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

MISC. CASE NO. 795 OF 2013
(Arising out of W.A No. 539 of 2013)

STATE OF ORISSA & ORS. .....Petitioners

.Vrs.

KHIROD CHANDRA MOHAPATRA .....Opp. Party

LIMITATION ACT, 1963 – S.5

Condonation of delay – Delay of 636 days – Whether such delay due to official procedure at the Government level can constitute "Sufficient Cause" so as to condone the delay – Held,No – Application for condonation of delay is liable to be dismissed.

(Paras 9,11)

Case Laws Rreffered to :-

1.(1987) 2SCC107 : In Collector, Land Acquisition, Anantnag and Anr. -V- Mst. Katiji & Ors.
2. (1996) 3SCC 132 : State of Haryana -V- Chandra Mani & Ors.
3. (2012) 3 SCC 563 : Office of the Chief Post Master & Ors. -V- Living Media India Ltd. & Anr.

For Petitioner - Mr. S.N.Mohapatra, Standing Counsel (S&ME)

Date of Order: 23.12.2014

ORDER

DR.A.K.RATH, J.

Aggrieved by and dissatisfied with the order dated 18.01.2012 passed by the learned Single Judge in W.P.(C) No.17840 of 2009, the State of Orissa has preferred the Letters Patent Appeal. Since there was delay of 636 days in filing the appeal, the instant application under Section 5 of the Limitation Act has been filed for condonation of delay.

2. Heard Mr.S.N.Mohapatra, learned Standing Counsel for the School and Mass Education-petitioners.

3. In the application for condonation of delay, the petitioners have assigned the following reasons in paragraph-4, which is quoted hereunder:-

"4. That the delay caused in filing the writ appeal in due to following official procedure which is incidental to the decision making process at the government level and the said delay caused is not due to deliberate in action of the present appellants.

4. Whether the reasons assigned in the application for condonation of delay can constitute "sufficient cause' so as to condone the delay ?

5. While considering the sufficient cause in the light of Section 5 of the Limitation Act, 1963, the apex Court pointed out various principles for adopting liberal approach in condoning the delay in matters instituted in the Court.

6. ***In Collector, Land Acquisition, Anantnag and Another Vs. Mst.Katiji and Others*** (1987) 2 SCC 107, the apex Court held as follows:-

"1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

7. The learned Standing Counsel for the School and Mass Education placed reliance on the aforesaid decision, to buttress his submission that some amount of latitude is permissible when the State is the applicant. Be it noted that in *Mst.Katiji (supra*), there was only delay of four days. Learned Standing Counsel for the School and Mass Education also placed reliance in the ***State of Haryana Vrs. Chandra Mani and others*** (1996) 3 SCC 132. The apex Court while condoning the delay of 109 days in filing the LPA before the High Court has observed that certain amount of latitude within reasonable limits is permissible having regard to impersonal bureaucratic setup involving red-tapism.

8. In ***Office of the Chief Post Master & Others Vrs. Living Media India Ltd. & Another,*** *(2012) 3 SCC 563*, after survey of the earlier decisions, the apex Court in paragraphs 27, 28, 29 and 30 held as follows:-

> "27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.
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> 28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.
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> 29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was

> bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.
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> 30. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay."

9. By no stretch of imagination, it can be said that the grounds stated in the application for condonation of delay constitute sufficient cause. Merely stating that the delay was caused due to official procedure and there is no deliberate latches or willful negligence on the part of the petitioners in not filing the Letters Patent Appeal in time is not suffice. The ground does not contain any acceptable or plausible reasons. No cause much less any sufficient cause has been shown in not filing the appeal in time.

10. We are of the view that the ratio of the judgment in *Living Media India Ltd. (supra)* applies with full force in the facts and circumstances of the present case.

11. In view of the same, the Misc.Case merits no consideration. Accordingly, the same is dismissed. Consequently, the Writ Appeal No.539 of 2013 is dismissed.

Appeal dismissed.

2015 (II) ILR - CUT- 211

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

JCRLA NO. 52 OF 2004

KUMI @ KUMAR NAHAK .....Appellant

.*Vrs.*

STATE OF ORISSA …….Respondent

CRIMINAL TRIAL – Murder Case – Allegation of false implication – It does not transpire from the evidence as to why prosecution will spare the real assailant and will foist a false case against the appellant with whom none of the eyewitnesses had any animosity or compelling reason to falsely implicate – Defence has not been able to cross examine both the eye witnesses on that aspect and even failed to bring out the circumstances for the P.W.s to prevaricate a cooked up story to implicate the appellant in a case of murder – The appellant in his 313 Cr.P.C. statement has also not been able to spell out any reason for his false implication – Held, no reason that the eyewitnesses deposed falsely against the appellant.

(Para 19)

CRIMINAL TRIAL – Appreciation of evidence – Allegation of discrepancies in the evidence of the eye witnesses – It is but natural that some discrepancies and inconsistencies will definitely occur in the statement of the witnesses and in cross examinations but unless those discrepancies and inconsistencies are of vital nature pointing conversely than what has been alleged by the prosecution, they can not be taken into consideration to throw the entire prosecution version over board – Held, there being no discrepancy surfaced in the depositions of the witnesses this Court is not impressed by the submissions of the learned counsel for the appellant that the inconsistency and incongruity occurring in the statement of the eye witnesses demolishes the prosecution version.

(Para 19)

For Appellant : M/s. A.P.Ray, R.K.Nanda, C.R.Sahoo & Smt. Susamarani Sahoo

For Respondent : Mr. J.Katikia (Addl. Govt. Adv.)

Date of hearing : 06.05.2015
Date of judgment: 12.05.2015

JUDGMENT

VINOD PRASAD, J.

Appellant Kumi @ Kumar Nahak having being found guilty of offences u/s 302/ 506 (II) I.P.C. was convicted of those crimes and was sentenced to life imprisonment with a fine of Rs. 1000/- and in default in payment of fine to serve additional imprisonment of six months on the first count and one year imprisonment on the second count by Additional Sessions Judge(FTC) , Chatrapur, district Ganjam in Sessions Case No. 11 of 2003/Sessions Case No. 82 of 2003(GDC) vide impugned judgement and order dated 12.12.2003, hence this appeal at the behest of the convicted accused appellant challenging the aforesaid decision.

2. Trotting out the background facts which had it's genesis in nature's curse, it becomes manifest from the prosecution case unfurled during trial that village *Baunsia Nuapalli* under police circle Kabi Surya Nagar has a locality/lane *Bauri Sahi* . Nature's wrath broke out epidemic in that area resulting in untimely and premature deaths of many infants prior to the date of present incident (3.9.2002), which had sent jittery and deterrence amongst local inhabitants. Worsening to the suspicious fearful psyche was the theft of two He-goats purchased for the purposes of scared sacrifice for alleviating supernatural spirits. Local inhabitants were of the view that all the miseries were the result of some black magic and therefore in a conclave they decided to contact some foreteller and also to employ the services of a sorcerer to get rid of their misfortune. As decided one person from each house of the locality jointly approached one Ramesh Gosinhi of village Ramshaw and after having met him returned back to their village in the afternoon where they received information that youngest daughter of Santosh Nahak, elder brother of the appellant, expired due to dysentery at mid noon (12 a.m.). While such eerie situation had engulfed and persisted in the area, the misfortune dawned upon Sani Nahak, the deceased and mother of Soura Nahak the informant/PW5, who after performing some exorcism(*Jhada-Phunka)* in local dialect called *Bhandari Atika,* on her grandson, who was ailing, went to the village tank to dispose off the materials used in such *Bhandari Atika(* exorcism). While returning from the tank when Sani Nahak reached in the vicinity of her house near the house of one Ganapati Nahak, just four houses away from her residential abode, at 8 p.m. on 3.9.2002, that she was repeatedly assaulted by the appellant by *Kati* sputtering that it was she who had caused death of his niece (*jhiari)* by

practising sorcery. When informant endeavoured to intervene and save the life of his mother, he was threatened with life and was chased to be assaulted and so the informant scampered inside his house and bolted the door to save his life. Appellant thereafter perambulated in a fit of anger challenging local inhabitants not to report the matter to the police and thereafter the situation subsided as the appellant left the incident scene. Informant/PW5 being terrified because of hurled life threatening intimidation could not muster enough courage to proceed for the police station during incident night itself and therefore following day morning he accompanied with Pitabash Padhi, village Gramrakhi tramped to the police station Kabisurya Nagar, at a distance of 13 KMs, where he orally dictated his FIR to O.I.C., Subash Chandra Panda/ PW15, which was recorded at 8.10 a.m. and after verifying the contents that the informant had put his thumb impression on it which FIR is Ext.8 and Ext. 8/2 is the formal FIR recorded as crime no.111 of 2002 u/s 302 I.P.C.

3. O.I.C. S.C.Panda/PW15 immediately embarked upon the investigation, dispatched constables Debakrar Swain/PW13 and constable Surjyanarayan Rath alongwith command certificate Ext.5 to guard the cadaver of the deceased at the spot, examined the informant and Gramrakhi and slated their statements and then he came to the incident spot and sketched spot map Ext.9. Witness Sukanti Nahak was examined and thereafter inquest over the corpse of the deceased was performed and inquest memo Ext.1 was prepared. After examining inquest witnesses I.O. seized blood stained and plain earth vide seizure list Ext.2 and then dispatched the dead body for post mortem examination along with dead body chalan Ext. 6 through Constables Debakrar Swain/PW13 and constable Surjyanarayan Rath and subsequent thereto other witnesses were examined and their statements were taken down. PW15/I.O. also requisitioned scientific team which had also visited the spot. On 5.9.2002 I.O. seized command certificate issued by him along with blood stained white saree, ornaments, waist thread and *Karata* of the deceased and prepared it's seizure list Ext 3. Ornaments were handed over to the informant through Zimanama Ext 10. Accused appellant voluntarily surrendered before J.M.F.C. Kodala on 6.9.2002. I.O./PW15 received autopsy report on 19.10 2002 and he also seized sample blood and hair of the deceased sent by the doctor vide Ext 4. Lantern, M.O.II, associated with the incident was seized vide Ext 11. Seized articles were dispatched for chemical examination vide forwarding report Ext.12 and scientific

officers report is Ext. 13. Investigation was called off by laying down a charge sheet against the appellant on the strength of which G.R. Case No. 209 of 2002 was registered against the appellant in the court of J.M.F.C. Kodala.

4. Autopsy on the cadaver of the deceased was performed by Dr. Sachidananda Mohanti/ PW14, a professor, F.M.T. Deptt. M.K.G.C.Medical College, on 4.9.2002 at 4 p.m. who found following ante mortem injuries on the dead body:-

(i) Cut wound of size 6 cm. x 2.5 cm. x muscle deep present over the deltoid region starting 4 cm. lateral to the shoulder tip, extending backwards.

(ii) Cut wound of size 9 cm. x 3 cm. x bone deep placed obliquely over the shoulder blade starting 3 cm. behind to the tip of the shoulder extending posteriorly downwards.

(iii) Cut wounds 3 in number, measuring from 12 cm. x 3 cm. x 14 cm. x 3 cm. x vetibra col. deep situated almost parallel to each other with a gape of 1.5 cm. to 2 cm. present over the back of neck, involving the right scapular area crossing the midline with a direction of above downwards and medially.

(iv) Cut wound of size 8 cm. x 5 cm. x muscle deep situated just below the external injury no.3 over the right scapula region.

(v) Cut wounds 4 in number varying from 18 cm. x 5 cm. x bone deep to 20 cm. x 5 cm. x bone deep present almost parallel one below and other involving the right side of lower face and upper neck, starting from the lateral boarder from nose extending posteriorly and downwards with cutting up underlying muscles vessels nerves and mediable at multiple places.

(vi) Cut wound of size 5 cm. x 0.5 cm. x skin deep present over the left molar area and nose starting from the bridge of the nose extending left laterally in a horizontal manner.

(vii) Cut wound of size 5 cm. x 1 cm. x bone deep present obliquely over the left temple.

(viii) Cut wound of size 8 cm. x 5 cm x muscle deep situated over the right deltoid area in obliquely manner.

(ix) Cut wound of size 2 cm. x 1 cm. x muscle deep present 3 cm. below external injury no. viii.

Internal examination of the cadaver revealed that injury No.iii had travelled up to the body of cervical vertebra cutting over lying vessels, muscles nerves and spine process with surrounding infiltrations. All the injuries were ante mortem and homicidal in nature and were the outcome of infliction by moderately heavy cutting weapon. Cumulatively and specially injuries no. (iii) and (v) including internal damages caused by them were fatal in ordinary course of nature and haemorrhage and shock were the cause of death which had occurred 18 to 24 hours prior to autopsy examination. Post Mortem examination report is Ext.7. These injuries were possible by seized Kati, M.O.II.

5. Since committal court of J.M.F.C. Kodala, which has submitted the record, found the offence against the accused appellant triable by Sessions Court, it committed the case of the appellant to the Sessions Court for trial on 22.2.2003 and before the Sessions Court the same was registered as Sessions Case No. 82 of 2003, State versus Kumi@ Kumar Nahak.

6. Learned trial judge on 11.09.2013 charged the appellant with offences punishable under Section 302/506-(II) IPC and since appellant abjured those charges by pleading not guilty and claimed to be tried therefore, to prove his guilt and establish the charge, the sessions trial procedure was resorted to by the learned trial judge.

7. Prosecution was satisfied by examining in all fifteen witnesses during the trial and tendering thirteen documentary evidences in the form of exhibits most of which have already been recorded hereinabove. Two material objects such as MO-I, the blood stained saree and MO-II, the Lantern were produced.

8. Defence of the accused was one of denial and false implication.No defence witness was examined by the accused-appellant to establish his innocence nor any document was filed by him.

9. Out of the witnesses examined Smt. Sukanti Nahak/PW1 and her husband informant Soura Nahak /PW5 are the fact witnesses. Arjuna Nahak/PW 2 and Pravakar Nahak/PW 4 are the inquest witnesses. Rabi Nahak/PW3 is a witness of the feast and regarding the lantern story put forth by the prosecution. Pitabasa Padhi/PW.6 is the Grama Rakhi, who had

covered the body of the deceased with a saree and had accompanied the informant to the police station. Judhistir Nahak /PW7 , Prakash Nahak/PW 8, Surata Nahak/PW9 and Ranka Nahak /PW 10 all had turned hostile although, they have given evidence regarding cause of murder, theft of goat and carrying of Bhandari Atika to the village pond for submerssion, going to the foreteller in village Ramshaw and returning from there in the evening. B.Lachamaya Reddy/PW 12 is a police constable and a seizure witness. Debakar Swain/PW 13 is also a police constable, who had guarded the dead body and then he carried it to the doctor, where he identified it. Dr.Sachidananda Mohanty, autopsy doctor is PW 14 and the Investigating Officer/recorder of the FIR, OIC Subash Chandra panda is PW 15.

10. Learned trial judge after critically appreciating the overall testimonies of the witnesses, scanning over the documents in the form of exhibits and summating facts and circumstances of the incident found the prosecution witnesses to be reliable and guilt of the appellant anointed convincing without any ambiguity ultimately conclude that the charges against the appellant have been proved to the hilt and, therefore, convicted him on both the counts and sentenced him for life imprisonment for the charge of murder and one year for the charge of criminal intimidation, which decision has now been impugned in the instant appeal.

11. In the above factual matrix, we have heard Mr. Chitaranjan Sahoo, learned counsel for the appellant in support of the appeal and Sri J.Katikia, learned Addl. Government Advocate for the respondent-prosecutor State and have vetted through the trial court record.

12. From the oral and documentary evidences, it is evidently discernible that the incident had occurred on 03.09.2002 at 8 p.m. in village Bounsia Nuapalli under Kabisuryanagar Police Station. Scanning simultaneously for the sake of brevity and to avoid repetition, the evidences of both the fact witnesses Smt. Sukanti Nahak/PW 1 and her husband-informant Soura Nahak/PW 5 it becomes apparent that the accused-appellant was known to them being a close neighbor and the deceased was the mother-in-law of PW1 and mother of informant PW 5. The incident had occurred when the deceased was returning to her house from the village tank where she had gone, accompanied by informant PW5, to submerge ‘Bhandari Atika’ and the place of assault on her by the appellant by a Kati was just four houses prior near the house of one Ganapati Nahak. Parts of body where she was assaulted were on her head, neck and other parts of the body and when the

deceased mother-in-law had raised shrieks "Marigali" after sustaining injuries that her daughter-in-law/PW1 had witnessed the incident standing on her veranda. Husband of PW1, informant/PW5 had arrived at the incident spot from *"Kotha Ghara"* from a distance of about 60 feet and when he mustered the courage to save his mother, accused-appellant threatened and chased him, which forced him to enter into his house and bolt the door to save his and PW1's lives. The accused then rambled around the street sputtering and forbidding the inmates not to report the incident to the police nor to come out. Throughout the night, the cadaver of the deceased was left open on the road. Next day at early morning hours, on opening the door of their house, when PWs 1&5 could not spot the appellant that they stepped out and informant PW5 went to inform village watchman (Gramrakhi). The background motive for the assault was suspicion of the appellant that the witch craft practiced by the deceased had caused the life of his niece, daughter of his elder brother who had expired on that very day, which is evident from the fact that while assaulting the deceased, the appellant was sputtering that it was she who had killed his niece. On the court's query the daughter-in-law/PW1 divulged that by magical power (*Jhada-phunka)* her mother-in-law used to cure aliments in the village prior to her murder. Cross examination of PW1 indicates that she had disclosed that prior to the incident the deceased had done *Jhada-phunka* on her son and then had gone to the village tank to throw the material *Bhandari Atika* along with her husband/PW5, but the mother-in-law was returning earlier as the informant had stayed back to attend nature's call and he came subsequently to the spot. Appellant was a resident of *Bauri Sahi*, which was on the other side of the road. *Kothaghara,* from where the informant/PW5 had arrived at the incident scene was at a distance of 30 cubits from their house and 60 cubits from the house of the accused. PW 1 further disclosed that there were 20 to 25 houses in all on both the sides of the street *Bauri Sahi*. She further stated that the street light was at a distance of about 4 houses from the place of the incident and the electricity light on the other side of the street was about 60 cubits away. She denied the defence suggestion that there was no electric light at the spot nor her husband had returned to the house at the time of the incident. PW 1 clearly testified that she did not endavour to save her mother-in-law and people of the street had bolted themselves inside their houses during the incident.PW1 had witnessed her mother-in-law sustaining three to four Kati blows at the hands of the appellant and being terror

stricken, she could not raise any alarm to call his brother-in-law and his wife who were taking their dinner in the backside of their house, which was situated at the other end of the inner court yard. None of the neighbors of the locality also came to save the deceased. She along with others had gone to see the cadaver of the deceased only after the police had arrived at the spot. Divulging motive for the murder PW1 corroborated the prosecution story of theft of two he-goats purchased from the community fund for the purposes of sacred sacrifice and also the decision taken in the committee that one person from each house of *Bauri Sahi* will go to the foreteller of Ramshaw village to find out a sorcerer to get rid off the super natural wrath and to be made known the reason for deaths of the infants. PW 1 further disclosed that her husband was earning his livelihood by bringing fire wood for sale from *Ghoda pahada*, which was about 3 to 4 hours walking distance from their house. She refuted the defence suggestion that she was not a witness to the incident as she was inside her house and PW5 had informed her about the murder.PW1 further abjured the defence case that the appellant had not assaulted her mother-in-law by a Kati and that she had spelt out a mendacious story and had prevaricated statements because of animosity.

13. Turning to the evidence of the informant PW 5, he corroborated his wife PW1 in all material significant aspects about the murder of his mother and in examination-in-chief had stated those very facts regarding date, time, place and manner of assault which had already been narrated by PW1, and hence we eschew repetition for the sake brevity and convenience. Concurring PW1, informant/PW5 also stated that after submerging the articles, used in *Jhada-phunka* to cure his ailing son, in the tank he remained behind to attend the call of nature while his mother alone returned back to her house. While returning to his house, after attending the call of nature, informant/PW5 when reached near *Kothaghara,* he heard shrieks(hullah) of his mother and witnessed the accused assaulting her by Kati shouting "Sabu Pilaku Gaon ra Mari Deuchu", in front of the house of Ganapati Nahak and when PW5 endeavored to save his mother appellant forbade him not to do so and even chased him to assault which forced the appellant to enter his house and bolt the door to save his and PW1's lives. PW 5 had confirmed the presence of his wife PW1 who, according to him, was standing in the verandah of her house at that time and was watching the incident and both had entered into the house and bolted the door to save their lives while the accused-appellant was tramping on the street hurling

life threats. Next day morning at 6 a.m. the informant/PW 5 had proceeded to the Police Station along with the Choukidar/Gramarakhi and had narrated the entire murderous episode to the OIC of the Kabisuryanagar P.S. Causa Causans of the incident was divulged to be the same as that of PW 1. Police had arrived at the incident spot at 10 a.m. and had conducted inquest over the cadaver and had obtained LTI of the informant on the inquest memo and thereafter the corpse was dispatched for autopsy purposes. On being cross examined informant had disclosed that he did not remember the calendar date, month and year of the incident, but it was a Tuesday. From the evidence of the informant/PW 5 it further emerges that the distance between the house of the informant and the tank was 100 cubits. The village street was built up on a filled up Nala(drainage). House of the appellant was situated at the end of the street on the western side of the tank and three electric poles existed besides the street. *Kothaghara* from where the informant had heard his mother's shrieks was 20 houses away from the incident spot and at the time of incident, electric bulb at *Kothaghara* was lighting. Informant has further disclosed that a meeting was convened at *Kothaghara*, which was scheduled to be held at the time of the incident to discuss about the cause of deaths of the children of the street and theft of two he-goats but due to murderous incident it did not take place. The informant has further deposed that reaching at the spot, he had witnessed the appellant giving Kati blows on the deceased, who was lying on the road. PW5 had not given any emergency calls nor had approached the persons sitting at the *Kothaghara* for help. The appellant had hurled threat calls to the local inhabitants about three times and because of this local inhabitants remained inside their houses by clasping their doors. Candidly the informant accepted that he had not informed about the murder to the *Naib-Sarpanch* or to the Ward member. House of Pitabas, village *Choukidar*(watchman) was situated at village Bounsia at some distance from the place of the incident. Nobody had searched or disturbed the cadaver of the deceased. Although under some confusion the informant had stated that he did not know the contents of the report which was written, but he had flatly refuted defence case that the appellant had not assaulted and killed his mother and that he was deposing falsely.

14. Looking to the evidence of hostile witnesses Judhistir Nahak/PW 7, Prakash Nahak/PW 8, Sarata Nahak/PW 9 and Ranka Nahak/PW 10, it becomes evident that they have also confirmed the prosecution case regarding theft of he-goats and decision by the village community to

contact foreteller of Ramshaw village and death of the deceased taking place on the date, time and place alleged by the prosecution. The prosecution had cross examined all these witnesses and had got elicited the contradictions in their 161 Cr.P.C. statements confirming the prosecution case. PW 8 had even stated that he had heard the call of the informant that they were carrying *Bhandari Atika*, therefore, the villagers should remain inside their houses and because of that, the local people had closed the doors of their houses and had remained inside. Such a statement has also been made by Ranka Nahak/PW10 and Bilambar Nahak/PW 11 corroborating PW 8.

15. Turning to the evidence of other witnesses, PW 2 is a witness of inquest, but his evidence clearly spells out that soon after the incident, name of the appellant as perpetrator of the crime was echoing in the locality. He had accompanied the cadaver of the deceased and identified it to the doctor. He is also a witness of inquest and had put his LTI on the inquest report.

Rabi Nahak/PW 3 had deposed besides other things that Gobinda Nahak of the street had paid him Rs.5/- to inform the inhabitants of both the sides of the street to attend the feast to be hosted by Gobinda Nahak on the event of maturity of his daughter, which he had informed by shouting from verandah of Kothaghara where he had lighted a lantern and then had returned to his house. After taking the dinner when he again came out of his house, he found the aforesaid lantern kept on *Kothaghara* missing, which he found in front of the house of Ganapati Nahak, where a person was lying on the road. When this witness had gone to pick up the lantern, the accused-appellant had nixed him not to take the lantern and threatened him to kill if he will remove it and at that time appellant was holding a Kati. PW 3 then returned to his house due to fear. This witness further confirmed that the person who was lying on the road was the deceased. During his cross examination, PW 3, however, stated that later on he heard that the person lying on the road was Sashi Nahak, the deceased. Pravakara Nahak/PW 4 had received the message that the appellant had killed Sashi Nahak on which he had came to the incident village and spotted the dead body and found injuries on the neck and other parts of the cadaver. He is a witness of inquest and had signed the inquest memo Ext.1 prepared by the police. Nothing worthwhile has been got elicited from his cross examination. Pitabasa Padhi/PW6 was a Village Choukidar/Gramarakhi since last 20 to 22 years. He was informed about the murder in the morning at 6 a.m. by the

informant/PW 5 and then he accompanied the informant to the spot to locate the dead body lying infront of the house of Ganapati on the path way and then he brought a saree from the house of the deceased and had covered the dead body to save it from being mutilated by the vultures. He had accompanied the informant to the police station to lodge the FIR. He has also proved the collection of blood stained and sample earth and seizure list thereto, which is Ext.2. Nothing worthwhile has come out from his cross examination to mullify the prosecution case on the core issues. Autopsy doctor and the Investigating Officer have stated those very evidences which have already been stated hereinabove attaching credence to the prosecution version and thereby confirming its authenticity.

16. In the background, learned counsel for the appellant criticized the impugned judgment for the reasons that there are discrepancies, inconsistencies, improvement in the statements of the witnesses and therefore, the witnesses are not reliable and the prosecution therefore, has failed to discharge its initial burden of poof and the appellant deserves to be acquitted. It has further been argued that the deceased was murdered in darkness when there was no source of light available and therefore, nobody was able to spot the real assailant. Next it was submitted that there was no motive for the appellant to murder the deceased and therefore, prosecution has not been able to attribute motive to the appellant to commit the murder of the deceased. Learned counsel therefore, submitted that the appeal be allowed and the appellant be acquitted.

17. Arguing conversely and putting forth the incriminating evidences appearing against the appellant, learned Additional Government Advocate referring to many circumstances clinchingly anointing the guilt of the appellant submitted that the prosecution has anointed guilt of the appellant convincingly without any ambiguity and therefore, the appeal being devoid of merit be dismissed and the conviction and sentence of the appellant be concurred.

18. Bestowing careful consideration on rival submissions and after critically appreciating facts and circumstances and the evidence of the fact witnesses as well as documentary evidences on record, it emerges that so far as date, time and place of the incident are concerned, the same have not been challenged with any seriousness by the defence. Testimonies of both the fact witnesses coupled with the depositions of even those witnesses who had turned hostile leaves no manner of doubt that the deceased was

murdered on the date and time of the incident in front of the house of Ganapati Nahak. Collection of blood from the spot further cements the place of the incident. The defence has not been successful in getting any evidence in its favour which can even slightly create doubt in the prosecution story on all the above aspects. Credibility of the prosecution witnesses therefore, remains unshaken on the aforesaid scores and the inescapable conclusion which can safely be arrived is that the date, time and place of the incident have been successfully established by the prosecution.

19. Now the only question to be decided is as to whether it was the appellant who had committed murder of the deceased or it was an unknown assailant and the appellant has been roped in by foisting a false case by the informant. Analyzing the evidences, we find that the prosecution has successfully anointed the presence of the appellant at the spot with sufficient clarity. The background in which the incident had occurred has already been narrated hereinabove. After returning from village Ramshaw, the appellant received a message that younger daughter of his elder brother died because of dysentery. The entire area was under fear psychosis of evil spirit presence and was reverberating with practice of witchcraft by somebody which was bringing deaths of young girls of the locality. In such a view, when PWs 1 and 5 both had stated that the deceased was curing ailments of the local people by exorcism, the apprehension of the appellant that because of her, calamity had fallen on the locality is not a difficult conclusion to arrive at. When the younger member of the family expired, the intuitive motive of the appellant to commit murder of the deceased came in his mind and when he found deceased was returning from the pond after submerging *Bhandari Atika*, the appellant, with total unfounded suspicion severely assaulted the deceased with a Kati and caused her death. Both the son and daughter-in-law in no uncertain terms have seen the appellant assaulting the deceased with a Kati. The evidence of the doctor also confirmed that the deceased had sustained injuries by a sharp moderating heavy cutting weapon and therefore, the medical evidence is consistent with that of the ocular version. Otherwise also the nature of the injury as was recorded by the doctor in the autopsy examination report leaves no manner of doubt that they were sharp edged weapon injuries and therefore, could have been inflicted by a Kati. Further it does not transpires from the evidence as to why prosecution will spare the real assailant and will foist a false case against the appellant with whom none of the

eyewitnesses had any animosity or compelling reason to falsely implicate. Defence has not been able to cross examine both the eyewitnesses on that aspect and even failed to bring out the circumstances for the PWs to prevaricate a cooked up story to implicate the appellant in a case of murder. The appellant in his 313 Cr.P.C. statement has also not been able to spell out any reason for his false implication. In such a view, once the defence has completely failed to dislodge the convincing statement of the two relative eyewitnesses, who had no reason to depose falsely against the appellant, we find total absence of any reason to discard the testimony of those two eyewitnesses. The site plan as well as the inquest report coupled with the statement of the I.O. further credits the prosecution version to be authentic and hence established convincingly. None of the castigations by the appellant's counsel is significant to discard the prosecution of the main substratum of its charge. It is but natural that some discrepancies and inconsistencies will definitely occur in the statement of the witnesses and in cross examinations, but unless those discrepancies and inconsistencies are of vital nature pointing conversely than what has been alleged by prosecution, they cannot be taken into consideration to throw the entire prosecution version over board. No such discrepancy surfaced in the depositions of the witnesses and therefore, we are not impressed by the submissions of the learned counsel for the appellant that the inconsistency and incongruity occurring in the statement of the two fact witnesses demolishes the prosecution version. As to whether the informant had arrived at the place of the incident subsequent to the murder where there was sufficient light at the electric pole, the defence has not been able to crumble the prosecution evidence by putting forth any significant evidence or circumstances of unimpeachable character as against the eyewitnesses.

20. In view of our discussions, we find no merit in this appeal and we are in agreement with the learned trial Judge and therefore, the residue is that we are of the opinion that the impugned judgment is infallible.

21. In essence we do not find merit in this appeal which is liable to be dismissed and is hereby dismissed and the conviction and sentence of the appellant recorded through the impugned judgment is hereby confirmed. Appellant is in jail. He shall remain in jail to serve out the remaining part of the sentence.

22. Let the trial Judge be informed accordingly.

Appeal dismissed.

2015 (II) ILR - CUT- 224

I. MAHANTY,J & B. RTAH,J.

WPCRL NO. 397 OF 2014

KAPA @ SOMANATH SAHOO ……..Petitioner

.Vrs.

SATE OF ODISHA & ORS. ……Opp.Parties

NATIONAL SECURITY ACT, 1980 – S.3

Order of detention passed on 26.09.2014 where as the grounds of detention were framed on 29.09.2014 and served on the detenue on that date – Order challenged being violative of Article 22 (5) of the constitution of India – Held, the grounds of detention not being in existence when the order of detention was made the same is liable to be quashed. (Paras 8, 9)

Case Laws Rreffered to :-

1. A.I.R. (88) 1951 : The State of Bombay v. Atma Ram Shridhar Vaidya.
2. A.I.R. 1959 SC 1335 : Naresh Chandra Ganguli for Shri Ram Prasad Das v.The State of West Bengal &Ors,

For petitioner : Mr. D.P.Dhal, Sr. Advocate
M/s. D.Sarangi & S. Mohapatra

For Opp.Party : Additional Government Advocate
M/s. Partha Sarathi Nayak

Date of hearing : 15.04.2015
Date of judgment: 14.05.2015

JUDGMENT

I. MAHANTY, J.

The petitioner-Kapa @ Somanath Sahoo in the present writ application in the nature of habeas corpus, is a detenue under the National Security Act, 1980 and has sought to challenge his detention on various grounds and, in particular, on the ground that "the grounds of detention" on the basis of which the satisfaction of the detaining authority is to be arrived at, was not in existence on the date when "the order of detention" was passed and served upon the petitioner-detenue.

2. Pursuant to direction issued by this Court in course of hearing of this case, the original file of the detaining authority was called for and on verification of the same, it is found that while "the order of detention" is dated 26.09.2014 (Annexure-1), "the grounds of detention" was served on the petitioner on 29.09.2014 and from the records of the detaining authority, it is seen that "the grounds of detention" were framed on 29.09.2014.

3. Mr. Sarangi, learned counsel for the petitioner submitted that it is well settled by judicial precedents that "the grounds of detention" must be in existence when "the order of detention" is made. It is submitted that in the case at hand, "the grounds of detention" were not in existence on the date on which "the order of detention" was passed i.e. on 26.09.2014 and only came into existence on later date i.e. on 29.09.2014. Consequently, the impugned order is clearly violative of Article 22(5) of the Constitution of India, which is quoted hereunder:

> "**22. Protection against arrest and detention in certain cases.**
>
> **(5)** When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

4. In support of his contention, learned counsel for the petitioner placed reliance on the Constitutional Bench judgment rendered by the Hon'ble Supreme Court in the case of **The State of Bombay v. Atma Ram Shridhar Vaidya,** A.I.R. (88) 1951 Supreme Court 157. In the said judgment, the Hon'ble Supreme Court dealt with the scope of Article 22(5) and came to the following findings:

> "Para-7……. We think that the position will be clarified if it is appreciated in the first instance what are the rights given by Art.22(5). The first part of Art. 22, cl.(5) gives a right to the detained person to be furnished with "the grounds on which the order has been made" and that has to be done "as soon as may be." The second right given to such person is of being afforded "the earliest opportunity of making a representation against the order." It is obvious that the grounds for making the order as mentioned

above, are the grounds on which the detaining authority was satisfied that it was necessary to make the order. These grounds, therefore, must be in existence when the order is made."

5. It is further submitted on behalf of the petitioner that the aforesaid Constitutional Bench judgment in the case of **Atma Ram Shridhar Vaidya** (supra) was relied upon an approved by the Hon'ble Supreme Court in a later Constitutional Bench judgment in the case of **Naresh Chandra Ganguli for Shri Ram Prasad Das v. The State of West Bengal and others,** A.I.R. 1959 Supreme Court 1335. Learned counsel for the petitioner placed further reliance on a judgment of the Hon'ble Gujarat High Court in the case of **Parshottam Dahyabhai Chunara v. State of Gujarat and others,** 1988(2) Crimes 432, in which a Division Bench of the Hon'ble Gujarat High Court placing reliance on the aforesaid two judgments rendered by the Hon'ble Supreme Court on similar circumstances as have arisen for consideration in the present case was pleased to direct quashing of "the order of detention" on a finding that "the grounds of detention" were framed four days after "the order of detention" was passed and executed.

6. Learned counsel for the State submitted that no prejudice is caused to the interest of a detenue even if "the grounds of detention" are prepared by the detaining authority after passing of "the order of detention" since the petitioner-detenue had a right to make representation to the State as well as to the Board. Learned counsel for the State further submitted that the petitioner's detention was approved by the State as well as by the State Board and such approval was granted after affording the petitioner-detenue with an opportunity to make a representation as well as after affording him an opportunity of hearing.

7. On the basis of the arguments advanced by the learned counsel for the respective parties as noted hereinabove, we are of the considered view that the contention advanced by the learned counsel for the State has to be out-rightly rejected. The scope of Article 22(5) of the Constitution of India has been clearly delineated in the judgment of the Constitutional Bench of the Hon'ble Supreme Court in the case of **The State of Bombay v. Atma Ram Shridhar Vaidya** (supra) and referred to in affirmation by a subsequent Constitutional Bench of the Hon'ble Supreme Court in the case of **Naresh Chandra Ganguli for Shri Ram Prasad Das v. The State of West Bengal and others** (supra). The Hon'ble Supreme Court has

determined the right under Article 22(5) as having two limbs. In the present case, we are required to deal with the second limb i.e. the mandatory requirement that "the grounds of detention" must be in existence when an order of detention is passed. Absence of "the grounds of detention" on the date on which "the order of detention" is passed clearly is violative of the rights of a detenue vested under Article 22(5) of the Constitution of India. Apart from the above, we are in respectful agreement with the views expressed by the Hon'ble Gujarat High Court in the case of **Parshottam Dahyabhai Chunara** (supra) and we are also of the considered view that the fact situation that arise for consideration in the present case, are absolutely similar to the facts that arose for consideration by the Hon'ble Gujarat High Court in the aforesaid judgment.

8. In view of the conclusions reached by us in the aforesaid facts and circumstances of the case, since admittedly "the grounds of detention" have been framed only on 29.09.2014 i.e. three days after "the order of detention" was passed and executed on 29.09.2014, we have no other option other than to declare such "order of detention" has been violative of the Constitutional mandate of Article 22(5) and, accordingly, direct quashing and setting aside of "the order of detention".

9. In the result, the conclusion arrived at here and before, the writ application in the nature of habeas corpus is allowed. The order of detention dated 26.09.2014 is quashed and set aside. Consequently, the petitioner-detenue-Kapa @ Somanath Sahoo is directed to be released forthwith, if his presence is not required in any other case, but in the facts and circumstances without cost.

Writ petition allowed.

2015 (II) ILR - CUT- 228

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

W.P.(C) NO. 165 OF 2009

M/S. CHANDRIKA SAO ……..Petitioner

.Vrs.

SALES TAX OFFICER, BALASORE RANGE & ANR. ……...Opp. Parties

ODISHA VAT ACT, 2004 – S.42(6)

Audit assessment – Audit visit report submitted on 12.12.2006 – Notice for audit assessment issued to the petitioner on 23.8.2007 and order of assessment passed on 18.06.2008 – Action challenged on the ground of limitation – Assessment should have been completed within 6 months from 12.12.2006 as required U/s. 42(6) of the Act – Order of assessment has been antedated and passed after expiry of the period of limitation – Permission of the commissioner for completion of the assessment proceeding within a further period of six months as provided U/s. 42(6) (Proviso) was not obtained – Order of assessment having not been made on the date it was purported to have been made, is bad in law – Held, impugned order of assessment and consequential demand notice are quashed.

(Paras 6 to 11)

Case Laws Referred to :-

1. (2005) 142 STC 496 : Sanka Agencies -V- Commissioner of Commercial Taxes, Hyderabad

For Petitioner : M/s. Prakash Ku. Jena & S.C.Sahoo

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 for quashing the order of assessment dated 18.6.2008 (Annexure-1) passed by opposite party no. 2-Assessing Authority under Section 42 of the Orissa Value Added Tax Act, 2004 (hereinafter referred to as "OVAT Act") for the tax period from 1.4.2005 to 30.11.2006 on the ground that the said order is barred by limitation and has been passed without complying with the statutory

requirement of Section 42 (2) of the OVAT Act and is in gross violation of the principles of natural justice.

2. The petitioner's case in nutshell is that it is a proprietorship concern dealing with gunny bags on wholesale basis and it is registered under the OVAT Act. It has filed its return for the tax period from 1.4.2005 to 30.11.2006. Opposite party no. 1-Sales Tax Officer, who is the head of the Audit Team, after conducting audit at the business premises of the petitioner for the aforesaid tax period submitted the Audit Visit Report to the Assistant Commissioner of Sales Tax on 12.12.2006 for completion of audit assessment under Section 42 of the OVAT Act. On the basis of the Audit Visit Report, opposite party no.2-Assessing Authority issued notice to the petitioner in Form VAT-306 under memo no. 6477 dated 23.8.2007 enclosing the Audit Visit Report dated 12.12.2006 for the aforesaid tax period. The Assessing Authority vide its order dated 18.06.2008 passed an exparte assessment order under Section 42 of the OVAT Act for the aforesaid tax period raising a demand of Rs. 38,03,766/- which includes penalty of Rs. 25,35,844/-. The said assessment order was issued under Memo No.4774 dated 24.10.2008 and was received by the petitioner on 24.11.2008. Hence, the present writ petition.

3. Mr. P.K. Jena, learned counsel appearing for the petitioner submitted that as per sub-section (6) of Section 42 of the OVAT Act, an assessment under Section 42 of the OVAT Act shall be completed within a period of six months from the date of receipt of the Audit Visit Report, but the proviso to sub-section (6) says that if for any reason, the assessment is not completed within the time specified in sub-section (6) i.e. within six months from the date of receipt of the Audit Visit Report, the Commissioner may, on the merit of each such case, allow such further time not exceeding six months for completion of the assessment proceeding. Sub-section (7) of Section 42 provides that no order of assessment shall be made under sub-section (3) or sub-section (4) of Section 42 of the OVAT Act after expiry of the period of one year from the date of receipt of the Audit Visit Report. The Audit Visit Report having been submitted on 12.12.2006, the last date for completion of the audit assessment under Section 42 of the OVAT Act expired on 11.06.2007. The assessment order under Annexure-1 having been passed on 18.6.2008, it is clearly barred by limitation prescribed under sub-section (6) of Section 42 of the OVAT Act. Hence, the said order of assessment is liable to be quashed.

Mr. Jena further contended that the notice for audit assessment under Section 42 of the OVAT Act was issued on 23.8.2007 enclosing the Audit Visit Report submitted to the Assessing Authority on 12.12.2006, which is much after expiry of the period of limitation of six months on 11.06.2007. He further contended that if the statute requires to do a thing in a particular manner, the authority is to follow the same. In support of his contention, he relied upon the judgment of this Court dated 25.9.2014 passed in W.P.(C) No. 2971 of 2009 in the case of *M/s. Delhi Foot Wear –v- Sales Tax Officer and others*.

It was also submitted that the order of assessment under Annexure-1 is not sustainable in law as the same has been antedated.

4. Mr. R.P. Kar, learned Standing Counsel appearing for the Revenue, on the contrary, submitted that the notice for audit assessment was issued on 23.8.2007 and the order of assessment has been passed on 18.6.2008, which is within one year from the date of issuance of notice for assessment and therefore the same is not barred by limitation. In similar circumstances, this Court vide order dated 22.8.2013 in W.P.(C) No. 11647 of 2010 in the case of *M/s. Chandramani Engineers –v- Commissioner of Sales Tax* quashed the order of assessment and remanded the matter back to the Assessing Officer to exercise his power under proviso to Rule 12 (3)(h) of the CST (O) Rules and thereafter pass fresh order of assessment by assigning reasons. Mr. Kar further submitted that due to clerical mistake, there has been a delay of four months in dispatching the order of assessment. Therefore, the allegation that the order of assessment has been antedated and passed after expiry of the period of limitation is not correct. Since the impugned order of assessment was served within four months, it cannot be said that there is an unreasonable delay. Therefore, no adverse inference can be drawn. In support of his contention, he relied upon the judgment of Andhra Pradesh High Court in the case of *Shaw Wallace and Co. Ltd. –v- State of Andhra Pradesh*, reported in (1997) 104 STC 497.

5. On the rival contentions of the parties, the following questions arise for consideration by this Court.

(i) Whether the impugned order of assessment dated 18.6.2008 under Annexure-1 has been passed within the period of limitation?

(ii) Whether the impugned order of assessment dated 18.6.2008 under nnexure-1 has been antedated and passed after expiry of the period of limitation?

6. To deal with the Question No. (i), it may be relevant to note that on 12.12.2006, opposite party no. 2-Assessing Authority has received the Audit Visit Report. As per the provisions of sub-section (6) of Section 42 of the OVAT Act, which stood at the relevant time, the assessment under Section 42 of the OVAT Act shall be completed within a period of six months from the date of receipt of the Audit Visit Report. In view of the said provision, the period of limitation of six months for completion of the audit assessment expired on 11.06.2007. It was contended by the Revenue that this Court in the case of ***M/s. Lalchand Jewellers Private Limited –v- Assistant Commissioner of Sales Tax, Puri Range, Bhubaneswar*** *in W.P.(C) No. 11864 of 2007* disposed of on 9.10.2007 held that the period of limitation of six months shall run from the date of receipt of the Audit Visit Report by the assessee. Further contention of the Revenue is that since the assessment order has been passed within one year from the date of issuance of notice for audit assessment, the assessment is valid in law. It is true that the order of assessment has been passed within one year from 23.8.2007 i.e. the date of issuance of notice for audit assessment. However, being asked, it was fairly stated by Mr. Kar, learned Standing Counsel for the Revenue that permission of the Commissioner for completion of the assessment proceeding within a further period of six months as provided under proviso to sub-section (6) of Section 42 of the OVAT Act was not obtained prior to or after passing of the assessment order on 18.06.2008.

7. In view of the above, the impugned order of assessment passed under Annexure-1 is bad in law.

8. To deal with the Question No. (ii), it may be relevant to note that the order of assessment was purportedly passed on 18.6.2008 and was communicated to the petitioner on 24.10.2008. Thus, there is a delay of more than four months in communicating the order of assessment to the petitioner. Explanation of the opposite party-Department is that delay was caused due to clerical mistake and the said delay is not inordinate.

9. The High Court of Andhra Pradesh in the case of ***Sanka Agencies – v- Commissioner of Commercial Taxes, derabad***,
(2005) 142 STC 496 held as under.

"We have seen the record. Record also shows that while the impugned order bears the date May 17, 1996, the order was sent to the appellants by dispatching it only on November 1, 1996. There is no

explanation in the record nor any explanation has been given by the respondent, as no counter is filed. Therefore, there is strong apprehension that in order to give an impression that the impugned order was passed within the period of limitation, the order bears the dated May 17, 1996, whereas it has been passed much after that. In this connection, the learned Counsel for the appellants has placed reliance on a judgment of the honorable Supreme Court in State of Andhra Pradesh V. M. Ramakishtaiah & Co. [1994] 93 STC 406, wherein under similar circumstances, the Supreme Court held that in the absence of any explanation, whatsoever, for the delayed service on the petitioner, of the order, the court should presume that the order was not made on the date it was purported to have been made."

10. In the instant case, there is no explanation for the delay of more than four months caused in issuing the assessment order to the petitioner except stating that due to clerical mistake there has been a delay of four months. Nothing has been stated in detail as to when the order of assessment has been handed over to the dispatch section and who is responsible for such delay. Therefore, we have no hesitation to hold that the order of assessment under Annexure-1 was not made on the date it was purported to have been made. In order to give an impression that the impugned order of assessment was passed within the period of limitation, the order bears the date 18.6.2008 whereas it has been passed much later that.11. For the reasons stated above, we allow the writ petition and quash the impugned order dated 18.6.2008 passed under Annexure-1 as well as consequential demand notice for the tax period from 01.04.2005 to 30.11.2006.

12. Before parting with the case, we think it proper to bring it to the notice of the Commissioner that this Court in several cases finds that the Assessing Officers are not passing the order in strict compliance of the provisions of Section 42 of the OVAT Act and/or there is unreasonable delay in communicating the order of assessment to the dealers which often causes huge loss to the Revenue. Therefore, we suggest that the Commissioner may take appropriate steps to block the revenue loss on this account and if necessary, in appropriate cases, Departmental Proceedings may be initiated against the erring officers. Compliance of the above direction may be intimated to the Registry of this Court within three months from today.

Writ petition allowed.

2015 (II) ILR - CUT- 233

I.MAHANTY, J. & BISWANATH RATH, J.

W.P.(C) NO. 20780 OF 2014

NIRUPAMA BEHERA .....Petitioner

.Vrs.

