned counsel for the opposite party-State has submitted that the petitioner is not entitled to get benefit of pension by counting the past service rendered by the petitioner as Clerk in the Office of the Collectorate, Ganjam because the petitioner has resigned from the post and thereafter he has appointed fresh in the aided High School at Padmanabhapur and as such in view of the provision as contained in Rule 23(2)(iv) of the Orissa Pension Rules, 1977, the petitioner is not entitled to be given the benefit of full pension.

12. He further contends that there are two separate rules governed rule one is for the employee working under the State Government, who are governed by the Odisha Civil Services (Pension), 1992 and the teaching and non-teaching staff are being governed by Orissa Aided Educational Institutions and Employees Retirement Pensions Rules, 1981 and as such since the benefit of pension is to be given to the employees of the regular establishment of the Government under provisions of the Rule and the Teaching and non-Teaching employees are being governed with different rules and as such the petitioner cannot be given such benefit.

13. Heard the parties and perused the documents on record.

14. The fact which is not in dispute in this case that the petitioner had joined his service on 14.07.1955 as Clerk in the Officer of the Collectorate, Ganjam remained there up to 5.8.1965. Thereafter, he has put his resignation which has been accepted and thereafter the petitioner has joined in the aided

High School after being relieved on 5.8.1965 and after performing his duty he has superannuated w.e.f. 31.04.1990. The petitioner has been given the benefit of pension under the provision of the Orissa Aided Educational Institutions and Employees Retirement Pensions Rules, 1981 and accordingly a P.P.O. has been issued and the petitioner has started drawing the pension according to its entitlement and on the basis of the period of service rendered by the petitioner as an Assistant Teacher in the said aided High school.

15. The petitioner thereafter has made an application before the authorities concerned for consideration of his case for counting the period of service, which he has rendered as Clerk in the Office of Collectorate, Ganjam which is a period of about 10 years and 29 days, the same has been looked into by the authorities and thereafter the Government has referred the matter before the Director, Secondary Education to take a decision.

16. The Director has directed the Inspector of Schools, who is the Sanctioning Authority of pension under the Orissa Aided Educational Institutions and Employees Retirement Pensions Rules, 1981 wherein Rule 2(f) the definition of Pension Sanctioning Authority has been given. According to which the Inspector of Schools in case employees of High School has been the authorities with the power of sanctioning authority of the pension to the Assistant Teacher working under the aided School. The Inspector of Schools has passed an order expressing his opinion for consideration the case of the petitioner's pension which ultimately has not given rather the claim of the petitioner has been rejected by the order dated 21.8.1999 issued by the Deputy Director (School and Mass Education Department by referring Rule 23 (2) (iv) of the Orissa Pension Rules, 1977.

17. The contention of the learned counsel for the petitioner is that since he has performed his duty about 10 years and 29 days in the capacity of the Clerk in the Office of the Collectorate, Ganjam, this period should have been considered for the purpose of consideration of entitlement of the petitioner for full pension. To appreciate this, it is relevant to see the relevant provisions of Odisha Civil Services (Pension) Rules, 1992.

18. However in the counter affidavit or in the order referred Orissa Pension Rules, 1977 has been made in Annexure-5 mentioned as Orissa Pension Rules, 1997 has been trite which according to learned counsel for

the State, it is due to typical error. The Orissa Pension Rules, 1977 will not be applicable because in the meanwhile the new Rule in the name of Odisha Civil Services (Pension) Rules 1992 has been promulgated but even if the relevant provision which has been given under Rule 23(2)(iv) of the Orissa Pension Rules, 1977, there is a Rule as contained in Rule 34(2) of the Odisha Civil Services (Pension) Rules 1992 which is parimateria to the Rule 23(2)(iv) of the Orissa Pension Rules, 1977 which speaks as follows:-

> *"A resignation shall not entail forfeiture of past service if it has been submitted to take up with proper permission, another appointment, whether temporary or permanent, under the State Government where service qualifies."*

19. If the case of the petitioner will be looked into on the basis of the provision of the Rule 34(2) of the Odisha Civil Services (Pension) Rules 1992 which speaks that a resignation shall not entail forfeiture of the past service if it has been submitted to take up with the proper permission for another appointment, whether it is temporary or permanent under the State Government where service qualifies.