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

EDUCATION – Admission into Diploma Course in General Nursing and Midwifery Training 2014-2015 – Petitioner was provisionally selected and her rank was 38 against S.C. category and she had a clear chance of getting a seat – Non-communication of the result to the petitioner – She was deliberately prevented from attending the counseling for no fault of her – Held, since admission process in the particular course for the year 2014-2015 is over by 31.10.2014 direction issued to the opposite parties to allow the petitioner for admission in the GNM course 2015-2016 – For the deliberate negligence on the part of the convener this Court imposed a cost of Rs. 5,000/- which shall be paid to the petitioner.

(Paras 6, 7)

For Petitioner : M/s. J.K.Lenka, P.K.Behera & U.C.Mohanty

For Opp. Parties : M/s. R.C.Mohanty, K.C.Swain & S.Patnaik

Date of Hearing : 13.05.2015
Date of Judgment : 19.06. 2015

JUDGMENT

BISWANATH RATH, J.

In filing this writ petition, the petitioner has sought for a direction to the opposite party nos.2 and 3 for admission of the petitioner into Diploma Course in General Nursing and Midwifery Training in the Government Schools of Nursing, Odisha keeping in mind the rank of the petitioner against Scheduled Caste category and the other related disputes.

2. Fact as revealed from the pleadings as well as submissions made on behalf of the petitioner is that the petitioner was an applicant for admission in to Diploma Course in General Nursing and Midwifery Training in the Government Schools of Nursing, Odisha for the session 2014-2015, a course for 3 ½ years. On receipt of the application of the petitioner, she

was given reference No.2939 along with the prospectus meant for admission into Diploma Course in General Nursing and Midwifery (for short "G.N.M") Training for the session 2014-2015. From the prospectus it reveals that 50% of the seats are to be filled up through counseling as State quota and rest 50% are to be filled up treating the same to be Management quota and the percentage of the reservation seats are as follows:

(i) 10% for Male,
(ii) 22.50% for Scheduled Tribe,
(iii) 16.25 % for Scheduled Caste,
(iv) 3% each for Physically Handicapped and Children of Ex- servicemen,
(v) 5% for G.C.H.

Petitioner belongs to Scheduled Caste community. Website of the Directorate dated 25.10.2014 discloses that the petitioner was selected provisionally and her rank Number is 38 against Scheduled Caste category. Consequently the petitioner was asked to attend the counseling under 1st preference on 25.10.2014 at 8.00 A.M. Since the information was uploaded in the website on 25.10.2014 itself, petitioner alleged that this clandestine action of the Counseling Committee intentionally debarred the petitioner from attending the counseling. Petitioner received the information downloaded from the website of the Directorate of Nursing, a letter dated 16.10.2014 on 25.10.2014 indicating therein that the petitioner did not mention her postal address consequent upon which she could not be given the information of her short listing. Petitioner submitted that all other candidates received the letter of intimations through speed post on 20.10.2014. Petitioner alleged that no such letter of counseling for admission into 3 ½ years G.N.M. course for the Session 2014-2015 was issued to the petitioner.

Clause-3 (i) of the prospectus provides for merger of seats in favour of unreserved category in the event particular reserved category of candidates is not available.

Clause-3(ii) of the prospectus provides that in case a seat is vacant in private institution after Central Counseling, the vacant seat will be merged in the Management quota of the concerned institution.

Petitioner further alleged that since she was prevented from appearing the counseling for no fault of her, seat meant for her could not

have been merged under the above provisions and she should be given a seat in the G.N.M. Course for the Session 2014-2015

During course of argument, learned counsel for the petitioner submitted that in the worse, petitioner should be given a seat for the next session by treating her to be a duly selected candidate for the session 2014-2015.

3. Per contra, on its appearance, the Convener, G.N.M. Selection Committee and Asst .Director, Nursing (Administration), Directorate of Nursing, Odisha-opposite party no.3 filed a counter affidavit, while admitting that the petitioner belongs to Scheduled Caste community and 16.24% of seats are reserved for Scheduled Caste candidates for admission into Diploma Course in General Nursing and Midwifery Training in the Government Schools of Nursing, Odisha and that the petitioner was provisionally selected , she got the rank 38 against the Scheduled Caste category but denied the allegation that the petitioner has been deliberately prevented from admission by not issuing communication through post. This opposite party objected the allegation of the petitioner on the premises that though the application form at Column-12 provides for information on present address for correspondence, no such address has been given for which they were not in a position to make any communication to the petitioner but however the informations were available in the website on 25.10.2014. Further since the opposite party no.3 made a publication dated 22.10.2014 in the local daily newspaper "The Samaj, intimating all concerned that the counseling for admission into 3 ½ years G.N.M Course for the Session 2014-2015 shall be taken on 24.10.2014 and 27.10.2014 to 31.10.2014, nothing prevented the petitioner to attend the office of the opposite party no.3 and get all such informations. The opposite party no.3 further submitted that the intimation letter of the petitioner dated 16.10.2014 was sent through speed post on 18.10.2014 but without mentioning the corresponding address, for which the letter remained undelivered. The opposite party no.3 ultimately submitted that the counseling in the said post is over since 31.10.2014 and therefore, they are not in a position to give her admission. Even though notice was made sufficient to the other opposite parties, none of them replied to the above submission in the Court nor filed any counter to the allegations raised by the petitioner.

4. Heard learned counsel for the parties. There is no denial that the petitioner was an applicant for the Diploma Course for G.N.M. Training in the Government Schools of Nursing, Orissa for the session 2014-2015.There is also no denial to the intake in the different category including Scheduled Caste category, as mentioned by the petitioner in the writ petition. There is also no denial by the parties that the petitioner was not only selected provisionally but was placed/ranked at Sl.No.38 in the Scheduled Caste category. Now coming back to consider on the question of non-availability of the postal address of the petitioner and the consequence thereof, the opposite party no.3 along with his counter has filed the application form for G.N.M. Course, 2014-2015 concerning the writ petitioner, the application form is available at Annexure-3 (Page No.20) of the brief, at Column No.11 the candidate is required to disclose his/her permanent home address, petitioner furnished the same which reads as follows:

> Villager/Town: BADHEI SAHI
> P.O.: BUXIBAZAR,
> Police Station: MANGALABAG,
> District-Cuttack,PIN-753001.

Column No.12 of the application provides disclosure of present address which remained blank. Column No.13 meant for full name of Father/Husband and address which discloses the father of the petitioner as Arjun Behera, Address-Badhei Sahi, P.O.-Buxibazar, P.S.-Mangalabag, Cuttack-1, Pin-753001. From perusal of the application form and reading of Clause-11 and 12 together it clearly reveals that the petitioner has given her address at least at two places remaining the same. It further appears from the application form that the petitioner has the only address as permanent home address. The column for present address remained unfilled for the reason that the petitioner has no such present address except a permanent address. The present address column may be a requirement for the candidates, who have permanent addresses but stay in a different address otherwise known as present address. From the detail reading of the application form of the petitioner, it clearly appears that the petitioner has no other address except the permanent address. The application form of the petitioner if compared with that of the application form of one Sunely Sethy, another candidate, it clearly indicates that Sunely Sethi had an address other than the permanent home address and

since she was available in the present address and as she was not available in the permanent address there was necessity for providing the present address. Further, from the submission of opposite party no.3 it appears as if the petitioner had not provided any address at all. Since the petitioner has provided a clear permanent address at least at two of the places of the application form, the stand of the opposite party no.3 that they were unable to contact the petitioner for her not providing the address is not only untrue but also contrary to the record itself. That too, from the record filed by the opposite party no.3, it appears that the petitioner has given a complete address of her. Non-communication of the letter for attending the counseling to the petitioner by speed post is fatal to her not taking the admission and for no fault of her. Negligence in not communicating the notice for attending the counseling to the petitioner is solely attributable to the opposite party no.3 and the petitioner cannot be made to suffer for the negligence of the opposite party no.3. Besides, petitioner had also made a specific allegation that the information of counseling with intimation to her positioning at Sl.No.38 in the counseling were known to her at her place on 25.10.2014 itself which is also the date of counseling for which this court finds that there is a sufficient reason for the petitioner's not attending the counseling.

5. Similarly, the submission of the opposite party no.3 that the necessary communication was made to the petitioner through speed pos but without any address. Such submission of the opposite party no.3 cannot be accepted in law as no speed post document be accepted by any postal department in absence of address on the envelope. This Court rejects such contention of the opposite party no.3. May be the opposite party no.3 has filed all envelopes together and the postal department has accepted all those packets without proper verification.

6. From the above, it is amply clear that the petitioner has been deliberately prevented from attending the counseling and thereby she has been kept outside the selection for no fault of her. Since she was positioned at Sl.No.38 in the counseling set for, she had a clear chance of getting a seat. Even though this Court do not hesitate to issue a mandamus against the opposite parties for providing a seat to the petitioner in the Diploma Course in General Nursing and Midwifery Training in the Government School of Nursing, Orissa by taking out the last candidate admitted for in the particular course, but however considering that the 1st

year session in the particular faculty is over, no separate class can be held for an individual and further considering the submission of Sri R.C.Mohanty, learned counsel appearing for the opposite party no.3 during course of argument that in view of mistake on the part of the opposite party no.3 and since the admission process in the particular course for the year 2014-2015 is over since 31.10.2014, it may be given a chance to provide admission to the petitioner in the particular course for the year 2015-2016, further as a grave injustice has been caused to the petitioner particularly in view of no fault of the petitioner, this Court while allowing the writ petition directs the opposite parties to allow the admission of the petitioner in the Diploma in G.N.M. Course, 2015-2016. Necessary communication to the petitioner in this regard be made at appropriate time.

7. However, considering the deliberate negligence on the part of the Convener in the communication of the result which being a very highly qualified body, to prevent such grave mistake in future, this Court imposes a cost of Rs.5,000/- (Rupees five thousand) on the Convener for such negligence of the Convener-opposite party no.3, which amount shall be paid to the petitioner within a period of two weeks from the date of the order.

8. In the result, the writ petition succeeds. However, with cost as awarded hereinabove.

Writ petition allowed.

2015 (II) ILR - CUT- 238

I.MAHANTY, J. & DR. D.P.CHOUDHURY, J.

W.P.(C) NO. 2922 OF 2006

M/S. GANAPATRAI BALABUX .....Petitioner

.Vrs.

THE ASSESSING AUTHORITY & ORS. .....Opp. Parties

ENTRY TAX ACT, 1999 – S. 7(4)

Entry tax – Extra demand raised by the assessing authority – First appellate authority confirmed the order without affording

opportunity to the petitioner to produce satisfactory proof of payment of tax – Action challenged – Petitioner paid entry tax at the check gate through his transporter which would be adjusted against the tax payable under the Act – Non consideration of the circular issued by the department in 1999 – Held, tax collected at check gate must be adjusted in respect of payment of tax – The petitioner can take the benefit of copy of money receipt issued to the transporter, carrying his goods by the check gate officer while assessing tax payable by the petitioner. (Paras 10, 11)

Case Laws Referred to :-

1. (1983) 53 STC : Titaghur Paper Mills Co. Ltd. Vs. State of Orissa
2. 2004(I) OLR S.C : Haribanslal Saharia and another Vs. Indian Oil Corporation Limited and others

For Petitioner : M/s. N.Paikray, B.P.Mohanty, A.N.Ray, K.K.Sahoo, P.K.Mishra & B.Das

For Opp.Parties : Mr. R.P.Kar, Standing Counsel

Date of hearing : 04. 05.2015
Date of Judgment: 22.06. 2015

JUDGMENT

DR. D.P. CHOUDHURY, J.

This writ application challenges the orders of the learned Assessing Authority and Appellate Authority of Sales Tax by raising extra demand of Rs.1,13,178/- on the ground that reasonable opportunity was not afforded to the petitioner to adduce his evidence in support of deduction of tax while computing the same by the Assessing Authority and, similarly, the Appellate Authority, confirmed the orders of the Assessing Authority, ignoring the norms and authority of the Hon'ble Apex Court.

2. The factual matrix leading to the case of the petitioner is that he was a registered dealer under the Orissa Sales Tax Act, 1947 (hereinafter called the "O.S.T. Act") as well as Orissa Entry Tax Act, 1999 (hereinafter called the "O.E.T. Act") and deals in mills-made and handloom clothes. During 2001-2002, he paid Rs.1,17,008/- through the transporter to the border check gate officer, who issued the common receipt in the name of the transporter as entry tax of the check gate while the goods entered into the

State of Orissa. According to the petitioner, on 18.12.1999, a circular bearing No.25118/CT was issued by opposite party No.3 to all concerned officers directing to issue consolidated receipt in respect of one truck of goods to the transporter, who will issue a copy of the receipt to the party while the party will take delivery of goods from the transporter. This circular also depicts that where large number of dealers bring goods in one truck, one receipt with authenticated list of dealers with value of goods, tax component and money receipt number would be handed over to the transporter and one copy of the list would be retained, while another copy would be sent to the concerned Commercial Tax Officer for necessary action at his end. In the instant case, while the petitioner's goods were being transported, the transporter at the check gates paid tax on behalf of owners of goods, including the petitioner, and they were issued with copy of money receipt for calculation of tax as well as list of dealers with value of goods and amounts of tax paid. So, the petitioner had reason to believe that whatever payment has been made by him to the transporter, who paid the same at the check gate, would be adjusted against the tax payable under the O.E.T. Act by the learned Assessing Authority. It is further alleged, inter alia, that surprisingly on 30.03.2005, the learned Assessing Authority has raised extra demand of Rs.1,76,552/- without making adjustment of payment of the entry tax at the check gate to the tune of Rs.1,13,178/- and without following the provisions of law and circular issued by the Department. Against the order of the learned Assessing Authority, the petitioner preferred appeal before opposite party No.2, who also did not afford proper opportunity to the petitioner in terms of proviso to sub-section (4) of section 7 of the O.E.T. Act and, in the absence of notice under Form No.E-4 and without following the judgment of this Court dated 23.06.2004 passed in W.P.(C) No.2769 of 2004 in the case of ***M/s. Ram Krishna Raj Kumar*** Vs. ***Assessing Authority Zone-1, West Circle, Cuttack.*** About illegality of the order, it is pointed out that no notice was issued for production of Books of Accounts regarding its correctness and completeness for the purpose of assessment. It is the case of the petitioner that the learned Appellate Authority has equally committed mistake by not following the circular of the Department and the provisions of law under the O.E.T. Act. So, the petitioner challenges both the orders passed by opposite party Nos.1 & 2 in this writ petition to quash the same.

3. Learned counsel appearing for the petitioner challenging the orders of opposite party Nos.1 & 2 submitted that the order passed by the learned

Assessing Authority without issuance of any statutory notice to the petitioner for production of Books of Accounts for examining the correctness and completeness is illegal, as section 7(4) of the O.E.T. Act requires the petitioner to be given an opportunity to produce evidence and, in the absence of the same, the order of the learned Assessing Authority is vulnerable, void and illegal. According to him, no reasonable opportunity was afforded to the petitioner to produce evidence for which the order of the learned Assessing Authority is perverse. He further submitted that the order of opposite party No.2 is equally bad in law because the decision in the case of ***M/s. Ram Krishna Raj Kumar*** (supra) has not been followed, which clearly states that in the absence of statutory notice being served to produce the Books of Accounts, the order of the learned Assessing Authority is wrong and illegal. It was his further submission that the order passed by opposite party No.2 is illegal by not following the circular issued by the Department in 1999, which speaks that the check gate officer issues money receipt to the transporter, who carries goods of a large number of dealers in one truck, and copy of list of dealers is retained while another copy is sent to the concerned C.T.O. to facilitate the adjustment of payment of tax at the entry of goods into the State of Orissa at the time of filing of returns by dealers in the concerned financial year. Submission was also advanced by him that the arbitrary order of the learned Appellate Authority in confirming the order of the Assessing Authority without following the provisions of law and circulars issued by the Department is equally vulnerable, perverse, and without any basis for which the same should be quashed.

4. On the contrary, learned counsel appearing for the opposite parties submitted that the writ petition is not maintainable when there is provision under section 17 of the O.E.T. Act read with section 23 of the O.S.T. Act to prefer appeal against the order of the First Appellate Authority. He submitted that opportunity was given by the learned Assessing Authority to the petitioner, as evident from the order of opposite party No.1; but the petitioner has failed to produce the evidence and, as such, opposite party No.1 has rightly passed the order. It was his further submission that the principles in the case of ***M/s. Ram Krishna Raj Kumar*** (supra) have been duly followed while disposing of the appeal. So, he supported the orders passed by the learned Assessing Authority and Appellate Authority and submitted to dismiss the writ petition.

5. After detailed discussions about the cases of the respective parties, the following points emerge for consideration:

i) Whether the petitioner can take the benefit of copy of money receipt issued to the transporter carrying his goods by the check gate officer while assessing the tax payable by the petitioner ?

ii) Whether reasonable opportunity has been given to the petitioner in accordance with law to produce evidence so as to make the impugned orders valid and legal ?

iii) Whether the writ petition is at all maintainable in the eye of law ?

Point No.(i) :

6. On going through the impugned orders, the petition and the documents filed by the petitioner, it is revealed that the learned Assessing Authority has passed the assessment order for the year 2001-2002 on 30.03.2005. In his order, he has maintained that the petitioner has claimed to have paid entry tax at the check gate to the tune of Rs.1,17,008/- and produced ten original money receipts for Rs.7,191/-, out of which four are photo copies of the original receipts involving tax of Rs.3,361/-, which were disallowed by him, and original check gate money receipts for Rs.3,830/- were only allowed by the Assessing Authority for deduction from the tax computed. He did not accept the other photo copies of the consolidated receipts in the name of the transporter and other forms submitted by the petitioner, for which, as per section 7(2) of the O.E.T. Act, to the best of his judgment passed the order to pay the tax of Rs.1,76,552/-. In his order, the learned Assessing Authority has observed that the petitioner was given opportunity to produce proof of correctness and completeness of the statement and the entry tax paid under section 7(4) of the O.E.T. Act. But, till the date of assessment, the petitioner could not produce and furnish any satisfactory payment of tax at the check gate against the photo copies of the check gate receipts furnished. The learned Appellate Authority while passing the order followed the O.S.T. Rules and O.E.T. Rules and agreed that the decision in the case of ***M/s. Ram Krishna Raj Kumar*** (supra) should be followed; but the Xerox copies submitted by the petitioner claiming adjustment were not accepted as these documents are not admissible in legal proceeding unless the same are certified by appropriate authority. He also discussed the necessary circular No.25118/CT dated 18.12.1999 issued by the Commissioner of Sales Tax

and opined that the same is meant for unregistered dealer but not for the petitioner. According to him, the petitioner is required to produce the original money receipt along with authentic documents showing value of goods, payment of tax, money receipt, its number and date of issue and, in the absence of the same, duly authenticated by the check gate officer, the petitioner has no claim.

7. It is worthwhile to go through the circular No.25118/CT dated 18.12.1999 issued by the Commissioner of Commercial Tax, Cuttack about implementation of the Orissa Entry Tax Act, 1999. After the O.E.T. Act came into force, to mitigate the problems faced by dealers and transporters, for proper implementation of the O.E.T. Act, the said circular was issued. In para-3, it has been clearly mentioned that if there are more than one unregistered dealers get their goods transported in one truck, separate receipt should be granted by the check gate officer as far as possible. Where a large number of dealers bring goods in one truck, one receipt with authenticated list of dealers with value of goods, tax paid and money receipt number / date be handed over to the transporters. One copy of such list be retained while another copy be sent to the concerned C.T.O. So, the clause is discernible in guiding the goods transported by unregistered dealers and the dealers who are registered. There is nothing found from the circular that the original money receipt should be available to the dealers or issued to the dealers, either registered or unregistered, by the check gate officer. It is the only transporters, who will obtain the receipt and copy of such receipt must be available to the dealers so that they can make adjustment of the tax computed for that year for the sake of implementation of the O.E.T. Act and Rules made thereunder. It must be remembered that in the taxing jurisprudence, no liberal interpretation can be made, but strict interpretation of the statute should be adhered to. So, the view of opposite party Nos.1 & 2 that Xerox copies available to the dealer are not admissible without being authenticated by the competent authority are otiose. It is true that the admissibility of documents is necessary before a quasi-judicial authority. Copies of documents as per Annexure-3 series go to show the name of the petitioner along with other dealers, the amount of property transported, and the amount of tax paid with necessary receipt number. Similarly, copies of documents containing seal of the Sales Tax Officer cannot be said to be without proof of payment of entry tax by the transporter and the same are duly authenticated by the Sales Tax Officer, which should have been

accepted for adjustment towards payment of tax in view of the circular issued in 1999 (supra) by the Department.

8. Section 7 under Chapter-III, of the O.E.T. Act has been introduced with amendment on 19.05.2005. Since incident of payment of tax relates to 2001-2002, the law prior to amendment has to be followed. Section 7(2) of the said Act has been introduced in Orissa Entry Tax Act, 2000 vide Orissa Act 5 of 2000. The erstwhile section 7(2) of the O.E.T. Act prescribes in the following manner :

> "Before any dealer submits a return under sub-section (1), he shall, in the prescribed manner, pay in advance the full amount of tax payable by him on the basis of such return as reduced by any tax already paid under Section 10, or of the composition money fixed under the proviso to sub-section (1) of Section 3, as the case may be, and shall furnish along with the return satisfactory proof of such payment; and after the final assessment is made, the amount of tax so paid shall be deemed to have been paid towards the tax finally assessed."

9. Similarly, un-amended section 7(3) of the O.E.T. Act prescribes that if the Assessing Authority is satisfied that any return submitted under sub-section (1) is correct and complete, he shall assess the dealer on the basis thereof. Section 7(4) of the said Act before amendment stipulates that if no return is submitted by the dealer under sub-section (1) within the period prescribed or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, he shall assess the dealer to the best of his judgment recording the reasons for such assessment. Proviso to such sub-section speaks that before taking action under this sub-section the dealer shall be given reasonable opportunity of providing the correctness and completeness of the return submitted by him. In the impugned order passed by the learned Assessing Authority, it is observed that he has given adequate opportunity for proving the correctness and completeness of the returns submitted by him, but nothing is found from the order that the return submitted by the petitioner is incorrect or incomplete when he has submitted the photo copies of the consolidated receipts in the name of the transporter containing the name of the petitioner. So, proviso to sub-section (4) of section 7 of the O.E.T. Act before amendment is pre-condition to pass the best of the judgment by the learning Assessing Authority on the tax payable by the petitioner. By merely stating that opportunity was given to

prove the correctness and completeness of the statement of entry tax paid, without any observation that such copies of money receipts in the name of the transporter being incomplete or incorrect, which necessitates to pass best of the judgment by the learned Assessing Authority, is wholly vulnerable one. On the other hand, without any finding that such copies of documents are incomplete and incorrect in spite of opportunity given to prove the correct and complete document by the petitioner, the doctrine of passing the best judgment as per section 7(4) of the erstwhile O.E.T. Act, 1999 cannot be said to have been complied with. Be that as it may, the order of the learned Assessing Authority (opposite party No.1) having not followed the provisions of the O.E.T. Act is vulnerable.

10. Similarly, the order of the learned First Appellate Authority confirming the order of the learned Assessing Authority with the observation that Xerox copies of documents are not admissible without following the procedure, as depicted under the circular of 1999 issued by the Department (supra), by interpreting the same for its applicability for the unregistered dealer is equally bad in law. The observation of opposite party No.2 that Xerox copy of any document is inadmissible in legal proceeding unless it is certified by the appropriate authority is also equally beyond the legal principles before the quasi-judicial authority. Opposite party No.2 has not properly evaluated the copies of documents produced by the petitioner for which his reasons for rejecting the appeal and confirming the order of the Assessing Authority is also vulnerable one. From the foregoing discussion, it must be observed by us that the observation of opposite party Nos.1 & 2 by not accepting the copies of receipts issued to the transporter in compliance with the circular issued by the Department in 1999 (supra) is contrary to section 7(4) of the O.E.T. Act, 1999 (unamended) and, as such, the petitioner is entitled to the benefit of such adjustment. Point No.(i) is answered accordingly.

Point No.(ii) :

11. It is evident from the aforesaid discussion that reasonable opportunity to produce the original Books of Accounts with original money receipt from the transporter has not been afforded to the petitioner because the impugned order does not indicate that the petitioner was given opportunity to produce the Books of Accounts and the original money receipts in support of his claim for adjustment of payment at the check gate. Mere observation of the learned Assessing Authority that the petitioner was

given opportunity to produce the satisfactory proof for completeness and correctness of the document submitted is without any compliance as per law. On the other hand, we are of the opinion that reasonable opportunity has not been given to the petitioner to produce satisfactory proof of payment of tax to the transporter or incidence of payment of tax towards adjustment of tax at the check gate while submitting the return for the year 2001-2002. So, point No.(ii) is answered accordingly.

Point No.(iii) :

12. With regard to maintainability of the writ petition, we may discuss the relevant provisions of law in that context. The assessment has been made under the O.E.T. Act, 1999 for the year 2001-2002. The O.E.T. Act, 1999 came into force as Orissa Act 11 of 1999 on 01.12.1999 having been published in the Orissa Gazettee, Extraordinary, No.1509 dated 04.11.1999. Such Act in Chapter-III enshrines about the assessment, payment, recovery and collection of tax vide section 7 of the O.E.T. Act. Such provision was amended by Orissa Act 10 of 2005 w.e.f. 19.05.2005. Since the assessment year relates to 2001-2002, we can discuss unamended provisions of section 7 of the said Act. Section 7(2) of the O.E.T. Act was substituted by amendment vide Orissa Act 5 of 2000. Under such provisions, the dealer can submit the return along with the documents for payment of any tax already paid for final assessment. It is reiterated that in the erstwhile provisions of section 7(4) of the O.E.T. Act, the present impugned order of assessment has been passed. Against such order, first appeal lies under section 16 of the O.E.T. Act, 1999 to such authority as prescribed as Appellate Authority. Section 16 has also undergone changes being amended in 2005 vide Orissa Act 10 of 2005 w.e.f. 19.05.2005. It is reiterated that the assessment year being 2002-2002, the unamended provisions of section 16 will apply. So, the impugned order of the Appellate Authority has been passed as per erstwhile provisions under section 16 of the O.E.T. Act, 1999. On further scrutiny, it appears that section 17 of the O.E.T. Act, 1999, as stipulated before it was amended in 19.05.2005, deals with the appeal against the order of the Appellate Authority to the Tribunal. Similarly, the unamended provision of section 18 of the O.E.T. Act, 1999, prior to its amendment, deals with revision by the Commissioner of orders prejudicial to the interest of revenue. Section 19 of the said Act, before its amendment, w.e.f. 19.05.2005 deals with the appeal to the High Court against the order passed under section 18. After amendment, section 19 contains revisional

power of the High Court in certain matters where order has been passed under section 7(4) of the O.E.T. Act, 1999. On bird's eye view of these provisions, it shows that second appeal against the order passed under section 16, before its amendment in 2005, lies to the Tribunal under section 17 of the O.E.T. Act, 1999. So, there is forum prescribed under the statute for any aggrieved person, whose right has been affected by the order of the First Appellate Authority. Not only this, but also pre-amendment of section 17 of the O.E.T. Act depicts that within a period of 60 days any person, either revenue or the person affected by the order passed by the First Appellate Authority, can file second appeal before the Tribunal. Under sub-section (4) of section 17, the Tribunal shall dispose of the appeal in the prescribed manner subject to the provisions of the Sales Tax Act. Under the O.E.T. Rules, 1999, the prescribed procedure for disposing of the appeal before the Tribunal has been prescribed. But, such procedure vide Rule 23A has been inserted by the Orissa Entry Tax (Amendment) Rules, 2005 w.e.f. 15.10.2005. Before amendment of the Rules in 2005, Rule 23 of erstwhile original O.E.T. Rules, 1999 was dealing with appeal and revision about the procedure adopted by the Appellate Authority and the Revisional Authority. According to that Rule 23 of the erstwhile O.E.T. Rules, 1999, except for the condition expressly provided in section 16 of the Act in respect of the appeal and in section 18 of the Act in respect of revision, the provisions under the Sales Tax Act and the Sales Tax Rules for appeals and revisions shall, *mutatis mutandis*, apply to the appeals and revisions under the Act. So, before incorporating the amended Rule 23A under the O.E.T. Rules (Amendment) Rules, 2005, the rules of the Orissa Sales Tax Rules will apply to the appeals and revisions filed under pre-amended provisions under the O.E.T. Rules. Rule 52 of the Sales Tax Rules, 1947 says that the second appeal will be filed before the Tribunal and necessary order will be passed by the Second Appellate Authority and under Rule 70, the Tribunal will pass the order in writing after hearing of the appeal is complete. So, prior to 2005, the Sales Tax Act and Rules will apply, *mutatis mutandis*, even if the appeal has been filed under the O.E.T. Act, 1999. When there is specific provision already made for the second appeal before the Tribunal and the appellate forum can take into consideration all the matters agitated by the appellant having wide jurisdiction, the present petition under Art.226 and 227 of the Constitution of India is not maintainable. Our view is fortified with the decision in the case of ***Titaghur Paper Mills Co. Ltd.*** Vs. ***State of Orissa*** reported in **(1983) 53 STC page-315 S.C.** where Their Lordships have been pleased to observe that where the petitioner has

alternative remedy by way of appeal and second appeal, no relief can be granted under Art.32 and 226 of the Constitution.

13. After extensive discussions, as made above, due to the existence of a right to file a second appeal and revision available to the petitioner against the impugned orders, which are otherwise defective, as discussed above, can be agitated in the second appeal. Apart from this, it is reported in the case of ***Haribanslal Saharia and another*** Vs. ***Indian Oil Corporation Limited and others*** reported in **2004(I) OLR S.C. page-81**, where Their Lordships have been pleased to observe :

> "In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three categories – (1) Where the writ petition seeks enforcement of any of the fundamental rights; (2) Where there is failure of principles of natural justice; or (3) Where the orders or proceedings are wholly without jurisdiction or the vires of the Act and is challenged". [See *Whirlpool Corporation* Vs. *Registrar of Trade Marks, Mumbai & Ors.* (1998) 8 SCC 11].

14. With due respect to the above decision, we find that the question of enforcement of any of the fundamental rights, in the present facts and circumstances, does not arise. Even if opportunity was not given to submit the documents, but there was hearing of the case and judgment has been passed and, as such, it cannot be said that principle of natural justice is not followed. In view of the discussions in point Nos.(i) & (ii), we are of the considered view that there is no compliance with the provisions of the O.E.T. Act and the circular issued by the Department under the relevant rules framed under the said Act. Therefore, it must be held that the impugned orders of the Assessing Authority and the Appellate Authority have been passed without jurisdiction. Although alternative remedy as per the decision reported in ***Titaghur Paper Mills Co. Ltd.*** Vs. ***State of Orissa*** (supra) is available, but by virtue of the later decision of the Hon'ble Apex Court in the case of ***Haribanslal Saharia and another*** Vs. ***Indian Oil Corporation Limited and others*** (supra), entertaining the writ petition is not barred, even if alternative remedy is available. It is, therefore, held that the present writ petition is maintainable. Point No.(iii) is answered accordingly.

15. As discussed above, the present matter has been agitated before this Court for quite a long time i.e. since 2006. Although alternative remedy is available and, at the same time, the writ petition is maintainable, for the interest of justice, it is more prudent to allow the writ petition by quashing the impugned orders so that the rights of the petitioner can be addressed expeditiously. Hence, we hereby quash the impugned orders vide Annexures-4 & 5. At the same time, we remit back the matter to opposite party No.1 with a direction to reassess the incidence of payment of tax for the year 2001-2002 within a period of three months from the date of receipt of copy of this order after giving reasonable opportunity to both parties to produce their respective evidence. The writ petition is disposed of accordingly.

Writ petition disposed of.

2015 (II) ILR - CUT- 249

S. PANDA, J.

W.P.(C) NO. 6535 OF 2011

BARENDRA BISWAL ……..Petitioner

.Vrs.

RAMA ROY @ DAS & ANR ……Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-23, R-3A

Application to set aside compromise decree – Application rejected – Hence the writ petition – Compromise petition was not in accordance with order 6, Rule 15 (1) (4) C.P.C. and Rules 16 & 485 of General Rules and circular orders of the High Court of Judicature, Orissa (Civil) Volume-I – Learned Court below accepted the compromise petition and decreed the suit though the said application was defective – Moreover compromise was recorded on plain papers instead of printed order sheets – While considering an application under order 23 Rule 3A C.P.C learned Court below should have taken

note of the above facts – Held, the impugned judgment is set aside and the matter is remitted back to the Court below for fresh disposal in accordance with law. (Paras 13 to15)

For Petitioner : M/s. S.K.Mishra, P.Prusty, J.Pradhan & D.Prdhan

For Opp. Parties : M/s. P.K.Khuntia & P.K.Mohapatra-3
M/s. Yeeshan Mohanty, P.C.Biswal, M.Jema, B.P.Das, S.Nayak & I.Rout

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Date of Judgment : 25.03.2015

JUDGMENT

S.PANDA, J.

This Writ Petition has been filed by the petitioner challenging the judgment dated 28.12.2010 passed by the learned Civil Judge (Senior Division), Balasaore in C.M.A No.209 of 2008-I arising out of C.S No.238 of 2004-I rejecting an application filed under Order 23, Rule 3-A of C.P.C to set aside the consent judgment and decree dated 11.5.2004 and 15.5.2004 respectively passed in the suit.

2. The brief facts of the case are that opposite party no.1 as plaintiff filed C.S No.238 of 2004-I before the learned Civil Judge (Senior Division), Balasore for declaration of right, title, interest and to declare that Registered Sale Deed No.8926 dated 29.12.2003 is illegal and inoperative. In the plaint it was pleaded that though the petitioner-defendant promised to pay the consideration amount of Rs.7,23,215/- to the plaintiff immediately after 15 days of the registration of Sale Deed, he avoided to pay the same. The possession of the suit land has not been delivered and the original sale deed was to be handed over to the defendant after full payment of the total consideration amount.

3. Though the suit was posted for office note on 01.5.2004, the same was put up in advance on 16.4.2004 on which date the suit was admitted and notice was issued to the defendant fixing the date of appearance on 01.7.2004. However, on 11.05.2004 the matter was put up on the basis of advance petition. An Advocate purportedly appeared on behalf of the petitioner and compromise was recorded by the court below on the basis of a compromise petition filed by both the parties. A decree to that effect was also passed on 16.5.2004.

4. On verification of record, the petitioner found that the said compromise decree had been obtained by misutilising the paper entrusted by him to opposite party no.2 who is a close neighbour of the petitioner. The petitioner was serving at Saudi Arabia in the year 2003 and he came to his native place in October, 2003. Opposite party no.2 gave a proposal to the petitioner to purchase a land situated adjacent to the Bank Petrol Pump at Station Square, Balasore for a consideration of Rs.7,23,215/-.The petitioner accepted the said proposal and also obtained a certified copy of the R.O.R, Non-encumbrance Certificate for 13 years and confirmed that it was not transferred earlier. He purchased the non-judicial stamp paper 'FRANK'for an amount of Rs.72,330/- in the name of opposite party no.1. A sale deed was drafted and submitted before the District Sub-Registrar, Balasore on 29.12.2003. The petitioner also paid the registration fee of Rs.14,525/-. Prior to the execution of the sale deed, a Savings Bank Account was opened in the Indian Overseas Bank, Somnathpur Branch in the name of opposite party No.1. The petitioner deposited Rs.5,00.000/- on 26.12.2003 and paid the rest consideration amount of Rs.2,23,215/- to opposite party No.1 at the time of execution of the sale deed, i.e., on 29.12.2003. Possession was delivered to the petitioner. The petitioner also obtained the original sale deed from the Sub-Registrar Office, Balasore on 12.1.2004.

5. While matter stood thus, opposite party no.2 proposed the petitioner to hand over all the documents including the original sale deed dated 29.12.2003 along with the written and unwritten signed papers to him so that he will take steps to mutate the land in the name of the petitioner. The petitioner had no occasion to disagree to the said proposal and he handed over all the documents, sale deed, written and unwritten papers along with Vakalatnama to opposite party no.2 in presence of opposite party no.1 keeping Xerox copies of the same with him. He paid Rs.25,000/- towards the expenses of mutation case. Thereafter, the petitioner left Balasore in the 1st week of April, 2004.

6. The petitioner came to Balasore and was shocked to notice that the sale deed dated 29.12.2003 in respect of the suit land had already been cancelled by virtue of a decree passed by the learned Civil Judge, (Senior Division), Balasore in C.S. No.238 of 2004 on the basis of compromise arrived at between the parties out of the Court. After enquiring about the said fact, the petitioner found that the compromise decree was obtained by

misutilising the papers entrusted by him to opposite party no.2. Therefore, the petitioner moved this Court in F.A. O. No.86 of 2005 against opposite party nos.1 and 2 challenging the collusive judgment and decree dated 11.5.2004 and 15.5.2004 respectively. This Court granted interim order of injunction and directed opposite party nos.1 and 2 not to change the nature and character of the suit land. The FAO was disposed of with a liberty to the petitioner that in case he files a proper application under Section 151 CPC before the trial court, the same shall be disposed of as early as possible, preferably within a period of six months from the date of filing of such application to recall the compromise decree and the name of opposite party no.2 was deleted from the F.A.O as he was not a party to the suit and liberty was also given to the petitioner that if so advised, he may implead opposite party no.2 as a party before the trial court.

7. Accordingly, the petitioner filed C.M.A No.209 of 2008 before the trial court along with an application to implead opposite party no.2 as a party to the proceeding. However, the said application was rejected by the court below by order dated 19.7.2008 against which the petitioner filed W.P.(C) No.10862 of 2008 before this Court, which was allowed by judgment dated 22.10.2008.

8. The petitioner filed an application before the court below under Order 23, Rule 3-A of C.P.C to set aside the consent judgment and decree dated 11.5.2004 and 15.5.2004 respectively passed in the suit, which was registered as C.M.A No.209 of 2008-I. In the said application it was stated that the decree was obtained fraudulently and the compromise effected was totally unlawful. The petitioner had paid the consideration amount in full to opposite party no.1 prior to execution of the sale deed through cheque and opposite party no.1 withdrew some amount from the Bank. Therefore the petitioner became the absolute owner in possession of the suit land after taking delivery of possession on 29.12.2003 and the title never passed to opposite party no.1 by virtue of any such compromise and at the instance of opposite party no.2 such fraud has been committed by opposite party no.1. Opposite party no.1 filed her show cause stating that the petitioner has signed the compromise being aware of the contents of the same and it was never effected behind his back. The petitioner was very well present in court and no fraud was committed. The petitioner himself admitted to have not paid any such consideration and he appeared through his own advocate. Opposite party no.2 also filed his objection to the said application stating that he is neither necessary party nor proper party. The petitioner without

paying any consideration wanted to grab the property and opposite party no.1 transferred a portion of the suit property to him to the knowledge of the petitioner.

9. The court below after hearing the parties by the impugned judgment rejected the application with a finding that compromise decree drawn was partly lawful and it was unlawful so far as declaration of title of plaintiff is concerned.

10. Learned counsel appearing for the petitioner submitted that as per the terms and conditions of the compromise petition, the defendant had not only admitted the title of the plaintiff over the suit land but also admitted the plaint allegations about non payment of the consideration amount and has agreed for cancellation of the registered sale deed in question declaring the same as illegal and inoperative. The judgment and decree is an outcome of fraud committed not only on the party but also on court. Hence the impugned judgment need be interfered with. In support of his contention he has relied on the decision in the case of **Santosh Vs. Jagat Ram and another** reported in **109 (2010) CLT 543 (SC)** wherein the Apex Court held that the decree as a result of fraud is nothing but a nullity.

11. Learned counsel appearing for opposite party no.1 submitted that the compromise decree was prepared in the presence of the petitioner and the contents of the same were read over and explained to him by his advocate therefore the plea of fraud and illegality taken by the petitioner cannot be accepted.

12. Learned counsel appearing for opposite party no.2 submitted that the petitioner without paying any consideration wanted to grab the property. He further submitted that opposite party no.1 transferred a portion of the suit property to opposite party no.2 to the knowledge of the petitioner. He also submitted that the compromise was lawful and no fraud was committed.

13. In view of the contentions raised by the learned counsel for the parties and after going through the materials available on record, it reveals that the application filed for compromise was not in accordance with the following statutory provisions. Rule 16 of General Rules and Circular Orders of the High Court of Judicature, Orissa (Civil) Volume-I stipulates that when a person presenting a pleading, affidavit, petition or application is not an Advocate, a Pleader or a Mukhtar, he shall, if so required by the

Court, be identified. In the case of an illiterate person his thumb impression shall be affixed in place of the signature required in this connection. Further Rule 485 stipulates that no Court shall accept admission of a compromise by a Pleader/ Advocate or record a compromise filed by a Pleader or Advocate in a pending case, unless a special Vakalatnama is filed by such Pleader or Advocate for the said purpose. In the present case the so called compromise was entered into between the parties and the terms and conditions of the said compromise was explained to the parties. They having understood the same put their signature in the compromise petition without identification and affidavit.

13.1 Order 6, Rule 15 (1) of C.P.C stipulates that every pleading shall be varied at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. Sub Rule (4) was inserted to Order 6, Rule 15 of C.P.C by Act No.46 of 1999 w.e.f. 01.7.2002 which stipulates that the person verifying the pleading shall also furnish an affidavit in support of his pleadings.

14. However, the court below accepting the compromise petition decreed the suit on the terms and conditions of the said compromise. Though the said application was defective due to non compliance of the aforesaid provision the said fact was not taken note of. On the above back ground the court below has not considered whether fraud has been practised or not taking into consideration the provisions as discussed. It further reveals from the L.C.R. that the order sheet in which the compromise was recorded is a plain paper one without assigning any reason why printed form of order sheet was not appended thereto. The court below while considering the application under Order 23, Rule 3-A of C.P.C should have also taken note of all these facts.

15. Considering the above, this Court while setting aside the impugned judgment dated 28.12.2010 passed by the learned Civil Judge (Senior Division), Balasaore in C.M.A No.209 of 2008-I arising out of C.S No.238 of 2004-I, remits the matter back to the court below for fresh disposal in accordance with law. The Writ Petition is accordingly disposed of.

Writ petition disposed of.

2015 (II) ILR - CUT- 255

S. PANDA, J.

W.P.C) NOS. 1620 &13293 OF 2012

SUSIL KUMAR MOTWANI ……..Petitioner

.Vrs.

SMT. BEBI PATTNAIK & ORS. ……..Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-6, R-17

Amendment of plaint – Discretion of the Court – However Court must take into consideration some basic principles i.e. whether such amendment is necessary for the determination of the real question in controversy and the potentiality of prejudice or injustice which is likely to be caused to the other side and that basic test should govern the Courts discretion while granting or refusing amendment.

In the present case since the plaintiff claimed his right over the property on the basis of his purchased land by registered sale deed, rejection of his application for amendment would lead to injustice and multiple litigation and the learned Court below has rightly allowed the amendment directing to implead the subsequent purchasers as party to the suit – Held, impugned order needs no interference under Article 227 of the constitution of India. (Para 11)

For Petitioner : M/s. S.R.Pattnaik,
For Opp. Parties : M/s. R.K.Rout & P.K.Mishra,

Date of Judgment : 26.06.2015

JUDGMENT

S. PANDA, J.

Petitioner-plaintiff in W.P.(C) No. 1620 of 2012 has challenged the order dated 18.5.2011 passed by learned District Judge, Khurda at Bhubaneswar in Interim Application No. 76 of 2011 arising out of F.A.O. No. 47 of 2011 confirming the order dated 28.3.2011 passed by learned Civil Judge (Sr.Divn.), Bhubaneswar in Interim Application No. 49 of 2011 arising out of C.S. No. 85 of 2011 rejecting an application filed under Order, 39 Rules, 1 & 2 of the Code of Civil Procedure.

Petitioner-defendant No.3 in W.P.(C) No. 13293 of 2012 has challenged the order dated 18.5.2012 passed by learned Civil Judge (Sr.Divn.), Bhubaneswar in C.S. No. 250 of 2008 allowing an application filed under Order, 6 Rule, 17 read with Order, 1 Rule, 10 of the Code of Civil Procedure for amendment of the plaint as well as to add some of the parties as defendant Nos. 6 to 19 to the suit.

Both the writ petitions arise out of two suits, parties are common in both the suits, the disputed properties are one and the same, hence the matters are heard together and disposed of by this common order.

2. The facts stated in W.P.(C) No. 1620 of 2012 are described herewith for convenience.

The present petitioner as plaintiff filed C.S. No. 85 of 2011 for permanent injunction against the opposite party No.1 from selling, mortgaging or alienating the suit properties. In the said suit plaintiff has filed an application under Order, 39 Rules, 1 & 2 of the C.P.C., which was registered as Interim Application No. 49 of 2011. In the said interim application plaintiff has averred that he has purchased the suit properties in the year 1979 as well as in the year 1980 from the recorded tenants and he is possessing the suit land. The opposite party No.1-defendant has no manner right, title and interest or possession over the suit land. Since the petitioner faced difficulties, he requested the husband of the defendant to look after the suit properties. It is also averred that the husband of the defendant managed to execute a power of attorney in his favour to manage the affairs. Subsequently the husband of the defendant executed a fake sale deed in favour of the defendant to fulfill their illegal gain and threatened to disposses the plaintiff from the suit land.

3. The defendant filed her objection to the interim application. The court below by order dated 28.3.2011 dismissed the interim application with a finding that prima-facie case and balance of convenience does not lean in favour of the petitioner. The plaintiff preferred F.A.O. No. 47 of 2011 before the learned District Judge, Bhubaneswar being aggrieved with the said order. In the said appeal plaintiff-appellant also filed an application under Order, 39 Rule, 1 of the C.P.C. which was registered as Interim Application No. 76 of 2011. The appellate court by order dated 18.5.2011 rejected the interim application with a finding that appellant has not made out any prima facie case in his favour.

4. The parties have already pleaded regarding mortgaging of the property with the Bank at Bhubaneswar by a person who has no such authority to mortgage the property. The said question will be decided in the suit itself on the evidence to be adduced by the parties. In the present case the loan was declared NPA by State Bank of India as well as UCO Bank, Maitree Vihar Branch, Bhubaneswar for which C.S. No. 85 of 2011 was filed for injunction not to sale, mortgage and alienate the suit property. This Court also directed for maintenance of status quo by order dated 9.2.2012 in Misc. Case No. 1382 of 2012 arising out of W.P.(C) No. 1620 of 2012. In spite of the said order of status quo the opposite party alienated the property which will lead to unnecessary harassment and injustice to the petitioner to protect and preserve the property. While considering an application under Order, 39 Rule, 1 of the C.P.C. the Court can make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit.

5. In the case of ***Mohd. Mehtab Khan & Others Vs. Khushnuma Ibrahim Khan and others*** reported in ***(2013) 9 SCC 221*** wherein it was held that interim matters, even though they may be inextricably connected with the merits of the main suit, should always be answered by maintaining a strict neutrality, namely, by a refusal to adjudicate on merit. Such a stand by the courts is neither feasible nor practicable. Courts, therefore, will have to venture to decide interim matters on consideration of issues that are best left for adjudication in the full trial of the suit. The Courts must endeavour to find out if interim relief can be granted on consideration of issues other than those involved in the main suit and also whether partial interim relief would satisfy the ends of justice till final disposal of the matter.