20. If the case of the petitioner will be taken into consideration then the petitioner although he was an employee under the State Government appointed as Clerk for a period of 10 years and 29 days but thereafter resigned from the said post and joined his service fresh in the aided School and accordingly fresh appointment cannot be said to be under the State Government.

21. In view of these aspect of the matter, the authorities who has passed the order after going through the Rule 34(2) of the Odisha Civil Services (Pension) Rules 1992 since the petitioner has not been appointed under the State Government rather under the aided School which is being governed by a separate Rule formulated for the purpose of consideration of the Teaching and Non-Teaching staff i.e. Orissa Aided Educational Institutions and Employees Retirement Pensions Rules, 1981. Hence the order passed by the Deputy Director cannot be said to suffer from any infirmity.

22. Further under the Orissa Aided Educational Institutions and Employees Retirement Pensions Rules, 1981 the Sanctioning authority for pension means the District Inspector of Schools but under the Provisions of the Odisha Civil Services (Pension) Rules 1992 "Pension Sanctioning

Authority" has been defined under Rule 2 (q) under the explanation who is the appointing authority competent to make appointment to the post held by the retirement from government service since both the pensions depend upon two different provisions of Rules and since the petitioner immediately after resignation had joined his service in the aided School not directly under the State Government, hence in view of the specific bar as contained in Rule 34(2) of Odisha Civil Services (Pension) Rules 1992, the authority thereafter taken a decision of rejecting the claim of the petitioner.

23. In view of the facts stated hereinabove, I find no reason to interfere with the impugned order.

24. Accordingly, the writ petition is dismissed.

Writ petition dismissed.

2015 (II) ILR - CUT- 193

J. P. DAS, J

CRIMINAL APPEAL NO. 221 OF 1991

RAJANI PATEL ….. ..Appellant

.Vrs.

NARESH CHANDRA NAIK ……..Respondent

PENAL CODE, 1860 – S.493

Charge U/s. 493 I.P.C. – To establish the charge two ingredients are necessary – Firstly the man must have deceitfully induced the woman to believe that she is his lawfully married wife and secondly with such belief to make her co-habit with him – In this case deceitful inducement by the respondent to the appellant to make her believe that she was lawfully married to the respondent having not been proved beyond all reasonable doubt, there is no other persuading reason for this Court to interfere with the view taken by the learned trial Court acquitting the accused respondent from the charge U/s. 493 I.P.C.

(Paras 14, 15)

For Appellant : M/s. S.K.Mund & D.P.Das
For Respondent : M/s. A.K.Dhal & A.Mohanta

Date of hearing : 08.05.2015
Date of judgment : 13.05.2015

JUDGMENT

J.P. DAS, J.

This appeal is directed against the order dated 18.05.1991 passed by the learned S.D.J.M., Sundergarh acquitting the respondent from the charge under Section 493 of the Indian Penal Code (IPC in short) in I.C.C. Case No.5/ Tr. No. 459 of 1987.

2. The present appellant filed the complaint petition before the learned S.D.J.M, Sundergarh with the submissions, shorn of unnecessary details, that she and the respondent belonged to the same village and for pursuing their studies in colleges at Sundergarh they were commuting daily and developed friendship. The friendship gradually turned into a love affair. She alleged that on 1.4.1985 the respondent called the appellant to his house during the absence of his parents. There the respondent brought two garlands and got exchanged with the complainant and told her that their marriage was completed. The complainant believed in good faith that she and the respondent became wife and husband and allowed the respondent to cohabit with her. The physical relationship between the two continued thereafter at different places including once in a hotel at Jharsuguda and consequently the complainant became pregnant. The complainant asked the respondent to keep her in his house as wife but the respondent delayed the matter on some plea or other. The complainant went to the house of the accused in the month of December 1986 and stayed there for two days but was driven out by the father of the respondent as the accused was absent from the house. She was also not allowed by her own parents to stay in her own house and hence, she took shelter in the house of one of her relatives at Sambalpur. Being aggrieved by the deception of the respondent she reported the matter to the police but since the police did not take any action, she filed the complaint in the Court on 28.01.1987. Cognizance was taken under Section 493 of the IPC and charge was framed.

3. The accused faced the trial with a plea of complete denial. The complainant examined four witnesses including herself in support of her case besides exhibiting certain documents as against none preferred by the accused-respondent in defence.

4. The learned Trial Court on evaluation of the evidence, both oral and documentary found and held that the alleged offence under Section 493, IPC has not been established beyond all reasonable doubts and pronounced the impugned judgment of acquittal.

5. The appeal has been filed with the submissions that the learned trial court failed to appreciate the evidence led on behalf of the complainant and the position of law in proper perspective and reached the conclusion erroneously. It has been submitted that the learned Court below erred in law by disbelieving the positive statement of the appellant that the respondent by exchange of garland made her to believe that the marriage was completed and kept physical relation with her. It has been stated that the learned Court below wrongly discarded the positive evidence that the appellant and the respondent were staying as husband and wife and searched for the evidence of eye witness regarding the marriage and cohabitation, which was not possible. It has been submitted that all the required ingredients constituting an offence under Section 493, IPC having been established, the impugned judgment of acquittal is liable to be set aside.

6. In order to be convicted for an offence punishable under Section 493, IPC, the man must by deceit cause any woman who is not lawfully married to him to believe that she is lawfully married to him and to have sexual intercourse with him with that belief.

7. Thus two ingredients are necessary in order to establish an offence under Section 493 of the IPC, viz. i) the man must have deceitfully induced the woman to believe that she is his lawfully married wife and ii) with such belief to make her cohabit with him.

8. In the present case the complainant has examined four witnesses to establish her case. The P.W. 1 is the manager of the hotel where the appellant and the respondent allegedly spent one night, the P.W. 2 is the complainant herself, the P.W. 3 is the brother-in-law of the complainant and the P.W. 4 is the owner of one house where both the appellant and the respondent stayed for sometime as husband and wife. The learned Trial Court has evaluated the

evidence of all the four witnesses and has disbelieved the evidence of P.Ws.1, 3 and 4.

9. The P.W. 1 proved some entries in the register of the hotel to show that the appellant and the respondent spent one night in the hotel. But he admitted that the respondent had mentioned the appellant to be his sister in the entries. Thus the evidence of P.W. 1 was of no use for the purpose of the case. The P.W. 3 who is the brother-in-law of the complainant stated that he had gone to the house of the respondent in the first week of January 1987 to ask him to keep the appellant as his wife but the respondent admitting his marriage with the appellant offered him Rs.5,000/- to give to the appellant, which he did not accept. The learned Trial Court held this witness to be an afterthought for the reasons that as per the complainant herself she had been to the house of the respondent on 30th December 1986 and stayed there for two days but was driven out by the father of the respondent since he was not there. Thus the presence of the respondent during the 1st week of January 1987 was not believable. Further as per the complainant, she had not disclosed the factum of marriage or physical relationship with the respondent before anybody apart from the fact that the said meeting between the respondent and the P.W. 3 or offering of money was not mentioned in the complaint petition. Similarly the P.W. 4 stated that he had rented his house to the respondent where both the appellant and the respondent stayed as husband and wife. Again this was not the case of the complainant that at any time she stayed with the respondent in any house as husband and wife. Rather it was her consistent case that her repeated request to the respondent to take her as his wife was not paid heed to. On going through the record and the evidence of the witnesses, I find no compelling reason to take any different view from what has been taken by the learned Trial court in discarding the evidence of these three witnesses as of no help to the complainant.