6. In W.P.(C) No. 13293 of 2012 petitioner has averred that the present opposite party No.1 as plaintiff filed C.S. No. 250 of 2008 for declaration and rendition of accounts valued at Rs.9.29,666/-. It is alleged by the plaintiff that during pendency of the suit on 19.1.2012 defendant No.6 had executed as many as 14 numbers of sale deeds in favour of 14 different persons. All the above sale deeds are outcome of the illegal sale deed dated 13.6.2006 executed by defendant No.1 in favour of defendant No.3 clandestinely. The defendant No.1 taking advantage of the power of attorney and documents handed over to him without informing the plaintiff deposited the title deeds before the defendant No.2-bank and obtained a

loan from the bank for his business. The plaintiff knows about the said illegal act committed by the defendant No.1 for the first time from the notice published by the defendant No.2 in daily newspaper "The New Indian Express", Bhubaneswar wherein the bank called upon the defendant No.1 on 11.1.2007 to repay the loan outstanding amount within sixty days. Thereafter plaintiff immediately demanded the defendant No.1 to return the power of attorney and documents to him but he did not listen to such demand of the plaintiff. Hence the suit.

7. During pendency of the suit plaintiff filed an application under Order, 6 Rule, 17 read with Order, 1 Rule, 10 of the Code of Civil Procedure for amendment of the plaint as well as to add some of the parties as defendant Nos. 6 to 19 to the suit. In the said application plaintiff has taken a stand that during pendency of the suit for the first time he came to know regarding some deeds alleged to have been made by defendant No.1 in favour of his wife-defendant No.3 and in order to grab the land of the plaintiff the alleged vendee made a fake power of attorney in favour of third person and the subsequent transfers which are relevant facts to be incorporated in the plaint by way of proposed amendment for just decision of the suit. The amendment will not change the nature and character of the suit land rather it helps for proper adjudication of the case.

8. Defendant Nos. 1 and 3 have filed their objection to the aforesaid application of the plaintiff taking a stand that the application filed by the plaintiff is not maintainable as he cannot file a petition under two provisions of law and willing to add defendant Nos. 6 to 19 as well as to add some new facts which will ultimately change the nature and character of the suit. Two separate reliefs cannot be claimed in one petition. In the present petition plaintiff has brought separate cause of action which is different from the cause of action of the main suit and is not permissible in the eye of law. The court below by order dated 18.5.2012 allowed the application with a finding that onus is on the plaintiff to prove its case and he has to set up his case.

9. The rules of procedure are intended to sub-serve justice. Where the Court is satisfied that the admission was made by inadvertence or erroneously and there was no malafide on the part of the applicant, it would be denial of justice not to permit the party to withdraw the admission or correct the mistake. No hard and fast rule can be laid down. Each case would depend on its own peculiar facts and circumstances. But in the

balancing exercise what should be kept in mind is the object that is dispensation of justice and not mere technicalities which hinder its just dispensation.

10. In the case of ***Revajeetu Builders and Developers V. Narayanaswamy & Sons and Others*** reported in ***2009(II) OLR (SC) 815*** the Apex Court analised the principles in respect of principle to be followed by the Court while considering the application under Order, 6 Rule, 17 of the Code of Civil Procedure. At paragraph 67 of the said judgment wherein it was described regarding the basic principles emerge which ought to be taken into consideration. One of the said principle is refusing amendment would in fact lead to injustice or lead to multiple litigation. Those basic principles are some of the important factors which shall be kept in mind while dealing with an application and those principles are only illustrative and not exhaustive.

11. In view of the above settled principle, in the present case since the plaintiff claimed his right over the property on the basis of his purchased land by registered sale deed and in such circumstances rejecting the application for amendment amounts to injustice and lead to multiple litigation, hence rightly the court below allowed the application for amendment and directed to implead the subsequent purchasers as party to the suit. Accordingly this Court is not inclined to interfere with the impugned order in exercising the jurisdiction under Article 227 of the Constitution of India. W.P.(C) No. 13293 of 2012 stands dismissed.

In view of the discussions made at paragraph four and five, W.P.(C) No. 1620 of 2012 is disposed of directing the parties to maintain status quo over the suit properties till disposal of C.S. No. 85 of 2011 and the suit shall be disposed of as expeditiously as possible. Parties will cooperate for early disposal of the suit.

Writ petitions disposed of.

2015 (II) ILR - CUT-260

B.K. NAYAK, J

O.J.C. NO. 7279 OF 1993

BINOD BEHARI PANDA ……..Petitioner

.Vrs.

REVENUE OFFR.-CUM-TAHASILDAR, JAIPATNA & ORS. ……..Opp. Parties

ODISHA LAND REFORMS ACT, 1960 – S.59 (2)

Ceiling Proceeding dropped by Revenue Officer – After 17 years Collector made reference U/s. 59(2) of the Act to the Member Board of Revenue for revision of the final order passed by the Revenue Officer – Order was set aside and matter was remanded for fresh disposal – Hence the writ petition – For the first time limitation of 25 years was prescribed by way of amendment of section 59(2) of the Act – Amendment which came into force during the pendency of the revision would apply to this case – Delay of 17 years can not be a ground that the revision was barred by limitation when there is no infirmity in the impugned order – Held, since the member Board of Revenue has given good reasons for doubting the correctness of the order of the Revenue Officer, delay of 17 years can not be a ground to hold that the revision was barred by limitation.

(Paras 9 & 10)

Case Laws Referred to :-

1. 1985 (2) OLR 309 Duryodhan Samal v. Smt. Uma Dei and others .

For Petitioner : Mr. Surya Prasad Mishra
For Opp. Parties : AGA

Date of Order: 02.12.14

ORDER

B.K. NAYAK, J.

Heard learned counsel for the petitioner and learned Additional Government Advocate. Perused the records.

2. Order passed by the Member Board of Revenue, Orissa, Cuttack in OLR Revision Case No.38 of 1992 which was referred by the Collector, Kalahandi under section 59(2) of the OLR Act has been assailed in this writ petition.

3. The facts of the case are that a suo motu ceiling case bearing no.27 of 1974 was initiated against the petitioner. Draft statement was issued on 30.101974 showing Ac.76.98 of land, equivalent to 21.90 standard acres owned by the ceiling holder. Out of the same 11.90 standard acres were shown as ceiling surplus. The petitioner submitted objection before the Revenue Officer to the effect that he had two major married sons who were residing separately. He produced an unregistered partition deed dated 16.5.1965 and a registered partition deed no.1406 dated 05.10.1970. The Revenue Officer passed final order on 03.03.1975 accepting the unregistered partition deed, even though, the registered partition deed was made subsequent to the enforcement of the ceiling law, i.e., 26.09.1970. By his order, the Revenue Officer excluded some lands as per the recital in the registered partition deed and some other lands in favour of Shri Purushotham Thakur. The balance land owned by the petitioner was held to be 7.56 standard acres, which was less than the permissible retainable area. The Revenue Officer, therefore, dropped the ceiling proceeding.

4. In 1992 the Collector, Kalahandi made a reference under section 59(2) of the OLR Act to the Member, Board of Revenue, Orissa, Cuttack for revising the final order dated 03.03.1975 passed by the Revenue Officer in the ceiling case on the grounds; (i) that neither the Local Committee was consulted nor memorandum of enquiry was prepared by the R.O. in support of the finding that the petitioner had two major married sons; (ii)classification of the land was not enquired into; and (iii) the details of the land particulars owned by the land holder and his family members were not collected from other Tahasils.

5. On hearing the counsel for the parties, the learned Member, Board of Revenue came to the conclusion that the ceiling case was finalized before amendment of the OLR Act necessitating consultation with the Local Committee if any, and therefore, non-consultation with the Local Committee is not a good ground for revising the order. However, taking into consideration the discrepancy in the age of the two sons of the petitioner as mentioned in the partition deeds, the learned Member entertained doubt that the second son of the petitioner was a major married separated son on the appointed date, i.e., 26.09.1970. The Member ultimately came to the conclusion that the Revenue Officer did not go deep into the matter and excluded the property held by the two sons from the purview of the ceiling case without thorough inquiry. Accordingly the impugned order was passed by him setting aside the order dated

03.03.1975 passed by the Revenue Officer in the ceiling case and remanding it for fresh disposal on merits as per law.

6. Learned counsel for the petitioner submits that it was not competent on the part of the Member, Board of Revenue to revise the order of the Revenue Officer after 17 years. Referring to some old decisions of this Court he contended that even if no limitation was prescribed for entertaining a revision by the Member under section 59(2) of the OLR Act, such power of revision however has to be exercised within a reasonable time. He cited some decisions where revision under section 59(2) of the OLR Act against orders passed before 11 to 14 years were held to be unreasonable on the facts and circumstances of those cases.

7. Section 59(2) of the OLR Act has been amended by Orissa Act 29 of 1993, prescribing a limitation period of 25 years for revising an order of a subordinate authority by the Board of Revenue on a reference made by the Collector of the District. Prior to the amendment, no limitation at all was prescribed by the statute for the purpose of such revision.

8. Learned counsel for the petitioner submits that the amendment must be held to be prospective in nature and shall have no application to the present revision before the Member, Board of Revenue which was initiated in 1992, i.e., 17 years after passing of the order by the Revenue Officer in the ceiling case. There is no dispute that by way of amendment of enactment vested rights cannot be taken away unless the amendment has been specifically made retrospective. A Division Bench of this Court in the case of **Duryodhan Samal v. Smt. Uma Dei and others, 1985 (2) OLR 309** have held as follows:-

> "**6**. Before we enter into discussion of the question at issue, we may state the accepted principle of interpretation of a statute that every legislation is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. The question whether a statute operates retrospective or prospectively is one of legislative intent. If the terms of the statute are clear or unambiguous and it is manifest that the legislature intended the Act to operate retrospectively, unquestionably, it must be so construed. If, however, the terms of a statute do not of themselves, make an intention certain or clear, it should be presumed to operate prospectively. An Act is retrospective if it takes away or impairs any vested right acquired under an existing law or creates a new

> liability or obligation in respect of transactions already past, or creates a new obligation or liability in respect of past transactions.
>
> The said Act does not spell out that it would have effect from a date anterior to its enactment nor, as already stated, it does purport to take away, destroy or impair a vested right. It does not create a new obligation or liability in respect of any past transaction either expressly or by necessary implication. *But the presumption that a statute is ordinarily prospective has no application to a statute or those provisions of a statute making procedural alteration or which affects the procedural law only*. It is, therefore, necessary to find out the nature of the right which is affected by the new statute in order to determine the retrospective nature of Sec.16(2) of the Act."

It is clear from the aforesaid decision that the presumption that a statute is ordinarily prospective has no application to those provision of amendment which make procedural alteration or which affects the procedural law only.

9. Providing a period of limitation by an enactment for the purpose of entertaining of appeals or revisions is in the realm of procedure. Therefore, it cannot be said that procedural law cannot be amended retrospectively. In the instant case by virtue of the amendment to section 59(2) of the Act prescribing the period of limitation no vested right of the petitioner is being taken away. Originally there was no limitation at all for entertaining a revision under section 59(2) of the OLR Act. For the first time limitation of 25 years was prescribed by way of amendment. Therefore, the amendments which came into force during the pendency of the revision before the Member, Board of Revenue will be governed by the amendment. It is not a case where a small period of limitation was initially provided for and after the expiry of the period of limitation for revision the order of the Revenue Officer is sought to be revised taking recourse to the larger period of limitation prescribed by the amendment. I am, therefore, of the view that the amendment prescribing limitation would apply to the instant revision, which was pending before the Member, Board of Revenue when the amendment came into force. Therefore, a delay of 17 years cannot be a ground to hold that the revision was barred by limitation.

10. Even assuming that the amended provision was not applicable, what would be a reasonable time for a revision under section 59(2) would

depend on the facts and circumstances of each case. In the instant case the Member, Board of Revenue has given good reasons for doubting the correctness of the order of the Revenue Officer excluding lands held by the sons of the petitioner accepting them to be major, married and separated on the appointed date. Therefore, I do not find any infirmity in the impugned remand order. The writ petition is, therefore, dismissed.

Writ petition dismissed.

2015 (II) ILR - CUT- 264

S.K. MISHRA,J.

BLAPL NO. 21677 OF 2014

MADHU SUDAN MOHANTY ……..Petitioner

.Vrs.

REPUBLIC OF INDIA ……...Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S. 439

Bail – While granting bail, the court has to keep in mind the nature of accusations , the nature of evidence in support there of, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of witnesses being tampered with and the larger interests of the public – However in economic offences which involves huge loss of public funds need to be viewed seriously.

In this case petitioner's involvement in the commission of the crime alleged is prima facie made out – Most of the witnesses who will be testifying against the petitioner were working with him – If petitioner will be released on bail there is every possibly of the gaining over the witnesses cited against him – Held, considering about the larger interest of the society this court is not inclined to release the petitioner on bail.

(Paras 11,12,13)

For Petitioner : M/s. Rajjeet Roy
For Opp. Party : Mr. V. Narasingh (C.B.I)

Date of Order: 23.12.2014

ORDER

S.K. MISHRA,J.

This is an application under Section 439 of the Cr.P.C. filed by the petitioner, who happens to be the publisher of Oriya newspaper, namely "Orissa Bhaskar" and the Chief Executive of J.P. Constructions Pvt. Ltd. The petitioner has been arrested by the C.B.I. in connection with his role in the Chit Fund scam and his involvement in Artha Tatwa Infra India Limited (in short "AT Group'), which was headed by accused Pradip Kumar Sethy.

2. The investigation of the case was taken over by the C.B.I. as per the direction of the Hon'ble Supreme Court in the case of **Subrata Chattoraj v. Union of India and others,** (2014) 8 S.C.C. 768, where the Hon'ble Supreme Court taking into consideration the magnitude of the Chit Fund Scam has directed that with respect to Odisha State, the C.B.I. shall investigate the larger conspiracy into the affairs of the 44 companies and also track the money trail. The Supreme Court has held that the investigation into the scam is not confined to those directly involved in the affairs of the companies but may extend to several others, who need to be questioned about their role in the sequence and unfolding of events that has caused ripples in several fronts.

3. Mr. Y. Das, learned Senior Advocate appearing for the petitioner in course of hearing elaborately argued in the matter. According to him, the petitioner being the owner of Orissa Bhaskar has done different advertisements of the AT group and in connection with such publication in the newspaper, money has been given to the petitioner between 2009 and 2012 and, as such, being the publisher of the newspaper, the petitioner has received cheques of Rs.57,75,025/-, although there were bills against AT Group for Rs.60,78,500/-. He further submitted that though the petitioner was arrested on 14.09.2014 and the Central Bureau of Investigation (C.B.I.) has taken him on remand, no document could be seized either from his residence or from the office of the present petitioner. It is submitted by the learned Senior Advocate that there is no prima facie case to hold that the petitioner was involved with the criminal conspiracy with accused Pradip

Sethy. In his elaborate argument, learned Senior Advocate also files several documents including the income-tax returns, which is filed after being audited, and states that the money has been received by the petitioner as the Managing Director of Tilak Raj Publications Pvt. Ltd. does not show that he has committed any conspiracy and has been wrongly implicated in this case. Further, he states that there is no apprehension of fleeing from justice or tampering with the evidence. Hence, it is submitted that he should have been released on bail.

4. The Bail Application was heard on two dates. On the first listing, K.Raghavacharyulu, Special Public Prosecutor, New Delhi appeared for the C.B.I. and contested the Bail Application of the petitioner. On the adjourned date, the further hearing was taken up and the learned Retainer Counsel for the C.B.I., namely Sri V.Narasingh argued on behalf of the prosecution and read out statements of several witnesses to show that the petitioner has close nexus with the main accused Pradeep Sethy. In the meantime, the C.B.I. has submitted charge-sheet against the present petitioner and others for commission of offences punishable under Sections 120-B, 294, 341, 406, 409, 420, 467, 468, 471, 506/34 of the I.P.C. and Sections 3, 4, and 5 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978.

5. Perusal of the statements of witnesses reveals that several witnesses have stated about the complicity of the present petitioner in the affairs of the AT Group. Dillip Kumar Mohanty is working as Supervisor, Tilak Raj Publications Private Limited. Prior to that he was working in J.P. Constructions Private Limited. He says that it is a company owned by the present petitioner. He has stated that J.P. Constructions Pvt. Limited is practically doing no work since last five years. Witness Banabihari Sarangi, Assistant Advertisement Manager, Tilak Raj Publications Private Limited states that he knows Pradeep Kumar Sethy through Madhu Sudan Mohanty, the present petitioner. Pradeep Sethy was the head of the AT Group during 2010 to 2013. Sri Sethy is a close friend of the present petitioner. The witness further states that generally both of them met each other at Artha Tatwa office at Kharavel Nagar or at Jaydev Vihar. He further states that as per the instruction of the petitioner, he had met Shri Sethy on different occasions at his office and also he had received huge amounts in cash and has deposited the same at different banks. He has also given the details of the money received and deposited by him in the name of Madhu Sudan Mohanty or T.R. Publication.

6. Tripati Prasad Dash was working as a Vice-President (Marketing), Tilak Raj Publications Pvt. Ltd. by referring to the documents he has stated that the petitioner has received Rs.60,42,500/- from the AT Group during the period from February, 2010 to July, 2012. He has further stated that the present petitioner was a close associate of Pradeep Sethy, head of Artha Tatwa Group. He further states that the petitioner has collected the aforesaid amount in the name of advertisement and sponsorship programme from AT Group owner Pradeep Sethy. He has further stated that for getting advertisements and sponsorship programmes, there must be agreement/offer letter/ quotation executed between the parties i.e. Tilak Raj Publication and AT Group. But in the instant case, no agreement/offer letter/ quotation was executed in between the above parties. The witness has very specifically stated that Pradeep Kumar Sethy has parked his amount collected from the public with the petitioner in the name of sponsorship and advertisement through his company's bank accounts.

7. Pradyumna Keshari Praharaj was working as Senior Territory Manager, AT Group during the period from October, 2009 to June, 2013. He states that he knows the present petitioner, who happens to be the Managing Director of Tillak Raj Publications Private Limited, Bhubaneswar and J.P. constructions Pvt. Limited, Bhubaneswar. This witness further states in his statement recorded under Section 161 Cr.P.C. that the petitioner was a close associate of Pradeep Kumar Sethy during the relevant period. The petitioner is involved in day to day functioning of AT Group business though he was not in any post/office bearer in AT Group. He further states that it was within the knowledge of the present petitioner that Pradeep Kumar Sethy was collecting amount from public alluring the depositors of higher returns. Even then, he has also motivated various depositors for depositing money with AT Group. He further states that he knows Pradeep Kumar Sethy in collusion with the petitioner has taken and deposited crores of rupees in the accounts of the petitioner and his companies during the period 2010-2013. He has specifically stated that the petitioner or his employees used to come to AT Office on different dates during the relevant period. The witness has also seen Pradeep Sethy handing over lakhs of rupees on different dates during the relevant period either to the petitioner or to Dillip Kumar Mohanty for keeping in the accounts of the petitioner or in the account of the company. It is stated that the said amounts were given in cash.

8. Thus, it is clear from the records and in the investigation made by the C.B.I. that J.P. Constructions Private Limited has virtually not doing any work during the relevant period. But moneys were being transferred from the account of the AT Group and deposited in the account of J.P. Constructions Private Limited and also money has been deposited in the accounts of Tilakraj Publication. It was contended by Mr. V.Narasingh, the retainer counsel for the C.B.I. that these transactions were camouflage to park the ill-got money of Pradeep Sethy. From the materials available on record, it is clear that the transactions between the petitioner and Pradeep Sethy, head of the AT Group are devised to park the ill got money of Pradeep Sethy received from depositors.

9. The Supreme Court in the reported case of **Arun Bhandari v. State of Utter Pradesh and others,** (2013) 2 SCC 801, has held that sometimes a case may apparently look to be of civil nature or may involve a commercial transaction but such civil disputes or commercial disputes in certain circumstances may also contain ingredients of criminal offences and such disputes have to be entertained notwithstanding that they are also civil disputes.

10. In the aforesaid case, the Hon'ble Supreme Court took into consideration its previous decisions rendered in **Mohd. Ibrahim v. State of Bihar**; (2009) 8 SCC 751, wherein the Hon'ble Supreme Court has held as follows:

> "8. This Court has time and again drawn attention to the growing tendency of the complainants attempting to give the cloak of a criminal offence to matters which are essentially and purely civil in nature, obviously either to apply pressure on the accused, or out of enmity towards the accused, or to subject the accused to harassment. Criminal courts should ensure that proceedings before it are not used for settling scores or to pressurize parties to settle civil disputes. But at the same time, it should be noted that several disputes of a civil nature may also contain the ingredients of criminal offences and if so, will have to be tried as criminal offences, even if they also amount to civil disputes."

11. The Hon'ble Supreme Court in the case of **Central Bureau of Investigation v. Vijay Sai Reddy,** (2013) 7 SCC 452; at paragraph 34 has held that while granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the

punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public/State and other similar considerations. The Hon'ble Supreme Court has also directed to keep in mind that for the purpose of granting bail, the legislature has used the words "*reasonable grounds for believing*" instead of "*the evidence*", which means the Court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. The Hon'ble Supreme Court has further held that it is not expected at the stage of considering the Bail Application to have the evidence establishing the guilt of the accused beyond reasonable doubt.

12. In the case of **Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation,** (2013)7 SCC 439, the Hon'ble Supreme Court held that economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

13. Keeping the foresaid considerations in mind, this Court is of the opinion that the petitioner's involvement in the commission of the crime alleged is prima facie made out. It is also apparent on record that most of the witnesses, who will be testifying against the present petitioners, were working with him either as employee of the M/s. J.P. Constructions Private Limited or of the M/s. Tilkraj Publications Private Limited. Keeping in view the aforesaid considerations, this Court is of the opinion that if the petitioner is released on bail, then there is every possibility of the gaining over the witnesses cited by the C.B.I. against him. So considering this aspect and the greater and larger interest of the State and Society, this Court is not inclined to grant bail to the petitioner, even though charge-sheet has been submitted in the meantime. Accordingly, the Bail Application is dismissed.

Application dismissed.

2015 (II) ILR - CUT-270

C.R. DASH, J.

W.P.(C) NO. 12211 OF 2014

BABAJI DHAL ……..Petitioner

.Vrs.

ELECTION OFFICER-CUM-B.D.O., & ANR. ……..Opp.Parties

ODISHA GRAMA PANCHAYAT ACT, 1964 – S.39 (d)

RECOUNTING OF VOTES – Election Petition does not contain adequate pleadings of material facts relating to improper acceptance or rejection of votes – Election petitioner has not made out a prima facie case of high degree of probability making out a case for recounting of votes – Narrow margin of votes between the returned candidate and election petitioner by itself is not sufficient for the above purpose – Moreover there was once recounting of votes by the election officer – Held, the impugned order passed by the learned Court below directing recounting of votes is set aside.

(Para 29)

Case Laws Rreffered to :-

1. AIR 1964 SC 1249 : Ram Sewak Yadav vs. Hussain Kamil Kidwai and others,
2. AIR 2010 SC 24 : Kattinokkula Murali Krishna vs. Veeramalla Koteswara Rao and Ors,
3. AIR 1966 SC 773 : Dr. Jagjit Singh vs. Giani Kartar Singh,
4. AIR 1980 SC 206 : R. Narayanan vs. Semmalai,
5 AIR 1989 SC 640 : P.K.K. Shamsudeen vs. K.M. Mappillai Mohindeen and others,
6. AIR 2004 SC 2036 : Chandrika Prasad Yadav vs. State of Bihar and others,
7. AIR 2004 SC 541 : M..Chinnasami vs. K.C. Palanisami and others
8 AIR 1970 SC 276 : Jitendra Bahadur Singh vs. Krishna Behari and others,
9. (2000) 8 SCC 355 : Vadivelu vs. Sundaram and others
10 1999 (9) SCC 420 : Mahant Ram Prakash Das vs. Ramesh Chandra and others,

For Petitioners : M/s. Manoj Kumar Mohanty
T.Pradhan, & M.R. Pradhan.

For opp.party : Addl. Government Advocate.
M/s. Amiya Kumar Mohanty (A)

R.K. Behera & Mr. R.C. Pradhan

Date of Judgment : 19.11.2014

JUDGMENT

C.R. DASH, J.

This writ application has been filed by the petitioner impugning the order dated 26.06.2014 passed by the learned Civil Judge (Junior Division), Pattamundai in Election Misc. Case No.7 of 2012 directing production of used, counted and rejected ballots of Balabhadrapur Grama Panchayat under Pattamundai Panchayat Samiti in the district of Kendrapara for inspection.

2. The present petitioner is the elected Sarpanch and present opposite party No.2 is the defeated candidate. The election for the post of Sarpanch was held on 13.02.2012 and the result was published on 24.02.2012. The petitioner was assigned with the symbol of "Open Book" and opposite party No.2 was assigned with the symbol of "Fish" in the said election. In the election, the petitioner polled 1288 votes, opposite party No.2 polled 1285 votes and 53 votes were rejected. The petitioner was thus declared elected by margin of 3 votes. Subsequently, opposite party No.2 moved the Election Officer for recounting. The prayer was allowed by the Election Officer. In recounting, the petitioner was found to have polled 1292 votes, opposite party No.2 was found to have polled 1291 votes and 43 votes were rejected. After recounting, the petitioner was declared to be elected thus by a margin of one vote.

3. The present opposite party No.2 filed Election Misc. Case No.7 of 2012 on various grounds, inter alia, grounds of multiple voting, non-affixture of prescribed rubber stamp, impersonation by some of the voters and so on in different booths. Altogether polling was held in 11 booths for the Grama Panchayat.

4. In course of the proceeding, present opposite party No.2 filed a petition for production of used, counted and rejected ballots for inspection. The said petition was rejected by the Election Tribunal vide order dated 06.09.2012. Opposite party No.2 moved this Court in W.P.(C) No.17720 of 2012. The writ application was disposed of on 02.07.2013 with the following observation:-

"However, the learned court below is directed to immediately proceed with the trial of the Election Misc. Case and dispose of the same within a period of four months from the date of production of certified copy of this order. If any fresh petition is filed by the petitioner at the appropriate stage for recounting, that may be considered on its own merit."

5. Opposite party No.2 filed another petition for production of used, counted and rejected ballots for inspection and recounting. Such petition was filed after closure of evidence from both the sides.

6. Learned Election Tribunal, on consideration of the materials on record and evidence adduced, took view in favour of recounting and passed the impugned order for production of used, counted and rejected ballots for inspection. The said order is impugned in this writ application.

7. Mr. Manoj Kumar Mohanty, learned counsel for the petitioner submits that the Election Tribunal has erred in ordering recount of votes, when the petitioner (opposite party No.2 here) has not made out a prima facie case for order of recounting. It is further submitted that secrecy of the ballot being sacrosanct, the same could not have been violated by ordering recount until a prima facie case of compulsive nature had been made out by the defeated candidate (opposite party No.2). Learned counsel for the petitioner further submits that the learned Election Tribunal has not properly followed the salutary principles of law pronounced by the Hon'ble Supreme Court in different cases and order of recount of votes has been passed:

(I) When the Election Petition does not contain an adequate statement of all the material facts, on which the allegation of irregularity or illegality in counting are founded ;

(II) When on the basis of the evidence adduced, such allegations are prima facie not established, affording a good ground for believing that there has been a mistake in counting ;

(III) When the Election Tribunal is not prima facie satisfied that making of such an order of recounting is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties ;

Mr. Mohanty, learned counsel for the petitioner relies on a catena of decisions to substantiate his contentions.

8. Mr. Amiya Kumar Mohanty, learned counsel appearing for the opposite party No.2 oppugns the contentions raised by learned counsel for the petitioner and supports the impugned order. He does not dispute the principle of law enunciated by the Hon'ble Supreme Court and this Court so far as recounting of vote by the learned Election Tribunal is concerned. But he submits that the conditions for recount have been well satisfied in his pleadings by the opposite party No.2 and in the evidence adduced on his behalf.

It is further submitted by Mr. Mohanty, learned counsel for opposite party No.2 that, when the finding of the learned court below is not perverse, no interference by this Court in exercise of writ jurisdiction is called for. He also relies on a number of decisions of the Hon'ble Supreme Court and this Court to substantiate his contention.

9. So far as the decision relied on by learned counsel for the parties are concerned, both of them having relied on a number of decisions so far as conditions precedent for ordering recount of votes in election proceeding is concerned, all the decisions need not be extracted here for the sake of brevity.

10. The Hon'ble Supreme Court, in the case of ***Ram Sewak Yadav vs. Hussain Kamil Kidwai and others,*** **AIR 1964 SC 1249,** has ruled regarding the principles, which should govern the field in ordering recount of votes in an election proceeding. That is a Five Judges Bench decision. The salutary principles enunciated by the Hon'ble Supreme Court in the aforesaid case has been followed consistently till date and the principles have remained the same. It would, therefore, suffice to quote the observation of the Hon'ble Supreme Court in this regard in the recent case of ***Kattinokkula Murali Krishna vs. Veeramalla Koteswara Rao and others***, **AIR 2010 SC 24** in paragraph- 11 of the judgment, which runs as follows:-

> *"Before examining the merits of the issues raised on behalf of the parties, it would be appropriate to bear in mind the salutary principle laid down in the Election Law that since an order for inspection and re-count of the ballot papers affects the secrecy of ballot, such an order cannot be made as a matter of course.*

Undoubtedly, in the entire election process, the secrecy of ballot is sacrosanct and inviolable except where strong prima facie circumstances to suspect the purity, propriety and legality in the counting of votes are made out. The importance of maintenance of secrecy of ballots and the circumstances under which that secrecy can be breached, has been considered by this Court in several cases. It would be trite to state that before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements, viz. (i) the election petition seeking re-count of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be, prima facie, satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied. Broadly stated, material facts are primary or basic facts which have to be pleaded by the election petitioner to prove his cause of action and by the defendant to prove his defence. But, as to what could be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down."

11. So far as the aforesaid principles of law is concerned, reference may be made to ***Dr. Jagjit Singh vs. Giani Kartar Singh,*** **AIR 1966 SC 773**, ***R. Narayanan vs. Semmalai,*** **AIR 1980 SC 206**, ***P.K.K. Shamsudeen vs. K.M. Mappillai Mohindeen and others***, **AIR 1989 SC 640**, ***Chandrika Prasad Yadav vs. State of Bihar and others***, **AIR 2004 SC 2036**, ***M. Chinnasami vs. K.C. Palanisami and others***, **AIR 2004 SC 541**, ***Jitendra Bahadur Singh vs. Krishna Behari and others***, **AIR 1970 SC 276**, ***Vadivelu vs. Sundaram and others*** **(2000) 8 SCC 355**, ***Mahant Ram Prakash Das vs. Ramesh Chandra and others***, **1999 (9) SCC 420**, ***Udey Chand vs. Surat Singh and others***, **2010 (1) CLR (SC) 371**, ***Nihar Ranjan Bisoi vs. Election Tribunal-cum-District Judge, Jeypore***, **2006 (1) OLR 796**, ***Jagannath Sethi vs. Adikanda Palata and others***, **2014 (1) OLR 521**, ***Ananda Chandra Ojha vs. Ashok Saha***, **2013 (1) OLR 575**.

12. Mr. Manoj Kumar Mohanty, learned counsel for the petitioner relying on the case of Chandrika Prasad Yadav, ***AIR 2004 SC 2036*** (supra) submits that narrow margin of votes between the returned candidate and election petitioner by itself is not sufficient for issuing direction for

recounting. He strenuously submits that opposite party No.2 having not pleaded regarding the material facts in election petition as well as the petition seeking recounting and there being no cogent evidence regarding the irregularity in the voting process, order of recounting is vitiated.

13. Mr. Amiya Kumar Mohanty, learned counsel for opposite party No.2 submits that it is well settled that while maintenance of secrecy of ballot is sacrosanct, maintenance of purity in election is equally important. He relies in the case of Nihar Ranjan Bisoi (supra) to substantiate his contention that, when purity in election had been in question, it was proper for the Election Tribunal to order recounting, especially when the margin of vote is only one vote in the present case.

14. Mr. Amiya Kumar Mohanty, learned counsel for opposite party No.2 with all persuasiveness relies on the case of ***R. Narayanan vs. S. Semmallai***, **AIR 1980 SC 206**, which reads as follows :-

> *"If the lead is relatively little and/or other legal infirmities or factual flaws hover around, recount is proper, not otherwise. In short, where the difference is microscopic, the stage is set for a recount given some plus point of clear suspicion or legal lacuna, militating against the regularity, accuracy, impartiality or objectivity bearing on the original counting."*

The Hon'ble Supreme Court, though has made the above observation, in paragraph- 25 of the judgment in the aforesaid case has observed thus :-

> *"Although no cast iron rule of universal application can be or has been laid own, yet from a beadroll of the decisions of this Court two broad guidelines are discernible, that the Court would be justified in ordering a recount or permitting inspection of the ballot papers only where (i) all the material facts on which the allegations of irregularity or illegality in counting are founded, are pleaded adequately in the election petition and (ii) the Court/Tribunal trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties."*

15. In view of such ruling, the observation of the Hon'ble Supreme Court in the case of R. Narayanan regarding microscopic margin in votes does not lead to any conclusion that, if the lead is relatively little, recount is

imperative. A little lead may be an additional ground for ordering recount of votes, if infirmity or factual flaws hover around and there is suspicion or legal lacuna, militating against the regularity, accuracy, impartiality, or objectivity bearing on the original counting. This Court in the case of ***Rabindra Kumar Mallick vs. Panchanan Kanungo and others***, **1998 (II) OLR 214**, has also held that no doubt, the smallness of margin between the victor and the vanquished is a relevant factor, but that by itself is not sufficient. Hon'ble Supreme Court, in the case of ***Kattinokkulla Murali Krishna***, **AIR 2010 SC 24** supra has also ruled that a narrow margin of votes between the returned candidate and the petitioner does not per se give rise to a presumption that there has been an irregularity or illegality in the counting of votes.

16. Mr. Amiya Kumar Mohanty, learned counsel for the opposite party No.2 relies on the case of Nihar Ranjan Bisoi (supra) to bring home the point that maintenance of purity of election is equally important.

17. I do not dispute the contention. If it is the duty of the Election Tribunal to preserve the secrecy of ballot, it is also its duty to see that purity in the election process had been maintained. But to arrive at the satisfaction as to whether there has been some lacuna, irregularity, inaccuracy, partiality or subjectivity bearing on the original counting, the election petitioner is duty bound to provide adequate statement of material facts in the election petition and the Court must be prima facie satisfied about the impurity in the counting process.

18. It is not the law that the Court must balance between the secrecy of ballot and the purity of election process. Secrecy of ballot, the Election Tribunal must preserve and purity of election process has to be found out only after conditions for recounting as discussed (supra) are satisfied to show that there has been impurity in the election process. In other words, the principle of "secrecy of ballot" is not absolute. It must yield to the principle of "purity of election" in larger public interest. "Secrecy of ballot" principle presupposes a validly cast vote, the sanctity and sacrosanctness of which must in all events be preserved. When it is talked of ensuring free and fair elections, it is meant elections held on the fundamental foundation of purity and the "secrecy of ballot" as an allied vital principle. Secrecy of ballot therefore has to be preserved until a case to show impurity in election process is made out on the basis of principles discussed supra. Such being the position of law, it is now the stage to find

out whether the election petition satisfies the conditions precedent for seeking recount of votes in the proceeding.

19. Paragraphs- 5 to 11 of the election petition speaks about casting of votes by some voters impersonating some other voters. Paragraphs- 5 to 10 speaks of instances of such casting of votes by impersonation. In this regard, Rule- 44 has been enacted in the Grama Panchayat Rules, 1965 to raise objections, which stipulates as follows :-

> *"44. (1) Any contesting candidates or his authorized polling agent may object to the identity of a voter on the only ground that he is not the person he claims to be as per entry in the electoral roll. For every objection a fee of Rs.2 shall be deposited with the Presiding Officer. The Presiding Officer shall decide the objection summarily and his decision shall be final. If the objection is rejected the deposit shall be forfeited. If, on the other hand, the objection is allowed, the deposit shall be refunded to the person who deposited the same.*
>
> *(2) In case of forfeiture of deposit under Sub-rule (1), a receipt in Form No.5 prescribed under the Orissa Grama Panchayat Rules, 1968 shall be issued to the person who has made the deposit."*

On consideration of this rule, this Court in the case of ***Bhagyadhar Khatei vs. Kubera Pradhan and others***, **2008 (II) OLR 82** has held thus :- *"Thus a provision is in built in the Election Rules to raise objection as to identity of a voter on the ground that he is not the person he claims to be as per the electoral roll. Such objection has to be made by the polling agents at the first instance. The modality for raising objection is stipulated in the Rules. The Rules also specify the consequences."*

In the aforesaid case, recount of vote was sought for on the ground that certain fictitious persons had cast votes impersonating some dead voters. There was no evidence to show that Rule- 44 of Orissa Grama Panchayat Rules had been complied with. Taking into consideration such non-compliance, this Court rejected the plea of recounting of votes.

20. So far as the present case is concerned, there is nothing on record to show that Rule- 44 had been resorted to or complied with by the election agents opposite party No.2 at the time of counting by the Presiding Officer or recounting by the Election Officer. In absence of such evidence, the

averments made in paragraphs- 5 to 11 of the election petition must be held to be vague plea without any supporting evidence.

21. In paragraph- 13 of the election petition, allegation has been made regarding improper acceptance and improper rejection of votes so far as symbols of the parties are concerned booth-wise. In Booth Nos. 1, 2, 3, 5, 6, 7 and 8 altogether 28 votes are alleged to have been improperly accepted in favour of the present petitioner. So far as Booth No.1 is concerned, serial number of ballot paper and name of the election agent in respect of one such vote has been provided. So far as other booths are concerned, general allegations have been made to the effect that such and such numbers of votes have been improperly accepted in respect of the symbol of the returned candidate and such and such numbers of votes have been improperly rejected in respect of the symbol of the election petitioner. Serial number of ballot paper, agent's name, who raised objection, table number in which the votes were counted etc. which are material facts have not been pleaded.

22. After the election result was declared, recounting was held on the basis of the petition filed by the election petitioner. There is no pleading containing adequate material facts so far as improper acceptance or rejection of votes in the said recounting is concerned except general averment to that effect in paragraph- 13 which reads as follows :-

> *"…… and the prayer of the plaintiff for counting was allowed but the Election Officer has also illegally accepted and counted the rejected votes in favour of "Open Book" and many valid votes polled in the symbol "Fish" have been improperly rejected and in the process the plaintiff got one vote less than the symbol "Open Book" ……"*

The opposite party No.2 in the election petition has not mentioned as to how many invalid votes had been counted in favour of the returned candidate at the recounting. So also, the opposite party No.2 has not alleged the nature of the illegality or irregularity said to have been committed by the Election Officer at the time of recounting. How and in what manner there was improper acceptance of invalid votes and improper rejection of valid votes at the recounting is also not explained by the opposite party No.2. In short, the election petition is bereft of all details so far as the recounting is concerned.

23. It is the settled law that the pleadings as a whole is to be considered and requirement for ordering recounting of vote is adequate pleading in the election petition. In all the cited cases, emphasis has been given to the word "adequate" before the pleading to show that any vague plea is not to be taken into consideration and recounting cannot be ordered for asking. If the entire pleading of the election petition (opposite party No.2) is taken into consideration, it is found that the pleading is deficient so far as adequate pleading of material or basic fact is concerned.

24. Learned court below, in the impugned order, has only given a passing remark about adequate pleading, but he has failed to take into consideration as to what made him to return such a finding and which pleading weighed with him in giving such a finding.

25. Hon'ble Supreme Court, in the case of ***P.K.K. Shamsuddeen, AIR 1989 SC 640*** supra has ruled that the right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or Court should not order the recount of votes.

26. Hon'ble Supreme Court has thus given emphasis to prima facie case of high degree of probability which must be distinguished from a prima facie case simplicitor. The Court or Tribunal, before ordering the recount of votes has to satisfy itself about the prima facie case of a high degree of probability and the requirement for indulgence by the Court or Tribunal is certainly more than finding a prima facie case simplicitor.

Hon'ble Supreme Court, in the case of ***Chandrika Prasad Yadav***, ***AIR 2004 SC 2036*** supra, in paragraphs- 22 & 23 has held thus :-

> *"22. In M. Chinnasamy v. K.C. Palanisamy and others [2003 (10) Scale 103] this Court upon noticing a large number of decisions held that it is obligatory on the part of the Election Tribunal to arrive at a positive finding as to how a prima facie case has been made out for issuing a direction for recounting holding :*

"Apart from the clear legal position as laid down in several decisions, as noticed hereinbefore, there cannot be any doubt or dispute that only because a recounting has been directed, it would be held to be sacrosanct to the effect that although in a given case the Court may find such evidence to be at variance with the pleadings, the same must be taken into consideration. It is now well settled principle of law that evidence adduced beyond the pleadings would not be admissible nor any evidence can be permitted to be adduced which is at variance with the pleadings. The Court at a later stage of the trial as also the appellate Court having regard to the rule of pleadings would be entitled to reject the evidence wherefor there does not exist any pleading".

23. It was further held that for the said purpose the Tribunal must arrive at a finding that the errors are of such magnitude which would materially affect the result of the election. As regard standard of proof, this Court held :

"The requirement of laying foundation in the pleadings must also be considered having regard to the fact that the onus to prove the allegations was on the election petitioner. The degree of proof for issuing a direction of recounting of votes must be of a very high standard and is required to be discharged. (See Mahender Pratap v. Krishan Pal and others (2003) 1 SCC 390).

(See also Mukand Ltd. v. Mukand Staff & Officers Association, 2004 (3) JT (SC) 474)."

27. Though the learned court below has given a finding regarding a prima facie case, he has not whispered even a word as to what are the materials, on which it found the prima facie case justifying recount of votes. Learned court below has given a passing finding to the effect that

"……. so this Court is of the considered opinion that in order to decide the dispute so also to do the complete and equitable justice between the parties making such an order for inspection of ballot papers as claimed by the election petitioner is imperatively necessary as it is the proper stage and this is a fit case……."

Hon'ble Supreme Court, in the case of ***Dr. Jagjit Singh AIR 1966 SC 773***, has held that it may be that in some cases, the interest of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes and consider his objections about the improper acceptance or improper rejection of votes tendered by voters at any given election, but in considering the requirement of justice, care must be taken to see that election petitioners do not get a chance to make roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned candidate's election is void.

29. From the aforesaid ruling of the Hon'ble Supreme Court, it is clear that where it appears that prayer has been made to fish out evidence in support of the election petitioner, the Court or Tribunal has to be cautious and circumspect. In the present case, as discussed (supra) there is absence of adequate pleadings of material facts, no prima facie case of a high degree of probability exists, as no evidence beyond pleading can be taken into consideration and there being recounting of votes once, the election petitioner cannot be allowed to fish out evidence for himself from the ballot boxes.

30. In the result, therefore, the impugned order is set aside.

31. Learned Election Tribunal is directed to conclude the election proceeding expeditiously on the basis of the evidence and materials available on record.

32. The writ application is accordingly allowed.

Writ petition allowed.

2015 (II) ILR - CUT- 282

R. DASH, J.

F.A.O. NO. 677 OF 2014

RAGESHREE MOHANTY ……..Appellant

.Vrs.

SUBHRAKANTA DAS MOHAPATRA ……Respondent

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

Interim injuction – Suit for specific performance of contract – Injunction to prevent the owner of the land to dispose of the suit land to any outsider – Prayer rejected – Hence this appeal – It can always be said that in a suit for specific performance of contract based on an agreement for sale no order of restraint can be passed against the owner of the land for the reason that the contract or agreement does not create any interest in the immovable property or that any alienation made during pendency of a suit being hit by the doctrine of lis pendens, no irreparable injury will be caused if temporary injuction is refused – In this case since all the three ingredients for the grant of interim injuction are satisfied and since there is apprehension that the respondent may dispose of the suit land during pendency of the suit, the appellant is entitled to an order of temporary injunction – Held, the impugned order is setaside – The respondent is restricted from creating any third party interest on the suit land till final adjudication of the suit.

Case Laws Rreffered to :-

1. 95 (2003) CLT 652 : Upendranath Singh V. Smruti Ranjan Mohanty & others: and

2. 2007 (I) CLR – 10 : M/s. East End Infotech Pvt. Ltd. V. M/s. Esskay Machinery Pvt. Ltd.

For Appellant : M/s. Tanmay Mishra & P.K Das

For Respondent : M/s. Banshidhar Baug, M.R.Baug R.R. Jethi & P.C.P Das

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Date of hearing : 03.12. 2014

Date of judgment : 10.12. 2014

JUDGMENT

R. DASH, J.

This appeal is against the order dated 29.10.2014 passed by the learned Civil Judge (Senior Division), Bhubaneswar in I.A. No.817 of 2013 arising out of C.S. No.1688 of 2013 dismissing the I.A. and refusing to grant injunction restraining the Opposite Party-Respondent from creating any third party interest in respect of the suit land till disposal of the suit.

2. The Appellant filed the C.S. claiming that the Respondent entered into an agreement with the former agreeing to sell the suit land to the latter for a consideration of Rs.23,00,000/-vide agreement dated 17.3.2013. Out of the agreed consideration amount a sum of Rs.14,00,000/- was paid at the time of signing of the agreement and the balance amount was agreed to be paid at the time of registration of sale deed which was, as stipulated in the agreement, to be executed within five months from the date of the agreement. The Appellant made several requests to the Respondent to execute the sale deed upon receiving the balance amount but the latter did not listen. Therefore, the Appellant sent lawyer's notice on 7.10.2013. When the Appellant got reliable information that the Respondent was intending to sell the suit land to a third party he filed the suit for specific performance of the contract with prayer for permanent injunction preventing the Respondent from executing any deed of conveyance in respect of the suit land to any outsider. The I.A. for interim injunction was filed along with the plaint.

3. The Respondent-Opposite Party filed objection to the I.A. denying that he had executed any agreement on 17.3.2013 to sell the suit land to the Appellant and that he received any amount towards part payment of the consideration. The specific stand taken by the Respondent is that Appellant's husband and the Respondent are partners of a registered partnership Firm in the name of M/s. Meenakshi Construction and Consultancy. As the Opposite Party was to stay away from the country from 8.8.2013 to 12.11.2013 he had in good faith handed over some sheets of blank letter head of the partnership firm signed by him and three sheets of signed blank white paper to the Appellant's husband to be handed over to the Chartered Accountant. Therefore, the Respondent apprehends that the alleged agreement dated 17.3.2013 has been manufactured using the said signed blank papers to grab the suit land.

4. Learned court below dismissed the I.A. observing that an agreement to sell immovable property does not create any title or interest in the property and possession of the suit property having not been delivered to the Appellant-petitioner in pursuance of the suit agreement, prayer for interim injunction is without any merit. The learned trial court has observed that the Appellant could make out a prima facie case but neither the balance of convenience does lean in his favour nor refusal of interim injunction would cause irreparable loss to her.

5. On behalf of the Appellant it is argued that since the agreement is in respect of a piece of immovable property the learned Court below has wrongly made a bare statement that denial of interim injunction would not cause irreparable loss to the Appellant. It is further argued that balance of convenience is in favour of the Appellant inasmuch as any alienation of the suit land to a third party would lead to multiple litigations. Learned counsel for the Respondent, on the other hand, submits that besides the absence of the ingredients of balance of convenience and irreparable injury, the very conduct of the appellant in creating an artificial cause of action renders her disentitled to get the equitable relief of interim injunction.