10. Thus remained the evidence of only the complainant-appellant herself as P.W. 2 to prove her case. It is to be seen from her evidence as to how far she has been successful to bring home the required two ingredients in order to establish the alleged offence under Section 493 of the IPC.

11. As regards the deceitful inducement, the case of the appellant was that the respondent took her to his house during the absence of his parents, and exchanging two garlands told her that they became husband and wife. Thereafter they cohabited. As stated earlier, the deceitful inducement must be so as to make the woman believe that she is the lawfully married wife of the

man. It is the position of law that the inducement should be such that it can be inferred with normal prudence that the woman could believe that she has been 'lawfully' married to the man. The word 'lawfully' has been used with the wisdom of the lawmakers to backup the belief of the woman with strong conviction about the marriage so as to surrender herself physically to the man for cohabitation.

12. On the aforesaid touchstone the evidence of the complainant-appellant is to be examined as to how far she has been successful to establish the allegations.

13. In the instant case the only contention of the appellant was that the respondent exchanged garlands with her and told her that they became man and wife. That was all to make her believe that she was married to the accused-respondent. Admittedly this exchange of garland was beyond the knowledge and sight of any third person. Further the appellant has categorically stated in her evidence before the Court that she had no idea about marriage by garlanding and that such marriage by garlanding was not recognised by the society. She has further stated that while she belonged to 'Mali' caste, the accused belonged to 'Aghria' caste and that marriage between these two castes was not permissible according to the prevailing social customs. Such facts have also been stated by her brother-in-law, the P.W. 3. Added to this the appellant has further stated before the Court that after the exchange of garlands the accused promised to marry her. She has also stated in her complaint petition that the accused told her that he would register the marriage subsequently but did not keep his words. In view of such glaring statements and admissions of the appellant herself before the Court, I find absolutely no fault with the learned Trial Court to have hold that there was no marriage, much less 'lawful marriage' between the appellant and the respondent so as to be believed by the appellant. It may be mentioned here that the appellant, at the time of the alleged occurrence was studying in 2nd year Arts in Government Women's college and she was not illiterate or ignorant rustic girl so as to believe that by mere exchange of a garland she became the lawfully married wife of the accused-respondent. Further it has been also remained admitted by the appellant in her evidence that the respondent had told her to get the marriage registered but did not comply. In such circumstances it could never have been said that the accused committed any deceit or fraud so as to make the complainant believe that they were lawfully married. In the stated facts and circumstances, I find no

reason to disagree with the learned Trial Court that the required ingredient of the offence under Section 493, IPC has not been established by the complainant.

14. The first ingredient for the offence u/s. 493 IPC having not been established, the second ingredient becomes merely academic. The allegation of physical relationship between the parties has not been seriously assailed by the defence. The complainant has proved certain letters to have been written by the accused-respondent to show their love and physical relationship. She was confronted by the defence in her cross-examination with Ext.-4, a letter said to have been written by the respondent, which revealed that after the exchange of garland on the first day there was no cohabitation between the two. Another factor that came to notice is that the appellant has exhibited a bunch of letters said to have been written by the respondent. But two of the letters vide ext. 6 and ext. 11, are seen to have been written by one Suryakanta and specifically in ext. 11 the author has described himself as 'brother Suryakanta'. Of course the complainant has started her evidence before the Court by saying that the accused was known as Dambarudhar @ Suryakanta besides Naresh Naik. But one person having three different names, as stated, is bit difficult to be believed. Apart from that all the letters do not appear to have been written in one handwriting even to the naked eye. Of course some letters seem to have been written by the respondent Naresh Naik hint about the physical relationship between the two, but the circumstances, as stated, cast a doubt on the veracity of the complainant-appellant. The complainant had given birth to a child in the year 1987 after filing of the complaint case. The learned trial court has calculated the time of conception to be around June 1986, i.e., more than one year after the alleged first date of meeting on 01.04.1985. However, I find those not relevant for the purpose of the case.

15. Thus, it can safely be concluded that the deceitful inducement by the respondent to the appellant to make her believe that she was lawfully married to the respondent having not been proved beyond reasonable doubts, no other persuading reason is found to take any different view from what has been taken by the learned Trial Court in acquitting the accused-respondent from the charge u/s.493 of the IPC.

16. Accordingly the appeal stands dismissed and the judgment of the learned lower Court stands confirmed.

Appeal dismissed.

2015 (II) ILR - CUT- 199

D.P.CHOUDHURY, J

ABLAPL NO. 4492 OF 2015

SANIA @ SANATAN MOHANTY ……..Petitioner

.Vrs.

STATE OF ODISHA …….Opp.Party

(A) CRIMINAL PROCEDURE CODE, 1973 – S.438

Anticipatory bail – Jurisdiction – Whether in case of Court's inclination to grant anticipatory bail or disinclination to grant the said relief can the petitioner be allowed to seek for a direction to surrender before the concerned Magistrate and be released on bail with the direction of this Court on such terms to be fixed by the Magistrate to avoid arrest under the NBWA issued against him ? – Held, No – Such directions are against the principles underlined in Section 438 of the Code – Since this Court is not inclined to grant anticipatory bail the application stands rejected. (Para12,16)

(B) CRIMINAL PROCEDURE CODE, 1973 - S. 438

Anticipatory bail – Maintainability – Whether jurisdiction U/s. 438 Cr.P.C. can be exercised even after submission of charge sheet, taking of cognizance and on issuance of NBWA against the accused ? Held, yes. (Para 8)

Case Laws Referred to :-

1. (2012) 5 SCC page-690 : Rashmi Rekha Thatoi and Another Vs. State of Orissa & Ors.
2. (1980) 2 SCC 565 : Gurubaksh Singh Sibbia Vs. State of Punjab
3. AIR 2003 SC 4662 : Bharat Chaudhary and another Vs. State of Bihar & Anr),
4. 1994 (I) OLR-51 : Hatanath Behera Vs. State of Orissa & Anr.
5. (2014) 57 OCR (SC) 306: Sudam Charan Dash Vs. State of Orissa & Anr.

For Petitioner : Mr. B.N.Satapathy
For Opp.Party : Addl. Standing Counsel

Date of hearing : 8. 5.2015
Date of Judgment :17.6.2015

JUDGMENT

DR. D.P. CHOUDHURY, J.

Lord Bolingbroke observed : "Liberty is to the collective body, what health is to every individual body. Without health, no pleasure can be tasted by man; without liberty, no happiness can be enjoyed by society". [Quoted from the decision reported in **(2012) 5 SCC page-690 (*Rashmi Rekha Thatoi and Another* Vs. *State of Orissa and Others*)]

2. Thus, the liberty has also taken proper place in preamble of our Constitution - "Liberty of thought, expression, belief, faith and worship". It is, therefore, well enshrined in Article 21 of the Constitution that no person shall be deprived of his life and personal liberty except according to the procedure established by law. Such provision has also been engrafted in the mandate of the Code of Criminal Procedure in order to sustain the liberty. But, a Court of law is required to be guided by the defined jurisdiction and not deal with matters being in the realm of sympathy or fancy. So, the Court while considering the anticipatory bail or regular bail must adhere to the parameters to find out whether liberty of a person has been curtailed or is required to be curtailed by following the established principles of law.

FACTS OF THE CASE :

3. Adverting to the facts of the present case, it is the prosecution allegation that on 20.03.2012 at about 11.30 P.M., the petitioner and others came near the scrap shop of the informant and abused him in filthy language demanding some amount. In the event of protest, the petitioner and others assaulted the informant by means of kicks and fist blows and snatched away a mobile phone from his possession. As F.I.R. was lodged, investigation went ahead. The police after investigation, submitted charge-sheet against the petitioner and others under sections 294/385/323/307/379/506/34 of the I.P.C. and the learned Magistrate has already taken cognizance of the said offences. Since the police showed the petitioner as absconder in the charge-sheet, Non-bailable Warrant of Arrest (NBWA) was issued against him. After NBWA was issued, the present petitioner moved this petition under section 438 of the Cr. P.C. praying to grant anticipatory bail.