6. Whether the Respondent has executed the agreement and received a part of the consideration amount or whether the suit agreement is a manufactured and manipulated one is to be decided during the trial of the suit. Unless and until it is decided that the agreement is genuine or not, the plaintiff-appellant cannot be said to have got no prima facie case. Learned trial court has rightly observed that the plaint makes out a prima facie case.

7. On the ingredient of irreparable injury, learned counsel for the Respondent, inviting attention to the alternative relief sought for by the Appellant in the prayer portion of the plaint that in the event of plaintiff's failing to obtain a decree for specific performance of contract a decree may be passed against the Respondent to refund Rs.14,00,000/- with interest, submitted that even on the Appellant's own saying he can be compensated in terms of money. Section 10 of the Specific Relief Act, 1963 lays down, inter alia, that unless and until the contrary is proved the court shall presume that breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. A party entering into a contract for sale of immovable property should not be allowed to avoid its performance by offering to pay damages or taking the stand that the other party to the contract can be compensated by way of damages. The plaintiff

in a suit for specific performance of contract in respect of immovable property can, as an abundant caution, seek for alternative relief of refund of the amount already paid under the contract with interest. Until it is proved that breach of the contract in question can be adequately mitigated by compensation in money, it has to be presumed that the appellant would suffer irreparable injury on the denial of specific performance of contract.

According to the learned lower court ingredient of irreparable injury is absent in the case on hand because in ***Upendranath Singh V. Smruti Ranjan Mohanty & others: 95 (2003) CLT 652*** and ***M/s. East End Infotech Pvt. Ltd. V. M/s. Esskay Machinery Pvt. Ltd.: 2007 (I) CLR – 10***, it has been observed that any alienation made during pendency of a suit being hit by the doctrine of lis pendens, no irreparable injury will be caused if no interim injunction is granted against such alienation. In both the reported cases the suits were not for specific performance of contract in respect of immovable property.

Learned counsel for the Respondent has cited another judgment of this Court in ***Smt. Laxmi Dei and another V. Shyam Sundar Hans: AIR 2005 ORISSA 78***. In this reported case the suit was for specific performance of agreement to sell immoveable property and application for temporary injunction restraining construction on a disputed land during pendency of the suit was refused on the ground that an agreement to sell by itself does not confer any right over the disputed property. But in that case the disputed property was already sold to third person who was in possession of the said property. Therefore, his Lordship observed that balance of convenience in that case was not in favour of the plaintiff. Relying on the case of ***Jiwan Dass Rawal V. Narain Dass***, reported in ***AIR 1981 DELHI 291***, learned counsel for the Respondent argues that till a decree for specific performance is obtained, the vendor or a purchaser from the vendor is entitled to full enjoyment of the property and that a contract for sale does not, of itself, create any interest in or charge on such property. It merely creates a right in personam and not in estate, it is observed. There is no quarrel over the aforestated principles dealt with in the reported case. Another reported case of this Court in ***Sujan Charan Lenka V. Smt. Pramila Murari Mohanty: AIR 1986 ORISSA 74*** has been cited by the learned counsel for the Respondent to support his contention that in a suit for specific performance of contract the vendor is entitled to full enjoyment of the property till a decree for such performance is obtained and no interim injunction can be passed against the vendor restraining him from

alienating the property during pendency of the suit inasmuch as the decree obtained in the suit would be binding on any subsequent transferee who obtains transfer of the property with notice of the agreement of sale. This is a judgment on a Civil Revision. The Revision petitioners challenged an order whereby they were restrained from entering upon the suit land. The plaintiff in the suit had sought for specific performance of contract in respect of the suit land. Subsequent to the agreement for sell the owner of the suit land alienated the property to the revision-petitioners under a registered sale deed. The order of injunction against the revision-petitioners was set aside by this Court observing that a deed of contract for sale does not confer title and, therefore, the plaintiff therein had prima facie acquired no title in respect of the suit land whereas the revision petitioners on the basis of the sale deeds had prima facie acquired title therein and possession would ordinarily be presumed to be with those having prima facie title. Thus, on the basis of presumption that the revision-petitioners were in possession of the suit land, the order of temporary injunction was vacated.

8. Learned counsel for the Appellant, on the other hand, has cited the judgment in ***M/s. Julien Educational Trust V. Sourendra Kumar Roy and others***, reported in ***2010 (I) CLR (SC) 173***. In this case the appellant Trust filed a suit for specific performance of contract and also made an application under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure for an order of injunction to restrain the original defendants from alienating the suit land during the pendency of the suit. An ad interim order on the said terms was prayed for but, it was refused by the trial court. On appeal against such order of refusal the High Court passed an ad interim order of injunction against the defendants but subsequently on being intimated that the suit properties had already been transferred to third parties by registered deeds of conveyance the High Court vacated the ad interim order of injunction observing that after alienation of the suit properties the order of injunction had become infructuous. During pendency of the suit for specific performance of contract filed by the Trust the suit properties were alienated to third parties. On the prayer of the plaintiff the third party purchasers were added as defendants and the plaintiff's application for temporary injunction against the newly added defendants was allowed by the learned trial court. Against that order appeal was preferred to the High Court where the order of injunction was set aside. Against that order the Trust moved the apex Court. Before the apex Court it was argued, inter alia, that balance of convenience and

inconvenience lay in favour of the newly added defendants who had already purchased the suit properties inasmuch as they would not be able to utilize the land till the disposal of the suit. It was also argued that there would be no irreparable injury, inasmuch as, the appellant Trust, if ultimately would succeed, could always be compensated in terms of money. The Hon'ble apex Court after being satisfied that a prima facie case had been made out by the Appellant Trust as to the agreement for sale did not accept the aforestated submissions and expressed the view that, that was a case where an interim order was required to be passed to maintain the status quo of the suit property during pendency of the suit for specific performance filed by the Appellant Trust.

Therefore, it cannot always be said that in a suit for specific performance of contract based on a mere agreement for sale no order of restraint can be passed against the owner of the land for the reason that the contract or agreement does not create any interest in the immovable property or that any alienation made during pendency of a suit being hit by the doctrine of lis pendens, no irreparable injury will be caused if temporary injunction is refused.

9. Learned counsel for the Respondent relying on ***Mohd. Mehtab Khan V. Khushunma Ibrahim,*** reported in ***AIR 2013 SUPREME COURT 1099*** and ***Skyline Education Institute (Pvt.) Ltd. v. S.L. Vaswani and another***, reported in ***AIR 2010 SUPREME COURT 3221 (1)*** argues that the learned trial court having exercised its discretion not to grant relief of temporary injunction, the appellate court would be loath to interfere with the impugned order. It is well settled that once the court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before the court and supported by cogent reasons, the appellate court will be loath to interfere simply because on a de novo consideration of the matter it is possible for the appellate court to form a different opinion on the issues of prima facie case, balance of convenience, irreparable injury and equity (Para 16 of Skyline Education Institute Pvt. Ltd.).

But a perusal of the impugned order does not reveal that while dealing with the ingredients of balance of convenience and irreparable injury learned trial court had made any objective consideration of the material placed before it and assigned any reason, much less cogent reason.

10. Learned counsel for the Respondent further argues that since the deed of agreement for sale relied on by the plaintiff-appellant is not duly stamped the same cannot be admitted in evidence for any purpose and that document cannot be the basis for a prima facie satisfaction that there exists an agreement for sale entered into between the parties. Learned counsel for the Appellant submits that the Appellant has made an application before the learned court below to impound the deed of agreement and direct the Appellant-plaintiff to pay the stamp duty and penalty. This Court is not in a position to know as to whether such an application has already been disposed of by the learned trial court. But, irrespective of any such application, it is the learned trial court to take appropriate steps under Sections 35, 38 and 42 of the Indian Stamp Act, 1899 as and when the situation demands for dealing with insufficiently stamped instruments tendered for being admitted in evidence. The learned lower court ought to have taken steps under Section 35 of the Act the moment the agreement for sale was placed before it for taking into consideration and the petition filed by the Appellant-plaintiff to impound the document ought to have been disposed of before entering into hearing on the interim application for temporary injunction. For the fault of the court a party should not be allowed to suffer and therefore, at this stage the Appellant's prayer for interim injunction cannot be kept out of consideration merely on the aforestated ground.

11. In his preliminary counter-affidavit filed by the Respondent it is elaborated as to how during the absence of the Respondent from India, which fact was known to the Appellant and her husband, the notice dated 7.10.2013 is said to have been sent to the Respondent calling upon him to execute a registered sale deed within three days from the date of receipt of the notice and how without awaiting for service of the notice on the Respondent the Appellant has filed the suit on 9.10.2013, just one day after issuance of the notice. It is submitted that such conduct on the part of the Appellant ought to be taken note of while making consideration as to whether the relief of interim injunction should be granted or not. The plea of non-service of any such notice before institution of the suit may be taken up in the suit as and when required, but not while dealing with the I.A. Since all the three ingredients for the grant of interim injunction are satisfied and since there is apprehension that the Respondent may dispose of the suit land during pendency of the suit the Appellant is entitled to an order of temporary injunction.

12. In the result, the appeal is allowed and the impugned order is set aside. The Respondent is restrained from creating any third party interest over the suit land till final adjudication of the suit.

Appeal allowed.

2015 (II) ILR - CUT- 289

DR. A.K. RATH, J.

W.P.(C) NO. 16563 OF 2014

RAMESH CH. MOHAPATRA .....Petitioner

.Vrs.

R.D.C., SAMBALPUR & ORS. .....Opp. Parties

ODISHA PUBLIC DEMANDS RECOVERY ACT, 1962 – S.61

The word "entertained" appearing in the proviso to section 61 of the Act – Meaning of – "to deal with or admit to consideration" – Held, the RDC can not refuse to register the revision on the ground of non-payment of amounts due but he has to register the case and assign the number.

In this case the RDC Sambalpur refused to register the revision taking a cue from the words "no such application shall be entertained unless the revision petitioner has paid all amounts due under the certificate to the certificate officer", appearing in proviso to section 61 of the OPDR Act – Action challenged – The RDC has no option but to register the case and assign the number.

(Paras 5, 8)

Case Laws Referred to :-

1. AIR 1968 SC 488 : Lakshmiratan Engg. Works Ltd. -V- Asst. Commissioner (Judicial) I, Sales Tax, Kanpur Range.
2. (1971) 3 SCC 124 : Hindustan Commercial Bank Ltd. -V- Punnu Sahu.

For Petitioner : Mr. P.K.Kar
For Opp.Parties : Mr. P.K.Muduli, (A.S.C.)

Date of hearing : 30.3.2015
Date of judgment: 03.4.2015

JUDGMENT

DR.A.K.RATH, J.

What is the meaning of 'entertained' appearing in Section 61 of the Orissa Public Demands Recovery Act, 1962 (hereinafter referred to as "OPDR Act"), is the seminal point that hinges for consideration of this Court.

2. The facts necessary to appreciate the controversy in this writ application are as follows:- Certificate Case No.1 of 1993 was initiated by the Sub-Collector, Keonjhar, opposite party no.3, against the petitioner to recover an amount of Rs.1,18,361.79 on the ground that the petitioner, who is Ex-Nazir of Sub-Divisional Office, Anandapur misappropriated the Government money. The Certificate Officer-cum-Sub-Collector, Keonjhar directed the petitioner to pay the above amount by 5.2.1994. Against the said order, the petitioner-CDr preferred Certificate Appeal Case No.05 of 1994 before the Additional District Magistrate, Keonjhar. The said appeal having been dismissed, the petitioner challenged the same before this Court in O.J.C.No.4464 of 1990. Further, the maintainability of the certificate proceedings was also challenged before this Court in O.J.C.No.2744 of 1995. The writ applications were dismissed. While the matter stood thus, by order 19.6.2012, the Certificate Officer issued sale proclamation. Thereafter, the petitioner filed an appeal before the A.D.M., Keonjhar, which was registered as Appeal No.2 of 2012. By order dated 12.4.2013, the A.D.M., Keonjhar dismissed the said appeal. Against the said order, he filed Certificate Revision before the Revenue Divisional Commissioner, Sambalpur on 18.8.2014. The grievance of the petitioner is that till yet the revision petition filed by him has not been registered in view of the fact that the petitioner has not paid all amounts due under the certificate to the Certificate Officer and produced a certificate from the Certificate Officer showing such payment.

3. Heard Mr.P.K.Kar, learned counsel for the petitioner and Mr.P.K.Muduli, learned Additional Standing Counsel for the State.

4. Section 61 of the O.P.D.R. Act reads as follows:-

> **61. Revision** – An order passed in an appeal under Section 60 may be revised by-
>
> (a) if the order was passed by an Additional District Magistrate or by a Collector, the Revenue Divisional Commissioner;
>
> (b) if the order was passed by a Revenue Divisional Commissioner, the Board of Revenue.
>
> Provided that where the certificate-debtor makes an application under this section for revision of any appellate order, no such application shall be entertained unless he has paid all amounts due under the certificate to the Certificate Officer, whether or not, under protest made in writing at the time of payment, and produces a certificate from the Certificate Officer showing such payment to have been made."

5. The question, thus, arises as to whether the Revenue Divisional Commissioner, Sambalpur can refuse to register the case for non-payment of the amounts due under certificate to the Certificate Officer taking a cue from the words "no such application shall be entertained unless he has paid all amounts due under the certificate to the Certificate Officer" appearing in proviso to Section 61 of the O.P.D.R. Act.

6. The subject-matter of dispute is no more *res integra.* In ***Lakshmiratan Engineering Works Ltd. Vrs. Assistant Commissioner (Judicial) I, Sales Tax, Kanpur Range*****,** AIR 1968 SC 488, the Hon'ble Supreme Court had occasion to construe the meaning of the word 'entertained' in proviso to Section 9 of the U.P. Sales Tax Act, 1948 and the Court took the view that the word 'entertain' means "admit to consideration". The Supreme Court while interpreting the word 'entertained' contained in Section 9 of the U.P. Sales Tax Act, 1948 and the proviso thereto made a distinction between the expressions 'appeal' and 'memorandum of appeal'. Section 9 contemplated that the appeal could not be entertained without the proof being given along with memorandum of appeal that the tax had been paid. While dealing with the meaning of the word 'entertained' Hidayatullah, J. in paragraphs 7 and 10 of the judgment observed as under:-

> "(7) To begin with it must be noticed that the proviso merely requires that the appeal shall not be entertained unless it is

accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due. A question thus arises what is the meaning of the word 'entertained' in this context? Does it mean that no appeal shall be received or filed or does it mean that no appeal shall be admitted or heard and disposed of unless satisfactory proof is available? The dictionary meaning of the word 'entertain' was brought to our notice by the parties, and both sides agreed that it means either 'to deal with or admit to consideration'. We are also of the same opinion. The question, therefore, is at what stage can the appeal be said to be entertained for the purpose of the application of the proviso ? Is it 'entertained' when it is filed or is it 'entertained' when it is admitted and the date is fixed for hearing or is it finally 'entertained' when it is heard and disposed of ? Numerous cases exist in the law reports in which the word 'entertained' or similar cognate expressions have been interpreted by the courts. Some of them from the Allahabad High Court itself have been brought to our notice and we shall deal with them in due course. For the present, we must say that if the legislature intended that the word 'file' or 'receive' was to be used, there was no difficulty in using those words. In some of the statutes which were brought to our notice such expressions have in fact been used……

* * *

(10)……..When the proviso speaks of the entertainment of the appeal, it means that the appeal such as was filed will not be admitted to consideration unless there is satisfactory proof available of the making of the deposit of admitted tax."

7. In ***Hindustan Commercial Bank Ltd. Vrs. Punnu Sahu,*** (1971) 3 SCC 124, the term 'entertain' as found in the proviso to Order XXI Rule 90 Code of Civil Procedure (CPC) fell for consideration of the Supreme Court. It was held that the term 'entertain' in the said provision means "to adjudicate upon" or "to proceed to consider on merits" and did not mean "initiation of proceeding".

8. In view of the authoritative pronouncement of the apex Court in the cases cited *(supra)*, the conclusion is irresistible that the Revenue Divisional Commissioner, who is the revisional authority, under Section 61 of the OPDR Act has no option but to register the case and assign the

number. Failure to deposit the amount due under the certificate to the Certificate Officer and production of certificate from the Certificate Officer evidencing payment, the consequence will ensue i.e., the revision will not be admitted to consideration. Admission of the revision is subject to the condition that the same is free from defects.

9. On taking a holistic view of the matter, this Court directs the Revenue Divisional Commissioner, Sambalpur-opposite party no.1 to register the case and assign the number. The writ application is allowed. No costs.

Writ petition allowed

2015 (II) ILR - CUT- 293

BISWAJIT MOHANTY, J.

C.M.P. NO. 440 OF 2015

UMARANI MUDRA & ORS. .....Petitioners

.Vrs.

CHIEF ADMINISTRATOR,
LORD JAGANNATH TEMPLE, PURI .....Opp. Party

CIVIL PROCEDURE CODE, 1908 – S.24

Transfer of suit – Application dismissed by learned District Judge – Hence this petition – Prayers made in two civil suits pending before the learned Civil Judge (Sr. Division) Puri are totally different from the prayers of the two suits pending before the learned Civil Judge (Jr. Division) Puri – Cause of action and subject matter of all the suits cannot be one though one of the issues may be common – Although parties in all the suits are not common in the transfer petition the petitioners have not arrayed LRs of Gopinath Mohanty as parties – Moreover, since one of such suits has been targeted by this Court, so the argument relating to probable conflict of decisions of two Courts below does not appeal to this Court – Held, there being no error apparent on the face of the impugned order, this Court is not inclined to interfere with the same.

(Paras 8, 9)

Case Laws Referred to :-

1. AIR 1954 SC 215 : Waryam Singh and another v. Amarnath and Anr
2. (1995) 6 SCC 576 : Laxminkant Revchand Bhojwani and another v. Pratapsing Mohansingh Pradeshi (Deceased) through his Heirs and legal representatives
3. AIR 2008 SC 2987 : Jitendra Singh v. Bhanu Kumari and others.

For Petitioner : M/s. Vijaya Kar, A.P.Bose, N.Hota & S.S.Routray

For Opp.Parties : M/s. Asok Mohanty, Sr. Adv. & S.P.Patra

Date of Judgment:30.06.2015

JUDGMENT

B. MOHANTY, J.

This Civil Miscellaneous Petition has been filed by the petitioners under Article 227 of the Constitution of India with a prayer to quash the impugned order dated 19.03.2015 passed by the learned District Judge, Puri in T.R.P. No.20 of 2015 under Annexure-1 dismissing an application filed by the petitioners under Section 24 read with Section 151 of the Code of Civil Procedure, 1908 for transferring T.S. No.410 of 1995 and C.S. No.81 of 2004 now pending in the court of the learned Civil Judge (Junior Division), Puri to the court of learned Civil Judge (Senior Division), Puri so that all these suits can be heard by the learned Civil Judge (Senior Division), Puri.

2. The facts of the present case are like this;

Petitioner Nos.2,3 & 4 filed T.S. 89/410 of 2006/1995 before the learned Civil Judge (Junior Division), Puri against opposite party nos.2 & 3 as defendant nos.1 and 2 respectively with the following prayers;

> "(a) let the title of the plaintiff over the Mudra Sevapali in the Jagannath Temple in the entire month be declared and their possession thereon be confirmed;
>
> (b) let a decree of permanent injunction be passed against the defendant prohibiting him from interfering in the Mudra sevapali of the plaintiff in the temple of Lords Jagannath throughout the month in any manner;

(c) cost of the suit be decreed against the defendants;

(d) any other relief may be granted as the court thinks fit."

Opposite party No.2 filed C.S. No.81 of 2004 before the learned Civil Judge (Junior Division, Puri against petitioner nos.2,3 & 4 and opposite party nos.3 & 1 as defendant nos.1 to 5 respectively with the following prayer:

"(a) pass a decree of declaration that the plaintiff has right, title and interest to perform Mudra Seva Pali in Jagannath Temple at Puri as the successor of late Jagannath Mudra and further it be declared that the order passed in Misc. Case No.4/95 is illegal and inoperative,

(b) pass a decree of permanent injunction restraining the defendants from preventing or obstructing the plaintiff from performing the Mudra Seva jointly with the defendant No.1 to 4 (one to four) as per his term,

(c) that the cost of the suit may be decreed in favour of the plaintiff,

(d) And pass any other relief what the court thinks just and proper."

Further opposite party no.2 filed C.S. No.94 of 2011 before the learned Civil Judge (Senior Division), Puri against one Gopinath Mohanty later substituted by three L.Rs., petitioner no.3 & opposite party no.3 as defendant nos.1 to 3 respectively with the following prayer;

"(A) to pass a decree declaring that plaintiff has succeeded the 2½ (Two and half) days pali of Akhanda Mekap Seba of his father Late Jagannath Mudra in the Temple of Lord Jagannath; and

(B) further declare that defendant no.1 (one) is the Khatanidar of 2½ (Two & half) days of pali of father of the plaintiff-Jagannath Mudra and he had no saleable right to sell the same to Defendant No.2 (two) who has no right, title interest over the 2½ (Two and half) days pali of Late Jagannath Mudra in the Akhanda Mekap Seba;

(C) Defendants be permanently injuncted to interfere in the peaceful possession and enjoyment of the Akhanda Mekap Seba of the plaintiff;

(D) the cost of the suit be decreed against the defendants;

(E) Plaintiff be granted such other reliefs as he is entitled under law."

Further opposite party no.2 filed C.S. No.94 of 2014 before the learned Civil Judge (Senior Division), Puri against the present petitioner nos.1 to 4 as defendant nos.1 to 4 respectively with the following prayer;

"a) to pass a preliminary decree declaring plaintiff has 1/3rd share interest over the suit property and the parties may be directed to amicably partition the suit property within a specified time fixed by the court or else on the application of plaintiff a survey knowing commissioner be appointed to partition the suit property as per preliminary decree and submit report and in that event the decree would be made final;

(b) Cost of the suit be decreed against the defendants,

(c) That the plaintiff be granted such other reliefs as he is entitled under law."

It is also undisputed that both T.S. No.89/410 of 2006/1995 and C.S. No.81 of 2004 are being heard analogously. In such background, the petitioners filed T.R.P. No.20 of 2015 before the learned District Judge, Puri praying that both T.S. No.410 of 1995 and C.S. No.81 of 2004 pending in the court of the learned Civil Judge (Junior Division), Puri be heard by the learned Civil Judge (Senior Division), Puri where C.S. No.94 of 2011 and C.S. No.824 of 2014 are pending. The present petitioners contended therein that the subject matters in all the four suits were essentially same as because status of opposite party no.2 as son of late Jagannath Mudra was an issue common to all the four cases. Therefore, in the interest of justice for avoidance of conflicting decisions, the suits be disposed of by one court. Opposite party no.2 vide Annexure-3 filed a detailed objection. In the said objection, opposite party no.2 submitted that T.S. No.89/410 of 2006/1995 was being tried analogously with C.S. No.81 of 2004 by the learned Civil Judge (Junior Division), Puri and this Court vide its order dated 23.4.2014 passed in W.P.(C) No.11366 of 2013 directed the learned Civil Judge (Junior Division), Puri to dispose of C.S. No.81 of 2004 in accordance with

law as expeditiously as possible, preferably by the end of October, 2014. Further, this Court directed the parties to co-operate with the court for early disposal of the suit. Thus, both T.S. No.89/410 of 2006/1995 and C.S. No.81 of 2004 being year old cases were being tried together and the petitioners, who were the plaintiffs in T.S. No.89/410 of 2006/1995 were adopting dilatory tactics to delay the matter knowing very well that they had no merit in the suit. Opposite party no.1 further pointed out that a number of witnesses have already been examined in C.S. No.81 of 2004. The learned District Judge, Puri vide order dated 19.3.2015 passed under Annexure-1 rejected the prayer of the petitioners on the finding that the prayer made in suits pending in the court of the learned Civil Judge (Senior Division), Puri were different than the prayer made in the suits pending in the court of the learned Civil Judge (Junior Division), Puri. Secondly, the learned District Judge also referred to the judgment dated 23.4.2014 passed by this Court in W.P.(C) No.11366 of 2013 whereby this Court has directed learned Civil Judge (Junior Division), Puri to hear and dispose of C.S. No.81 of 2004 as expeditiously as possible preferably by the end of October, 2014. In such background, the learned District Judge, Puri held that if the two suits pending in the court of the learned Civil Judge (Junior Division), Puri were transferred to the court of the learned Civil Judge (Senior Division), Puri, their hearing would be further delayed, which would violate the order of this Court. Thirdly, the learned District Judge indicated in the impugned order that while the suits pending before the learned Civil Judge (Junior Division), Puri are year old suits and suits pending before the learned Civil Judge (Senior Division), Puri are of the year 2011 and 2014 where hearing has not yet commenced unlike the suits pending in the court of the learned Civil Judge (Junior Division), Puri. Fourthly, from the orders of the learned Civil Judge (Junior Division), Puri he found that the present petitioners were trying their best to delay the disposal of the suits. For all these reasons, the learned District Judge, Puri dismissed the petition.

3. Mr. A.P. Bose, learned counsel for the petitioners contended that the learned District Judge, Puri has gone wrong in dismissing T.R.P. No.20 of 2015 under Annexure-1 filed by the petitioners despite existence of commonality of issues between the parties. He contended that one of the issues in all four suits was with regard to question of status of opposite party no.2 as son of Jagannath Mudra. Therefore, the two civil suits pending in the court of the learned Civil Judge (Junior Division), Puri ought

to have been directed to be transferred before the learned Civil Judge (Senior Division), Puri. Secondly, he contended that by not allowing the prayer of the petitioners as made in T.R.P. No.20 of 2015, it might result in conflicting decisions by two different courts.

4. In this Civil Miscellaneous Petition though no notice has been issued, Mr. Asok Mohanty, learned Senior Advocate entered appearance on behalf of opposite party no.2 and defended the impugned order under Annexure-1 passed by the learned District Judge, Puri relying on objection under Annexure-3.

5. Before examining the legality or otherwise of the impugned order, it would be profitable to refer to the relevant portions of Section 24 of the Code of Civil Procedure, 1908, which are quoted below;

> " **24. General power of transfer and withdrawal** – (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage –
>
> (a) xxx xxx xxx
>
> (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and –
>
> (i) xxx xxx xxx
>
> (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
>
> (iii) xxx xxx xxx
>
> (2) xxx xxx xxx
>
> (3) xxx xxx xxx
>
> (4) xxx xxx xxx
>
> (5) xxx xxx xxx"

A perusal of the above quoted portion Section 24 of the Code of Civil Procedure Code, 1908 makes it clear that on the application of any of

the parties and after notice to the parties and after hearing them, if they desire to be heard, the High Court or District Court may at any stage withdraw any suit, appeal or other proceeding pending in any subordinate court to it and transfer the same for trial and disposal by any competent court subordinate to it. The above noted power can also be exercised by the High Court or the District Court suo motu without any notice to the parties. In the instance case, let it be clear that this Court is not delaying with suo motu exercise of power by the learned District Judge, Puri. Here is a case where an application was made by the petitioners before the learned District Judge, Puri for transfer. Thus, in such background, as per mandate of the Section 24 of the Code of Civil Procedure all the parties were/are required to be noticed. In the present context, the parties would mean all the parties involved in four suits.

6. Now to the contours of power under Article 227 of the Constitution of India. Under the said Article, this Court is supposed not to interfere with the impugned order unless there is an error apparent on the face of the impugned order. Further, this Court has to keep in mind that such power of superintendence is to be used most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors as held by the Hon'ble Supreme Court in the case of **Waryam Singh and another** v. **Amarnath and another** reported in **AIR 1954 SC 215.**

Further in the case of **Laxminkant Revchand Bhojwani and another** v. **Pratapsing Mohansingh Pradeshi (Deceased) through his Heirs and legal representatives** reported in **(1995) 6 SCC 576** the Hon'ble Supreme Court clearly reminded that the High Court that under Article 227 of the Constitution of India it cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. Its exercise must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice.

7. Now to the facts of the present case. A scanning of the Cause Titles of all the four suits clearly shows that the parties are not common to all the four suits. In fact in the suits pending before the learned Civil Judge (Junior Division), Puri neither Gopinath Mohanty nor his LRs, who are parties in C.S. No.94 of 2011 pending before the learned Civil Judge (Senior Division), Puri is/are parties. Similarly, petitioner no.1, who happens to be defendant no.1 in C.S. No.824 of 2014 pending in the court of learned Civil

Judge (Senior Division), Puri is not a party to any of the two suits pending in the court the learned Civil Judge (Junior Division), Puri. Further, the Administrator, Sri Jangannath Temple, Puri, who is defendant no.5 in C.S. No.81 of 2004 pending before the learned Civil Judge (Junior Division), Puri is not a party in either of two suits pending before the learned Civil Judge (Senior Division), Puri. Thus, it cannot be said that the parties in the suits pending before the learned Civil Judge (Senior Division), Puri are same as that of the parties in the two suits pending before the learned Civil Judge (Junior Division), Puri.

Secondly, a perusal of the prayers made in the four civil suits would clearly show that the prayers of two civil suits pending in the court of learned Civil Judge (Senior Division) are totally different from the prayers of two civil suits pending before the learned Civil Judge (Junior Division). In fact while the subject matter of two civil suits pending before the learned Civil Judge (Junior Division), Puri relate to performance of Mudra Sevapali in Jagannath Temple; the prayer in C.S. No.94 of 2011 relates to Akhanda Mekap Seba, admittedly a different type of Seba. The other civil suit, i.e., C.S. No.824 of 2014 pending in the court learned Civil Judge (Senior Division), Puri is a suit for partition. Therefore, the cause of action for suits pending in the court of learned Civil Judge (Senior Division) are different than that of the two civil suits pending before the learned Civil Judge (Junior Division), Puri. Thus, the subject matter of all the four suits can not be said to be one though one of the issues may be common.

Thirdly, in T.R.P. No.20 of 2015 the LRs of Gopinath Mohanty, who have been arrayed as parties in C.S. No.94 of 2011 as defendants have not been made parties in T.R.P. No.20 of 2015. A perusal of relevant provision of Section 24 of the Code of Civil Procedure as quoted shows that a District Court can exercise its jurisdiction on the application of any of the parties and after notice to the parties, which obviously mean that notice has to be issued to all the parties, who have been arrayed as parties in different suits. Here, admittedly, the LRs of Gopinath Mohanty were not made parties. It is well settled that when an application for transfer is made by a party, the Court is required to issue notice to the other side and hear the parties before directing transfer. This has been laid down in the case of **Jitendra Singh** v. **Bhanu Kumari and others** reported in **AIR 2008 SC 2987**.

Fourthly, C.S. No.81 of 2004 pending before the learned Civil Judge (Junior Division), which is being analogously with T.S. No. 89/410 of 2006/1995 has been directed to be disposed of as expeditiously as possible vide order of this Court dated 23.4.2014 passed in W.P.(C) No.11366 of 2013. Both the suits are pending before the learned Civil Judge (Junior Division), Puri for more than ten years and are in the midst of hearing. In contrast two suits pending before the learned Civil Judge (Senior Division), Puri are of 2011 and 2014 origin, where hearing has not commenced.

8. In such background, this Court has to examine the contention of Mr. Bose. He submitted that since one of the issues in all four suits was whether opposite party no.2 was the son of Jagannath Mudra or not, the prayer for transfer of both the suits pending before the learned Civil Judge (Junior Division), Puri to the court of learned Civil Judge (Senior Division), Puri for consideration along with both C.S. No.94 of 2011 and C.S. No.524 of 2014 pending before the learned Civil Judge (Senior Division), Puri should have been allowed as otherwise there might be conflicting decisions by two honourable courts. This contention does not appeal to this Court because as indicated earlier the subject matters and prayers made in two suits pending before the learned Civil Judge (Senior Division), Puri are different from the subject matters and prayers made in two suits pending before the learned Civil Judge (Junior Division), Puri. Further, parties to the two suits pending before the learned Civil Judge (Junior Division), Puri are not the same as parties to the two suits pending before the learned Civil Judge (Senior Division), Puri. Moreover in T.R.P. No.20 of 2015, the petitioners have not arrayed LRs of Gopinath Mohanty as parties, which was a fatal flaw. Further, transfer of two old suits pending in the court of the learned Civil Judge (Junior Division), Puri to the court of learned Civil Judge (Senor Division), Puri would further delay their disposal, though one of such suits has been targetted by this Court. In such facts and circumstances, merely because only one of the issues is common to all suits, the learned District Judge, Puri has done no wrong in not allowing the prayer of the petitioners to transfer of two suits pending before the learned Civil Judge (Junior Division), Puri to the court of the learned Civil Judge (Senior Division), Puri. With regard to apprehension relating to conflicting decisions, it can only be said that once the issue of sonship of opposite party no.2 is decided by the learned Civil Judge (Junior Division), Puri in the decade old suits pending before it, where hearing is on; the finding on such an issue can be made use of in the suits of the years 2011 and 2014 pending before the

learned Civil Judge (Senior Division), Puri, where hearing is yet to begin. Therefore, the argument relating probable conflict of decisions of two courts does not appeal to this Court under the present facts and circumstances of the case.

9. For all these reasons, keeping in mind the well settled principles with regard to exercise of powers under Article 227 of the Constitution of India as laid down by the Hon'ble Supreme Court, this Court comes to a conclusion that there is no error apparent on the face of the impugned order and no grave injustice has been to the petitioners by dismissal of their T.R.P. No.20 of 2015 by the learned District Judge, Puri.

10. The Civil Miscellaneous Petition is accordingly dismissed. No costs.

Petition dismissed.

2015 (II) ILR - CUT- 302

DR. B.R.SARANGI, J.

W.P.(C) NO. 20586 OF 2012

MANORAMA CHHOTRAY ……. .Petitioner

.Vrs.

PRAFULLA KU. CHHOTRAY & ANR. ……..Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O-18, R-1

Right to begin – Suit for partition – Joint family property – Defendants filed written statement taking the plea of previous partition – Plaintiff filed petition under O-18, R-1 C.P.C praying that the defendants should begin first – Application rejected – Hence this writ petition – In the instant case, defendants having admitted some of the facts alleged by the plaintiff regarding earlier partition, the learned Court below should not have rejected the application under Order 18, Rule 1 C.P.C. – Held, the impugned order passed by the learned trial court is set aside – Direction issued to the defendants to begin with the suit. (Paras 10, 11)

Case Laws Referred to :-

1. 1992 (I) OLR 72 : Purastam alias Purosottam Gaigouria and Ors v.Chatru alias Chatrubhuja Gaigouria
2. ILR (1954)Cut 165 : Balkrushna Kar & another v. H.K. Mohatab,
3. ILR 1966 Cut 51 : Baidhar Behera and others v. Pranabandhu Moharatha
4. ILR 1979 Cut 879 : Debara Barik v. Surya Kumar Dev & Anr,
5. 1990(1) OLR 153 : Sudarsan Mohapartra and another v. Prasanna Kumar Mohapatra,
6. (2008) (II) OLR 566 : Mirza Niamat Baig and another v. Sk. Abdul Sayeed and others
7. 2011 (Supp.II) OLR 464: Niranjan Nath and others v. Rabindra Nath Sharma and others,

For Petitioner : M/s. Bansidhar Baug, M.R.Baug, P.K.Jena & S.Rath

For Opp. Parties : M/s. Mahadev Mishra, Mamata Mishra

Date of hearing : 02.01.2014
Date of judgment : 16 01.2014

JUDGMENT

Dr. B.R. SARANGI, J.

This application has been filed challenging the order dated 08.10.2012 passed by the learned Civil Judge (Senior Division), Bhubaneswar in Civil Suit No.110/2011 rejecting the application of the plaintiff-petitioner under Order-18 Rule-1 CPC.

2. The fact of the case is that the petitioner being the plaintiff filed Civil Suit No.110/2011 in the court of learned Civil Judge (Senior Division), Bhubaneswar for partition of the suit land by metes and bounds. The suit land is the joint undivided property of the family and the same has not been partitioned by metes and bounds between the parties. The plaintiff-petitioner claims half share in the suit land along with her children.

3. The defendant-opposite parties on being noticed appeared through their counsel and filed their written statement denying the plaint allegations.

They pleaded specifically in paragraph-8 of the written statement that after the death of Madan Mohan his properties were partitioned among his three sons and the same have been recorded separately vide Mistake No.147 and 563 and accordingly Settlement ROR vide Khata No.19 recorded in the name of Anathabandhu and Khata No.11 recorded in the name of Antrajyami and Prafulla. Though some properties were recorded jointly in the name of Anathabandhu, Antrajyami and Prafulla, yet the same were also partitioned and the parties are in separate possession.

4. Taking into account the averments made in paragraph-8 of the written statement, the plaintiff-petitioner stated that the defendant-opposite parties have taken a plea of prior partition in the written statement and therefore, he filed an application vide Annexure-3 under Order-18 Rule-1 CPC to direct the defendant-opposite parties to lead their evidence first.

5. Defendant-opposite parties filed objection to the said application filed by the plaintiff-petitioner under Order-18 Rule-1 CPC. Learned Civil Judge (Senior Division), Bhubaneswar after hearing the parties passed the impugned order dated 08.10.2012 rejecting the application filed by the plaintiff-petitioner. Hence this writ petition.

6. Mr. Baug, learned counsel for the plaintiff-petitioner strenuously urged that since there is prior partition as per the pleadings averred in paragraph-8 of the written statement, the burden lies on the defendants to establish such prior partition. Therefore, as per the provisions contained under Order-18 Rule-1 CPC, the defendant-opposite parties should begin first and the learned court below while rejecting the application has committed gross error in stating that the contention of the present plaintiff-petitioner that the defendants pleaded previous partition of the suit property has been denied by the defendant-opposite parties which is based on wrong factual matrix. Rather it is contrary to the pleadings made in paragraph-8 of the written statement. To substantiate his contention he has relied upon the judgment of this Court in the case of ***Purastam alias Purosottam Gaigouria and others v. Chatru alias Chatrubhuja Gaigouria***, 1992 (I) OLR 72 where in it is held that in a suit for partition on the ground of joint family property if the defendants plea is of previous partition then defendant has to begin adducing evidence and the right to begin is an integral part of a suit for which reliance is placed on ***Balkrushna Kar & another v. H.K. Mohatab***, ILR (1954)Cut 165, ***Baidhar Behera and others v. Pranabandhu Moharatha***, ILR 1966 Cut 51, ***Debara Barik v. Surya***

Kumar Dev & another, ILR 1979 Cut 879, ***Sudarsan Mohapartra and another v. Prasanna Kumar Mohapatra***, 1990(1) OLR 153.

7. Mr. Mahadev Mishra, learned Senior Counsel for the defendants-opposite parties stated that where the parties have not admitted the prior partition, in that case burden lies on the party who should begin to approach the Court by filing the application meaning thereby it is the plaintiff-petitioner who has the right to begin as the burden lies on him to establish the contention of partition. In order to substantiate his case, he has relied upon the judgment of this Court in the cases of ***Mirza Niamat Baig and another v. Sk. Abdul Sayeed and others***, (2008) (II) OLR 566 and ***Niranjan Nath and others v. Rabindra Nath Sharma and others***, 2011 (Supp.II) OLR 464.

8. In view of the above pleadings of the parties and after hearing their learned counsel, the sole question that emerges for consideration is who has got the right to begin under Order-18 Rule-1 CPC. The order-18 Rule-1 of CPC reads as follows:

> "Right to begin- The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin"

This Court in the case of ***Chittaranjan Das v. Janaranjan Das & others***, 84 (1997) CLT 296 held that plaintiff in all cases has the right to begin, exception being that when the defendant admits the facts and contends either in the point of law or on some additional facts alleged by the defendants the plaintiff is not entitled to any part of the relief which he seeks in the suit and in that event only the defendant is to begin. Therefore, in normal course, it is the plaintiff who in all cases has the right to begin. If the exception point takes into consideration, then in that case it is to be examined in the context of the case in hand whether the plaintiff is to begin or defendant is to begin. In paragraph-8 of the written statement it is specifically pleaded that after death of Madan Mohan his properties were partitioned among his three sons and that has been recorded separately vide Mistake No.147 and 563 and accordingly Settlement ROR vide Khata No.19 recorded in the name of Anathabandhu and Khata No.11 recorded in the name of Antrajyam i and Prafulla. Though some properties were

recorded jointly in the name of Anathabandhu, Antrajyami and Prafulla, yet the same were also partitioned and the parties are in separate possession. The specific pleading in the written statement is that there was a prior partition amongst the sons of Madan Mohan, namely, Anathabandhu, Antrajyami and Prafulla. The plaintiff-petitioner belongs to the branch of Anathabandhu whereas the present defendant-opposite parties belongs to the branch of Prafulla. The reference made by the learned counsel for the petitioner in ***Purastam alias Purosottam Gaigouria and others*** (supra) wherein it is categorically held that the right to begin is an integral part of hearing. The party who would fail in case he leads no evidence has the right to begin. Similar view has also been taken in ***Balakrushna Kar and another, Baidhar Behera and others, Debara Barik, Sudarsan Mohapatra and another*** (supra). It has also been clarified in ***Sudarsan Mohapatra*** (supra) that right to begin is not the same as the adducing of evidence in support of a party's case. There is a distinction between the two. Trial Court ought to call upon the plaintiff first to adduce evidence and in case he declines then to call upon the defendant to express whether he would begin his case. If neither party express their desire to begin the case first, trial court to post the case for hearing arguments on the basis of pleadings and other admissible materials on record depending upon presumptions under the Evidence Act and other laws. The procedure has been clarified by the above judgment. The plaintiff-petitioner relies upon ***Purastam alias Purosottam Gaigouria and others*** (supra) in which the plaintiff alleged the property is joint family property and have not been divided by metes and bounds and the defendant pleaded previous partition to defeat the plaintiff's suit. The plaintiff's plea that the property was joint family property having been admitted by the defendant and the latter having pleaded previous partition the defendants are to lose if neither party adduced evidence, the burden being on the defendant to prove previous partition, it is right to call the defendant to begin first. In the present context, referring to paragraph-8 of the written statement of the defendant, Mr. Baug, learned counsel for the petitioner strenuously urged that since there is a pleading of prior partition of the property, the right to begin rests on the defendants and not with the plaintiff.

9. Mr. Mahadev Mishra, learned Sr. Counsel for the defendant-opposite parties relies upon ***Mirza Niamat Baig and another*** (supra) wherein it has been held that a person who sets the law in motion and seeks a relief before the Court, must necessarily be in a position to prove his case

and get the relief moulded by the law. The right to begin is to be determined by the rules of evidence. But factually it is stated that as the plaintiff has raised the question of fraud to have been practiced on him, it is he who should begin first as per the provisions contained in Order-18 Rule-1 CPC and defendants shall adduce rebuttal evidence thereafter. He further relies upon ***Niranjan Nath and others*** (supra) wherein this Court has held that right to begin as provided under Order-18 Rule-1 of CPC has nothing to do with the requirement of filing the examination-in-chief on affidavit. Order-18 Rule-1 of CPC refers to right of parties to begin whereas Order-18 Rule-4 of CPC deals with the requirement to file affidavit as prescribed under the said Rule which caters to the convenience of the parties and is aimed at expeditious disposal of cases. Therefore, the procedure for adducing evidence in examination-in-chief as provided under Order-18 Rule-4 of CPC cannot defeat rule of evidence conferring right to begin as provided under Order-18 Rule-1 CPC.

10. The judgments cited by Mr. Mahadev Mishra, learned Senior Counsel for the opposite parties in ***Mirza Nizmat Baig and another and Niranjan Nath and others*** mentioned supra are not applicable to the present context in view of the fact that both the cases have been decided on their own merits basing upon the facts of the respective cases. On the basis of the specific pleading made available in paragraph-8 of the written statement, the opposite party-defendants having raised the plea of prior partition, the burden lies with him to establish the same. Therefore, the reason assigned in the impugned order that though the contention of the plaintiff is that the defendants pleaded previous partition, the same has been denied by the defendant, not correct on the basis of the materials available in the record. However, it is observed in the impugned order "in the instant case defendants have admitted only some of the facts alleged by the plaintiff regarding earlier partition". Having come to such a finding the learned Civil Judge (Sr. Division), Bhubaneswar could not have rejected the application filed by the plaintiff-petitioner under Order-18 Rule-1 CPC to call upon the defendants to begin and such decision of the learned court below is in gross violation of the settled principle of law decided by this Court in ***Purastam alias Purosottam Gaigouria and others*** (supra). Even though the said judgment was cited but the learned Civil Judge (Sr. Division), Bhubaneswar has not applied his mind in proper perspective and rejected the application filed under Order-18 Rule-1 CPC to call upon the defendants to begin. In the instant case, defendants have admitted some of

the facts alleged by the plaintiff regarding earlier partition. Therefore, the application under Order-18 Rule-1 filed by the plaintiff, could not have been rejected on a flimsy ground.

11. For the foregoing reasons, the impugned order so passed on 08.10.2012 by the Civil Judge (Senior Division), Bhubaneswar under Annexure-4 is hereby set aside, and it is directed that the defendant-opposite parties should begin with the proceeding in accordance with law to establish the earlier partition as admitted in paragraph-8 of the written statement. With the above observation and direction, the writ petition is allowed indicating the above.

Writ petition allowed.

2015 (II) ILR - CUT- 308

DR. B. R. SARANGI, J.

W.P.(C) NO.17344 OF 2014 (WITH BATCH)

ISHWAR CHANDRA PRUSTI .....Petitioner

.Vrs.

R.T.O., SAMBALPUR & ORS. .....Opp. Parties

MOTOR VEHICLES ACT, 1988 – Ss. 48, 50 (2) (b)
r/w Rule 57 of the CMV Rules 1989

Vehicle purchased in public auction pursuant to confiscation proceeding U/s 56 of the Orissa forest Act, 1972 – Application for transfer of ownership by auction purchaser – Whether he is liable to pay tax and penalty for the pre-auction period and required to submit NOC from the Registering Authority for such transfer – Held, No .
(Paras 23,24,25)

For petitioner : M/s. S.K. Behera & R.K.Rana & Mohit Agarwal
For Opp. Parties : Mr. J.Pal, Standing Counsel,
Transport Department

Date of hearing : 15.01.2015
Date of judgment : 05.02.2015

JUDGMENT

DR. B.R.SARANGI, J.

In the above batch of writ petitions, the petitioners have sought for a direction for grant of registration by transferring ownership without insisting upon No Objection Certificate, payment of tax and penalty as per the provisions of the Motor Vehicles Act and the Rules framed thereunder. Since common questions of facts and law are involved in these writ petitions, they were heard together and are disposed of by this common order.

2. The factual backdrop of the case, in hand, is that the vehicle has been seized by the Forest Authority on the allegation of commission of forest offences under Section 56 of the Orissa Forest Act, 1972 (in short "1972 Act"). Following a confiscation case, proceeding was initiated under Section 56 of the 1972 Act. Since no claimant appeared in the proceeding, said vehicle was finally confiscated by the competent authority. After lapse of appeal period, opposite party no.2 issued a tender sale notice for auction of the vehicle seized inviting applications from intending persons. Pursuant to the same, the petitioner offered his price and participated in the process of tender and was declared as the highest bidder and consequently, the auction sale order was confirmed in his name and on acceptance of the sale price, auction certificate was issued by delivering the possession of the vehicle on the very same day. On taking over possession of the vehicle, the petitioner approached the Transport authority in accordance with the provisions contained under Section 50(2) of the Motor Vehicle Act, 1988 (in short, "1988 Act") read with Rule 57 of the Central Motor Vehicle Rules, 1989 with an application in prescribed Form No. 32 for transfer of the ownership in his name and for allotment of new registration number in his favour. The application so submitted has not been accepted on the plea that the petitioner is to obtain no objection certificate (NOC) from the concerned registering authority and further he is liable to pay tax for the pre auction period. Hence these applications.

3. Mr. M. Agrawal, learned counsel for the petitioner in W.P.(C) No. 17344 of 20114 vehemently urged that direction given for levy of tax and penalty for pre auction period by the Transport Authority is arbitrary,

unreasonable and contrary to the provisions of law inasmuch as the same is contrary to the settled principles of law decided by this Court and also the apex Court. He further urged that the petitioner is not liable to pay any tax or penalty as demanded by the Transport Authority in view of the provisions contained in Sub-section(2) of Section 64 of 1972 Act. On harmonious reading of the provisions of the 1972 Act read with the Orissa Motor Vehicle Taxation Act , 1975(hereinafter referred to as " 1975 Act"), the petitioner having purchased the vehicle in public auction pursuant to the order of confiscation passed under Section 56 of the 1972 Act, which became final under that section, it shall vest with the State Government free from all encumbrances. Therefore, the purchase having been made by way of an auction, from the date the property has been transferred and the petitioner being in possession of the same, from that date he is liable to pay the tax and not prior to that. To substantiate his contention, he has relied upon the judgments of this Court in **Orissa State Finance Corporation through its Managing Director v. State of Orissa and Anr.,** AIR 2008 Orissa 119 and **Bachan Singh V. The Road Transport Officer & Ors**., AIR 2009 Orissa 185 and the judgment of the Calcutta High Court in **Kanakia Trading Co. v. Income-tax Officer and Others,** 164(1987) ITR 204.

4. Mr. J.Pal, learned Standing Counsel for Transport Department submits that in view of the provisions contained under Section 10 read with Section 12 of the 1975 Act, the auction purchaser is liable to pay tax and also penalty as per the provisions contained under Section 13(1) of the 1975 Act read with Rule 9(2) of the Orissa Motor Vehicle Taxation Rules, 1976 (hereinafter referred to as "1976 Rules"). To substantiate his contention he has relied upon the judgments of the apex Court in **Commissioner, Transport-cum-Chairman & Others v. Tapan Kumar Biswas,** AIR 2004 SC 4417 and **Sri Rabindra Kumar Jena v. Managing Director, OSFC and 3 others,** 2002 (Suppl.) OLR (NOC) 806 and in **Sri Sudhankar Patnaik v. Commissioner-cum- Chairman State Transport Authority and two others,** 2004 (Supp.) OLR 840.

5. In view of the facts pleaded above, the following questions arise for consideration.

(i) Whether an auction purchaser is liable to pay tax and penalty for the preauction period in respect of the vehicle he purchased in a public auction conducted by the Forest Authority?

(ii) Whether the auction purchaser is required to obtain No Objection Certificate (NOC) from the Registering Authority to transfer the ownership in his favour when the vehicle in question was purchased in a public auction?

6. The State legislature to consolidate and amend the law relating to Taxation on Motor Vehicles enacted "the Orissa Motor Vehicles Taxation Act, 1975". To give effect to the provisions of the Act, Rules have been framed called " Orissa Motor Vehicles Taxation Rules, 1976". Section 3 of the 1975 Act deals with "levy of tax" which reads as follows:

> "3. Levy of tax- (1) Subject to the other provisions of this Act, there shall be levied on every motor vehicle used or kept for use within the State a tax at the rate specified in Schedule-I and Schedule-III.
>
> (2) The State Government may by notification from time to time, increase the rate of tax specified in Schedule-I and Schedule-III;
>
> Provided that such increase shall not exceed fifty percent of the rate specified in Schedule-I and Schedule-III.
>
> (3) All references made in this Act to Schedule-I and Schedule-III shall be construed as reference to Schedule-I and Schedule-III for the time being amended in exercise of the powers conferred by this section."

7. The aforementioned provision mandates that every motor vehicle used or kept for use within the State shall be liable to pay tax in accordance with schedule provided under the Statute. Section 12 of the 1975 Act states about liability of successor to pay arrears, which reads as follows:

> " 12. Liability of successor to pay arrears- (1) If the tax leviable in respect of any motor vehicle unpaid by any person liable for payment thereof and such person before having paid the tax has transferred the ownership of such vehicle or has ceased to be in possession or control of such vehicle, the person to whom the ownership of the vehicle has been transferred or the person who has possession or control of such vehicle shall be liable to pay the said tax to the Taxing Officer.
>
> (2) Nothing contained in this section shall be deemed to (affect) the liability of the person who has transferred the ownership or has

ceased to be in possession or control of such vehicle, for payment of the said tax.

8. Section 12(1) makes it amply clear that the transferee of the vehicle or the person who is in possession or control of the vehicle shall be liable to pay the arrears of the tax payable by the previous owner or the person who had possession or control of such vehicle and remained unpaid at the time of transfer of the vehicle and Sub-Section(2) of Section 12 speaks that nothing contained in this section shall be deemed to affect the liability of the person who has transferred the ownership or has ceased to be in possession or control of such vehicle, for payment of the said tax. Therefore, Section 12(1) only speaks about unpaid tax and does not speak anything about penalty. On plain reading of above mentioned statutory provision, the inevitable conclusion is that transferee of the vehicle or the person who is in possession or control of the vehicle shall be liable to pay the amount of penalty due and arrear unpaid tax by the time the vehicle was put to auction and purchased by subsequent purchaser. In the present case, the vehicle has been seized by following due procedure of law by the enforcement agency as per the provisions contained in 1972 Act and Rules framed thereunder and the vehicle was in custody of such enforcement agency and pursuant to the public auction held by such authority, the petitioner has purchased the vehicle. Section 13 of the 1975 Act states about penalty for failure to pay and such penalty is only chargeable due to noncompliance of the provisions of Sections 4 and 4-A of the said Act. Section 4 mandates that tax shall be paid in advance within such time and such manner as may be prescribed to the taxing officer by the registered owner or the person having possession or control of the vehicle. Similarly, Section 4-A mandates that notwithstanding anything contained in Sections 3 and 4 of the said Act, the vehicle which is used personally or kept for personal use, onetime tax at the rate equal to a standard rate as specified in Schedule-III are to be paid. Therefore, due to noncompliance of the specific provisions contained in Sections 4 and 4-A and under Section 13 of the 1975 Act, the registered owner or person in possession or control of the vehicle in addition to payment of tax due is liable to pay penalty and the modus operandi for recovery of penalty has been prescribed under Section 14 of the 1975 Act. In view of the above mentioned provisions, it is made conclusive that the order of imposing penalty for failure to carry out the statutory obligation is the result of a quasi criminal proceeding and the penalty would not ordinarily be imposed unless a party either acted

deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its statutory obligation. The petitioner being an auction purchaser pursuant to the public auction held by the competent authority, is not liable to pay penalty because of the fact that he has not acted deliberately in defiance of law or was guilty of conduct contumacious or conscious of its statutory obligation. More particularly, there is no violation of Section 4 or 4-A of the 1975 Act making the petitioner liable to pay penalty to the authority. On the other hand, the petitioner having purchased the vehicle pursuant to public auction held by competent authority from the date of auction purchase, till possession of the vehicle, he may be liable for payment of tax not the penalty.

9. Mr. J. Pal, learned Standing Counsel appearing for the Transport Department in his usual fairness states that the petitioner being an auction purchaser in a public auction may not be liable to pay penalty but he is obliged to pay the tax as demanded by the authority. Such contention of Mr. Pal has been strongly repudiated by Mr. M. Agrawal, learned counsel for the petitioner in W.P.(C) No. 17344 of 2014.

10. In **Bachan Singh (Supra)**, the Division Bench of this Court has considered the similar question where the petitioner had purchased a truck in auction by the State Government and when application was filed to transfer the ownership of the truck to his name and to issue road permit the same was refused for non-payment of the arrear tax outstanding against the vehicle prior to the date of auction and this Court held that levy of tax and penalty for post auction period by the authorities is not permissible and the petitioner is not liable to pay the arrears payable by the previous owner and also not liable to pay the tax and penalty for the post auction period. This Court held that the OSFC cannot make a claim of sale proceeds of a confiscated vehicle on the ground that the vehicle was purchased by a hire purchase agreement.

11. Mr. M. Agrawal, learned counsel for the petitioner states that in view of the provision contained under Section 64(2) of the 1972 Act, the vehicle which has been seized on the allegation of commission of forest offence the order of confiscation passed under Section 56 in respect of the said vehicle having become final, the petitioner is not liable to pay tax and penalty prior to the date of auction.

Section 64(2) of the 1972 Act is quoted below"

> "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, all encumbrances."

12. On perusal of the above mentioned provisions it appears that once the property is confiscated under Section 56, it vests with the State Government free from all encumbrances. Once it is a State property and it has been put to auction by following due procedure, the petitioner being the auction purchaser, the post auction tax cannot be leviable on him. It is stated that once the property has been vested with the State Government free from all encumbrances means the State owes all the liabilities.

13. In Black Law Dictionary, 7th Edn. the meaning of "Encumbrance" has been defined as follows :

> "A claim or liability that is attached to property or some other right and that may be lessen its value."

14. In **Collector of Bombay v. Nusserwanji Rattanji Mistri**, AIR 1955 SC 291 incorporating the word 'encumbrance' in Section 11 of the L.A. Act, the apex Court has held as follows :

> "The word ' encumbrance' in Section 16 can only mean interests in respect of which a compensation was made under section 11, or could have been claimed. It cannot include the right or the Government to levy assessment on the lands."

15. The meaning of 'encumbrance' has been considered in **Ai Champdany Industries Ltd. v. Official Liquidator**, (2009) 4 SCC 486 (490) in which the apex Court explained the meaning of the word 'encumbrance' to mean, "a burden or charge upon property or a claim or lien upon an estate or on the land."

16. In **State of Himachal Pradesh v. Tarsem Singh**, (2001) 8 SCC 104: AIR 2001 SC 3431, the apex Court further explained the meaning of 'encumbrance', which reads as follows:

> "Encumbrance" means a burden or charge upon property or claim or lien upon an estate or on the land. 'Encumber' means burden of legal liability on property, and, therefore, when there is

> encumbrance on a land, it constitutes a burden on the title, which diminishes the value of the land."

17. In **Kanakia Trading Co. (supra)** referring to Dinendronath Sannial v. Ramkumar Ghosh, 1880-81 ILR 7, the High Court of Calcutta has observed as follows :

> "There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former, the price is fixed by the vendor and purchaser alone; in the latter, the sale must be made by public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former, the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, not withstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or encumbrances effected by him subsequently to the attachment of the property sold in execution."

18. In the aforesaid case, the property was purchased by the petitioner free from all encumbrances. Even if there was any attachment levied by the Income-tax Department before sale, the attachment had shifted to the sale proceeds in view of the permission granted by the Tax Recovery Officer for the sale of the said property by the receiver in satisfaction of the decree obtained by the Mercantile Bank Limited and therefore, the Calcutta High Court considering the meaning of 'encumbrance' stated as follows :

> "x x x Encumbrance means a claim lien, charge or liability attached to and binding immovable property, e.g., a mortgaged ejectment or right of way, accrued and unpaid taxes. x x x " (emphasis supplied)

19. Applying the analysis made by the Calcutta High Court in **Kanakia Trading Co. (supra)**, the petitioner is not liable to pay the unpaid tax pursuant to a confiscation order, which has become final, as the property has already vested to the State Government. Therefore, the tax cannot be leviable on the auction purchaser for the pre auction period.

20. Mr. J. Pal, learned Counsel referring to Sri Sudhakar Pattnaik (Supra) where this Court considered the provisions under Sections 10 and

12 of the 1975 Act and held that no imposition of penalty shall be made for the period of confiscation as enforcement agencies making seizure of vehicles are not liable to submit off road intimation and the auction purchaser is only liable to pay arrear of tax if not paid by the owner of the vehicle or the enforcement agencies. With due respect to the Hon'ble judges of this Court with humble way I disagree with findings given in said judgment inasmuch as while holding that the auction purchaser is liable to pay 'tax'. Following a confiscation proceeding under Section 56 of 1972 Act, this Court held as such while Section 64(2) of the 1972 Act had not been taken into consideration. Thereby the judgment so passed holding that the auction to pay tax only if the same has not been paid by the owner of the vehicle or the enforcement agency, in my humble opinion, is a per incuriam judgment and more so, the provision contained under Section 64(2) of the 1972 Act has not been brought to the notice of the Hon'ble Judges in Sudhakar Pattnaik (Supra) and therefore, there was no occasion on the part of the Court to deal with such aspect.

21. Mr. J. Pal, learned Standing Counsel for Transport Department relying on **Commissioner, Transport-cum-Chairman & Others (supra),** wherein the apex Court held that if the owner of the Truck is required to give intimation, an undertaking of temporary discontinuance of use of vehicle for a period of one year only, and no subsequent undertaking was filed it has to be presumed that the vehicle had been used or kept for use within the State. Merely because the certificate of fitness was cancelled, it could not be said that the vehicle had not been kept for use in the State. The apex Court decided the case taking into consideration the provision contained under Sections 3 and 10 of the 1975 Act. There is no dispute with regard to the power and authority to impose tax and penalty thereof. But in the present case, the question is altogether different where the auction purchaser following the confiscation proceeding purchased the vehicle from the authority who is liable to pay the tax and penalty is the question to be considered.

22. In view of the analysis being made, this Court is of the considered opinion that for the period the vehicle was in custody of the enforcement agency and subsequently, following a confiscation proceeding the auction purchaser having purchased the same free from all encumbrances by making a harmonious consideration of the provisions contained in Sections 3 ,10,12 of the 1975 Act read with Section 56 and Section 64(2) of the

1972 Act, the auction purchaser is not liable to pay the tax and penalty demanded by the Transport Authority for the pre auction period. From the date auction purchaser purchased the vehicle and possessed the same, the tax can be leviable in conformity with the provisions of 1975 Act. The question no.(i) is answered accordingly.

23. Mr. M. Agrawal, learned counsel for the petitioner urged that after the vehicle was purchased in auction purchase, the auction purchaser approached the opposite party no.1 with an application in prescribed Form No. 32 for transfer of the ownership of the vehicle to his name and a new registration number should be allotted in his favour since the vehicle was originally registered before opposite party no.3, RTO, Dhanbad in the State of Jharkhand, the opposite party no.1 refused to accept the application and insisted that the petitioner has to first obtain NOC from opposite party no.3 and then only opposite party no.1 can effect the transfer of ownership of the vehicle in his name.

24. Admittedly, the vehicle was seized by the enforcement agency and after being confiscated following a conciliation proceeding, the same was put to public auction and the petitioner purchased the same in public auction. Section 48 of the 1988 Act deals with No Objection Certificate. It signifies that where the transfer of a vehicle is to be effected in a State other than the State of its registration, the transferor of such vehicle when reporting the transfer under Sub-Section (1) of Section 50 of 1988 Act, shall make an application in such form and in such manner as may be prescribed by the Central Government to the registering authority by which the vehicle was registered for issue of a certificate. Sub-Section (2) of Section 50 of 1988 Act deals with Transfer of ownership which reads as follows:

> "50 (2) Where-
>
> (a) the person in whose name a motor vehicle stands registered dies, or
>
> (b) a motor vehicle has been purchased or an acquired at a public auction conducted by, or on behalf of, Government, the person succeeding to the possession of the vehicle, shall make an application for the purpose of transferring the ownership of the vehicle in his name, to the registering authority in whose

jurisdiction he has the residence or place of business where the vehicle is normally kept, as the case may be, in such manner, accompanied with such fee, and within such period as may be prescribed by the Central Government."

25. Sub-Clause(b) of Sub-Section(2) of Section 50 of the 1988 Act mentioned above stipulates that a motor vehicle which has been acquired at a public auction conducted by, or on behalf of, Government, the person succeeding to the possession of the vehicle, he is to only make an application for the purpose of transferring the ownership of the vehicle to his name, to the registering authority in whose jurisdiction he has the residence or place of business where the vehicle is normally kept. In view of the provisions contained in Sub-Clause(b) of Sub-Section(2) of Section 50 and Section 48 of the 1988 Act read with Rule 57 of the Central Motor Vehicle Rules, 1989, the insistence of submission of NOC by opposite party no.1 to the petitioner is contrary to the provisions of law. As such, he is not required to produce such NOC as the petitioner purchased the vehicle following a public auction from the enforcement agency in accordance with law.

26. In view of the aforesaid facts and circumstances, neither the petitioner is liable to pay tax for the pre auction period and also was not required to submit NOC as he purchased the vehicle in question in a public auction pursuant to the confiscation proceeding held under Section 56 of the 1972 Act.

27. The writ petitions are thus allowed. However, there shall be no order as to costs.

Writ petition allowed.

2015 (II) ILR - CUT- 319

DR. B.R. SARANGI, J.

W.P.(C) NO. 1636 OF 2015

SARAT CHANDRA TRIPATHY ……..Petitioner

.Vrs.

O.F.D.C. & ORS. ……Opp. Parties

SERVICE LAW – Government enhanced the age of retirement of its employees from 58 years to 60 years vide resolution Dt. 28.06.2014 – Petitioner being an employee of OFDC claims similar benefit – Government approved the proposal made by OFDC on 22.10.2014 with a condition that the benefit shall be effective from the date of issuance of order by OFDC – Petitioner retired on 30.09.2014 – No notification by OFDC pursuant to order Dt. 22.10.2014 – Held, no notification having been issued by OFDC extending the benefit of enhancement of age of retirement from 58 years to 60 years, the petitioner is not entitled to get the benefit of continuing in service till attaining the age of 60 years. (Paras 6, 7, 8)

For Petitioner : M/s. B.Rout & P.Panda-3

For Opp.Parties : M/s. S.K.Pattnaik, Sr. Adv.
P.K.Pattanaik, S.P.Das, D.P.Das & S.Das

Date of hearing : 20.04.2015
Date of judgment : 05.05.2015

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner who was working as Field Assistant under the Divisional Manager, Dhenkanal (C) Division of the Orissa Forest Development Corporation and attained the age of superannuation i.e 58 years on 30.09.2014 seeks for a direction to continue in the post till completion of 60 years of age pursuant to resolution dated 28.06.2014 passed by the Government in Finance Department and avail all the consequential service benefits as due and admissible in accordance with law.

2. The short facts of the case in hand is that the service condition of the petitioner who was working as Field Assistant Grade-III under Divisional Manager, Dhenkanal (C) Division, Orissa Forest Development Corporation Ltd. is regulated by Service Rules framed by the Corporation. The age of superannuation of the employees of Grade-III post as per Rule-43 of the Service Rules of the Regulation was 58 years. The petitioner was due to attain the age of 58 years on 30.09.2014 and retire on the same day. Accordingly, the notice of superannuation was issued to the petitioner on 20.03.2014 allowing him to retire with effect from 30.09.2014. The Government of Orissa passed a resolution on 28.06.2014 enhancing the age of superannuation of State Government employees from 58 years to 60 years. Pursuant to resolution dated 28.06.2014, the petitioner claims that similar benefit has to be extended to the employees of the corporation by enhancing the age of superannuation from 58 years to 60 years. The Government of Odisha, Department of Public Enterprises by Resolution dated 02.08.2014 decided to increase the age of retirement of the employees of the Public Sector Undertakings to 60 years following the decision of the Government of Odisha to increase the age of retirement for the State Government employees. In spite of such Resolution being passed, since the benefit of enhancement of retirement age has not been extended to the petitioner, he has preferred this application.

3. Mr. B.Rout, learned counsel for the petitioner strenuously urged that once the State Government has extended the retirement age of its employees from 58 years to 60 years pursuant to Resolution dated 28.06.2014, the said benefit of enhancement of retirement age should be extended to the petitioner. Further, the Government of Odisha, Department of Public Enterprises by its Resolution dated 02.08.2014 decided to increase the age of retirement of the employees of the Public Sector Undertakings to 60 years. Once such decision has been taken, on that basis the opposite party-Corporation should have extended the benefit to the petitioner and due to non-consideration of the same, the petitioner made a representation on 04.08.2014. When such representation was pending, the petitioner filed W.P.(C) No.18141/2014 and this Court disposed of the same stating that if the Board takes a decision in the light of the Resolution passed by the State Government increasing the age of superannuation of its employees from 58 years to 60 years, the petitioner shall be brought back to his position within a period of seven days from the date of concurrence from the Finance Department. The opposite party-Corporation

recommended the proposal to the Government for approval with regard to enhancement of retirement age of its employees from 58 years to 60 years. On such recommendation, the State Government approved the proposal of enhancement of retirement of age of the Corporation employees from 58 years to 60 years along with consequential amendment to Rule-42 of OFC Service Rules-1986 vide Annexure-D dated 22.10.2014. It is urged that once the age of superannuation is enhanced from 58 to 60 years the benefit should be extended to the petitioner retrospectively in consonance with the order passed by this Court in W.P.(C) No.18141/2014.

4. Mr. S.K. Pattnaik, learned Senior Counsel appearing for the opposite party-Corporation strenuously urged that though the State Government passed a Resolution on 28.06.2014 enhancing the age of superannuation from 58 to 60 years and subsequently, the Public Enterprise Department of Government of Odisha by Resolution dated 02.08.2014 decided to increase the age of retirement of the employees of the Public Sector Undertakings to 60 years, on that basis the Corporation has recommended vide letter dated 15.10.2014 in Annexure-C seeking for approval of the proposal of enhancement of age of retirement of its employees from 58 years to 60 years and the Government approved the proposal of enhancement of retirement of age of the Corporation employees from 58 years to 60 years along with consequential amendment to Rule-42 of OFC Service Rules-1986 vide Annexure-D dated 22.10.2014. With reference to the letter dated 22.10.2014 vide Annexure-D, the claim made by the petitioner cannot sustain. So far as the claim relating to enhancement of retirement age is concerned, learned senior counsel submits that on the basis of the judgment passed by this Court, the same having been passed ex parte without hearing the opposite party cannot be acted upon.

5. On the basis of such contentions raised by the learned counsel for the parties, it appears that admittedly the petitioner was continuing as Field Assistant under the Divisional Manager, Dhenkanal (C) Division of the Orissa Forest Development Corporation. While continuing as such, in view of Rule 42 of the OFDC Service Rules,1986 notice of superannuation vide Annexure-1 dated 20.03.2014 was issued to the petitioner allowing him to retire from the Corporation Service with effect from 30.09.2014 on attaining the age of superannuation of 58 years considering his date of birth as recorded in his Service Book being 30.09.1956. At this point of time the Government of Orissa passed a Resolution dated 28.06.2014 enhancing the

age of superannuation of its employees from 58 years to 60 years. But, this Resolution has no application to present petitioner because that is only relating to the employees of the State Government. Subsequently, the Government of Odisha, Department of Public Enterprises passed a Resolution dated 02.08.2014 vide Annexure-3 enhancing the age of retirement of the employees of the Public Sector Undertakings from 58 years to 60 years subject to fulfillment of certain conditions by the respective Public Sector Undertakings which read as follows:

1. The Public Sector Undertaking must justify its need to retain the present experienced manpower for utilization of their services in achievement of the objectives of the Corporation.

2. The entity does not have compelling reasons to reduce cost by downsizing manpower.

3. The PSU must not have defaulted in payment of salary, statutory dues of the employees such as Provident Fund and ESI etc. in past three years.

4. The PSU must not have availed any additional budgetary support during the last three years for payment of salary and other employees dues (excepting the usual level of budgetary support availed by the PSU, if any).

5. The PSU must not have defaulted in payment of loan to any financial institution or State Government. The PSU must be update in payment of guarantee fee/royalty/dividend to the State Government, whichever is applicable.

6. The entity is and will be able to discharge the salary burden out of its own resources and not depend on additional budgetary grant (excepting any usual budgetary allocation)".

6. Pursuant to the aforesaid Resolution under Annecxure-3 dated 02.08.2014, the Board of Directors of O.F.D.C. in their 242nd meeting held on 30.09.2014 authorized the Managing Director to submit the proposal to the Administrative Department for concurrence and for obtaining prior approval of the Govt. for giving effect to Public Enterprises Department Resolution dated 02.08.2014 prospectively. On 15.10.2015 the Odisha Forest Development Corporation Ltd. sought for approval of the proposal

of enhancing the retirement age of its employees from 58 to 60 years along with the approval of the amendment of Rule 42 of OFC Service Rules 1986 as resolved in 242nd meeting of Board of Directors. Consequence thereof the Government of Orissa, Forest and Environment Department vide order dated 22.10.2014 vide Annexure-D approved the proposal of enhancement of age of retirement on superannuation of the employees of Odisha Forest Development Corporation Ltd. from 58 years to 60 years along with consequential amendment to Rule-42 of OFC Service Rules-1986 with a condition that the enhancement of retirement age shall be effective from the date of issuance of order by the Corporation. In consonance with the order passed under Annexure-D dated 22.10.2014 by the Government of Odisha, Forest and Environment Department, no material has been produced before this Court to show issuance of the order by the Corporation effecting the enhancement of age of retirement of its employees. The petitioner was superannuated from service on attaining the age of 58 years on 30.09.2014 even before grant of approval by the State Govt. In absence of any notification of OFDC pursuant to Annexure-D, the age of retirement of its employees cannot be construed to be applied with retrospective effect from the date of passing of Resolution by the Government of Odisha Department of Public Enterprises. If at all the benefit of enhancement of the age of superannuation is to be extended to the employees of OFDC, it will always be given prospectively pursuant to the approval of the State Govt. in Forest and Environment Department.

7. Coming to the question of implementation of the order of this Court in earlier writ petition bearing No.W.P.(C) 18141/2014 disposed of on 29.09.2014 so far as bringing back the petitioner to his position within a period of seven days from the date of concurrence by the Finance Department, it is only to be considered that the said order has been passed ex parte without hearing the opposite party. Similar question came up for consideration of this Court in ***Sukanta Chandra Mohanty v. State of Orissa and others*** W.P.(C) No.14957/2014 disposed of on 31.03.2015) and ***Raghunath Das v. State*** (W.P.(C) No.20381/2014 disposed of on 12.11.2014) wherein this Court has already held that the order of approval by the competent authority having been passed after the superannuation of the petitioner, the said approval can be applied prospectively but not retrospectively. Till date no material has been produced before this Court to indicate that the Corporation has already passed Resolution after getting approval of the State Government, Department of Forest and Environment

to extend the benefit of enhancement of retirement age of its employees from 58 to 60 years. In absence of any notification, the claim of the petitioner that he is entitled to continue in service till attaining the age of 60 years cannot be accepted.

8. In that view of the matter, even though approval has been made by the State Government, no notification having been issued by OFDC extending the benefit of enhancement of age of superannuation from 58 years to 60 years so far as its employees are concerned, the petitioner is not entitled to get the benefit of continuing in service till attaining the age of 60 years.

9. For the foregoing reasons, this Court finds no merit in the writ petition. Accordingly, the same is dismissed. No order to cost.

Writ petition dismissed.

2015 (II) ILR - CUT- 324

D. DASH, J

F.A.O. NO. 371 OF 2013 & 328 OF 2014

BIMALA SAHOO & ANR. ….. …Appellants

.*Vrs.*

BINAYAK SAHOO …..…..Respondent

HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – S.13

Appointment of guardian of Hindu minors – Welfare of minor should be paramount – Maternal grand father and paternal grand father of the minors are applicants – After the death of parents of the minors maternal grand father is looking after the minors – No material that his prayer is backed by malafides – Even one minor child in her evidence has expressed her whole hearted willingness to stay with the maternal grand parents – In the other hand evidence of O.P.W.1, the paternal grand father, discloses that after the death of the parents of the minors he has never tried to bring the minors and looked after their problems – Held, the impugned order refusing to appoint the maternal grand father as guardian in respect of the

person and properties of the minors is set aside and he is appointed to discharge the said role for the welfare of the minors.

(Paras 8 to 10)

For Appellants : M/s. P.K.Mohanty, P.Mohanty, P.Behera, D.K.Swain, A.Kar,S.Biswal,S.K.Tripathy

For Respondent : M/s. A.Tripathy, B.Sahoo, B.Mohanty

Date of hearing : 19.03.2015
Date of judgment: 30.04.2015

JUDGMENT

D. DASH, J

Both these appeals arise out of the judgment dated 20.07.2013 passed by the learned District Judge, Nayagarh in Guardian Misc. Case No. 3 of 2011. Therefore, these having been heard together have been taken up for their disposal by this common order.

The appellant of F.A.O No. 328 of 2014 is the petitioner in the above noted Guardian Misc. Case, wherein the respondents were the opposite parties and they are now the appellants in F.A.O. No. 371 of 2013

2. For the sake of convenience to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arrayed in the court below.

3. The petitioner Binayak Sahoo now nearing 60 years of age filed a petition for his appointment as the guardian of the person and the properties of the minors, namely, Manali and Suman, her granddaughters (daughter's daughters).

The petitioner's daughter Gitanjali had married to one Markanda, who was working as a driver in the office of the Commissioner, Regional Provident Fund, Bhubaneswar. They were leading happy conjugal life. The first daughter was born during the life time of Markanda, who unfortunately died prior to the birth of Suman, when she was in the womb of Gitanjali. Gitanjali in the year 2007 got a job in the same office under the Rehabilitation Assistance Scheme i.e. about three years after the death of her husband. She stayed in the quarter provided by the employer and lived with her minor daughters taking all their care. As ill luck would have it,

Gitanjali met her death in a road accident and the two minor daughters then lost all their supports. At this juncture, the petitioner being the maternal grandfather brought and kept them with him in his house providing all those facilities required for their living up to his capability. They were also put in the school for pursuing education.

The opposite parties are the parent-in-laws of Gitanjali i.e. paternal grandparents of minors. . It is said that after the death of their son Markanda, when Gitanjali was going to their house, she was always facing caustic comments that she was ominous and responsible for death of her husband, which was putting her under tremendous mental torture. Towards last part being not able to bear such torture any more, she had severed all her relationship with the opposite parties.. So when the opposite parties did not come forward to take care of the minor daughters, the petitioner had to step on.

In view of all these, the petitioner prayed before the competent court for being appointed as the guardian of the person and property of the minors.

The opposite parties then came out to contest the proceeding by projecting the case that such move of the petitioner was only to grab their family properties while denying the allegations of cruelty and torture to have been meted out at Gitanjali at any point of time. They further stated to have been looking after Gitanjali and her children with utmost care giving love and affection. At this stage, the opposite parties also pleaded that it was only because of their according consent, Gitanjali had got the employment under the Rehabilitation Assistance Scheme. It is stated that this petitioner has polluted the minds of the children after the death of Gitanjali and that ultimately prevailed upon the mind of the children not to come to their paternal house when the opposite parties were and are always ready and willing to keep them and provide all basic amenities. With such pleadings, they resisted the prayer of the petitioner for his appointment as the guardian of the person and the properties of the minors.

4. In course of the proceeding, the petitioner when examined four witnesses, the opposite parties also examined the equal numbers of witnesses.

The learned District Judge finally considering the welfare of the minors as the paramount consideration and viewing the fact and

circumstances as also the evidence on record, appointed the petitioner as the guardian for the person of the minors, namely, Manali and Suman, the daughters of late Markanda and Gitanjali. So by this order, the learned District Judge remained silent with regard to the appointment of the petitioner as the guardian in respect of the properties of the minors. In other words that amounted to refusal of the prayer of appointment of the petitioner as the guardian in respect of the properties of minors.

So, the application was filed under Section 151 of the Code of Civil Procedure for necessary correction in the order viewing it to be an inadvertent omission in view of the discussion and reasons assigned in the order itself. However said prayer has also been rejected. Therefore, now the petitioner has approached this Court in appeal for his appointment as the guardian of the minors also in respect of their property.

The opposite parties being aggrieved by the order of appointment of the petitioner as the guardian of the person of the minors have also filed the other appeal.

5. The learned counsel for the appellant (petitioner in the court below) submits that when the petitioner has been appointed as the guardian of the person of the minors, considering the facts that the welfare of the minors would be best taken care of, guarded and protected by the petitioner, there was no justification on the part of the learned District Judge to remain silent in his order as regards appointment of the petitioner as the guardian of the properties of the minors, thereby indirectly refusing the said prayer without indicating the same in clear term and assigning the reason thereof. It is his next submission that now the petitioner is aged about sixty plus and for the education of minors and other needs in view of advancement of age, funds are absolutely necessary when it is not possible at this age on the part of the petitioner to do some other work and earn for the purpose of having more funds in his hand than those coming from the existing sources and hence there may be lack of proper provision for education and to meet other growing need of the minors. He contends that when the court below has arrived at the conclusion that the petitioner is taking care of the two minors after the death of Gitanjali since the year 2010 and the conduct of the petitioner is free from blemish rather have always been above board and as the allegations by the opposite parties against him thereby get completely repelled, in that circumstance, non appointment of the petitioner as the guardian of the minors in respect of their properties rather stands in

opposition to the welfare of the minors which is the primary objective sought to be achieved in such eventuality.

Learned counsel for the respondent (opposite parties in the court below) submits that the learned District Judge, Nayagarh without properly appreciating the facts and circumstances of the case as also the evidence on record ought not to have appointed the petitioner as the guardian of the person of the minors when that prayer is with a view to grab their properties. He contends that appointment of petitioner as the guardian of minor's property would not at all serve the interest of minors and rather the opposite parties being appointed as such would be in a better position to look to their welfare.

6. Keeping the above submission in mind when the order passed by the learned District Judge is perused, in my opinion not only that it is found to be cryptic but also it appears to have been passed in a cavalier fashion and is thus not appreciated. The matter has been dealt in a slipsord manner throwing the legal position to the winds without due application of mind on all those required facts. The evidence laid by the parties have not been discussed and in a generalized manner it having just been indicated, the order finally runs as under :-

> "Therefore, on totality of facts and circumstances of the case, it is found that it is the petitioner who is taking care of the two orphan minors after the death of their mother since 2010. Section 13 of Hindu Minority and Guardianship Act, 1956 reads thus:
>
> ***Section 13. Welfare of minor to be paramount consideration*** – (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court the welfare of the minor shall be the paramount consideration.
>
> 6. Under the above premises and the factual background of the case the welfare of the minors being the paramount consideration and by giving due weightage to the provisions of Section 17 of the Guardians & Wards Act, 1890, this Court orders as below :
>
> ORDER
>
> 7. The Guardian Misc. Case be and the same is partly allowed on contest against the O.Ps. The petitioner Shri Binayak Sahoo is hereby appointed as Guardian for the person of minors namely

Manali Sahoo and Suman Sahoo, daughters of late Markanda Sahoo and late Gitanjali Sahoo, till they attain majority."

7. However, considering the importance and sensitivity of the matter concerning the welfare of the minors, this Court refrains to adopt the usual course as it ordinarily would have been done by remanding the matter to the court below with the observation as above for disposal afresh keeping the settled position of law in mind and applying the same to the case in hand upon due appreciation of evidence. Thus this court is constrained to take up the said exercise in the interest of justice.

8. It is the settled position of law that in the matter of appointment of guardian of the minors in respect of the person and the properties, the court has to always look to the welfare of the minor and that is the paramount consideration. In this case of appointment of guardian of both the person and properties of the minors, the court in view of the competing claims is under legal obligation probably being placed in the position of superior guardian under the special legislation to consider as to in whose hands the welfare of the minors would be best served. For the purpose, let me begin the exercise in approaching the evidence on record viewing the fact and other circumstances including the conduct of the parties although to decide the fate of the rival prayers.

The petitioner has examined himself as P.W.1 and has stated in clear terms to have no adverse interest to those of the minors. It is his evidence that the opposite parties did not spend a single pie for the minor after the death of Gitanjali. He has further stated that these minors are to get the family pension under the death benefit scheme and also the deposits lying in different Banks and Life Insurance Company when they may also receive the award amount if passed by the Motor Accident Claims Tribunal who is in seisin of the claim application filed on account of death of Gitanjali in motor accident. He has been cross-examined at length. But nothing has been elicited to discard his version and no material has surfaced in his evidence indicative of the fact that his prayer is backed by mala fides. The wife of the petitioner has been examined as P.W.2 and she has stated in the same vein that the minors are residing with them and they are taking all their care including their education. Her evidence on this score has remained unshaken. Interestingly the minor Manali has come to the dock and in her evidence she has expressed her whole hearted willingness to stay with the maternal grand parents.

Support has come from the evidence of P.W.4 who is none other than a person being a frequent visitor to the house of the petitioner. His evidence reveals that in view of the dispute between the parties, there were attempts to resolve the same, but those failed for the stubborn attitude of the opposite parties. Despite of scathing cross-examination, he has remained firm and no such materials either indicating his over interestedness or showing his evidence to be tainted with falsehood have emanated.

9. Next, let us straight way proceed to examine the evidence of the opposite parties i.e, O.P.W.1. On a bare reading of his evidence, it is seen as if after the death of his son, it was because of him and his magnanimity that Gitanjali had the job under the Rehabilitation Assistance Scheme which exposes his mind set and attitude. He has not stated that he had at all attempted to bring the minors. However, in a casual manner he has gone to state that the petitioner is not leaving them. The greed of this old gentle man is well apparent when the move of his wife who is under one roof with him to get the legal heir certificate after the death of Gitanjali indicating her name as such is viewed. It stands as a conduct which tend to show the adverse interest against the minor and thus is a conduct for disentitlement of the relief. The purpose standing or staking claim as one of the legal heirs of Gitanjali can be well said to advance a claim over all the properties of Gitanjali which is but adverse to the interest of minors.

Even this when was sought to be corrected, there was resistance and to strike off the name of the opposite party no.2 from the list of the legal heirs of Gitanjali an appeal had to be carried which of course succeeded providing shy of relief to the minors. These conducts lead to show their mind set in the negative and thus leads to well visualise that their show of jeal and coming forward to act as guardians of minors person and properties is nothing but pretention shedding crocodile tears. In the entire evidence, no allegation has been levelled against the petitioner that he has not acted adverse in the interest of the minors at any point of time till now nor any such instance even is shown when minor Manali has expressed her satisfaction.

In the above premises, when both minor daughters have been living with the petitioner and his wife in their house for quite few years by now since the death of Gitanjali having no grievance against the petitioner and in the absence of any such evidence forthcoming that any such act to have been committed by the petitioner running against or tending to injure the

interest of the minors as also when minors wish to so reside, this Court is led to hold the petitioner to be the fittest person to act as the guardian of his two minor granddaughters, namely Manali and Suman in respect of their person as well as the properties while concluding that in his hands only their welfare would be best taken care of and served. Therefore, the order of the earned District Judge, Nayagarh refusing to appoint the petitioner as the guardian in respect of their properties is liable to be set at naught. The prayer of the opposite parties for the same purpose in view of the aforesaid discussion and reasons merits no consideration.

10. In the result, the FAO No. 328 of 2014 stands allowed to the extent as indicated above and the FAO No. 371 of 2013 stands dismissed. In the facts and circumstances of the case, no cost is awarded.

The petitioner (appellant of F.A.O. No. 328 of 2014) is hereby appointed as the guardian in respect of person and property of minors Manali and Suman and as such by this appointment he is ordained to discharge the said role keeping the welfare of the minors in view and as the top agenda in every matter of decision or action concerning them. The petitioners shall in view of above appointment submit half yearly report to the District Judge, Nayagarh apprising the developments concerning the minors, their health and education and also to place accounts of all their properties coming to be dealt by the petitioners giving details of income and utilization thereof for the court to further monitor the matter in the best interest and welfare of minors if so felt the need at any future time.

Appeal allowed.

2015 (II) ILR - CUT- 331

D. DASH, J.

RSA. NO. 104 OF 2009

JAYARAM @ JAYAKRUSHNA BEHERA ……..Appellant

.Vrs.

HARAMANI BEHERA & ORS. ……..Respondents.

CIVIL PROCEDURE CODE, 1908 – O - 22, R- 6

Abatement – Suit for partition – All formalities of the final decree proceeding was over awaiting the formal sealing and signing – Death of defendant No 9 in the mean time – whether the final decree passed against a dead party is a nullity ? – Held, final decree can not be said to be nullity in the absence of the legal representatives of defendant No.9. (Para 9)

Case Law Relied on :-

1. AIR 1996 SC 116 : N.P.Thirugnanam (D) by L.Rs vs. Dr.R.Jagan Mohan Rao & Ors.

For Appellant : M/s. A.K.Mishra-2, S.K.Rout, B.P.Samal and M.R.Parida,

For Respondents : M/s. P.K.Swain, N.Senapati, G.Behera, S.K.Mohanty, Behera, Satraughna Dash-A, A.R. Dash, S.K.Pradhan-2, B.Mohapatra, S.K.Nanda,K.S.Sahu and L.D. Achari,

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Date of hearing : 09.04.2015
Date of judgment : 22.04.2015

JUDGMENT

D. DASH, J.

This appeal has been filed challenging the judgment and decree passed by the learned District Judge, Cuttack in RFA No. 143 of 2007 affirming the final decree passed by the learned Second Addl. Civil Judge (Sr.Divn.), Cuttack in T.S. No. 424 of 1993.

2. Facts necessary for the purpose are stated hereunder:-

(a) Respondent no. 1 as the plaintiff filed the suit for partition i.e. T.S. No. 424 of 1993 against the appellants (defendant no.1 and others) claiming shares over the properties described in the schedules of the plaint. The suit was preliminarily decreed and the preliminary decree was drawn up on 14.11.2000.

(b) The defendant no. 1 thereafter filed a petition under Order 9 Rule 13 of the Code of Civil Procedure to set aside the said judgment and decree on the ground that it was passed *ex parte* against him and he was prevented by

sufficient cause from appearing in court on that date and participating in the trial court.The same got numbered as Misc. Case No. 142 of 2000. The trial court rejected the petition on 27.6.2000 holding the decree to be a contested one and as such it was held that the provision of Order 9 Rule 13 of the Code would not come to the aid and assistance of the defendant no. 1.

(c) On 6.7.2002 the plaintiff filed a petition before the trial court for making the preliminary decree final. The proceeding continued. The defendant no. 1 then carried an appeal i.e. Misc. Appeal 79 of 2002 challenging the aforesaid order of the trial court refusing to set aside the *ex parte* decree applying the provision of Order 9 Rule 13 of the Code. The learned District Judge in that appeal passed an order of stay of further proceeding in the suit and that was later on modified that only sealing and signing of the final decree would remain stayed. The first order was received on 3.9.2002 and the other order was received on 23.12.2002. So, final decree proceeding continued as before.

(d) The learned District Judge finally allowed the above noted Misc. Appeal holding the decree to be an *ex parte* one so far as the defendant no.1 was concerned and thus petition under Order 9 Rule 13 of the Code was held to be maintainable. Therefore, the matter got remanded to the court below for disposal of the said petition on merit. The order of the appellate court was received on 18.7.2003.

(e) The trial court recorded the evidence and after hearing the parties refused to set aside the *ex parte* decree holding the plea of defendant no.1's illness as not believable. This order was again challenged by carrying an appeal vide Misc. Appeal No. 97 of 2003 by the defendant no. 1. In the said appeal, the order of stay was passed on 17.5.2005 staying the sealing and signing of the final decree. That order was received by the trial court on 21.7.2005.

(f) It is now pertinent to state here that in the meantime, final decree proceeding that was continuing, the court below received the report of the civil court commissioner invited objections from the parties. The defendant no. 1 filed objection. So the civil court commissioner was examined and upon hearing finally by order dated 05.07.2005 the report of the commissioner was accepted finding no such infirmity and overruling the objection of the defendant no. 1. It is also worthwhile to mention here that the defendant no. 9 (Kusuma Muduli) had never objected to the said report before acceptance of the said report by order as above. Again on

11.07.2005 the trial court heard argument and passed necessary order making the preliminary decree final mandating that the report of the commissioner, the allotment sheets and the sketch map are to form a part of the final decree. With such order, the matter was awaited directing the parties to submit stamp papers within a fortnight for the final decree to be engrossed upon the same so as to make it executable in the eye of law. On 21.07.2005 the decree was also drawn up and notified. Later, on that date, the trial court received the extract of the order passed by the appellate court in CMA No. 4 of 2005 arising out of Misc. Appeal No. 97 of 2003 that the sealing and signing of the final decree would remain stayed. So the matter stood at that stage.

(g) The appellate court in that Misc. Appeal finally allowed the Misc. Appeal and set aside the *ex parte* decree against defendant no.1 subject to payment of cost of Rs.20,000/- by the defendant no.1 to the plaintiff on 1.12.2005 in the trial court where the plaintiff or her authorized agent would be present to receive the amount. It was further stipulated that further under no circumstances the date of payment of the cost would be deferred and in case of non-payment of cost the application for setting aside the *ex parte* decree would stand dismissed. Defendant no. 1 then challenged that order of imposition of cost and other stipulations by filing W.P.(C) No 14133 of 2005. Similarly, the plaintiff also challenged that order of setting aside the *ex parte* decree in the Misc. Appeal on merit by filing W.P. (C) No. 9597 of 2005. On 1.12.2005, this Court passed an order of interim stay till disposal of the writ application. Those writ applications were finally dismissed. After disposal of those writ applications, the matter being put, the trial court on 20.06.2007 finally sealed and signed the final decree being engrossed on stamp papers which had been submitted.

This was challenged by the defendant no. 1 in RFA No. 143 of 2007 in the court of District Judge and the appeal having been unsuccessful, present second appeal has been filed.

3. The appeal has been admitted on the following substantial question of law:

> "Whether the final decree passed in the absence of the legal heirs of one of the parties to the suit upon his death during the pendency of the final decree proceeding is a nullity?"

4. It is pertinent to state here that the defendant no. 1's specific challenge to the final decree is that prior to the sealing and signing of the

final decree on 20.6.2007, the defendant no. 9 (Kusum Muduli) had died on 11.1.2006 and her legal representatives were not brought on record. So, the final decree having been passed against one of the defendants who was by then dead and was not represented in the said proceeding, the final decree is a nullity.

5. Learned counsel for the appellant (defendant no.1) submits that as admittedly by the time when the final decree was sealed and signed one of the defendants was dead and her legal representatives were not on record as parties, the final decree being against a dead party is a nullity. According to him, the lower appellate court has failed to appreciate this legal position properly and has erroneously confirmed the final decree instead of setting aside and remanding the matter to the trial court for proceeding further with the final decree proceeding for its culmination in accordance with law. The ground assigned that all formalities being over before death of defendant no.9 and when nothing was done after the said death, and just the final decree being sealed and signed, the death of defendant no. 9 is of no significance and in no way render the final decree, a nullity is seriously challenged. It is argued that the appellate court's reasoning is based on assumption that said legal representatives of the defendant no.9 would not have done anything.

Therefore, he urges that the lower appellate court's order is untenable in the eye of law.

6. Learned counsel for the respondents on the other hand supports the order of the lower appellate court reiterating the grounds on which there has been refusal to disturb the final decree. He contends that all formalities of the final decree proceeding was over and defendant no. 1's objection being overruled, he did not further questioned it. The matter was just awaiting the formal sealing and signing. Therefore, he contends that non-bringing of the legal representatives of defendant no. 9 as parties to the said proceeding at that stage is of no consequence.