SUBMISSIONS :

4. Learned counsel appearing for the petitioner relied upon the decision in the case of ***Gurubaksh Singh Sibbia*** Vs. ***State of Punjab*** reported in **(1980) 2 SCC 565,** wherein the Constitution Bench of the Hon'ble Apex Court has been pleased to observe that even after submission of charge-sheet and taking cognizance of offence by the learned Magistrate, the petition under section 438 of the Cr. P.C. is maintainable. He also relied upon the decision reported in **AIR 2003 SC 4662** (***Bharat Chaudhary and another*** Vs. ***State of Bihar and another***), wherein Their Lordships of the Hon'ble Apex Court have been pleased to observe that the Court of Session, High Court or the Supreme Court have the necessary power vested in them to grant anticipatory bail in non-bailable offences under section 438 of the Cr. P.C. even when cognizance is taken or charge-sheet is filed provided the facts of the case require the Court to do so. So, according to learned counsel for the petitioner, such petition is maintainable. Reliance was also placed by him in the case of ***Hatanath Behera*** Vs. ***State of Orissa and another*** reported in **1994 (I) OLR-51,** wherein this Court has followed the decision in the case of ***Gurubaksh Singh Sibbia*** (supra) about maintainability of the petition under section 438 of the Cr. P.C. He further relied upon the decision in the case of ***Basudev Samantaray*** Vs. ***State of Odisha*** in **BLAPL No.23121 of 2013** decided on 20.11.2013, wherein this Court also followed the aforesaid authoritative pronouncements and allowed the anticipatory bail and since charge-sheet has already been submitted, directed the petitioner to surrender before the learned Magistrate and in the event of his surrender, direction was given to the learned Magistrate to enlarge him on bail on such terms and conditions as deemed just and proper. Thus, he submitted that anticipatory bail can be considered even after cognizance of offence has been taken and NBWA has been issued. He further revealed that in such case, the Court may direct the accused to surrender and to release him on bail with any condition as deemed fit and proper.

5. Learned Addl. Standing Counsel appearing for the State opposed the bail plea stating that the offences being serious in nature, the petition for anticipatory bail cannot be entertained. He further submitted that there are ample materials against the petitioner.

POINTS FOR CONSIDERATION :

6. From the aforesaid submissions and the facts of the case, two points emerge : (1) Whether jurisdiction under section 438 of the Cr. P.C. can be exercised even after submission of charge-sheet and taking of cognizance of offence against the accused; and (2) Whether the Court can ask the petitioner to seek for regular bail while allowing or disallowing the anticipatory bail filed by him under section 438 of the Cr. P.C. and to further direct lower Court to grant regular bail on his surrendering.

DISCUSSIONS :

7. No doubt, the Constitution Bench of the Hon'ble Apex Court in the case of ***Gurubaksh Singh Sibbia*** (supra) observed that even after submission of charge-sheet and taking of cognizance by the Magistrate, petition under section 438 of the Cr. P.C. is maintainable. Same decision has also been followed in the case of ***Bharat Chaudhary and another*** (supra), wherein Their Lordships have been pleased to observe in para-7 at page-4663 that :

> "xxx xxx xxx
>
> The fact that a Court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet would not by itself, in our opinion, prevent the concerned Courts from granting anticipatory bail in appropriate cases. xxx xxx".

8. With due respect to the above decision, it is clear that even after submission of charge-sheet and taking of cognizance of offence, the petition under section 438 of the Cr. P.C. is maintainable. This view has also been well followed in the cases of ***Hatanath Behera*** and ***Basudev Samantaray*** (supra). Thus, considering all such decisions, in the present case, it must be held that the submission of charge-sheet, taking of cognizance of offence by the concerned Magistrate and issuance of NBWA cannot be a bar to exercise the jurisdiction under section 438 of the Cr. P.C. As such, point No.(i) is answered accordingly.