Relying on the decision in case of **N.P.Thirugnanam (D) by L.Rs vs. Dr.R.Jagan Mohan Rao and others**: AIR 1996 SC 116, he contends that the same principle would apply with full force to the present case that just like that in a suit or the appeal, the argument being heard and the same if posted for pronouncement of judgment when in the meantime, during this period if a party dies, there remains no need for substitution of the legal representatives. So in the case since the parties had been heard on the

question of acceptance of report of the Commissioner inviting objection and that too recording the evidence holding the objection as untenable, the hearing stood concluded and sealing and signing of the final decree being engrossed on stamp paper being awaited means it was just for the purpose of giving the right to the party is to be able to execute. So, this settled principle which finds also mentioned in Order 22, Rule 6 of the Code can legally be borrowed for the purpose in the interest of justice to meet the eventuality. It is next submitted that the said defendant no. 9 was only a proforma defendant and no relief was sought for against her. So, substitution of her legal representatives was not the necessity and final decree cannot be said to be a nullity in the absence of the legal representatives of said defendant no. 9 being there on record as parties at the time of its sealing land signing being engrossed on stamp paper.

7. As I find in the instant case, the lower appellate court has lost sight of some vital factual aspects and thus has not proceeded to examine the matter in that light applying the settled law. In my considered view examining the case from those angles is very much necessary as the outcome of it may be sufficient enough to answer the substantial question of law formulated while admitting the appeal.

The court below in the instant case ought to have first ascertained as to which is to be taken as the date of sealing and signing of the decree so as to conclude on fact that whether the death of defendant no.9 was prior to it or thereafter.

8. Admittedly, in the present case on the day when the report of the commissioner was accepted, there was no order of even stay of sealing and signing of the final decree and that order came to be received by the trial court on 21.07.2005 whereas the order sheet reveals that the report was accepted on 05.07.2005 and thereafter, on 11.07.2005 after hearing argument, the preliminary decree was made final and order has been passed that the Commissioner's report with map and allotment sheets would form a part of the said final decree and it was simply awaited to be engrossed upon stamp paper to be provided by the parties which has nothing to do as regards passing the final decree but only to make the final decree executable. In fact, decree was notified on 21.07.2005 whereafter only the order of the learned appellate court dated 19.7.2005 staying the sealing and signing of the final decree was received. The death of said defendant no. 9 is said to have taken place on 11.01.2006 which is not disputed by the

respondent no. 1. The settled position of law is that the date of final decree so as to be enforceable is the date when the court passes the order making the preliminary decree final upon acceptance of the report of the civil court commissioner. In the instant case thus it is to be taken to have been passed on 11.07.2005 and that is the date for computing the period of filing appeal as also the period for the levying the execution proceeding starts to run from that date as the final decree's enforceability springs up from that day. Parties by not supplying the stamp paper cannot arrest the running of the said period for above purposes. However, the decree would not be executable unless it gets engrossed on stamp paper and sealed and signed. So once the preliminary decree is made final by order, the same stands final and is no more amenable to challenge by the parties without questioning it by filing appeal or review as the case may be. The parties right to file execution proceeding becomes barred by limitation as provided under article 136 of the Limitation Act once twelve year elapses from that date of final decree as stated above land not computable from the date of engrossment of the decree on stamp paper being sealed and signed.

Therefore, without touching the contentions raised by the learned counsel for the parties and going to examine the sustainability of the reasons assigned by the lower appellate court in refusing to disturb the final decree, in the present case, the final decree cannot at all on fact be said to have been passed against a dead party as on the date of the passing of final decree being taken as per the settled law, the defendant no.9 was living. The lower appellate court appears to have not considered this important aspect that the final decree being viewed through the legal spectrum was actually in fact not passed against a dead party i.e. defendant no.9. In that view of the matter, it was not at all necessary to find out the justification that if such passing of final decree against a dead party is of any consequence or not in view of the fact that all required formalities were over by then. So above being the factual as well as legal position, the substantial question of law certified while admitting the appeal receives its answer in the negative.

9. Be that as it may, even accepting for a moment that the final decree was passed against a dead party i.e. defendant no.9 without bringing her legal representatives on record, it is seen that the plaintiff along with defendant nos. 9 and 10 were allotted with 8 annas of share over schedule 'B' and 'D' properties, 4 annas of share over schedule 'E' and 'F' properties and 1 anna of share over schedule 'C' property. Accordingly, in

the final decree proceeding, the civil court commissioner has made the allotment and has prepared the allotment sheets allotting the properties of that much of share over the properties under different schedules to plaintiff, defendant nos. 9 and 10 enblock. Therefore, even in the absence of the legal representatives of defendant no.9 if any there arises no question of their deprivation and prejudicial to them. Furthermore, the interest of legal representatives of defendant no. 9 can very well said to have been substantially represented. In view of aforesaid discussion, the challenge to the final decree is wholly untenable in the eye of law. For the above reasons, the substantial question of law as stated above gets accordingly answered against the appellant.

Thus now there arises no further need to address the rival submission as regards legal sustainability of the justifications given by the lower appellate court about the affect of non-substitution of legal representatives of defendant no. 1 if any, in view of completion of all formalities before the death of defendant no.9. Even if the view rendered by the lower appellate court is not concurred with and found untenable, still for the above discussion made in the forgoing paras, it would make no difference so far as the answer to the substantial question of law is concerned standing in the negative.

10. Resultantly, the second appeal stands dismissed and in the circumstances without cost.

Appeal dismissed.

2015 (II) ILR - CUT- 338

S. PUJAHARI, J

W.P.(C) NO. 11520 OF 2014 (WITH BATCH)

SIBA CHARAN PRADHAN ……..Petitioner

.Vrs.

D.F.O, RAIRAKHOL DIVISION & ORS. ……..Opp.Parties

ODISHA TIMBER AND OTHER FOREST PRODUCE TRANSIT RULES, 1980 – RULE 7

Application for T.T. permit for removal of Sal trees from the recorded private lands of the petitioners – D.F.O. refused to grant permit – Action challenged – Forest Conservation Act, 1980 shall not apply to any trees planted in any area which is not a forest – Impugned order not being sustainable is quashed – Direction issued to the concerned D.F.O. to pass necessary orders for removal of the trees from the respective lands of the petitioners and to issue T.T. permit for the same. (Paras 10,11)

For Petitioner : M/s H.M. Dhal & Associates
For Opp. Parties : Addl. Govt. Adv.

Date of hearing : 16.04.2015
Date of judgment: 19.06.2015

JUDGMENT

S.PUJAHARI, J.

All these four writ petitions have been filed by the respective petitioners under Articles 226 and 227 of the Constitution of India assailing the order under Annexure-15 passed by the Divisional Forest Officer, Rairakhol Division, opposite party no.1. Since all the writ petitions involve common question of facts and law, they were heard together and are disposed of by this common order.

2. For convenience, the facts stated in W.P.(C) No.11520 of 2014 are taken up for consideration. Be it noted that the facts in all the four writ petitions are identical and the impugned order is common to all the writ petitions i.e., Annexure-15. According to the petitioner, he applied for grant of Timber Transit Permit on 02.03.2010 under Annexure-2 for removal of trees standing over the plots indicated therein. The petitioner is the recorded owner of the said plots. It appears that a joint verification was conducted and report thereof was submitted to the D.F.O. Rairakhol Division on 11.03.2011, basing upon which the application for T.T. permit was rejected by the D.F.O. on 08.04.2011 vide Annexure-6. The writ petition filed by the petitioner challenging Annexure-6 was disposed of on 10.05.2011 requiring the petitioner to prefer an appeal before the Appellate Authority who was also directed to dispose of the appeal within a period of two months. The appeal filed by the petitioner before opposite party no.2 was disposed of

vide order dated 29.07.2011 under Annexure-7 with the following directions:-

> "1.The impugned order passed by the Divisional Forest Officer, Rairakhol Division on 8.4.2011 is set aside as the ground mentioned by the D.F.O., Rairakhol Divn. Are not strictly applicable in case of the tree growth standing in the private land.
>
> 2.The Divisional Forest Officer, Rairakhol Division is directed to conduct Joint Verification in recorded Plot No.508, 793, 460/852 of Khata No.40 of Mouza- Dangapathar as per the rule prescribed therein.
>
> 3.On completion of Joint Verification other procedures are to be followed to complete the formalities to issue T.T. permit within the time limit prescribed in Rule 7 of the Orissa Timber and Other Forest Produce Transit Rules, 1980."

3. It further appears that the D.F.O., Rairakhol Division instead of acting in terms of the order of the Appellate Authority, has passed an order dated 03.11.2011 vide Annexure-8 requiring the Tahasildar, Rairakhol to furnish certain information indicated therein. Challenging the same, the petitioner filed W.P.(C) No.30795 of 2011 which was disposed of by order dated 15.12.2011 setting aside the order dated 03.11.2011. In the selfsame order passed by this Court, the D.F.O. was directed to comply with the order of the Appellate Authority from the stage of joint verification and was also directed to dispose of the application in accordance with Rule-7 of Odisha Timber and Other Forest Produce Transit Rules, 1980 (for short "the Rules").

4. Subsequent to the order dated 15.12.2011 was passed by this Court, the D.F.O. fixed 19.03.2012 for joint verification which was however conducted on 10.01.2013. On completion of the joint verification, a report thereof was submitted on 13.11.2013 under Annexure-11 series. Thereafter, the D.F.O. wrote a letter on 24.12.2013 vide Annexure-12 to the Tahasildar requiring him to make certain compliances and sought information with regard to the earlier joint verification report dated 11.03.2011. Accordingly, compliances were made and the earlier joint verification report dated 11.03.2011 was supplied. On receipt of the joint verification report vide Annexure-11 series and subsequent compliances, the D.F.O. has passed an order under Annexure-15 refusing to grant T.T. permit on the reasoning that

the plots adjoin Siaripani P.R.F. and Sagamalia Reserve forest and the applied plots look like forest inasmuch as the plots are full of sal trees which were naturally grown and, therefore, any non-forest activities in the forest require prior permission of the Central Government as visualized in Section 2 of the Forest Conservation Act. The D.F.O. having held thus directed that the applicant may seek prior permission of the Central Government for removal of the trees over the applied plots. Challenging this order passed by the D.F.O., the present writ petitions have been filed and the said order has been enclosed as Annexure-15 in all the writ petitions.

5. The Divisional Forest Officer has filed separate counter affidavits in all the writ petitions. However, the contents of the counter affidavit are one and same in all the writ petitions. In the counter affidavit so filed, it is admitted that the applied plots stand recorded in the name of the petitioners and the plots in question are private plots belonging to the petitioners. It is stated in the counter affidavit that the earlier joint verification report dated 04.04.2011 was merely an inspection report and not a joint verification report as stated in the writ petition. However, it is stated that basing on the materials available in the joint verification report vide Annexure-11 series and subsequent compliances made vide Annexures-13 and 14, the impugned order vide Annexure-15 has been passed. It is also admitted in the counter affidavit that the earlier order rejecting the application for T.T. permit vide Annexure-6 has been set aside by the Appellate Authority vide Annexure-7. It is also not disputed that this Court vide order dated 15.12.2011 has directed the D.F.O. to comply with the order of the Appellate Authority and the D.F.O. was directed to dispose of the application in accordance with Rule-7 of the Rules. However, it is stated that the petitioner had applied for the non-forest activities in the plots and the applied plots for removal of tree growth attracts the provisions of Forest Conservation Act. It is stated that the impugned order was passed basing on the materials available in the joint verification report.

6. The petitioners have filed rejoinder in each of the cases controverting the stand taken in the counter affidavit. The petitioner has specifically stated that the earlier report dated 04.04.2011 was a joint verification report and not an inspection report as stated in the counter affidavit. According to the petitioners, placing reliance on the said report dated 04.04.2011, application for T.T. permit was rejected vide Annexure-6 which later on was set aside by the Appellate Authority. Therefore, the

earlier report dated 04.04.2011 is nothing but a joint verification report. It is also stated in the rejoinder that in view of the finding recorded by the Appellate Authority that the plots in question being private plots, Forest Conservation Act would not apply. It is also stated that no sooner the D.F.O. receives the joint verification report vide Annexure-11 series, D.F.O. was required to pass orders on the application for T.T. permit instead of seeking compliances as has been done by the D.F.O. vide Annexures-13 and 14. According to the petitioners, by issuing such letter vide Annexures-13 and 14, the D.F.O. made an endeavour to bring the earlier joint verification report for consideration which is impermissible and no reliance can be placed on the same.

7. I have heard the learned counsel for the petitioners as well as the learned counsel for the State. I have also perused the materials available on record.

8. Undisputedly, the petitioners are the recorded owners in respect of the plots, for which application for T.T. permit was made and the applications are pending since the year 2010. It is also not in dispute that the earlier order rejecting the application for T.T. permit was set aside by the Appellate Authority as would appear from Annexure-7. Despite the appellate order, opposite party no.1 passed orders vide Annexure-8 requiring the Tahasildar to furnish certain informations indicated in that letter which was also set aside by a Bench of this Court in the earlier writ petitions filed by the petitioners. Thereafter, a fresh joint verification was undertaken and a report thereof was submitted to the D.F.O. vide Annexure-11 series. From a bare reading of Clause (d) of sub-rule (8) of Rule-7 of the Rules makes it clear that the D.F.O. on receipt of the joint verification report shall scrutinize the same whereafter would communicate the results of the joint verification to the applicant. Therefore, the conclusion is inescapable that the D.F.O. was required to consider the joint verification report alone and not any other material for passing appropriate orders on the application for T.T. permit. But, it appears, the D.F.O. on receipt of the joint verification report vide Annexure-11 series has communicated a letter to the Tahasildar vide Annexure-12 requiring him to submit the earlier joint verification report submitted pursuant to an inspection conducted by the Revenue Inspector and Range Officer on 11.03.2011 obviously making a reference to the earlier joint verification report dated 04.04.2011 vide Annexure-5 series. It needs no emphasis that the said joint verification report was taken into consideration by the D.F.O.

while rejecting the application for T.T. permit and, therefore, was not further available to be pressed into service. Be that as it may, the earlier report having been made available, the impugned order vide Annexure-15 has been passed. The finding recorded in the impugned order was that the applied plots adjoin Siaripani P.R.F. and Sagamalia reserve forest and the applied plots look like forest. But, a perusal of the joint verification report vide Annexure-11 series would show that the findings as recorded in the impugned order are not available in the joint verification report. On the contrary, the joint verification report vide Annexure-11 series dated 13.11.2013 states as follows:-

> "With reference to the above cited memos, I along with the R.I., Charmal, Range Officer, Charmal, Forester Bansajlal, Forest Guard, Dangapather have demarcated the plots of the following recorded tenants and submitted the enumeration list signed by all the recorded tenants and R.I., Charmal, Range Officer, Charmal, Forest Bansajlal, Forest Guard, Dangapather and Revenue Supervisor, Rairakhol and has been duly countersigned by the undersigned."

Save and except the aforesaid, no other finding as reflected in the impugned order is available in the joint verification report. Therefore, the D.F.O. was in error in recording the findings contrary to the materials available in the joint verification report. The D.F.O. having reached such erroneous conclusion was of the view that the plots being adjacent to Siaripani P.R.F. and Sagamalia reserve forest, any non-forest activity thereon would require prior permission of the Central Government under Section 2 of the Forest Conservation Act.

9. Now, let us examine as to whether the D.F.O. was justified in requiring the petitioners to seek prior permission of the Central Government under the Forest Conservation Act on the reasoning that the plots adjoin Siaripani P.R.F. and Sagamalia reserve forest. In the counter affidavit, it is specifically stated at paragraph-22 that the joint verification was conducted on 10.01.2013 and the Tahasildar, Rairakhol submitted the joint verification report on dated 13.11.2013 which obviously refers to the joint verification report vide Annexure-11 series. As already stated, the joint verification report vide Annexure-11 series does not contain any statement that the applied plots adjoin Siaripani P.R.F. and Sagamalia reserve forest. In absence of such statement in the joint verification report which was required to be considered, it is difficult to reach at a conclusion as has been

reached by the D.F.O. in the impugned order vide Annexure-15. Therefore, the finding to that extent is contrary to the materials on record and the D.F.O. is not justified in coming to the conclusion that the applied plots adjoin Siaripani P.R.F. and Sagamalia reserve forest.

10. Learned counsel for the petitioners have placed reliance on a decision of the Hon'ble Apex Court in the case of ***Sri Ram Saha vrs. State of West Bengal,*** reported in AIR 2004 SC 5080 and also a decision of this Court in the case of ***Dr. Jayakrushna Patnaik vrs. Divisional Forest Officer, Ghumsur North Division,*** reported in 2005 (II) OLR 40 in support of his contention that Forest Conservation Act shall not apply to non-forest activity in privately owned lands. Following the same, I am of the considered view that the order impugned in each of the writ petitions is unsustainable.

11. Thus, all the writ petitions stand allowed. Consequentially, the orders impugned therein are quashed and the D.F.O., Rairakhol Range is directed to pass necessary orders for removal of the trees from the respective lands of the petitioners and issue the T.T. permit for the same within a period of fifteen days of receipt of this judgment.

Writ petition allowed.

2015 (II) ILR - CUT- 344

BISWANATH RATH, J.

W.P. (C) NO. 24972 OF 2014

SITARANI RATH … ….Petitioner

.Vrs.

THE INSPECTOR GENERAL OF REGISTRATION, ODISHA & ORS. ……..Opp. Parties

A. REGISTRATION ACT, 1908 – S.22-A

Registration of sale deed – O.P.3 refused registration as the petitioner-vendor did not have consent of other recorded co-owners of the property as required U/s. 22-A of the Act – Order challenged in appeal before O.P.2 but the same was dismissed – Hence the writ petition – There is no infraction of section 8 of the T.P.Act, 1882 as

the petitioner being the recorded owner is disposing of her entire share – She has also fulfilled the requirements under sections 21 & 22 of the Act, 1908 as well as Rules 23, 24 and 25 of the Odisha Registration Rules, 1988 – There is absolutely no prohibition in sale of a coparcener's undivided property and as such there cannot be any obstruction in registering such documents – Held, O.P. Nos. 2 & 3 have acted contrary to law and illegally refused registration of the sale deed – Direction issued to O.P.2 to register the documents submitted by the petitioner. (Paras 5 to 8)

B. TRANSFER OF PROPERTY ACT, 1882 – S.44

Joint family property – Transfer of immoveable property by one of co-owners legally competent in that behalf – Held, transfer is valid to the extent of the share of the transferor. (Para 5)

Case Laws Referred to :-

1. AIR 1967 Orissa 139 :Udayanath Sahu v. Ratnakar Bej and Ors.
2.(2000) 10 SCC 636 :A.Abdul Rashid Khan (Dead) and Ors. vs. P.A.K.A. Shahul Hamid and Ors
3. 2009 (Suppl.1) OLR 610 : Harekrushna Mahakud Vs. Radhanath Mahakud and Ors.
4. (2007) 10 SCC 448 : Lachhman Dass Vs. Jagat Ram and Ors.
5. AIR 2008 SC 2489 : Hardeo Rai Vs. Sakuntala Devi and Ors.

For Petitioner : M/s. G.M.Rath, S.K.Patnaik, S.Padhy & S.Satpathy

For Opp.Parties : Additional Government Advocate

Date of Hearing : 02.02.2015
Date of Judgment :19. 02.2015

JUDGMENT

BISWANATH RATH,J

This is a writ petition at the instance of the petitioner assailing the order dated 7.11.2014 passed by the opposite party no.3 and the order in confirmation of the same by the appellate authority vide order dated 2.12.2014 in denying registration of sale deed submitted by the petitioner.

2. Facts involved in the writ petition is that the father of the petitioner was a recorded tenant having 7/16th interest in respect of the land under Khata No.138, Mouza-Gangapur, Tahasil-Salipur. After death of her father,

the petitioner being the sole legal heir succeeded to the property entirely. Record-of-right was published in the name of the petitioner in Mutation Case No.2507 of 2013 indicating her share as 7/16th of the plots mentioned there under. It is submitted by the petitioner that in an attempt to clear the hand loans incurred by the petitioner for her daughter's marriage as well as meeting with the medical expenses for herself gynecological disorder wanted to sale her property. In the process, a sale deed to the extent of share belonging to the petitioner was conducted between the petitioner and one Goutam Charan Sahoo on 7.11.2014 and the same was presented for registration before opposite party no.3. The registration of the sale deed was denied holding that the sale deed presented for registration contravenes Section 22-A of the Registration Act, 1908 (hereinafter for short "the Act") inasmuch as the vendor-petitioner does not have the consent of the other recorded co-sharers of the property. Being aggrieved by such action of the registering authority, the petitioner approached this Court in W.P.(C) No.21898 of 2014 and this Court being satisfied the availability of an alternate remedy under Section 72 of the Act, did not entertain the writ petition. Following the observation of this Court in the above writ petition, the petitioner approached the appellate authority which is ultimately dismissed by his order dated 7.12.2014. The petitioner assailed the order passed by the opposite party no.3 as well as the order in appeal passed by the opposite party no.2 on the premises that there was no infraction of the provision contained under Section 22-A of the Act. The opposite parties referred to hereinabove have misconstrued the mandate of Sections 21 and 22 of the Indian Registration Act read with Rule 23 and 24 of the Orissa Registration Rules, 1988 (hereinafter for short "the Rule") requiring description of the property in the sale deed sought to be alienated. Petitioner contended that the description of the property in the sale deed as appearing is mandate of the law in the case of sale deed on the basis of a record-of-right. The description of the property contained the name of the village, khata number, plot number, classification of land and area noted in the record-of-right and the local name, if any. Petitioner contended that she had satisfied the requirements of Rules 23 and 24 of the Rule. Petitioner further contended that following provisions under Section 8 of the Transfer of Property Act, the vendor is capable of transferring of her interest in the property. In the present case, the petitioner having sold her entire share, there was no infraction of the provisions contained in Section 8 of the Transfer of Property Act and both the authorities have erroneously rejected the registration of the sale deed. It is on these premises, the petitioner

sought for setting aside the impugned orders vide Annexures-3 and 4 passed by opposite party nos. 3 and 2 respectively.

3. Per contra, on their appearance, the opposite party nos. 1 and 2 i.e. the State Authorities referring to counter submitted that the denial of the registration is based on the premises of violation of provisions contained in Section 22-A of the Registration (Orissa Amendment) Act, as well as Section 21 of the Act read with Rules 24 (2) and (3) of the Orissa Registration Rules framed there under. The opposite parties contended that following Section 21 of the Act, a vendor is required to properly identify with mouza, khata number, plot number, area and four boundaries in case of part plots as provided in the Rule 24 (2) of the Orissa Registration Rules. It is next contended by the opposite parties that in absence of a valid partition between the parties there is no possibility of identifying the plots. Therefore, there is no compliance of the requirements of Section 21 of the Act as well as Rule 24 of the Rules. The attempt of the petitioner is also opposed to Section 44 of the Transfer of Property Act. Referring to a decision rendered in the case of ***Udayanath Sahu v. Ratnakar Bej and Ors.***, *AIR 1967 Orissa 139*, it is submitted that there is no illegality committed by the opposite party nos. 2 and 3 and their action is well supported by the decision referred to above. It is, on these premises, the opposite parties sought for dismissal of the writ petition.

4. Before proceeding to decide the matter on merit, it is necessary to look into the statutory provisions as contained in the Registration Act, Orissa Registration Rules as well as Transfer of Property Act, which are quoted hereunder:

> **Sections 21 and 22-A of the Registration Act,1908**.
> **Secs. 21: Description of property and maps or plans:**
>
> (l) No non-testamentary document relating to immovable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same.
>
> (2) Houses in towns shall be described as situate on the north or other side of the street or road (which should be specified) to which they front, and by their existing and former occupancies, and by their numbers if the houses in such street or road are numbered.
>
> (3) Other houses and lands shall be described by their name, if any, and as being in the territorial division in which they are situate, and

by their superficial contents, the roads and other properties on to which they abut, and their existing occupancies, and also, whenever it is practicable, by reference to a Government map or survey.

(4) No non-testamentary document containing a map or plan of any property comprised therein shall be accepted for registration unless it is accompanied by a true copy of the map or plan, or, in case such property is situate in several districts, by such number of true copies of the map or plan as are equal to the number of such districts.

Section 22-A of the Registration (Odisha Amendment) Act,2013
Sec. 22-A:

(1) The registering officer shall refuse to register:-

(a) Any instrument relating to the transfer of immovable properties by way of sale, gift, mortgage, exchange or lease:
Authority

(i)belonging to the State Government, or the Local

(ii) belonging to any religious institution to which the Odisha Hindu Religious Endowment Act,1951 is applicable.

(iii)belonging to or recorded in the name of Lord Jagannath, Puri

(iv)donated for Bhoodan Yagna and vested in the Odisha Bhoodan Yagna Samiti established under Section 3 of the Odisha Bhoodan and Gramdan Act,1970.

(v)belonging to Wakfs which are under the supervision of the Odisha Wakf Board established under the Wakf Act,1995 unless a sanction in this regard, issued by the competent authority as provided under the relevant Act or in absence of any such authority, an authority so authorized by the State Government for this purpose, is produced before the registering officer ;

Explanation- (a)For the purpose of this section Local Authority means any Municipal Corporation, Municipality, Notified Area Council Zilla Parisad, Grama Panchayat, Urban Development Authority and Planning Authority or any Local Self Government constituted under any law for the time being in force.

(b)the instrument relating to cancellation of sale deeds without the consent of the person claiming under the said sale deed; and

(c)any instrument relating to transfer of immovable property, the alienation or transfer of which is prohibited under any State or the Central Act.

(2)Notwithstanding anything contained in this Act, the registering officer shall not register any document presented to him for registration unless the transferor produce the record of rights for the satisfaction of the registering officer such transferor has right, title and interest over the property so transferred.

Explanation-For the purpose of this sub-section 'record of rights' means the record of rights as defined under the Odisha Survey and Settlement Act1958.

From the reading of above provisions and the narrations made by the parties as well as the documents filed herein clearly demonstrate that the petitioner has supplied the contingencies as required under Section 21 (1) as well as 22-A (c) (2) of the Registration Act and in view of clear identification on the share of the property belong to the petitioner, there is absolutely no requirement of the consent of other co-sharers. The opposite parties failed to appreciate that there is absolutely no other co-sharer in respect of the property sold particularly in view of clear indication of the State opposite parties in the Record-of- Right itself.

Rules 23 and 24 of the Orissa Registration Rules,1988.

Rule 23. Territorial Division-

The description of the "territorial division" required by Section 21 of the Act shall, as far as practicable, give the following particulars:

(a) The registration districts, sub-districts, Tahasil and Thana;

(b) Any well known division such as Pragana, Bisa Mostha and Mouza;

(c) The village, Hamlet or suburb in which the property referred to in a registrable document is situated;

(d) revenuedistrict, if they are different from Registration District.

Rule 24. Description of property by reference-

(1) If the property is described in a supplementary document by specific reference to an instrument which has been already registered or of which a true copy has been filed under Section 65 of 66 in the office in which the document is presented for registration and if that document contains the particulars required by the rules in force, the description need not be repeated in a supplementary document.

(2) In the case of villages where survey and settlement operations are complete and final record-of-right issued, the description of property shall contain all the details as described in the record-of-rights, viz. Village Number, Khata Number, Plot Number, classification of land and the area noted in the record-of-rights and the local names, if any, used.

(3) In case of part-plots, the four boundaries shall be furnished.

Thus from the pleadings available in the present case and perusal of Record-of-Right it clearly satisfies the mandates of Rule-23 as well as Rule 24 of the Registration Rules, 1988 and both the forums have failed to appreciate this appeal of law.

From the pleadings available in the present case and perusal of Record-of-Right, it clearly satisfies the mandates of Rule 23 as well as well Rule 24 of the Registration Rules, 1988 and both the forums have failed to appreciate this aspect of law.

Rule-25: Conditions of admissibility:

Every document, on being tendered for registration shall be examined by the Registering Officer in regard to the following points.

i. that it has been presented at the Proper Office (Sections 28, 29 and 30);

ii. that it bears the proper stamp or is exempted from or is not liable to stamp duty;

iii. that it is in a language deemed to be commonly used in the district, or is accompanied by a true translation into such a language and a true copy (Section 19);

iv. that in case of any interlineation, blank erasure or alternation, Section 20 and Rule 22 have been complied with;

v. that if the document is non-testamentary and relates to immovable property, the description thereof is sufficient (Section 21);

vi. that if the document is non-testamentary and contains a map or plan, it is accompanied by the prescribed number of true copies of the map or plan (Section 21(4);

vii. that if the document is non-testamentary and relates to lands or houses, the description of which is governed by rule made under Section 22, Sub-section (1), the lands or houses are described according to that rule (Section 22);

viii. that if the document is not a will, it has been presented within the proper time (Sections 23 to 26);

ix. that, the document has been presented by the person authorised in that behalf (Section 32 or Section 40);

x. that the presentant has affixed his passport size photograph and fingerprints to the document (Section 32-A)

xi. that the pass-port size photograph and finger prints of each buyer and seller, in case of sale of immovable property has been affixed to the document."

Sections 8 and 44 of the Transfer of Property Act.,1982:

Sec.8. Operation of transfer.—Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth; and, where the property is machinery attached to the earth, the moveable parts thereof; and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith; and, where the property is a debt or other actionable claim, the securities there for (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer; and, where the

property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

Sec.44. Transfer by one co-owner.—Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred. Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

5. Rule 25 (5) of the Rule envisages that if the document is a non-testamentary one and relates to immovable property, the description thereof is sufficient. A whole reading of Section 21(1) of the Registration Act, 1908 read with Rules 23 and 24 of the Registration Rules and Rule 25 (5) mandates requirement of particulars of the land such as registration, district Sub-Registrar, Tahasildar, Thana, Mouza and the description as evident in the record-or-right. Therefore, reading of the description made in the sale deed based on a record-of-right gives a clear identification of the property as required under the above provisions as an indication satisfying the mandatory requirements. Further, the provisions contained in Section 44 of the Transfer of Property Act confers a power on the co-owner of immovable property for transferring his share of such property or any interest therein creating transferee's right to joint possession or other common on part enjoyment of the property and it be needed to enforce a partition of the same for complying the conditions and liabilities affected at the date of the transfer. It is, under the circumstances and on conjoint reading of the provisions contained in Sections 21 and 22 of the Act read with Rules 23, 24 and 25 of the Rules further read with Section 44 of the Transfer of Property Act, this Court is of the view that in view of carving out of definite share in the property in favour of the petitioner, she has a right to alienate the property by sale or mortgage and, therefore, there is no illegality in presenting the sale deed for registration. Both the opposite party nos. 2 and 3 have acted contrary to law and illegally refused the registration of the sale deed.

6. Now coming to law of the land, as settled by the Hon'ble Apex Court in the case of ***A.Abdul Rashid Khan (Dead) and Ors. vs. P.A.K.A. Shahul Hamid and Ors***.,*(2000) 10 SCC 636* the Hon'ble Apex Court held as follows:

> "15. Thus we have no hesitation to hold, even where any property is held jointly, and once any party to the contract has agreed to sell such joint property agreement, then, even if other co-sharer has not joined at least to the extent of his share, he is bound to execute, the sale deed. However, in the absence of other co-sharer there could not be any decree of any specified part of the property to be partitioned and possession given. The decree could only be to the extent of transferring the share of the Appellants in such property to other such contracting party. In the present case, it is not in dispute that the Appellants have 5/6 share in the property. So, the Plaintiffs suit for specific performance to the extent of this 5/6th share was rightly decreed by the High Court which requires no interference.

A similar view is also taken by this Court in the case of ***Harekrushna Mahakud Vs. Radhanath Mahakud and Ors***.,2009 *(Suppl.1) OLR 610*.

In dealing with a case on the constitutional right of a person over the property in terms of Article 300(A) of the Constitution of India, the Hon'ble Apex Court in a decision rendered in the case of ***Lachhman Dass Vs. Jagat Ram and Ors.,*** *(2007) 10 SCC 448* Hon'ble Apex Court held as follows:

> "10.Despite such notice, the appellant was not impleaded as a party. His right, therefore, to own and possess the suit land could not have been taken away without giving him an opportunity of hearing in a matter of this nature. To hold property is a constitutional right in terms of Article 300A of the Constitution of India. It is also a human right. Right to hold property, therefore, cannot be taken away except in accordance with the provisions of a statute. If a superior right to hold a property is claimed, the procedures therefore must be complied with. The conditions precedent therefore must be satisfied. Even otherwise, the right of pre-emption is a very weak right, although it is a statutory right. The Court, while granting a relief in favour of a pre-emptor, must bear it in mind about the character of the right, vis-à-vis, the constitutional and human right of the owner thereof."

In the case of ***Hardeo Rai Vs. Sakuntala Devi and Ors.,*** *AIR 2008 SC 2489*, in paragraphs 21 and 22 the Hon'ble Supreme Court held as follows:

> "21.For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a co-parcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property "joint tenants" but as "tenants in common".
>
> "22.Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property."

7. Law is well settled that where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage. However, the parties in such event would not possess the property as joint tenants but as tenants in common and in the process while permits to sale his/her undivided interest with the joint family property. But this is however subject to the condition that the purchaser without the consent of his other coparcener cannot create possession except however he has a right to sue for partition.

Therefore, law is amply clear that there is absolutely no prohibition in sale of a coparcener's undivided property and as such there cannot be any obstruction in registering such documents. Now coming to the decision referred to above by the opposite party nos.2 and 3, as reported in the case of *Udayanath Sahu* (supra), the particular case involved not only sale a Gharabari Kisam but also land having a house thereon. However, the present case is not a case in relation to sale of house or homestead side. That apart, in view of catena of decision referred to hereinabove, the decision reported in the case of *Udayanath Sahu* (supra) will have no application to the present case and as such, there is misapplication of the decision referred to above by filing opposite party nos.2 and 3.

8. Under the circumstances this Court finds that the petitioner has met the requirements under Sections 21 and 22 of the Act, 1908 as well as Rules

23, 24 and 25 of the Rules, 1988. Further, keeping in view the statutory provisions as well as the decisions referred to hereinabove, this Court finds both the impugned orders dated 7.11.2014 and 2.12.2014 vide Annexures-3 and 4 are bad in law for which while setting aside both the orders under Annexures-3 and 4 this Court directs the opposite party no.2 to register the documents as submitted by the petitioner and proceed accordingly. The writ petition succeeds to the above extent. However, there shall be no order as to cost.

Writ petition allowed.

2015 (II) ILR - CUT- 355

S. K. SAHOO, J.

BLAPL NO. 19817 OF 2014

PRAMOD KUMAR PANDA ……..Petitioner

.Vrs.

REPUBLIC OF INDIA ……Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.438

Application for anticipatory bail – Intervention Petition filed – No provision in the code – Locus Standi – Petitioner alleged that the proposed intervener is neither the informant nor an aggrieved party – However intervener filed documents showing that he filed writ petition before the Apex Court praying to handover investigation of multi-thousand crores Chit Fund Scam from the state agency to the C.B.I. and for which the petitioner threatened the intervener and his wife not to pursue the above case – Since the intervener has been harassed while pursuing a genuine grievance, he can be said to be an aggrieved person in the context of this case – Held, the intervention petition filed by the intervener Alok Jena is allowed.

(Para 10)

CRIMINAL PROCEDURE CODE, 1973 – S.438

Anticipatory bail – Offence under sections 120-B, 294, 341, 406, 420, 467, 468, 471, 506/34 I.P.C. and sections 3, 4 & 5 of Prize

Chits and Money Circulation Schemes (Banning) Act, 1978 – Common man's hard earned money duped with assurance of lucrative returns – Documents seized from the residence of the petitioner shows close link between the petitioner and the main accused – Wife of the petitioner was running an institution namely ZICA at Janpath, Bhubaneswar and there was money trailing from the accounts of Artha Tatwa to the account of ZICA – If the petitioner will be protected with an order of anticipatory bail, there is reasonable apprehension of tampering with the witnesses and threat to the intervener who is now a witness for the prosecution – Moreover custodial interrogation of the petitioner may provide many useful information to the prosecution – Held, this court is not inclined to allow pre-arrest bail to the petitioner.

(Paras 18, 19)

Case Laws Referred to :-

1. (2014) 58 O.C,R (SC) 219 : Sundeep Kumar Bapna –v- State of Maharastra.
2. AIR 1993 SC 892 : Janata Dal –v- Harinder Singh Chowdhary
3. AIR 1993 SC 280 : Simranjit Singh Mann vs. Union of India
4. 1991 (3) S.C.C. 356 : Janata Dal, vs. H.S. Chowdhary
5. AIR 2000 SC 1851 : R. Rathinam vs. State by DSP, District Crime Branch, Madurai District, Madurai
6. AIR 2000 SC 1851 : R.Rathinam -v- State
7. AIR 2001 SC 2023 : Puran vs. Rambilas
8. 2009 C L.J. 896 : Vinay Poddar –v- State of Maharashtra
9. 2010 C.L.J. 1610 : C.S.Y.Sankar Rao –v- State of Andhra Pradesh
10. AIR 1980 S C C 1632 : Gurbaksh Singh Sibbia –v- State of Punjab
11. (2013) 55 O.C.R.(SC) 825 : Y.S. Jagan Mohan Reddy –v- CBI
12. AIR 1987 SC 1321 : State of Gujurat –v- Mohan Lal Jitamal Torwal

For Petitioner : M/s. Devashis Panda, D.P.Dhal

For Opp. Party : Mr. V.Narasingh, (CBI), Republic of India

For Intervener : M/s. Satyabrata Pradhan, A.K.Dash, S.Lokesh, P.Sahu & G.Sahoo

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Date of Argument: 08.12.2014

Date of Judgment : 15.12.2014

JUDGMENT

S.K.SAHOO, J.

The petitioner who is posted as Deputy Superintendent of Police, District Intelligence Bureau (DIB), Nayagarh under the State Government has approached this Court in an application under section 438 Cr.P.C. apprehending arrest in connection with CBI/SCB/KOL Case No. RC.47/S/2014-KOL. dated 5.6.2014 registered under sections 120-B, 294, 341, 406, 420, 467, 468, 471, 506 read with section 34 Indian Penal Code and Sections 3, 4 & 5 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 which arises out of Kharavelnagar P.S. Case No.44 dated 7.2.2013 and other cases registered against the officials of Artha Tatwa Group of Companies at different police station in the State of Odisha.

As it appears the aforesaid Kharvelnagar P.S. Case No.44 of 2013 was instituted on the First Information Report submitted by one Sri Sukumar Panigrahi before the Inspector-in-charge, Kharvelnagar Police Station, Bhubaneswar on 7.2.2013 and the case was registered under sections 420, 120-B and 406 Indian Penal Code against 13 accused persons namely Pradeep Sethy, Manoj Pattnaik, Lakhia Sahoo, Satyabrat Padhi, P.K. Swain, Krushna Padhi, Sambit Lenka, Ashok Kar, Jhuma Chakrabarti, Partha Sarathi Mohapatra, Mrunmaya Sial, Jugajyoti Majhi and Abinash Pradhan.

It is the gist of the F.I.R. that the informant Sukumar Panigrahi deposited a sum of Rs.18.00 lakhs in Arthatatwa Multipurpose Co-operative Society Ltd. (hereafter for short "ATMPCS") situated at SCR-29, Unit-III, Kharvelnagar, Bhubaneswar under monthly income plan of the said company phasewise by way of five cheques. The company returned rupees one lakh to the informant after much persuasion. The Company issued money receipts and monthly income plan bonds in favour of the informant authorizing him to receive 1% interest on the deposits monthly with understanding to give another 2% in the form of bonus i.e., total 3% on the deposits monthly. After the maturity period of one year, the bonds were to be surrendered and the principal amount would have to be paid back. The interest and the bonus were to be paid monthly till the maturity. It is the case of the informant that after paying interest for a few months, the company unilaterally stopped paying further interest on the plea of income tax raid and absence of Chief Managing Director Pradeep Kumar Sethy. Subsequently the Director of the company namely Pradeep Kumar Sethy

and other important functionary Directors Manoj Pattnaik, Satyabrat Padhi, Lakhia Sahoo, P.K. Swain, Krushna Padhi, Sambit Lenka, Jhuma Chakrabarti, Jubajyoti Majhi and others absconded and the office of the company was closed. The informant was confirmed that the said company through its Chief Managing Director Pradeep Kumar Sethy and other Directors have cheated him dishonestly in deceitful manner and misappropriated Rs.17 lakhs by fraudulent means.

During investigation of Kharvelnagar P.S. Case No.44 of 2013, it revealed that a non-banking financial company under caption of "AT Group of Companies" with its headquarter at SCR-29, Unit-III, Kharvelnagar was running its business with its branch offices in various places in Odisha including Lewis Road, Bhubaneswar, Cuttack, Balasore, Baripada, Dhenkanal, Berhampur etc. and Mr. Pradeep Kumar Sethy was the President of the said Artha Tatwa Multi Co-operative Society Ltd., Artha Tatwa State Credit Co-operative Society. AT Group of Companies was also running its business through various Companies. The registration of the Atrha Tatwa Multi Purpose Co-operative Society was granted on 3.11.2011 by the Asst. Registrar of Co-operative Societies, Bhubaneswar Circle, Bhubaneswar. Artha Tatwa Multi State Credit Co-operative Society Ltd. was formed in September 2011. It was also found out that the Company made wide propaganda, awareness programme, distributed leaflets, circulated brochures through agents to attract investors to deposit money in different schemes floated by the Company. The aforesaid two Co-operative Societies collected funds from the common people through various schemes. Pradeep Kumar Sethy, Chairman-cum-Managing Director of AT Group of Companies with his associates collected money by forming ATMPCS under the provisions of Orissa Co-operative Societies Act, 1962 (Orissa Act 2 of 1963) and used to enroll the depositors as members promising them to provide higher rates of interest on the deposits and since the schemes of AT Group were very attractive, the people in large number invested their money for better returns in comparison to other banks. After a few months, the Company unilaterally stopped paying interest to the depositors on the plea of income tax raid and cheated the depositors by duping their hard earned money.

On 10.7.2013 Inspector-in-charge, Kharvelnagar Police Station submitted preliminary charge sheet against accused persons namely Pradeep Kumar Sethy, Jagabandhu Panda, Sri Krushna Padhi, Md. Hanif,

Jhuma Chakrabarti and Munmaya Sial under sections 420,406,120-B Indian Penal Code read with sections 4,5 and 6 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978. The investigation was kept open for arresting the absconding accused persons namely Manranjan Nanda, Sambit Khuntia, Rahul Kanwal, Jyoti Prakash Jay Prakash, Chandrika Patnaik and others and for many other aspects of investigation like scrutiny of bank documents, verification of money trail, verification of genuineness of landed properties purchased by the Company from different persons, verification of legal status of the company and verification of land records etc..

While Kharavelnagar P.S. Case No.44 of 2013 was under further investigation, writ petitions seeking transfer of investigation of Chit Fund Scam Cases from the State agencies to the Central Bureau of Investigation (CBI) were filed before the Hon'ble Supreme Court. Writ Petition (Civil) No. 401 of 2013 was filed by one Subrata Chhattoraj and Writ Petition (Civil) No. 413 of 2013 was filed by one Alok Jena and both the cases were decided on 9.5.2014 **(Subrata Chattoraj –v- Union of India and others reported in (2014) 58 Orissa Criminal Reports (SC) 905)**. The relevant paragraphs are quoted herein below:-

> "28. An affidavit has been filed by the State of Odisha pursuant to the said directions in which the F.I.Rs where the State Investigating Agency is examining the larger conspiracy angle, have been identified. …. Larger conspiracy angle is according to the affidavit being examined in three cases. These are :
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> (ii) Case No. 44 dated 7.2.2013 under the same provisions registered in Kharvelnagar Police Station (Bhubaneswar Urban Police District) against M/s. Artha Tatwa Group of Companies and
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> 30. The factual narrative given in the foregoing paragraphs clearly establish the following:-
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> 1. The financial scam nicknamed chit-fund scam that has hit the States of West Bengal, Tripura, Assam and Odisha involves collection of nearly 10,000 crores (approx.) from the general public especially the weaker sections of the society which have fallen prey to the temptations of handsome returns on such deposits extended by the companies involved in the scam.

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5. That investigation so far conducted reveals involvement of several political and other influential personalities wielding considerable clout and influence.

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31. The question is whether the above feature call for transfer of the ongoing investigation from the State Police to the CBI. Our answer is in the affirmative.

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Investigation by the State Police in a scam that involves thousands of crores collected from the public allegedly because of the patronage of people occupying high positions in the system will hardly carry conviction especially when even the regulators who were expected to prevent or check such a scam appear to have turned blind eye to what was going on. The State Police agency has done well in making seizures, in registering cases, in completing investigation in most of the cases and filing charge sheets and bringing those who are responsible to book.

The question, however, is not whether the State Police has faltered. The question is whether what is done by the State Police is sufficient to inspire confidence of those who are aggrieved. While we do not consider it necessary to go into the question whether the State Police have done all that it ought to have done, we need to point out that money trail has not yet been traced. The collections made from the public far exceed the visible investment that the investigating agencies have till now identified. So also the larger conspiracy angle in the States of Assam, Odisha and West Bengal although under investigation has not made much headway partly because of the inter-State ramifications, which the investigating agencies need to examine but are handicapped in examining.

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34. In the circumstances, we are inclined to allow all these petitions and direct transfer of the following cases registered in different police stations in the State of West Bengal and Odisha from the State Police Agency to the Central Bureau of Investigation (CBI).

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B. State of Odisha: All cases registered against 44 companies mentioned in our order dated 26th March, 2014 passed in Writ Petition (C) No. 413 of 2013. The CBI is also permitted to conduct further investigations into all such cases in which charge sheets have already been filed."

2. As per the direction of the Hon'ble Supreme Court in Writ Petition (Civil) No. 401 of 2013 and Writ Petition (Civil) No. 413 of 2013 dated 9.5.2014, Superintendent of Police, CBI, SPE, SCB, Kolkata registered one F.I.R. vide CBI/SCB/KOL Case No.RC. 47/S/2014-KOL dated 5.6.2014 by treating eight original F.I.Rs (which were registered against the officials of Artha Tatwa Group of Companies at different Police Stations in Odisha State) as F.I.R. in the said case. The F.I.R. was registered under sections 120-B /294/341/406/409/420/467/468/471/506/34 I.P.C. and sections 3, 4 and 5 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 against 48 named persons who were in the management/ staff/agent of AT Group of Companies and against other staffs of AT Group and unknown others. The Investigation was entrusted to Sri N.C. Sahoo, Inspector, CBI, SPE, SCB/SIT, Kolkata.

3. In spite of the order dated 9.5.2014 of the Hon'ble Supreme Court in Writ Petition (Civil) No. 401 of 2013 and Writ Petition (Civil) No. 413 of 2013 so also registration of F.I.R. in CBI/SCB/KOL Case NO.R.C. 47/S/2014-KOL dated 5.6.2014, the Investigating Officer in Kharvelnagar P.S. Case No.44 of 2013 submitted second charge sheet on 21.6.2014 in continuation of the charge sheet submitted on 10.7.2013 for the offence under sections 420, 406, 120-B I.P.C. read with section 4,5 and 6 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 read with section 6 of Odisha Protection of Interests of Depositors (In Financial Establishments) Act, 2011 against Pradeep Kumar Sethy, Jagabandhu Panda, Srikrushna Padhi, Md. Hanif, Jhuma Chakrabarti, Munmaya Sial, Manoj Kumar Patnaik and Artha Tatwa Infra India Ltd. (ATIIL), Artha Tatwa Enterprises Pvt. Ltd. (ATEPL), Artha Tatwa Multi Purpose Co-operative Society Ltd. (ATMPCSL) and Artha Tatwa Multi State Credit Co-operative Society Ltd.(ATMSCCS) represented by MD/President Promod Kumar Sethy keeping the investigation open under section 173 (8) Cr.P.C.

4. While the matter stood thus, CBI officials conducted raid in the residential premises of the petitioner situated at Gayatri Nagar, Bamikhal, Bhubaneswar on 25.9.2014 in between 9.45 a.m. to 1.50 p.m. in connection with this case in presence of the witnesses. The petitioner was absent at his village Khantapada to attend the funeral ceremony of his father and the son of the petitioner namely Sri Millan Panda was present. The authorization given by the I.O. under section 165 Cr.P.C. for search was shown to the son of the petitioner. The petitioner was contacted over phone who informed about his inability to return to Bhubaneswar on account of his father's funeral ceremony. After observing all the legal formalities, C.B.I. officials conducted search and seized some documents during search but the most relevant documents so far as this case is concerned are mentioned in serial numbers 1, 2 and 3 of the search list. Those documents are as follows:-

> **(i)** one bunch of documents containing copy of F.I.R., charge sheet filed against AT Group, agreement between AT group and Jagabandhu Panda, letter dated 2.7.2011 of Jagabandhu Panda to Secretary, AT Group etc. (53 sheets) (*seized from the room in the ground floor*),
>
> **(ii)** one visiting card of Dr. Pradeep Sethy, AT group (*seized from the bed room of the petitioner in the first floor*),
>
> **(iii)** one letter written by Pradeep to Mr. P.K.Panda, ZICA, Z Multimed, Saheed Nagar, Bhubaneswar, (two sheets) (*seized from the bedroom of the petitioner in Ist floor*)

5. The bail application was filed by the petitioner on 26.9.2014. During the midst of hearing of the bail application, on 19.11.2014 one Alok Jena filed an application for intervention vide Misc. Case No. 1553 of 2014. Copy of such intervention application was served on the learned counsels for the petitioner as well as the C.B.I. The learned counsel for petitioner and C.B.I. did not file any written objection to such application but Mr. Devasis Panda, learned counsel appearing for the petitioner vehemently opposed the application for intervention mainly on the ground that the proposed intervener has no locus standi and he is in no way connected with this case in as much as he is neither the informant nor an aggrieved party and therefore his application for intervention is liable to be rejected even at the threshold. He further contended that question of bail is to be decided

only after hearing the petitioner's counsel as well as the counsel for the C.B.I. and no opportunity of hearing is to be granted to the proposed intervener.

The learned counsel for the C.B.I. on the other hand submitted that if this Court feels the necessity of hearing the learned counsel for the proposed intervener for the just decision of the case then he has no objection.

6. Now the question is that who is this intervener Alok Jena? Whether he is an 'aggrieved party' as contended by his learned counsel? Whether in an application for anticipatory bail, an 'aggrieved party' can be given an opportunity of hearing?

As it appears, it is case of the proposed intervener Alok Jena that he is a public spirited person and whistle blower who filed a writ petition bearing Writ Petition (Civil) No. 413 of 2013 under Article 32 of the Constitution of India before the Hon'ble Supreme Court of India praying therein to handover the investigation of multithousand crores Chit Fund Scam cases from the State investigating agency to C.B.I. and also prayed before Hon'ble Court to monitor the same. According to the learned counsel for the proposed intervener, this high profile scam involves very powerful politicians including ministers, bureaucrats, high ranking police officers etc. and after filing of the case, while the proposed intervener was staying in a flat at Sahajanbad Society at Dwarka, on 19.1.2014 at 4.30 p.m. a person came and met the President of the Sahajanbad Society, namely Mr. Mohd. Zaffar and showed his identity card as police officer of Crime Branch and on query of Md. Zaffar, he told that he had come to meet a person who is staying in the society and a hardened criminal and taken some fraudulent loan and purchased a flat and demanded documents from the President relating to the transaction. The President of the society did not oblige him but informed the proposed intervener regarding the incident. The police officer after coming inside to the society tried to locate the flat where the proposed intervener was staying and took photographs of the flat. The proposed intervener and his wife became panic and lodged a report at Sector-9 Police Station, Dwarka. It is further contended that the petitioner also threatened him within Supreme Court campus on 20.1.2014 and asked him not to proceed with the writ application regarding Chit Fund Scam otherwise he would face dire consequence and on 22.1.2014 the petitioner again met the intervener outside the Court premises of the

Supreme Court and threatened him to withdraw the case for which another F.I.R. was lodged at Tilak Marg Police Station, New Delhi on 22.1.2014. It is further stated that on 22.1.2014 the wife of the intervener was also threatened over mobile phone and in that connection also F.I.R. was lodged at Tilak Marg Police Station and different authorities were also appraised. The proposed intervener has also annexed some documents to his intervention application to substantiate his stand that he was threatened by the petitioner to withdraw the case while the matter was subjudiced in the Hon'ble Supreme Court.

According to the learned counsel for the proposed intervener, the petitioner was placed under orders of suspension by the State Government but after the judgment of Hon'ble Supreme Court, he was reinstated in the service and that the petitioner was on official tour to New Delhi and was staying in Odisha Bhawan during the period when the intervener was threatened to withdraw the case. It is further submitted that since at the instance of the proposed intervener, the Hon'ble Supreme Court handed over the investigation of the Chit Fund Scam cases to the C.B.I. and CBI/SCB/KOL Case No.RC. 47/S/2014-KOL. dated 5.6.2014 was registered, he is the de facto complainant in the case. It is further contended that while the proposed intervener was fighting the case, the petitioner at the instance of some influential persons tried to prevent him from prosecuting the case and threatened him and therefore, he is also an aggrieved person.

The leaned counsel for the proposed intervener placed reliance on a decision of the Kerala High Court in case of **Kunhiraman –v- State of Kerala reported in 2005(2) Kerala Law Times 685** wherein in an application under section 438 Cr.P.C. the bank who has lodged the complaint, prayed for being impleaded in the application for anticipatory bail which was objected to by the learned counsel for the petitioner in that case. Discussing the provisions of section 301 Cr.P.C. so also 438 Cr.P.C., it was held as follows :

> "11. When can the Court "think it fit" to grant anticipatory bail ? The Court will have to consider the relevant facts relating to the case to arrive at such satisfaction. Details of the case have to be obtained from the case diary which will be available with the Prosecutor. The Court may look into the case diary produced by the Prosecutor, though the section does not provide for perusal of

documents. Though the section does not specify that a notice should be given to the Public Prosecutor, the Court normally gives notice to the Public Prosecutor. The Court hears petitioner and the Prosecutor though the section does not state that they should be heard. But, all these are done with a view to ascertain the relevant facts which will help the Court to take a right decision in the matter. All these will be essential for the Court to 'think it fit' to invoke Section 438 and exercise the powers under the said section.

12. Therefore, no Court dispenses with a notice to the Prosecutor in an application under Section 438 of the Code of Criminal Procedure, though the section does not distinctively contemplate issuance of notice to Prosecutor or hearing of either the Prosecutor or the petitioner. There is nothing in the section to indicate that the said power can be exercised by hearing the petitioner and the Public Prosecutor alone. So, if the Court feels that one more person viz., the injured or the aggrieved must also be heard, no provision in the Code prohibits the Court from doing so. Anyway, prohibition and restrictions in Section 301 and other related provisions apply not to an application under Section 438 Cr.P.C. The power vested in the Court under Section 438 Cr.P.C. can be exercised by hearing the petitioner as well as such other party as the Court may deem fit and proper, depending on the facts and circumstances of each case.

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16. All these give sufficient assurance to me to hold that an aggrieved can be heard. The right of hearing of an aggrieved Police Station person by the Court appears to be well-recognized. What guides the various courts in such issues is the absence of any barrier in the relevant section or in any other law which inhibits a person from moving the Court to exercise the powers under the relevant section. In the above circumstances, I hold that in the absence of specific provisions barring the de facto complainant or the aggrieved to be heard in an anticipatory application, the de facto complainant can be heard in the matter.

17. Summing up my discussions, I hold that there is no legal bar for hearing the de facto complainant in an application for anticipatory bail. Theoretically of course, there is no provision in the Code for

> impleading a party, but nothing prevents the Court from hearing the de facto complainant or aggrieved in an application for anticipatory bail. In fit cases, the Court can afford to the aggrieved or the de facto complainant an opportunity of hearing. Technicalities shall not baffle the judicial mind. It cannot hinder course of justice, either. Principles of natural justice shall not remain a mere paper-philosophy. If adhered to, it can never spill over and tend to spoil justice delivery system. Court can hear the aggrieved and not bang its doors to the one who knocks. The Court exists to redress the grievance that of the accused or the aggrieved. After all, it is all for the purpose of taking a right decision in the case".

7. The learned counsel for the petitioner Mr. Devasis Panda while drawing the attention of this Court to sub-section (1-A) of section 438 Cr.P.C. submitted that no notice is required to be given either to a private person who may be an informant or victim or an aggrieved person. He further submitted that the aforesaid sub section (1-A) mandates a notice to be given on the Public Prosecutor as well as the Superintendent of Police for the purpose of giving the Public Prosecutor reasonable opportunity of being heard before the application is finally heard by the Court and such a notice is to be given in the event an interim order under sub-section (1) of section 438 Cr.P.C. is passed.

The learned counsel for the petitioner further submitted that under no stretch of imagination, the proposed intervener Alok Jena can be said to be a "victim" as defined under section 2 (wa) of Cr.P.C. The learned counsel further submitted that though the proposed intervener claims to be an aggrieved person but there is nothing on record to show as to how he was aggrieved and in what way. Mr. Panda further submitted that merely because on the basis of a Writ Petition filed by the proposed intervener, the investigation of Chit Fund Scam Cases were transferred from the State Agency to CBI, it cannot be said that the proposed intervener is an "aggrieved person". He submitted that the informant Sukumar Panigrahi of Kharvela Nagar P.S. Case No.44 of 2013 may be an aggrieved person. He further submitted that the dispute between the proposed intervener and the petitioner as highlighted in the Misc. Case appears to be private in nature which has been given a colour of public spirited nature. Mr. Panda further pointed out section 301 Cr.P.C. and submitted that the role of the pleader of a private person in any Court in a case which is under enquiry, trial or

appeal is very limited and the pleader so instructed by the private person has to act under the directions of the Public Prosecutor or Asst. Public Prosecutor and with the permission of the Court can submit written arguments after the evidence is closed in the case. He submitted that such a pleader cannot be given any chance to conduct the prosecution. Mr. Panda further pointed out section 302 Cr.P.C. and submitted that while any Magistrate is enquiring into the matter or trying the case, he may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector. Similarly no person other than the Advocate General or Government Advocate or a Public Prosecutor or Asst. Public Prosecutor shall be entitled to conduct the prosecution without the permission of the Magistrate.

The learned counsel for the petitioner placed reliance in case of **Sundeep Kumar Bapna –v- State of Maharastra reported in (2014) 58 Orissa Criminal Report (SC) 219** wherein it is held as follows:-

> "25. The upshot of this analysis is that no vested right is granted to a complainant or informant or aggrieved party to directly conduct a prosecution. So far as the Magistrate is concerned, comparative latitude is given to him but he must always bear in mind that while the prosecution must remain being robust and comprehensive and effective, it should not abandon the need to be free, fair and diligent. So far as the Sessions Court is concerned, it is the public prosecutor who must at all times remain in control of the prosecution and a counsel of a private party can only assist the Public Prosecutor in discharging his responsibility. The complainant or informant or aggrieved party, may, however, be heard at a crucial and critical juncture of the trial so that his interests in the prosecution are not prejudiced or jeopardized. It seems to us that constant or even frequent interference in the prosecution should not be encouraged as it will have a deleterious impact on its impartiality. If the Magistrate or Sessions Judge harbors the opinion that the prosecution is likely to fail, prudence would prompt that the complainant or informant or aggrieved party be given an informal hearing".

The learned counsel for the petitioner further placed reliance in case of **Janata Dal –v- Harinder Singh Chowdhary reported in AIR 1993 Supreme Court 892,** wherein it is held as follows:-

"107. It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly, a vexatious petition under the colour of PIL brought before the Court for vindicating any personal grievance, deserves rejection at the threshold.

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109. In the words of Bhagwati, J. (as he then was) "the Courts must be careful in entertaining public interest litigations" or in the words of Sarkaria, J. "the applications of the busybodies should be rejected at the threshold itself" and as Krishna Iyer, J. has pointed out, "the doors of the Courts should not be ajar for such vexatious litigants."

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113. My. Jethmalani expostulating the objectives of PIL urged with vehemence and persistence that H. S. Chowdhary does not have any locus standi to initiate this litigation and as such his petition is liable to be rejected even at the threshold. According to him, the true Public Interest Litigation is one in which a selfless citizen having no personal motive of any kind except either compassion for the weak and disabled or deep concern for stopping serious public injury approaches the Court either for (1) Enforcement of fundamental rights of those who genuinely do not have adequate means of access to the judicial system or denied benefit of the statutory provisions incorporating the directive principles of State Policy for amelioration of their condition, and (2) preventing or annulling executive acts and omissions violative of Constitution or law resulting in substantial injury to public interest.

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115. Mr. Anand Dev Giri, the learned Solicitor General stating that Public Interest Litigation is not in the nature of adversorial litigation and it is intended to promote and vindicate public interest which demands that violation of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position, should not go unnoticed and

unredressed. According to him, the very litigation itself is not within the definition of Public Interest Litigation and more so H. S. Chowdhary absolutely has no locus standi to approach the Court by filing the petition under Ss. 397 and 482 of the Code of Criminal Procedure by way of a revision of the Order of the Special Judge and also quashing the criminal case filed against some known and unknown persons, involved in a series of criminal offences of conspiracy, criminal breach of trust, cheating and bribery. It is the submission of the learned Solicitor General that Mr. Chowdhary, wearing the insignia of a public interest litigant has preferred the quashing petition before the High Court for the glare of publicity. According to him, the petition by Mr. Chowdhary has been drafted in an ingenious way without mentioning as to who all are respondents besides the Union of India and it is an ignoble and unscrupulous action and, therefore, both the Special Judge and the learned Judge of the High Court were justified in rejecting this petition holding that Mr. Chowdhary does not even have the semblance of public interest litigant and as such he has no locus standi.

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117. After deeply and carefully considering the submissions of all the parties, we see much force in the submissions made by the learned Solicitor General, Mr. A. D. Giri and Mr. Jethmalani, senior counsel. A perusal of the petitions filed by H. S. Chowdhary before the Special Judge and the High Court clearly unfolds that Mr. Chowdhary appears to be very much concerned with the personal and private interest of the accused in the criminal case and there is absolutely no involvement of public interest. Can it be said that this litigation is in the nature of PIL to vindicate and effectuate the public interest? The emphatic answer would be 'Not even a single ray of the characteristic of public interest litigation is visibly seen'."

8. Section 438 (1-A) Cr.P.C. reads as follows:-

"438.

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(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days

notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court".

Sub-section (1) of section 438 Cr.P.C. empowers the High Court or the Court of Session while considering an application for anticipatory bail to issue an interim order for grant of anticipatory bail. At the time of passing the interim order, the Court has to consider the factors which are enumerated under (i), (ii), (iii) and (iv) of Section 438 (1) Cr.P.C. At the stage of passing the interim order, the Public Prosecutor can also be heard. If the Public Prosecutor seeks for time to produce the case records, criminal antecedents of the accused etc., the Court can grant appropriate time but at the same time, if the Court feels just and proper, it can pass interim order for grant of anticipatory bail. Obviously where the Court after hearing the learned counsel for the petitioner feels that in view of the factors as enumerated under (i), (ii), (iii) and (iv) of section 438 Cr.P.C., the anticipatory bail application is to be rejected forthwith, there may not be any necessity of hearing the Public Prosecutor. Thus the Public Prosecutor has a right to get reasonable opportunity of hearing before the final order in an anticipatory bail application is passed. Even though at the first instance while hearing an anticipatory bail application from the learned counsel for the petitioner, the Court does not issue any interim order but directs the Public Prosecutor to obtain the case records as well as necessary instruction, in such cases also the Public Prosecutor has to be given an opportunity of hearing when the application is finally heard. After hearing the Public Prosecutor, the Court has discretion either to grant anticipatory bail finally or to reject such bail application.

Section 438 Cr.P.C. on the face of it no where states that an opportunity of hearing has to be given to any other party than the Public Prosecutor. Now the question is suppose a Court feels that an informant or de facto complainant or an aggrieved person or a victim should be heard before passing the final order in the matter of anticipatory bail application, whether the Court has power to notice such persons and hear such persons or not? Suppose in a case, the informant or de facto complainant or an aggrieved party or a victim suo motu appears through his counsel or in person and prays before the Court to give him reasonable opportunity of hearing before the interim order/final order is passed, whether the Court has power to give such persons an opportunity of hearing?

Section 2 (wa) of Cr.P.C. defines "victim" which is quoted herein below:-

> "2 (wa) "Victim" means a person who has suffered any loss or injury caused by reason of act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."

Who is an "aggrieved person"? Aggrieved person has not been defined in Cr.P.C. An aggrieved person as per the Law Lexicon is a person who has suffered a legal grievance. The term includes any person who has a genuine grievance because an order has been made prejudicially affecting his interests, who is wrongfully deprived of his entitlement which he is legally entitled to receive. Aggrieved is somewhat wider term than injured. A person is aggrieved if a decision has been pronounced which has wrongfully refused him something which he had a right to demand. An aggrieved person is one who is adversely affected, cheated, damaged, defrauded, harassed, injured, offended, oppressed or wronged.

9. In case of **Puran-v-Rambilas reported in AIR 2001 SC 2023**, it is held as follows:-

> "13. Mr. Lalit next submitted that a third party cannot move a petition for cancellation of the bail. He submitted that in this case the prosecution has not moved for cancellation of the bail. He pointed out that the father of the deceased had moved for cancellation of the bail. He relied upon the case of **Simranjit Singh Mann vs. Union of India, reported in AIR 1993 SC 280** and **Janata Dal, vs. H.S. Chowdhary, reported in 1991 (3) S.C.C. 356**. Both these cases dealt with Petitions under Article 32 of the Constitution of India whereunder a total stranger challenged the conviction and sentence of the accused. This Court held that neither under the provisions of the Criminal Procedure Code nor under any other statute is a third party stranger permitted to question the correctness of the conviction and sentence imposed by the Court after a regular trial. It was held that the petitioner, who was a total stranger, had no 'locus standi' to challenge the conviction and the sentence awarded to the convicts in a petition under Article 32. The principles laid down in these cases have no application to the facts of the present case. In t his case

the application for cancellation of bail is not by a total stranger but it is by the father of the deceased. In this behalf the ratio laid down in the case of **R. Rathinam vs. State by DSP, District Crime Branch, Madurai District, Madurai AIR 2000 SC 1851**, needs to be seen. In this case, bail had been granted to certain persons. A group of practising Advocates presented petitions before Chief Justice of the High Court seeking initiation of suo motu proceedings for cancellation of bail. The Chief Justice placed the petitions before a Division Bench. The Division Bench refused to exercise the suo motu powers on the ground that the petition submitted by the Advocates was not maintainable. This Court held that the frame of sub-section (2) of Section 439 indicates that it is a power conferred on the Courts mentioned therein. It was held that there was nothing to indicate that the said power can be exercised only if the State or investigating agency or a Public Prosecutor moves by a petition. It was held that the power so vested in the High Court can be invoked either by the State or by any aggrieved party. It was held that the said power could also be exercised suo motu by the High Court. It was held that, therefore, any member of the public, whether he belongs to any particular profession or otherwise could move the High Court to remind it of the need to exercise its power suo motu. It was held that there was no barrier either in Section 439 of the Criminal Procedure Code or in any other law which inhibits a person from moving the High Court to have such powers exercised suo motu. It was held that if the High Court considered that there was no need to cancel the bail then it could dismiss the Petition. It was held that it was always open to the High Court to cancel the bail if it felt that there were sufficient enough reasons for doing so."

In case of **R. Rathinam -v- State reported in AIR 2000 SC 1851**, it is held as follows:-

"7. The frame of the sub-section indicates that it is a power conferred on the said Courts. Exercise of that power is not banned on the premise that bail was earlier granted by the High Court on judicial consideration. In fact the power can be exercised only in respect of a person who was released on bail by an order already passed. There is nothing to indicate that the said power can be

exercised only if the State or investigating agency or even a Public Prosecutor moves for it by a petition.

8. It is not disputed before us that the power so vested in the High Court can be invoked either by the State or by any aggrieved party. Nor is it disputed that the said power can also be exercised suo motu by the High Court. If so, any members of the public, whether he belongs to any particular profession or otherwise, who has a concern in the matter can move the High Court to remind it of the need to invoke the said power suo motu. There is no barrier either in Section 439 of the Code or in any other law which inhibits a person from moving the High Court to have such powers exercised suo motu. If the High Court considers that there is no need to cancel the bail for the reasons stated in such petition, after making such consideration it is open to the High Court to dismiss the petition. If that is the position, it is also open to the High Court to cancel the bail if the High Court feels that the reasons stated in the petition are sufficient enough for doing so. It is, therefore, improper to refuse to look into the matter on the premise that such a petition is not maintainable in law".

In case of **Dr. Krishna Appaya Patil –v- State of Maharashtra reported in 2014 (1) Bom CR (Cri) 616: 2014 All Maharastra Law Reporter (Criminal) 833,** it is held as follows:-

"3.Perused the applications and the documents annexed with those applications. It is true that both the applicants Vithhal Chavan and Chitra Salunkhe have sent letters to the Sr. Police Inspector, Azad Maidan Police Station and pointed out that excess amount in the nature of capitation fee is demanded and collected by the applicant/accused and thus, the offence is committed under the Act. However, these two persons are not the informants under section 154 nor the Complainants under section 200 of the Cr.P.C. They may be called as whistleblowers or may be aggrieved persons. One lady Dr. Manjusha Mulavane is the first informant on whose information the impugned offence was registered by the Azad Maidan Police Station. There are cases in which many persons get adversely affected because of the commission of crime, however, they all cannot be heard. In the case of **Puran vs. Rambilas reported in AIR 2001 SC 2023**, wherein the Supreme Court has

taken a view that the aggrieved person has locus and is to be heard and, therefore, the application made by the aggrieved person for cancellation of bail which is a regular bail under section 439(2) of the Cr.P.C. is maintainable. However, in the case of anticipatory bail under section 438 of the Cr.P.C. which is a pre-trial/pre-inquiry stage, such provision of locus cannot be made available to all the persons, who are aggrieved or affected by the act of the accused. In the case of Prem Kumar Sharma (supra), a learned Single Judge of this Court while referring to the judgment of this Court in the case Vinay Poddar vs. State of Maharashtra & Ors., Criminal Application No. 2862 of 2008, has held that there is no such provision to hear the complainant as an intervener in the case of anticipatory bail. This Court has held thus:

16. From the above judgments what emerges is that the learned single Judge of this Court has held that the first informant/Complainant has right to be heard in an application for anticipatory bail application filed by the accused and the position is different when it comes to an application for bail filed by the accused. None of the judgments cited by the Intervener deals with identical situation arising in the present case. Indisputably, none of the applicants is either the Complainant or the first informant. I am in respectful agreement with the view taken by the learned Single Judge in the case of Vinay Poddar (supra). No doubt, the Intervenors being members/account holders and depositors may be ultimately interested in the outcome of the investigation but this fact by itself would not be sufficient to give them locus in an application for anticipatory bail filed by the accused.

4. It is true that in this case, many students of the College were affected due to the policy of demand and collection of the capitation fee and, therefore, every student from whom the capitation fee or the excess fee are collected is an aggrieved person. Even in the cases registered under the MPID Act, many investors can come before the court as the aggrieved persons when the application for anticipatory bail under section 438 of the Cr.P.C. is filed by the applicant/accused. Undoubtedly, all these persons are aggrieved persons, however, if at all, they are heard, or only one such aggrieved person on a representative basis is heard then it may

amount to discrimination and such hearing will consume a considerable time of the Court, which is not feasible in view of the time constraints. Moreover, the first informant Mrs. Moravale has not filed application as an intervener. Thus, it is expected that interest of the aggrieved person is to be represented by either the first informant or by the State and aggrieved persons may assist the State to bring out the correct information and true aspects of the commission of the crime.

5. In view of this, I am not inclined to allow the intervention applications. However, the learned Counsel for the applicant/interveners may assist the Court if at all any query is put forth to them."

In case of **Dr. Sunil Pati –v- State of Chattisgarh reported in 2006 (2) Chatisgarh Law Judgments 1**, it is held as follows:-

"10. Admittedly, there is no provision made in the Code that a complainant or a third party can intervene and make any submissions independently in opposing the application for grant of anticipatory bail. Whatever is there, is in Section 301(2) of the Code. They are the provisions which are covered under Chapter XXIV which deals with the general provisions as to enquiries and trials. Sub-section (1) of Section 301 provides that the Public Prosecutor or Asstt. Public Prosecutor who is in charge of a case may appear and plead without any written authority before any Court in which that case is under enquiry, trial or appeal. Sub-section (2) of Section 301 further provides that if in any such case, a private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Asstt. Public Prosecutor in charge of the case shall conduct the prosecution and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Asstt. Public Prosecutor, and may with the permission of the Court submit written arguments after the evidence is closed in the case. This makes abundantly clear that there is no prohibition of law in permitting a private counsel engaged by the complainant to prosecute any person, but the area of his functioning has been limited by the mandate of law that is to say he may assist the Public Prosecutor in prosecuting a person, accused of a case, but

he shall work and function under the directions of the Public Prosecutor and if so required, he may file written arguments with the permission of the Court, after the evidence is closed in the case. This all makes it very clear that the provisions of the aforesaid sections are that the complete charge of a criminal case cannot be handed over to the hands and entrustment of the private counsel engaged by a private party or the first informant of the case. The underlying principle appears to be embodied in the concept of a fair trial to the accused. As held by the Apex Court, in the matter of Shiv Kumar's case (1999) 7 SCC 467 , a private counsel engaged by a party, if allowed a free hand to conduct prosecution would focus to bring the case to conviction even if it is not a fit case to be so convicted, but a Public Prosecutor is not expected to show a thirst to reach the case to the conviction somehow of the other irrespective of the true facts involved in the case. If we apply the similar analogy in a case filed Under Section 438 Cr. P.C. the result comes that the private counsel engaged by the complainant or the aggrieved party can appear in such a case and the party can always make his representation, but the counsel so engaged would not be the complete in charge of the case and he would only work therein under the directions of the Public Prosecutor and shall assist the Public Prosecutor by providing more and more facts to him and at the most, he may with the permission of the Court, submit written arguments at the time of closure of hearing. I am in respectful agreement with the view taken by the single Judge of Delhi High Court in Smt. Indu Bala's case that the counsel for the complainant or the first informant has no right to be heard in a petition filed Under Section 438 Cr. P.C. and he can brief the State Counsel and it is only the State Counsel who can be heard in opposing the bail application.

11. The arguments of the Sr. Counsel for the first informant regarding application of analogy of Section 173(2) Cr. P.C. in a proceeding under Section 438 Cr. P.C. cannot be accepted. In case of a Magistrate deciding that there is no sufficient ground for proceeding further and dropping a proceeding or taking the view that the proceedings would continue against some of the accused persons for the reason that there is no sufficient ground for proceeding against others mentioned in the first information report,

the first informant would certainly be prejudiced because the FIR lodged by him would have failed of its purpose wholly or in part. Since the interest of the first informant is going to be prejudiced, it was held in Bhagwant Singh's case that the first informant must be given an Opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. Indeed, the aforesaid situation is of end of the matter forever and in the said circumstances only, an opportunity of being heard to the first informant has been recognized. However, in a petition under Section 438 Cr. P.C. for grant of anticipatory bail, there is no question of any prejudice caused to the first informant, even if the applicant is granted anticipatory bail as no right or interest of the first informant is going to frustrate forever.

12. The other argument advanced, on behalf of the first informant, on the provisions of Section 439(2) Cr. P.C. can also not be accepted. The power Under Section 439(2) Cr. P.C. is a power possessed with the Courts mentioned under the said provisions. For settling at motion, the exercise of such a power, any person can invoke jurisdiction of the Court concerned and while doing so, that person would be entitled for hearing to convince the concerned Court, regarding the need to exercise such powers. This is one of the ratio laid down by the Apex Court in the matter of Puran v. Rambilas . This power vested with the High Court or the Court of sessions Under Section 439(2) Cr. P.C. cannot be equated with the power and jurisdiction Under Section 438. The powers for cancellation of bail may be invoked by the first informant or the other aggrieved party, and in that situation, he or she would be entitled for audience under the aforesaid provisions, but in Section 438 the first informant or the aggrieved party has no role to invoke jurisdiction because in any case, in such a petition they may not be classified as an applicant. There is no force in this argument and the same is also turned down.

13. The next argument advanced by learned Counsel for the first informant, based upon the principles laid down by the Apex Court in the Matter of J.K. International's case 2001 Cri LJ 1264 is also misconceived. In the said case, the accused approached the High Court for quashing the criminal proceedings I nitiated by the

complainant. The Apex Court held that it may not be that the complainant should have been made a party by the accused himself in the petition for quashing of the criminal proceedings as the accused has no such obligation when the case was charge sheeted by the Police. It is predominantly concern of the State to continue the prosecution, but when the complainant wishes to be heard when the criminal proceedings are sought to be quashed, it would be negation of justice to him if he is foreclosed from being heard even after he makes a request to the Court in that behalf. Here the case is not for quashing the complaint or the first information report and in fact, nothing is going to attain finality, so far as the criminal prosecution is concerned and in the said situation, on the basis of the law laid down in the said matter, the first informant cannot be awarded right of audience in this matter.

14. The last argument advanced by the Sr. counsel for the first informant was about the encouragement to an effort to bring more facts on record with a view to give adequate decision in the case. The general rule about the right of audience cannot be befitted in the procedural frame work of the Cr. P.C. This argument advanced on the concept of natural justice can possibly be made applicable, if we bent upon to apply, to an area not covered by any law validly made. In fact, they do not and they cannot substitute the law. If the statutory provisions are clear and unambiguous and the field, for example the field of procedure as in this case, is already occupied by a procedural law, the general rule or prayer permitting hearing with an intention to bring more and more facts on record cannot be permitted. Here, whatever is to be done, is to be done in accordance with the Code of Criminal Procedure and once Code does not permit a right of audience to the complainant while hearing a case for grant of anticipatory bail to the applicant/accused that cannot be transplanted by making necessary implications based on principles of natural justice etc. there is no force in this argument advanced by learned Counsel for the objector and the same can also not be accepted.

In case of **Vinay Poddar –v- State of Maharashtra reported in 2009 Criminal Law Journal 896**, it is held that

> "13. When an application for anticipatory bail is considered, the police may not place all factual details before the Court as the investigation in most of such cases is at a preliminary stage. Therefore, some role can be played by the complainant by pointing out factual aspects. In the circumstances, it is not possible to hold that the first informant or the complainant cannot be heard in an application for anticipatory bail. When the complainant appears before the Court in the course of hearing of an application for grant of anticipatory bail, the Court is bound to hear him. But the said right cannot be allowed to be exercised in a manner which will delay the disposal of an application for anticipatory bail. The delay in disposal of such application may adversely affect the investigation. Therefore, the right which can be spelt out in favour of the first informant or the complainant is of making oral submissions for pointing out the factual aspects of the case during the course of hearing of an application for anticipatory bail before the Court of Session. The said right is to be exercised by the complainant either by himself or through his Counsel. This is not to say that the Sessions Court hearing the application for anticipatory bail is under an obligation to issue notice to the first informant or the complainant. There is no such requirement of issuing notice to the first informant or the complainant at the hearing of the application for anticipatory bail. However, if the complainant or the first informant appears before the Court, he cannot be denied a right of making oral submissions either in person or through his Counsel. It must be noted here that the legal position on this aspect in the case of an application for regular bail may not be the same."

In case of **C.S.Y.Sankar Rao –v- State of Andhra Pradesh reported in 2010 Criminal Law Journal 1610**, it is held that

> "16. Even though there is a danger of biased representation, the victims cannot be prevented from knocking the doors of the Court and making their submissions. It should not be forgotten that it is the victim who is put to injury, physical or mental suffering. The victim is the ultimate looser. He is put to pain, trouble, damage as a result of an offence. The victims are permanently deprived of their near and dear. In fact, no amount of compensation can bring back the lost life or limb. They are permanently deprived of their

enjoyment and happiness of the company of the deceased. When, in a case, the deceased is the earning member, his wife and children would, be driven to the streets. They may be deprived of their source of livelihood and they may not be a in a position to fulfill their basic needs. Though Section 357(3) Cr. P.C. empowers the Court to award compensation to the victims, such orders made seldom.

17. In fact, victims are forgotten at every stage. They face many problems from the moment they report the matter to police. They are not being treated as victims. In some cases, the victim and witnesses are put to unnecessary harassment by the police. They are not informed about the progress in investigation. They are not, informed about the progress of the trial, They may have to come to Court on several occasions to complete their evidence.

18. In view of the scope of the above referred sections and the scheme of the Code of Criminal Procedure and the public policy, I am of the view that though it is the primary duty of the State to conduct the prosecution, however, the victims are not totally barred in approaching the Court in appropriate cases and to represent their grievances. It is common knowledge; that nowadays, in many cases the victims and the witnesses are not in a position to appear before the Court and depose without any fear or favour. The very criminal justice delivery system may fail and ultimately, justice may not be done in serious and heinous criminal offences if the witnesses are not allowed to depose freely without any fear or favour. In view of the same, though there is a limited scope, I feel that the victims and the de facto complainants can be heard at the stage of considering the bail applications or cancellation of bail with the permission of the Court and as supplementary to the arguments advanced by the Public Prosecutor. Whatever the de facto complainant or the victim has to say initially, they must act as per the directions and under the instructions of the Public Prosecutor. But, however, the Court may in appropriate cases if comes to a conclusion that in the interest of justice, it is necessary to hear the de facto complainant or the victim, they may be heard. However, the discretion has to be exercised judiciously with reasonable care and caution".

Considering the submissions made by the respective parties and keeping in view the ratio laid down in the aforesaid decisions, I am of the view that in the absence of any provisions in Cr.P.C. in debarring an informant or de facto complainant or victim or an aggrieved party an opportunity of hearing in an application for anticipatory bail but keeping in view the criminal justice delivery system and public policy, it can be held as follows:-

i. There is no mandate in law to issue notice to the informant/victim/aggrieved party by the Court before passing any interim order or final order in an application for anticipatory bail.

ii. While adjudicating an anticipatory bail application, if the court feels that the informant/de facto complainant/ victim/aggrieved party is required to be heard for an effective adjudication, then the Court can issue notice to such person for giving him a reasonable opportunity of hearing.

iii. If the informant/de facto complainant/victim/aggrieved party suo motu appears in Court in an application for anticipatory bail either to support or oppose such application and prays before the Court to give him an opportunity of hearing, the Court may accept such prayer if it feels the necessity of hearing such person in the interest of justice and for the just decision of the case.

iv. The counsel for the informant/de facto complainant/ victim/aggrieved party can always appear during hearing of the anticipatory bail application and assist the State Counsel even if he is not awarded a right of audience in the matter by the Court. He can also assist the court if any query is put forth to him.

v. Where it appears that there are lot of aggrieved persons and all of them pray before the Court to give them an opportunity of hearing in an application of anticipatory bail, the Court may be reluctant to give them such opportunity if it feels that it would be a time consuming affair or in view of the time constraints, it would not be feasible to give each of them an opportunity of hearing or it would delay the disposal of such application. However if the Court feels in such cases to hear one of the aggrieved parties who can highlight the common grievances of all which is not properly addressed by

the State Counsel, the Court can give an opportunity of hearing to such party.

vi. No particular category of cases can be enumerated as to where the informant/de facto complainant/ victim/aggrieved party can be given an opportunity of hearing in an application for anticipatory bail in as much as it would depend upon the nature and gravity of the offences as well as the discretion of the Court which is to be exercised judiciously with reasonable care and caution.

vii. If a person is neither an informant nor victim but claim himself to be an aggrieved party and prays for an opportunity of hearing, the Court has to decide whether such person is an aggrieved party in the context of the case or not and if so, whether a right of hearing is to be given to him or not to take a right decision in the matter.

10. So far as the present case is concerned, there is no dispute that the intervener filed Writ Petition (Civil) No.413 of 2013 before the Hon'ble Supreme Court seeking transfer of the Chit Fund Scam cases from State agency to C.B.I. which was allowed and all the cases registered against 44 companies were directed to be transferred in Odisha from the State Police agencies to Central Bureau of Investigation and in pursuance to the direction of the Supreme Court, CBI/SCB/KOL Case No.RC.47/S/2014-KOL. dated 5.6.2014 was registered. The petitioner has also brought materials before this Court by filing Misc. Case No.1553 of 2014 as to how he was allegedly dissuaded by the petitioner from pursuing his case in the Supreme Court and how he was allegedly threatened from time to time. Without expressing any opinion on such allegation which is stated to be under investigation, it can be said that the proposed intervener has definitely played a crucial role in transferring the Chit Fund Scam cases from the State Agency to the CBI. The learned counsel for the CBI has also stated that the proposed intervener has been examined as a witness in the case and placed such statement for perusal. Considering the background of the case in which the CBI case has been registered, the role of the proposed intervener, the statement of the proposed intervener recorded by the CBI officials during course of investigation, it cannot be said that the intervener is a total stranger to the proceeding or he is a simple whistle blower rather he is the de facto complainant of the case. The way he is alleged to have been oppressed/harassed/injured while he was pursuing a genuine

grievance, he can also be said to be an "aggrieved person" in the context of this case.

Thus considering submissions made by the respective parties, Misc. Case No.1553 of 2014 filed by the intervener Alok Jena is allowed and the learned counsel for the intervener is given an opportunity of hearing to have his say on the application of anticipatory bail filed by the petitioner in the interest of justice and equity.

11. The learned counsel for the petitioner submitted that the documents seized from the residential premises of the petitioner on 25.9.2014 cannot be said to prima facie attract the ingredients of criminal conspiracy as required under section 120-B IPC. The learned counsel for the petitioner during initial stage of hearing of the bail application submitted that Jagabandhu Panda is related to the petitioner as his cousin (also mentioned in bail application) who was associated with the Artha Tatwa Group of Companies and through his cousin, the petitioner became acquainted with the main accused Pradeep Kumar Sethy. At the subsequent stage, Mr. Panda submitted that Jagabandhu Panda is acquainted to him as the co-villager and the expression "cousin" has been used in that context. Mr. Panda submitted that when Jagabandhu Panda was arrested and taken into custody, his family members approached the petitioner and entrusted him with the job of engaging a lawyer for his bail and that is how the bunch of documents mentioned in Sl. No.1 of the search list was found in his house. He further submitted that since the petitioner had got acquaintance with Pradeep Kumar Sethy through his cousin Jagabandhu Panda that is how the visiting card of Pradeep Kumar Sethy was found in his house. Mr. Panda further submitted that the letter written by Pradeep Kumar Sethy to the petitioner which is mentioned in Sl. No.3 of the search list and found from the bedroom of the petitioner cannot be sufficient to draw an inference that there was criminal conspiracy between the petitioner and the main accused Pradeep Kumar Sethy. Mr. Panda submitted that ZICA as mentioned in Sl. No.3 is a franchise Zee-Learn Computer Education at Janpath, Bhubaneswar which is run by petitioner's wife Gitanjali Panda and petitioner does not look after the affairs of ZICA or he is in no way connected therewith. He further submitted that even though notices were sent to his residence on 3.11.2014 and 8.11.2014 by the Inspector of Police, CBI to appear before him for the purpose of answering certain questions relating to the case but on account of the obsequies of his father as the petitioner was absent at Allahabad, he could not appear which was duly

intimated to the Investigating Officer. Mr. Panda submitted that though after 8th November 2014, the petitioner was available for interrogation at Bhubaneswar and was ready to appear before the Investigating Officer but he was never summoned thereafter. Mr. Panda submitted that the documents mentioned in Sl. Nos.1 to 3 of the search list are innocuous and cannot lead to an inference of conspiracy and no money was transferred from the accounts of Artha Tatwa to the account of the petitioner. He further submitted that the search was conducted in gross violation of the provisions under section 165 Cr.P.C. and local witnesses were not called for at the time of search and no search warrant was obtained and the guidelines in the CBI manual relating to search was also not followed. He further submitted that even the signatures of the family members of the petitioner were not taken on the search list which is a fundamental mistake committed by the CBI officials. He further submitted that since the documents alleged to have been collected on the basis of an illegal search, no importance is to be attached to such documents. The learned counsel for the petitioner highlighted that the notice issued to the petitioner does not mention as to under what provision it was issued and there is absolutely no material that there was any money trailing to ZICA account. He further submitted that there is no necessity of custodial interrogation of the petitioner and it would seriously prejudice the petitioner who is now serving as D.S.P, DIB, Nayagarh and intentionally the CBI authorities are conducting raids in the houses of the important personalities and issuing notices to them for their appearance before the Investigating Officer not only to humiliate a public servant like the petitioner but also to his employer i.e, the State Government. He further submitted that the documents seized by way of search list dated 25.9.2014 are not of such a nature to come to a prima facie conclusion that the petitioner has got any nexus with Artha Tatwa or there was any money trailing from Artha Tatwa Group of Companies to the petitioner or that the petitioner has any role in the larger conspiracy angle. Mr. Panda highlighted the crime manual of the CBI particularly Chapter X to XIV to indicate as to how the CBI officials have violated the procedural aspects as laid down in the said manual. The learned counsel further submitted that the very fact that the petitioner being fully aware that the case has been transferred from the State Agency to CBI has kept the documents in question with him clearly reveals that he has no guilty intention otherwise he could have easily destroyed the same. The learned counsel further submitted that the manner in which CBI officials are interrogating the accused persons in the case clearly envisage that the

right of freedom is completely lost and they are putting undue pressure and adopting 3rd degree method to extract something from the accused persons. The learned counsel further highlighted that in this case many of the accused persons were called for the purpose of interrogation on number of occasions and all on a sudden they are being arrested after some dates and forwarded to Court. The conduct of the CBI officials in the past, according to the learned counsel for the petitioner creates a reasonable apprehension of arrest for which the anticipatory bail application should be liberally considered in favour of the petitioner.

12. Mr. V. Narasingh, the learned counsel for the CBI submitted that the petitioner's case comes within "other influential personalities wielding considerable clout and influence" as observed by the Hon'ble Supreme Court in paragraph 30.5 in case of Subrata Chattoraj –v- Union of India. He further submitted that petitioner's wife is running an institution namely ZICA and the materials collected during investigation reveals that there was money trailing from the accounts of Artha Tatwa to the account of ZICA which is clear after the seizure of bank documents. He further submitted that nothing has been found till date that Jagabandhu Panda is in any way related to the petitioner in any manner and the stand taken by the learned counsel for the petitioner in the bail petition that Jagabandhu Panda is a cousin of the petitioner is an afterthought story which is clear from the pre-varicating stand taken by the learned counsel during hearing of the bail application. He further contended that the petitioner who claims to have a distinguished service records and investigated many importance cases has been used by the main accused Pradeep Kumar Sethy to get the bail for accused Jagabandhu Panda. He further contended that the role of the petitioner is very suspicious and the visiting card of Dr. Pradeep Sethy which was seized from the house of the petitioner during search and the letter written by the main accused to the petitioner while in custody clearly reveals the intimacy between them. The learned counsel further highlighted the statement of intervener Alok Jena which prima facie indicates as to how the petitioner threatened him to withdraw the case from the Supreme Court and how his wife was also threatened by the petitioner. He further pointed out the statement of a travel agent which indicates that the main accused Pradeep Kumar Sethy booked Air Tickets for the petitioner on a number of occasions. The learned counsel for the CBI further submits that twice notices were sent to the petitioner for appearance before the I.O. which was not complied with and the petitioner has never intimated to the

I.O. after 8.11.2014 indicating his availability for interrogation or his readiness for interrogation as contended by the learned counsel for the petitioner. The learned counsel for the CBI further submitted that all the necessary formalities of search and seizure as prescribed under the Cr.P.C. as well as in the CBI manual have been duly followed. He further contended that the petitioner has not come up with a clean hand for seeking anticipatory bail in as much as the copy of the search list which has been filed by the petitioner in the bail petition is not the true copy of such search list which was supplied to the son of the petitioner Sri Millan Panda which he has received under the signature. Mr. V. Narasingh submitted that through the original search list contains the acknowledgment and signature of Milan Panda on the search list but such portion has not been deliberately xeroxed. The learned counsel for the CBI produced the search list in sealed cover which indicates the acknowledgement and signature of Millan Panda with date. The learned counsel for the CBI further submitted that if the petitioner who is a very influential person is well ensconced with a favourable order of pre-arrest bail then it would create obstacles for finding out the truth and stifle the investigation and in view of the previous conduct of the petitioner in threatening the intervener to withdraw the case from the Supreme Court, the close connection between the main accused and the petitioner, the air journey of the petitioner being financed by the main accused Pradeep Kumar Sethy and the money trailing from Artha Tatwa to ZICA, it would not be proper to grant anticipatory bail to the petitioner and the custodial interrogation of the petitioner is very much necessary.

13. Now the question is whether in view of the available materials on record, the anticipatory bail is to be granted in favour of the petitioner.

In **Gurbaksh Singh Sibbia –v- State of Punjab reported in AIR 1980 Supreme Court Cases 1632,** it was held as follows:-

> "21.
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> xx xx xx
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> To say that the applicant must make out a "special case" for the exercise of the power to grant anticipatory bail is really to say nothing. The applicant has undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a "special case"
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> xx xx xx

> 22. By proposition No.1 the High Court says that the power conferred by section 438 is "of an extraordinary character and must be exercised sparingly in exceptional cases only". It may perhaps be right to describe the power as of an extraordinary character because ordinarily the bail is applied for under section 437 or section 439 Cr.P.C. These sections deal with power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which the bail is applied for. But this does not justify the conclusion that the power must be exercised in exceptional cases only, because it is of an extraordinary character. We will really be saying once too often that all discretion has to be exercised with care and circumspection, depending on circumstances justifying its exercise. It is unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self-imposed limitations".

14. Section 438 (1) Cr.P.C. lays down a condition which has to be satisfied before grant of anticipatory bail and such condition is that the applicant has "reason to believe" that he may be arrested on accusation of having committed a non-bailable offence. Such belief must be founded on reasonable grounds and not mere "fear" or "vague apprehension".