9. The second point before this Court is whether in case of Court's inclination to grant anticipatory bail or disinclination to grant the said relief, can the petitioner be allowed to seek for direction to surrender before the concerned Magistrate and can he be released on bail with the direction of this Court on such terms to be fixed by the learned Magistrate to avoid arrest under the NBWA issued against him ? In the case of ***Rashmi Rekha Thatoi and Another*** Vs. ***State of Orissa and Others*** reported in **(2012) 5 Supreme**

Court Cases 690, Their Lordships of the Hon'ble Apex Court have been pleased to observe at para-19 as under :

> "The aforesaid provision in its denotative compass and connotative expanse enables one to apply and submit an application for bail where one anticipates his arrest in a non-bailable offence. Though the provision does not use the expression "anticipatory bail", yet the same has come in vogue by general usage and also has gained acceptance in the legal world".

10. Thus, exercise of jurisdiction under section 438 of the Cr. P.C. is distinct from the jurisdiction exercised under section 437 of the Cr. P.C. inasmuch as in an application for anticipatory bail, one anticipates his arrest in a non-bailable offence, whereas application for regular bail is not confined to anticipating arrest but it also includes execution of NBWA, submission to the custody and for asking the concerned competent Court to consider the bail application. Their Lordships in the above decision have not only observed the essential concept of relevant provisions, but also have been pleased to rely on the decision in the case of ***Savitri Agarwal*** Vs. ***State of Maharashtra*** reported in **(2009) 8 SCC 325** to the extent that the provisions of section 438 of the Cr. P.C. cannot be invoked after arrest of the accused and after arrest, the accused must seek his remedy either under section 437 or under section 439 of the Cr. P.C. if he wants to be released on bail in respect of the offence or offences for which he has been arrested.

11. Not only this, but also Their Lordships in the case of ***Rashmi Rekha Thatoi and Another*** (supra) have been pleased to observe as under :

> "33. xxx xxx xxx
>
> On a reading of the said authoritative pronouncement and the principles that have been culled out in *Savitri Agarwal* there is remotely no indication that the Court of Session or the High Court can pass an order that on surrendering of the accused before the Magistrate he shall be released on bail on such terms and conditions as the learned Magistrate may deem fit and proper or the superior court would impose conditions for grant of bail on such surrender. When the High Court in categorical terms has expressed the view that it is not inclined to grant anticipatory bail to the petitioner-accused it could not have issued such a direction which would tantamount to

conferment of benefit by which the accused would be in a position to avoid arrest. It is in clear violation of the language employed in the statutory provision and in flagrant violation of the dictum laid down in *Gurbaksh Singh Sibba* and the principles culled out in *Savitri Agarwal.* xxx xxx".

36. In the case at hand the direction to admit the accused persons to bail on their surrendering has no sanction in law and, in fact, creates a dent in the sacrosanctity of law. It is contradictory in terms and law does not countenance paradoxes. It gains respectability and acceptability when its solemnity is maintained. Passing such kind of orders the interest of the collective at large and that of the individual victims is jeopardised. That apart, it curtails the power of the regular court dealing with the bail applications.

37. In this regard, it is to be borne in mind that a court of law has to act within the statutory command and not deviate from it. It is a well-settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory power a court is bound to act within the four corners thereof. The statutory exercise of power stands on a different footing than exercise of power of judicial review. This has been so stated in *Bay Berry Apartments (P) Ltd.* V. *Shobha* [(2006) 13 SCC 737] and *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey* [(2006) 1 SCC 479]".

12. With due respect to the said decision, it is clear that any direction in the application for bail under section 438 of the Cr. P.C. about surrendering of the accused before the concerned Magistrate and releasing him on bail on such and such terms and conditions as the learned Magistrate may deem fit and proper or direction by the superior Court imposing conditions for grant of bail on such surrendering of the accused should not be passed under such provisions, as they are against the principles underlined in section 438 of the Cr. P.C. The decision in the case of ***Rashmi Rekha Thatoi and Another*** (supra) has been well followed in the case of ***Sudam Charan Dash*** Vs. ***State of Orissa & Anr.*** reported in **(2014) 57 OCR (SC) – 306.** In this regard, learned counsel for the petitioner submitted that this Court in the case of ***Basudev Samantaray*** (supra) has been pleased to allow the application for anticipatory bail and then directed the petitioner to surrender before the learned J.M.F.C.(P), Kujang within fifteen days and prayed for bail and on

such event, direction was given to the learned Magistrate to enlarge him on bail on such terms and conditions as deemed just and proper and in case the petitioner is arrested by the police in the meantime, he shall be produced before the learned Magistrate forthwith on the same day, who shall grant him bail on such terms and conditions as deemed just and proper by him. As such, it was his forceful submission to follow the decision in the case of ***Basudev Samantaray*** (supra).

13. On an anxious reading of the said decision, it is found that His Lordship has been pleased to observe that the application for grant of anticipatory bail is maintainable after filing of the charge-sheet and, for the reasons stated, allowed the anticipatory bail with the aforesaid directions.

14. It was the submission of learned Addl. Standing Counsel that observation of this Court in the last para of the order is result of the case, but not what is decided by the Court. In the case of ***Kalyan Chandra Sarkar*** Vs. ***Rajesh Ranjan @ Papu Jadav*** reported in **2005(1) Crimes 202 S.C.,** Their Lordships have been pleased to observe as under :

> "While deciding the cases on facts, more so in criminal cases, the Court should bear in mind that each case must rest on its own facts and the similarity of facts in one case cannot be used to bear in mind the conclusion of facts in another case (*C. Panduranga & Anr.* Vs. *State of Hyderabad* : 1958 (1) SCR 1083). It is also well settled principle that while considering the ratio laid down in one case, the Court has to bear in mind that every judgment must be read as applicable to the particular facts proved or assumed to be true. Since the generality of expressions which may be found therein are not intended to be exposition of the whole of the law, but are governed and clarified by the particular facts of the case in which such expression are to be found. A case is well authoritative what it actually decides and not logically follows from it."

15. Now, applying the aforesaid decision, the view of this Court in the concluding paragraph in the case of ***Basudev Samantaray*** (supra) is the observation of the Court while disposing of the case on facts of that case, but the ratio of the case is that the application under section 438 of the Cr. P.C. is maintainable as in that case the decisions of ***Hatanath Behera, Bharat Chaudhary and another***, and ***Gurubaksh Singh Sibbia and others*** (supra)

have been well dealt with. It is also settled by the Hon'ble Apex Court in the case of ***State of Orissa and others*** Vs. ***Balaram Sahu and others*** reported in **95 (2003) C.L.T. Page-287 (S.C.),** where Their Lordships have been pleased to observe that the direction issued on facts while disposing of cases is not binding precedent. Thus, the contention of learned counsel for the petitioner appears to be not acceptable to direct the petitioner to surrender before the concerned Magistrate, who will grant the bail with such and such terms and conditions, as the NBWA has been issued inasmuch as the said principle has been well jettisoned in the cases of Rashmi ***Rekha Thatoi and Another*** (supra) and ***Sudam Charan Dash*** (supra).

16. Considering the facts of the case that the charge-sheet has already been submitted under the aforesaid sections of law, which are major offences against the petitioner, who has become absconder, and having regard to the nature of accusation against the petitioner, I am loath to grant anticipatory bail under section 438 of the Cr. P.C. to the petitioner and the same stands rejected. When the petition under section 438 of the Cr. P.C. is rejected, no direction can be given to the concerned Magistrate to release the petitioner on bail with such terms and conditions on his surrendering or on his production being arrested. It is needless to point out that in the event the petitioner is produced being arrested by virtue of NBWA issued against him or on his surrendering before the concerned Magistrate, if so advised, he may move regular bail before the concerned Court, who will dispose of the same according to law. The petition under section 438 of the Cr. P.C. is disposed of accordingly and the interim order dated 15.05.2015 stands vacated.

Application disposed of.