In view of the materials collected by the CBI as pointed out by the learned counsel for the CBI during course of argument, the raid conducted by the CBI on 25.9.2014 in the house of the petitioner, the nature of documents seized during such raid, the notices issued by the Inspector of Police, CBI to the petitioner for interrogation and the arrest of number of persons by the CBI who were neither named nor charge sheeted in Kharvelnagar P.S. Case No.44 of 2013, it can be said that the petitioner has every reason to believe that he might be arrested in connection with CBI/SCB/KOL Case No. RC.47/S/2014-Kol and his belief is founded on reasonable grounds and not mere "fear" or "vague apprehension". The contention of the learned counsel for the CBI that the petitioner is a mere "suspect" and therefore his anticipatory bail application should not be entertained cannot be accepted in view of the guidelines enunciated in case of Gurbaksh Singh Sibbia (supra).

15. There is no dispute that the case relates to commission of economic offences. Such offences are "economic murder" of the entire community of people who invested their hard earned money in organizations with

assurance of lucrative returns but lost their lives' savings. The victim is duped and thereby deprived of his economic life. The crime is no heinous than putting an end to the life of a person. Sometimes the loss is so heavy that it rocks the backbone of the investor for all time to come and he hardly gets any scope to come out of the trauma.

In case of **Y.S. Jagan Mohan Reddy –v- CBI reported in (2013) 55 Orissa Criminal Report (SC) 825**, it is held as follows:-

> "15. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.
>
> 16. While granting bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of public/State and other similar considerations."

In case of **State of Gujurat –v- Mohan Lal Jitamal Torwal reported in AIR 1987 SC 1321,** it is held as follows:-

> "5.
>
> xx xx xx
>
> The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white colour crimes with a permissive eye

unmindful of the damage done to the National Economy and National Interest".

In case of **State –v- Radhakrishnan reported in 2003 (1) Current Tamil Nadu Cases 530,** Hon'ble Justice C.Nagappan has held as follows:-

"21. The larger interest of the public and State demand that in economic offences the discretion to grant anticipatory bail under section 438 of Criminal Procedure Code should be exercised with utmost care and caution".

Keeping in view the aforesaid proposition of law, it can be said that while dealing with an application for grant of anticipatory bail in an economic offence, apart from the nature and gravity of the accusation, the role played by the accused, the character of the accused, the antecedent of the accused, the possibility of the accused tampering with the witnesses or fleeing away from justice, likelihood of repetition of similar offences in future, reasonable possibility of securing the attendance of the accused at the time of trial are all to be seen with utmost care and caution and exceptional case has to be made out for grant of anticipatory bail particularly in economic offences.

16. The learned counsel for the CBI placed reliance in case of **Enforcement Officer –v- Bher Chand Tikaji Bora reported in (1999) 5 Supreme Court Cases 720**, wherein it is held as follows:-

"2……From a bare reading of the impugned order, it appears that the learned Single Judge is of the view that because the respondent was available for interrogation and the prosecution did not avail of that opportunity, there should not be any justification for not granting the anticipatory bail sought for. We have no hesitation to hold that the learned Judge has misread the decision of this Court referred to in the impugned order. The criteria and questions to be considered for exercising power under Section 438 of Cr.P.C. has been recently dealt with in Dukhishyam Benupani, Asst. Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria. The white – collar criminal like the respondent against whom the allegation is that he has violated the provisions of the Foreign Exchange Regulation Act is a menace to the society and therefore unless he alleges and establishes in the materials that he is being

unnecessarily harassed by the investigating agency, the Court would not be justified in invoking jurisdiction under Section 438 Cr.P.C and granting anticipatory bail."

The learned counsel for the CBI further placed reliance in the case of **State rep. by the C.B.I. –v- Anil Sharma reported in (1997) 7 Supreme Court Cases 187,** wherein it is held as follows:-

"6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under section 438 of the Code. In a case like this, effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

The learned counsel for the CBI also placed reliance in case of **Dukhishyam Benupani –v- Arun Kumar Bajoria reported in (1998) 1 Supreme Court Cases 52,** wherein it is held as follows:-

"6. Learned counsel for the respondent defended both orders on the premises that the respondent presented himself for being interrogated on many days subsequent to the High Court order and nothing incriminating was elicited from him so far and that the respondent is a sick person entitled to a pre-arrest bail order.

7….. It is not the function of the Court to monitor investigation process so long as such investigation does not transgress any provision of law. It must be left to the investigating agency to

decide the venue, the timing and the questions and the manner putting such questions to persons involved in such offences. A blanket order fully insulating a person from arrest would make his interrogation a mere ritual."

In case of **Muraleedharan-v-State of Kerala reported in AIR 2001 SC 1699,** wherein it is held as follows:-

"7…..*Custodial interrogation* of such accused is indispensably necessary for the investigating agency to unearth all the links involved in the criminal conspiracies committed by the persons which ultimately led to the capital tragedy. We express our reprobation at the supercilious manner in which the Sessions Judge decided to think that "no material could be collected by the investigating agency to connect the petitioner with the crime except the confessional statement of the co-accused." Such a wayward thinking emanating from a Sessions Judge deserves judicial condemnation. No court can afford to presume that the investigating agency would fail to trace out more materials to prove the accusation against an accused. We are at a loss to understand what would have prompted the Sessions Judge to conclude, at this early stage, that the investigating agency would not be able to collect any material to connect the appellant with the crime. The order of the Sessions Judge, blessing the appellant with a pre-arrest bail order, would have remained as a bugbear of how the discretion conferred on Sessions Judge under Section 438 of the Cr.P.C. would have been misused. It is heartening that the High Court of Kerala did not allow such an order to remain in force for long."

17. What is "custodial interrogation"? "Custody" means formal arrest or the deprivation of freedom to an extent associated with formal arrest. "Interrogation" means explicit questioning or actions that are reasonably likely to elicit an incriminating response. Questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his or her freedom in any significant way is called "custodial interrogation". The Court has to strike a balance between individual's right to personal freedom and the investigational rights of the police. On one hand, the Court has to prevent harassment, humiliation and unjustified detention of an accused, on the other hand it is to see that a free, fair and full investigation is not hampered in any manner. When an application for

anticipatory bail of an accused is objected to by the State on the ground of necessity of custodial interrogation, the Court can scan the materials available on record and ask the State to satisfy as to in what way the custodial interrogation would benefit the prosecution. The satisfaction of the Court would depend upon several facts viz., the nature of offence, the stage at which the investigation is pending, the materials which could not be traced out by the Investigating Agency due to absence of custodial interrogation and the benefit which the prosecution would get on account of custodial interrogation of the accused. It cannot be stated that in which particular type of cases or particular type of accused, the custodial interrogation would be mandatory. It would all depend upon the facts and circumstances of each case. No strait jacket formula could be laid down. When the accused makes out a case for anticipatory bail, it is not to be defeated by mere asking for custodial interrogation by the prosecution without satisfying the necessity for the same. Of course in terms of section 438 (2) (i) Cr.P.C., the Court can impose a condition on the accused to make himself available for interrogation by the Investigating Officer as and when required. Sometimes the custodial interrogation of suspects would give clue regarding criminal conspiracy and identity of the conspirators and it may lead to recovery of the incriminating materials. Sometimes at the crucial stage of investigation, the custodial interrogation would be a boon to the Investigating Officer. The person in custody likely to be interrogated has a right to remain silent. On some questions, he may answer and on some questions, he may remain silent or refuse to answer. Nobody can be compelled to answer to a particular question. No third-degree method is to be adopted for elicitating any answer. It is illegal to employ coercive measures to compel a person to answer. The Investigating Officer is bound to provide the arrested accused to meet an advocate of his choice during interrogation though not throughout interrogation as required under section 41-D Cr.P.C.

18. The materials so far produced by the respective parties indicate the nature of accusations against the petitioner as follows:-

(i) The petitioner allegedly threatened the intervener and his wife not to pursue the transfer of Chit Fund Scam Cases from State agency to C.B.I.

(ii) A search was made in the house of the petitioner on 25.9.2014 in the absence of the petitioner but in the presence of his son namely

Millan Panda who was provided with the copy of search list which he has received under due acknowledgement by putting his signature and date.

(iii) The necessary formalities of the provisions of search and seizure appears to have been prima facie complied with by the C.B.I. officials on 25.9.2014 during the search of the house of the petitioner.

(iv) Certain relevant documents as mentioned in Sl. Nos. 2 and 3 of the search list i.e., the visiting card and the contents of the letter written by the main accused Pradeep Kumar Sethy to the petitioner while in custody which were seized from the house search of the petitioner on 25.9.2014 prima facie establishes the close link between the petitioner and the main accused Pradeep Kumar Sethy.

(v) The wife of the petitioner namely Geetanjali Panda was running an institution namely ZICA at Janpath, Bhubaneswar and the bank documents produced by the C.B.I. prima facie shows that there was money trailing from the accounts of Artha Tatwa to the account of ZICA.

(vi) The petitioner was looking after the bail of one co-accused Jagabandhu Panda who is in jail custody in connection with this case and has kept the documents of different cases instituted against the said co-accused as well as bail application copies of Jagabandhu Panda with him which were seized under search list as mentioned in Sl. No.1.

(vii) The contention raised by the learned counsel for the petitioner that Jagabandhu Panda is a cousin of the petitioner appears to be pre-varicating.

(viii) The statement of the travel agent and documents produced by C.B.I. indicates that the main accused Pradeep Kumar Sethy booked Air Tickets for the petitioner on some occasions and made payment for the same.

(ix) Notices issued to the petitioner on 3.11.2014 and 8.11.2014 were not responded to by the petitioner even after returning performing the obsequies of his father.

19. Considering the submissions and counter-submissions expounded by the respective parties with reference to various provisions of law and materials available on record and in view of the nature and gravity of accusation and the role of the petitioner which has come out so far by way of oral and documentary evidence, it prima facie appears that the petitioner who is an influential personality and serving in an important post of police department under the State Government seems to have misutilised his official position for obvious reason. The "money trailing" to ZICA which is run by petitioner's wife Gitanjali Panda at Janpath, Bhubaneswar from the accounts of Artha Tatwa appears to have been prima facie traced out by the Investigating Agency. The materials produced by the C.B.I. in sealed cover coupled with the statement of the intervener recorded during course of investigation as well as the documents produced by the intervener by way of an affidavit also prima facie establishes the involvement of the petitioner in the "larger conspiracy angle". The nature of accusations against the petitioner as discussed in the previous paragraph is also very clinching. The apprehension expressed by the learned counsel for the C.B.I. that in the event the petitioner who has got years of experience as a police officer and his stint with the Crime Branch is ensconced with a favourable order of pre-arrest bail then his interrogation would be a futile exercise appears to have sufficient force. The further apprehension of the C.B.I. that in the event the petitioner is protected with an order of anticipatory bail, there is reasonable apprehension of tampering with the witnesses and threat to the intervener who is now a witness for the prosecution in view of the past conduct of the petitioner has also got sufficient force. Though the investigation has progressed to some extent but according to the learned counsel for the C.B.I. there are many other aspects which are to be unearthed in the case and custodial interrogation of the petitioner may provide many useful information and materials to the Investigating Agency on such aspects and grant of anticipatory bail would cause serious prejudice to the free, fair and full investigation. Without entering into a detailed examination of the materials available against the petitioner at this stage but on a brief examination of such materials and after evaluating the same with utmost care and caution, I am not inclined to exercise the discretionary power under section 438 of the Code by granting pre-arrest bail to the petitioner. The anticipatory bail application is therefore rejected.

Application rejected.

2015 (II) ILR - CUT- 395

S.N. PRASAD, J

W.P.(C) NO.19843 OF 2011

PADALA BINDU MADHAVI ……Petitioner

.Vrs.

DIRECTOR, ELEMENTARY EDUCATION, ORISSA & ORS. ……...Opp. Parties

SERVICE LAW – Transfer of Sikhya Sahayak – Contrary to the guide line formulated by the Government – Authority concerned has not disclosed any reason in the order of transfer – Held, impugned order of transfer is quashed – Matter is remitted back to the competent authority to take fresh decision in the matter in accordance with law.

For petitioner : Mr. Rama Chandra Ray
For Opp. Parties :

Date of Order : 01.05.15

ORDER

S.N. PRASAD, J

The petitioner has challenged the order dated 16.7.2011 passed by the District Inspector of Schools, Paralakhemundi whereby and whereunder she has been transferred from Relief Colony P.S/NAC under Kasinagar Block/Municipality to Chandragiri PUPS under Mohana Block/Municipality.

Case of the petitioner is that she was engaged on 22.3.2011 as Sikhya Sahayak but within short span of time within a period of less than four months order of transfer has been issued which is contrary to the guideline dated 5.7.2011 which prescribes suggestive guidelines for rationalisation of teachers at elementary level wherein provision has been made that in the schools where Shikshya Sahayaks have been posted recently without immediate need of teaching hands they may be shifted to the schools where there is dearth of teachers.

Lady teachers and teachers with physical disabilities may be posted in the schools having communication facilities, while transferring the surplus teachers from the school the station senior teacher may be taken into consideration in case of rural area but in case of schools in urban areas,

the station seniority of the teacher in that NAC or Municipality may be taken into consideration.

Case of the petitioner is that she having appointed on 22.3.2011, being lady, junior to two station seniors, i.e. Sashi Bhusan Patra and Prasad Mishra who are continuing in the same block for more than 10 years but they are not transferred.

Heard learned cousnel for the parties and perused the documents on record.

Petitioner was appointed as Sikshya Sahayak in Relief Colony P.S/NAC under Kasinagar Block/Municipality under the District Inspector of Schools, Paralakhemundi in the district of Gajapati and started serving. Guideline has been formulated by the Government wherein the following provisions have been made:

(i) In the schools where Shikshya Sahayaks have been posted recently without immediate need of teaching hands they may be shifted to the schools where there is dearth of teachers.

(ii) Lady teachers and teachers with physical disabilities may be posted in the schools having communication facilities.

(iii) While transferring the surplus teachers from the school the station senior teacher may be taken into consideration in case of rural area but in case of schools in urban areas, the station seniority of the teacher in that NAC or Municipality may be taken into consideration.

Case of the petitioner is that she being engaged on 22.3.2011 has been transferred within short span of leass than four months by office order dated 16.7.2011 in order to rationalise the PTR.

Further case of the petitioner that station seniors who are regular teacher and they were contining in the station for about more than 10 years but has not been transferred.

Further submission has been made by learned counsel for the petitioner that the petitioner is unmarried lady and it is difficult for her to go to the new station that too without following provisions made in the

guideline by the authorities and further without disturbing other persons who have been permitted to remain in the same station for last ten years.

Guideline has been made governing the transfer of Sikshya Sahayak from one place to another wherein various grounds have been given but the relevant ground which is paramount of consideration of case of the petitioner, which has been quoted above, is to be seen.

In spite of direction given by this Court on 26.7.2011 no counter affidavit has been filed.

Admittedly, petitioner is an unmarried lady and even two other persons have been permitted to remain in the same school for last ten years but petitioner who has recently been posted has been transferred within short span of less than four months on the ground of rationalisation of PTR, for rationalisation suggestive guidelines has been made wherein certain conditions have been made.

It is true that the guideline has no binding effect but in absence of any such rule, guideline is to be given paramount consideration otherwise there will be no purpose from making the guideline governing the transfer policy. In this context, judgment rendered by the Supreme Court in the case of **Union of India and others –vs-S.L.Abbas**, reported in (1993)4 SCC 357 may be seen. Hon'ble Supreme Court at paragraph-7 held:

> "xxx While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. xxx"

Since the guideline has been formulated by the Director, Elementary Education,Orissa which is supposed to be followed by the authority concerned, but while transferring the petitioner the provision of the guideline has not been followed and for that on what reason the petitioner has been transferred has also not been disclosed in the order of transfer.

Considering the fact that the order of transfer is contrary to the provisions made in the guideline, same cannot be said to be in confirmity with the said guideline.

In view of the reasons mentioned above, the order of transfer dated 16.7.2011 is hereby quashed.

The matter is remitted before the competent authority to take fresh decision in accordance with law within a reasonable period, preferably within a period of four weeks from the date of presentation of certified copy of this order. The writ petition is accordingly disposed of.

Writ petition disposed of.

2015 (II) ILR - CUT-398

K. R. MOHAPATRA, J.

F.A.O. NO. 581 OF 2014

M/S. WESCO LTD, BURLA .....Appellant

.Vrs.

PRABATI GHIBILA & ORS. .....Respondents

CIVIL PROCEDURE CODE, 1908 – O-9, R-13

Setting aside exparte decree – Delay – No material that the delay is deliberate – Rather the appellant-company acted promptly to get the exparte decree set aside when it came to its knowledge – Even if some delay has occurred, that by itself, can not constitute "negligence" of the defendant-appellant – Moreover the appellant-company has raised some substantial grounds which require adjudication – Held, the impugned order rejecting application under order 9 Rule 13 C.P.C. is set aside subject to payment of cost of Rs. 30,000/- to the plaintiff. (Paras 20, 21, 22)

Case Laws Referred to :-

1. AIR 1981 SC 1400 : Rafiq & Anr. -V- Munshilal & Anr.
2. 2013 (Suppl-II) OLR 61 : Badani Parida -V- Smt. Mahanga Parida
3. 2013 (12) SCC 649 : Esha Bhattacharjee -V- Raghunathpur Nafar Academy
4. AIR 2012 SC 1506 : Postmaster General & Ors. -V- Living Media India Ltd. & Anr.
5. AIR 2014 SC 746 : Basawaraj & Anr. -V- The Special Land Acquisition Officer

For Appellant : Mr. P.K.Mohanty, Senior Advocate, M/s. D.N.Mohapatra, Smt.J.Mohanty, P.K.Nayak, S.N.Dash & A.Das

For Respondents : M/s. S.K.Mishra, R.N.Debata, B.D.Sahu & S.S.Sahoo

Date of Judgment: 10 .07.2015

JUDGMENT

K.R. MOHAPATRA, J.

The appellant, who is defendant in C.S. No. 49 of 2012 of the court of learned Civil Judge (Senior Division), Sambalpur, has come up in this appeal assailing the order dated 24.7.2014 passed in CMA No. 17 of 2013 rejecting an application under Order 9 Rule 13 C.P.C. to set aside the ex parte judgment and decree dated 16.3.2013 and 25.3.2013 respectively in the aforesaid suit.

2. The plaintiffs are respondents in this appeal. Plaintiffs' case, in brief, is that one Prufulla Ghibila died on 30.8.2011 due to electrocution for the negligence on the part of the defendants-company and thus, his dependants-legal heirs (widow and children) filed a suit claiming compensation of Rs. 30,40,000/- with 18% interest per annum and cost.

3. It is not disputed that the defendant-appellant on receipt of summons appeared through Mr. G.K. Satpathy, Advocate on 03.08.2012 and sought for time to file written statement. Subsequently, the defendant-appellant was set ex parte due to non-appearance of its Advocate on 5.10.2012. The suit was taken up for ex parte hearing on 8.01.2013 and 14.02.2013 respectively. On 08.03.2013, argument was closed. On 16.03.2013, ex parte judgment was passed and ex parte decree was signed on 25.3.2013 by the learned Civil Judge (Senior Division), Sambalpur. Subsequently, Execution Case No. 22 of 2013 was filed by the plaintiffs and the defendant-appellant was noticed to appear and file show cause on 14.08.2013.

4. After receipt of the notice in the Execution Case No. 22 of 2013, the concerned officer of the defendant-company contacted Mr. Satpathy, learned Advocate appearing for it and requested Mr. Satpathy to look into the matter and file a petition for setting aside the ex parte judgment and decree. Again on 20.8.2013, he visited the Chamber of concerned Advocate but the learned Advocate intimated him that due to his illness, he could not enquire into the matter and also informed that as the Advocates of Sambalpur Bar Association were on strike, no steps could be taken till

strike is called off. The strike was called off on 30.9.2013. Thus, on 1.10.2013, the defendant-company contacted Mr. Satpathy, Advocate and requested him to take steps without any further delay. Again on 8.11.2013, the concerned officer contacted Mr. Satpathy, for follow up action, but on that date he, for the first time, refused to conduct the case on the plea of his illness and returned the brief to the defendant-company. On receiving the case record, the defendant-company immediately engaged another Advocate on 11.11.2013 who filed an application to inspect the case records in C.S. No.49 of 2012 as well as in Execution Case No. 22 of 2013. On 13.11.2013, the case record was made available for inspection from which it revealed that the former Advocate had not taken any step after filing Vakalatnama, therefore, the defendant-company was set ex parte and ex parte judgment was passed in the matter. Thus, without making any further delay, the defendant-company filed CMA No. 17 of 2013 under Order 9 Rule 13 C.P.C. for setting aside the ex parte judgment and decree passed in C.S. No. 49 of 2012 along with a petition for condonation of delay. To show its bona fide, the defendant-company also filed written statement along with the CMA and prayed for acceptance of the same and to allow it to contest the suit after setting aside the ex parte decree.

5. The plaintiffs-respondents filed their show cause strongly refuting the averments made in the plaint. They specifically prayed that the defendant-company has duly received the summons in the suit and was represented by an Advocate, who took time to file written statement. Due to sheer negligence on the part of the defendant-company and its Advocate, it was set ex parte and ex parte judgment was passed in the matter. They also contended that grounds taken in the petition under Order 9 Rule 13 C.P.C. as well as in the petition for condonation of delay can, at no stretch of imagination, be sufficient to condone the delay and set aside the ex parte judgment and decree and also contended that the compensation awarded was reasonable. They further contended in the show cause that the Board of Directors of the company has not authorized the C.E.O. or any other officer either to contest the suit or the CMA. Thus, CMA was not maintainable and prayed for dismissal of the same.

6. In order to prove the case, the defendant-company examined one Chandrasekhar Ray, Deputy Manager (Legal), WESCO as P.W. 1. On the other hand, the plaintiffs did not examine any witness.

7. The learned Civil Judge (Senior Division), Sambalpur considering the materials on record and the submission of the respective parties held that the party should not suffer for the latches of an Advocate but, at the same time, the party must be vigilant about progress of the case and he must keep touch with his Advocate to know the different stages of the case. The learned Civil Judge also took exception to the fact that Mr. G.K. Satpathy, leaned Advocate for the defendant-company was not examined in the case, who could have thrown light in the matter. The learned Civil Judge also took exception to the fact that though defendant-appellant had knowledge about the ex parte decree before 14.8.2013 i.e. the date of appearance in the execution case, the CMA was filed only on 15.11.2013. It was also held that the period consumed for engagement of another Advocate and inspection of case records cannot be a ground to condone the delay, particularly when the defendant-company had knowledge about the passing of the ex parte decree prior to 14.8.2013. Thus, the learned Civil Judge vide his order dated 24.7.2014 dismissed the CMA. Hence, the present appeal.

8. During pendency of the appeal, a warrant of attachment in respect of current account A/c. No. 32989620455 of the defendant-company was issued by the executing court for which the appellant filed Misc. Case No. 286 of 2014 before this Court for stay of the order of attachment. This Court considering the submission made vide its order dated 29.4.2015 stayed execution of the warrant of attachment of the current account subject to the appellant/defendant-company depositing a sum of Rs. 19,64,985/- in the executing court by 01.5.2015. Accordingly, on depositing the aforesaid amount in the executing court, the warrant of attachment has been stayed.

9. Mr. A. Das, learned counsel for the appellant-company strenuously urged that the court below was not justified in dismissing the CMA on the ground of delay in filing such petition. He also submitted that for the latches of the Advocate, a party should not suffer. The defendant-company after receiving the summons in the suit, i.e. C.S. No. 49 of 2012, engaged Mr. G.K. Satpathy, Advocate to defend its case. As such, the defendant-company remained under a bona fide impression that the learned Advocate was taking appropriate steps in the matter and would protect the interest of the company. At no point of time, Mr. Satpathy, learned Advocate engaged on its behalf, had intimated about the development of the case. As

such, no fault can be found with the company for default of the Advocate engaged on its behalf. Only on receiving the notice in the execution case, the defendant-company could come to know about passing of the ex parte decree and Mr. Satpathy was requested to take appropriate steps in the matter to set aside the ex parte decree, but due to his illness and strike (cease work) called by the Advocates of the Sambalpur Bar, immediate steps could not be taken to file a petition for setting aside the ex parte decree. Subsequently, Mr. Satpathy, learned Advocate for the company refused to conduct the case on the ground of his illness and returned the case record on 8.11.2013. Without making any further delay, the appellant-company engaged another Advocate on 11.11.2013. As the learned Advocate had no knowledge about the development of the case, he filed a petition for inspection of the case record in C.S. No. 49 of 2012 as well as Execution Case No. 22 of 2013. The case record was made available to him on 13.11.2013. On 14.11.2013, the court remained closed on the occasion of Muharam. Hence, the petition under Order 9 Rule 13 C.P.C. was filed on 15.11.2013 along with written statement, which was registered as CMA No. 17 of 2013. The CMA was accompanied with a petition under Section 5 of the Limitation Act detailing the aforesaid facts.

10. Mr. Das, learned counsel for the appellant further urged with vehemence that all through the defendant-company has acted bona fide. The company had a substantial issue to be raised in the matter as the death of Prafulla Ghibila caused due to heavy rain and lightening and not due to electrocution. Thus, there was no negligence on the part of the defendant-company which allegedly caused the death of said Prafulla. He further contended that on a bare reading of the ex parte judgment, it would appear that compensation awarded is at the higher side. He submitted that no material was placed with regard to income of the deceased. However, on a guess work, the learned Civil Judge assessed the monthly income of the deceased at Rs. 12,000/-. Thus, an inflated compensation has been awarded. The monthly income of a stone cutter in the district of Sambalpur would be much less. Moreover, the deceased Prafulla was a BPL Card Holder. He further submitted that non-examination of the conducting Advocate cannot be looked into adversely as law is well settled that conducting Advocate cannot be summoned to lead evidence in the court. On the aforesaid submission, he prayed to set aside the impugned order and direct the learned trial court to give the defendant-company an opportunity of hearing in the suit by accepting the written statement.

11. Mr. S.K. Mishra, learned counsel for the plaintiff-respondents, on the other hand, supporting the impugned order strongly refuted the contention raised and the assertion made by the learned counsel for the appellant. He submitted that the learned trial court on a vivid and detailed discussion of the materials on record and taking into consideration the legal position passed the impugned order. It is his submission that as the summons was duly served on the defendant-company, it has to establish that the company was prevented by sufficient cause from appearing in court when the suit was called for hearing. Reiterating the observation made by the learned trial court, he submitted that there is no conflict on the legal position that a party should not suffer for the latches of his Advocate, but at the same time, the party must be vigilant about progress of the case and he must keep touch with his Advocate to know about the different stages of the case. Order 8 Rule 1 C.P.C. mandates that the defendant-company should file a written statement within thirty days from the date of service of summons on it and in no circumstance, it should be later than ninety days from the date of service of summons. The present appellant-company has a Law Department and the suit as well as the execution case is being looked after by a responsible officer, who is none other than the Deputy Manager (Legal) posted in the office at Burla. Said Deputy Manager (Legal), who is P.W. 1, in his evidence, did not depose regarding steps taken by him in the suit after the matter was entrusted to Mr. G.K. Satpathy, Advocate. Mr. Mishra also raised the question about the diligence of the appellant as well as its Advocate to defend the case in the suit. The CMA does not disclose about the steps taken by the company in between 10.7.2013 to 3.11.2013 which was admitted by P.W. 1 in his evidence. Register containing the receipt of letters though available with the company was not produced in the court and no complaint about the alleged negligence of Mr. Satpathy, learned Advocate was made before the State Bar Council by the company. Thus, he submitted that no sufficient cause has been shown either for condonation of delay or to set aside the ex parte decree. The award of compensation is just and reasonable. As such, the appeal merits no consideration and the same is liable to be dismissed.

12. It is not disputed at the Bar that in C.S. No. 49 of 2012, the defendant-appellant entered appearance on 3.8.2012 through Mr. G.K. Satpathy, Advocate and sought for time to file written statement. However, on 5.10.2010, the defendant-company was set ex parte due to non-appearance of its Advocate. Ex parte hearing of the case was taken up

on 8.01.2013 and 14.02.2013, ex parte judgment was pronounced on 16.3.2013 and ex parte decree was signed on 25.3.2013. The company had engaged Mr. G.K. Satpathy who entered appearance in the suit on 3.8.2012 and sought for time to file written statement in the suit. Normally, the Advocate engaged on behalf of a party intimates about the stages of the suit to his client so that proper step can be taken at the right time to defend the case effectively and the client acts as per the instruction of the Advocate. When Mr. Satpathy did not appear on 5.10.2012 and take appropriate steps to file written statement, no fault can be found with the appellant-company for such default. It is a different matter that the company should be vigilant to take steps on its own, but when it has engaged an Advocate to defend the suit, the company has to act as per the instructions of its counsel and it so happened in the instant case. Law is no more *res integra* that the court should not be a silent spectator to a situation, where an innocent party is suffering injustice merely because his chosen advocate defaulted to take appropriate steps at the relevant time. Mr. Mishra, learned counsel for the respondent does not dispute this position of law. This view gets support of the decision of the Hon'ble Supreme Court in the case of ***Rafiq & Anr vs. Munshilal & Anr.,*** reported in AIR 1981 SC 1400 which reads as follows:

> "..... The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted……."

13. On the other hand, Mr. Mishra, learned counsel for the respondents relied upon the decision in the case of ***Badani Parida –v-Smt. Mahanga Parida,*** reported in 2013 (Suppl.-II) OLR 612, wherein, this Court relying upon the decision of the Hon'ble Apex Court held in the facts and circumstances of the case that grounds of Lawyer's latches cannot be clothed to cover up the latches of the party. The facts and circumstance of that case is quite different in the case at hand.

14. In view of the above, I have no hesitation to hold that the appellant-company should not suffer for the latches, if any, for the default of its Advocate on the date it was set ex parte.

15. Mr. Das, learned counsel for the appellant, however, submitted that had the appellant been aware about the default of the Advocate engaged on its behalf, it could have taken appropriate steps immediately but to its misfortune, the appellant-company was never intimated about the same and it came to know about the ex parte decree only on receipt of the notice in Execution Case No. 22 of 2013. On receipt of the notice in the said execution case, the concerned officer of the company immediately contacted Mr. Satpathy, Advocate immediately and apprised him about the notice received in the execution case and the ex parte decree passed in the suit. He also requested Mr. Satpathy, Advocate to take steps to get the ex parte decree set aside. The appellant-company through its representative again contacted Mr. Satpathy on 20.8.2013 for follow up action, but the learned Advocate intimated that due to his illness, he could not enquire into the matter and as the Lawyers of Sambalpur Bar Association were on strike, proper steps could be taken only after the strike is called off on 30.9.2013. Thus, on 1.10.2013, the appellant visited the learned Advocate and requested him to take steps immediately without any further delay. Again on 8.11.2013, the concerned Officer of the appellant-company contacted Mr. Satpathy for follow up action. But he refused to conduct the case and returned the brief to the appellant. Thus, the appellant-company engaged another Advocate on 11.11.2013, who filed an application for inspection of case records. The case record was made available on 13.11.2013 for inspection. On 14.11.2013 being a holiday, the CMA was filed on 15.11.2013. Thus, the delay caused in filing the CMA was not deliberate and the same was bona fide.

16. Mr. Mishra, learned counsel for the respondents, on the contrary, further contended that such submission cannot be taken into consideration because there is no pleading regarding steps taken in the petition filed under Order 9 Rule 13 C.P.C. between 10.7.2013 to 13.11.2013 by the defendant-company, which was admitted by P.W. 1 at paragraph-4 of the cross-examination.

Order 6 Rule 2 C.P.C. reads as follows:

"**2.** ***Pleading to state material facts and not evidence*****.—**

(1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

(2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words."

17. It is the trite law that the basic and cardinal rule of pleadings are that the pleading has to state the 'material facts' and not the evidence. It mandates that every pleading shall contain and contain only, a statement in a concise form of the material facts on which the party pleads, relies for his claim or defence.

The expression 'material facts' has not been defined. But those facts upon which a party relies for a claim or defence, are called the 'material facts'. In other words, it is a concise form of statement of the plaintiff's cause of action or defendants' defence depends. However, 'particulars' need not be pleaded. Particulars are given during course of evidence, which gives a final touch to the pleadings.

In the instant case, though a concise statement of fact has been stated in the petition under Order 9 Rule 13 C.P.C., the same is elaborated in evidence of P.W. 1 by providing particulars. Though P.W.1 was thoroughly cross-examined, no suggestion with regard to the inaction of the appellant-company in between 10.7.2013 to 13.11.2013 was put to him. This being an application under Order 9 Rule 13, CPC, I refrain myself from analyzing the pleadings in the light of Rule 4 of Order 6 C.P.C. Thus, taking a liberal approach, this Court is of the view that concise statement of facts in the petition under Order 9 Rule 13 C.P.C. has been elaborated in the evidence of P.W. 1, which was not rebutted effectively by the respondents.

18. Mr. Das, learned counsel for the appellant further submitted that there should be a liberal, pragmatic, justice oriented and non-pedantic approach while dealing with an application under Order 9 Rule 13 C.P.C. and 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. He also submitted that substantial justice being paramount and pivotal the technical consideration should not be given undue and uncalled for emphasis. Borrowing these language from a decision of the Hon'ble Supreme Court in the case of ***Esha Bhattacharjee Vs. Raghunathpur Nafar Academy***, reported in 2013 (12) SCC 649, he further submitted that these principles are squarely applicable to the facts of the case at hand.

19. Mr. Mishra, learned counsel for the respondents, on the other hand, submitted that the appellant-company, namely, WESCO, has a Department of Law and the instant suit was in-charge of an officer who is none other than Deputy Manager (Legal) of the appellant-company. He could have taken appropriate steps in the matter. It is due to his negligence and latches, inordinate delay has been caused in filing the CMA. He also in support of his case relied upon the decisions in the case of ***Postmaster General and others Vs. Living Media India Limited and another***, reported in AIR 2012 SC 1506 and in the case of ***Basawaraj and another Vs. The Special land Acquisition Officer,*** reported in AIR 2014 SC 746. Thus, no liberal approach should be made to the facts and circumstances of the case. He also submitted that the dependants of a daily wage earner had filed the suit claiming compensation for negligence on the part of the appellant-company. The learned court below making a thread bare discussion on the materials available on record has come to a definite finding that there is no sufficient cause either for non-appearance of the appellant-company when the matter was called for hearing or for condonation of delay.

20. There is no quarrel over the fact that the appellant-company has a Law Department and is a Corporate Body and the instant suit was in the charge of Deputy Manager (Legal) of the company. Had the appellant-company been more vigilant, the situation might have been avoided, but the court below while adjudicating the matter should have kept in mind that a man becomes prudent after an incident occurs. Fact remains, on a good-faith, the appellant-company relied upon its Advocate who did not take appropriate steps at the relevant time to defend his client. However, on being aware about the fact of the suit, the appellant-company tried its best to get the ex parte decree set aside and contest the suit on merit. True it is that some delay has occurred in approaching the Court to file an application under Order 9 Rule 13 C.P.C., but that should not stand on the way of

substantial justice being done in view of the fact that the appellant-company has tried its best, in the facts and circumstances of the case, to get the ex parte order set aside. There is no quarrel to the principles laid down by the Hon'ble Apex Court in the case of *Postmaster General and others* (supra). But, the same are distinguishable on facts. In the case of *Postmaster General and others* (supra), the delay caused in observing the necessary official formalities was not accepted to be sufficient cause for condonation of delay. But in the instant case, the delay has occasioned primarily due to the inaction of learned Counsel. In the case of *Basawaraj and another* (supra), the expression "sufficient cause" has been described at Paragraph-9 of the said judgment, which is quoted herein below.

> 9. Sufficient cause is the cause for which defendant could not be blamed for his absence. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude, which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case, duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive". However, the facts and circumstances of each that the party has "not acted diligently" or "remained inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the Court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the Court should not allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose."
>
> (See: Manindra Land and Building Corporation Ltd. Vs. Bhootnath Banerjee and others, AIR 1964 sc 1336; Lala Matadin Vs. A.Narayanan, AIR 1970 SC 1953; Parimal Vs. Veena @ Bharti,

AIR 2011 SC 1150; and Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai, AIR 2012 SC 1629)

In the case at hand, no material is placed before this Court to come to a conclusion that the delay caused in filing the CMA is deliberate. Moreover, there are materials to show that the appellant-Company acted promptly to get the ex parte decree set aside, when it came to its knowledge. In the facts and circumstances, some delay has occurred, but that by itself, cannot constitute 'negligence' of the defendant-appellant. Thus, in the facts and circumstances discussed above, taking a liberal view, this Court feels that the cause assigned by the appellant-company is sufficient to condone the delay as well as to set aside the ex parte decree, more particularly when the appellant-company in the written statement filed along with the petition under Order 9 Rule 13 C.P.C., a copy of which has been produced before this Court at the time of hearing of this appeal, has raised some substantial grounds which require adjudication.

21. Another material aspect while considering the petition under Order 9 Rule 13 C.P.C. is whether the appellant-defendant would be prejudiced by setting aside the ex parte decree and if the same can be compensated with cost. In the instant case, the dependants of the deceased Prafulla Ghibila had filed the suit in the year, 2012 and the first date of appearance of the defendants was on 3.8.2012. The ex parte judgment was passed on 16.3.2013 and the decree was signed on 25.3.2013. The petition for setting aside the ex parte decree i.e. C.MA. No. 17 of 2013 was filed on 15.11.2013. In this process, though a decree was passed in favour of the plaintiffs, they are prevented from enjoying the fruits of the decree since 25.3.2013. If the ex parte decree is set aside, they have to fight out the litigation to establish their rights. Pursuant to the order dated 29.4.2015 passed by this Court in Misc. Case Non. 286 of 2013, the decreetal amount of Rs.19,64,985/-, which includes compensation amount, interest accrued and cost, has already been deposited in the executing court by the appellant-company. Hence, there would be no difficulty in realizing the decretal amount, if occasion arises. Taking into the aforesaid facts and circumstances of the case, this Court feels that a cost of Rs. 30,000/- (Rupees thirty thousand only) would be just and proper to meet the ends of justice.

22. In view of the above, the impugned order dated 24.7.2014 passed in CMA No. 17 of 2013 arising out of C.S. No. 49 of 2012 by the learned

Civil Judge (Senior Division), Sambalpur is set aside subject to payment of cost of Rs. 30,000/- (Rupees thirty thousand only) to the plaintiff-respondents within a period of one month from today. It is further directed that on payment of cost as directed above, the learned Civil Judge (Senior Division), Sambalpur shall accept the written statement and settle the issues and proceed with the trial of the case in accordance with law. An endeavour shall be made to dispose of the suit at an early date, preferably within a period of six months from the date of acceptance of the written statement.

23. With the aforesaid observations and directions, the appeal is allowed.

Appeal allowed.

2015 (II) ILR - CUT- 410

DR. D.P. CHOUDHURY, J

CRIMINAL APPEAL NO. 327 OF 1992

AMAR JENA ……..Appellant

.Vrs.

STATE OF ORISSA …..…Respondent

DOWRY PROHIBITION ACT, 1961 – S.4

Demand of dowry – Initial burden is on the prosecution to prove that there was demand of dowry by the accused either directly or indirectly and there after the burden will be shifted to the accused to prove that he has neither demanded nor received any dowry from the bride or on her behalf.

In the present case evidence of P.W. 1 (father of the deceased) after cross-examination does not prove that the accused had demanded any dowry – Similarly though P.W.3 deposed that the accused side demanded Rs. 2000/- and a cycle he has not spelt out who demanded the same – In the other hand evidence of P.W.4 (brother of the deceased) does not disclose the demand of dowry by the accused from him or from his father – Learned trial court failed to properly appreciate their evidence – So the initial burden on the prosecution having not been discharged, question of shifting the

burden to the accused to prove his innocence does not arise – Held, impugned order of conviction and sentence is set aside – Appellant is acquitted of the charge of offence U/s. 4 of the D.P.Act.

(Paras 17 to 22)

Case Laws Referred to :-

1. (1995) 6 SCC 219 : State of Himachal Pradesh Vs. Nikku Ram & Ors.
2. 2014 (6) Supreme 533 : State of Rajasthan Vs. Chandgi Ram & Ors.
3. (2008) 39 OCR (SC)-573 : Kunju @ Balachandran Vs. State of Tamil Nadu
4. AIR 1989 SC 1141 : Gopal Saran Vs. Satyanarayan reported in
5. AIR 1957 SC 614 : Vadivelu Thevar Vs. State of Madras

For Appellant : M/s. K.N.Jena, A.K.Mohapatra, P.K.Jena, D.K.Mohapatra & Mrs R.Rath

For Respondent : Addl. Standing Counsel

Date of Argument : 30.04.2015
Date of Judgment ; 13.05. 2015

JUDGMENT

DR. D.P. CHOUDHURY, J.

This appeal is directed against the judgment of conviction and order of sentence dated 14.09.1992 passed by the learned Addl. Sessions Judge, Bhadrak in S.T. Case No.26/12 of 1992, whereby the appellant (hereinafter called the 'accused') was convicted under section 4 of the Dowry Prohibition Act, 1961 (hereinafter referred to as the 'Act') and sentenced to undergo Rigorous Imprisonment for one year.

2. The factual matrix leading to the case of the prosecution is that in June, 1990, the accused had married to deceased Basanti Jena, the daughter of the informant, according to Hindu rites and customs. It is alleged, inter alia, that before the marriage, the elder brother of the accused had demanded cash of Rs.2,000/- and a bicycle towards dowry. At the time of marriage, dowry amount of Rs.1,500/- was paid by the informant with an assurance to pay the rest amount of Rs.500/- and a bicycle to the accused later on. Since the said amount of Rs.500/- and the bicycle were not delivered within one year of marriage, the accused and his relatives started

torturing the deceased, both mentally and physically. On many occasions, the deceased informed her parents about the torture meted out to her by the accused and his relatives on the demand of dowry. On 24.03.1991, Kalandi Jena, the elder brother of the deceased, visited the house of the accused and, during his stay, witnessing the assault inflicted by the accused to the deceased, he interfered. On 28.03.1991, Binod Jena, the elder brother of the accused, asked the informant to visit their house as the deceased was not well. On 29.03.1991 at 8 A.M., when the elder brother of the deceased reached the house of the accused, found the deceased dead. Marks of injuries were noticed on her dead body. Thereafter, on 30.03.1991, F.I.R. was lodged by the informant alleging dowry death against the accused. The concerned O.I.C. registered a case under sections 498A/304B of the I.P.C. read with section 4 of the Act. During investigation, inquest over the dead body was made, post-mortem examination was conducted and material witnesses were examined under section 161 of the Cr. P.C. After due investigation, charge-sheet under section 306 of the I.P.C. was submitted by the police against the accused. But, it is found that charges have been framed under sections 498A/304B of the I.P.C. read with section 4 of the Act against the accused by the learned Addl. Sessions Judge. The order-sheet dated 29.04.1992 shows that charge under section 306 of the I.P.C. has been framed against the accused, perhaps due to typographical error. When the charge form vide separate sheet denotes framing of charges under sections 498A/304B of the I.P.C. read with section 4 of the Act, the contents thereof were read over and explained to the accused by the learned Addl. Sessions Judge and the accused pleaded not guilty and claimed trial, the typographical mistake appearing in the order-sheet cannot be pressed into service. However, the accused faced his trial for the commission of the offences punishable under sections 498A/304B of the I.P.C. read with section 4 of the Act. Hence, the case of the prosecution.

3. The plea of the accused, as revealed from the cross-examination made to the prosecution witnesses and his examination made under section 313 of the Cr. P.C., is that he is innocent and the allegations made against him are false. The specific plea taken by him is that his wife, who was suffering from stomach upset, was taking medicines and, at the time of her death, he was serving at Rourkela and was not present in his house. On the other hand, he has taken a plea of alibi.

4. The learned Addl. Sessions Judge, after considering the evidence of five witnesses examined from the side of prosecution, two witnesses

examined on behalf of defence and the documents available on record, acquitted the accused of the offences punishable under sections 498A/304B of the I.P.C., but convicted him for the offence punishable under section 4 of the Act and sentenced him thereunder to undergo Rigorous Imprisonment for one year.

5. Learned counsel appearing for the appellant submitted that cognizance of the offence under the Act has been taken although being barred by limitation for which the entire proceeding is illegal. He further submitted that since previous sanction of the State Government is necessary for proceeding against the accused under the provisions of the Act, the proceeding for the offence punishable under section 4 of the Act is not maintainable due to lack of such sanction. Submission was further advanced that there is neither evidence to show the demand of dowry by the accused, nor there is any sort of evidence indicating payment of any dowry amount to the accused for which the order of conviction and sentence under the Act is vulnerable and liable to be interfered with. During course of argument, learned counsel for the appellant did not emphasize on the point of limitation or on the question of sanction, but strenuously submitted that in the absence of evidence as to the demand of dowry by the accused and payment thereof, the conviction and sentence recorded by the learned Addl. Sessions Judge should be set aside and the accused should be acquitted.

6. Learned Addl. Standing Counsel appearing for the State Government submitted that there are evidences of prosecution witnesses showing the demand of dowry of Rs.2,000/-, payment of cash of Rs.1,500/- to the accused and his relatives and demand of rest of dowry amount of Rs.500/- and a bicycle. He also submitted that even if this is an appeal of the year 1992, but since the allegation of demand of dowry is on the rise in society, no leniency should be extended to acquit the accused.

7. Since the State Government has not preferred appeal against the order of acquittal, this Court is only concerned with the appeal against the conviction and sentence under section 4 of the Act against the accused. So, the sole point for consideration is whether the accused demanded cash of Rs.2,000/- or any amount thereof and a bicycle, directly or indirectly, from the parents or other relatives or guardian of the deceased ?

8. Section 4 of the Act states as follows :

"4. **Penalty for demanding dowry**. - If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees;

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for term of less than six months".

9. The definition of "dowry" as per section 2 of the Act is as under :

"In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly –

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before (or any time after the marriage) (in connection with the marriage of the said parties but does not include) dower or *mahr* in the case of persons to whom the Muslim Personal Law (*Shariat*) applies".

10. From the above provisions of law, it is construed that the demand of dowry can be made before the marriage, during the marriage and after the marriage, although the same does not include dower or *mahr* in case of persons to whom Muslim Personal Law applies. It is further found from the provisions of law that dowry means any property, including valuables or valuable security, given or agreed to be given either directly to the party concerned by one party or indirectly to the party concerned by one party. But the crucial question is that such give and take should be connected with the marriage of the said parties. In the case of ***State of Himachal Pradesh*** Vs. ***Nikku Ram & Ors.*** reported in **(1995) 6 SCC 219,** Their Lordships have been pleased to observe as under :

"Dowry, dowry and dowry. This is the painful repetition which confronts, and at times haunts, many parents of a girl child in this holy land of ours where, in good old days the belief was : "Yatra Naryastu Pujyante ramente tetra dewatah" (where woman is worshipped, there is abode of God). We have mentioned about

> dowry thrice, because this demand is made on three occasions : (i) before marriage; (ii) at the time of marriage; and (iii) after the marriage. Greed being limitless, the demands become insatiable in many cases, followed by torture on the girl, leading to either suicide in some cases or murder in some".

The aforesaid authority has also been followed by Their Lordships of the Hon'ble Apex Court in the case of ***Bhim Singh & Anr*** Vs. ***State of Uttarakhand***, reported in (2015) 60 OCR (SC) at page 984 at paragraph-11.

11. With due respect to the said decision, it is found that demand of dowry can be made at any stage, but that must be related to the marriage between the parties. Whenever any person is prosecuted for taking dowry under section 3 of the Act or demanding dowry under section 4 of the Act, the burden of proof lies on that person to the effect that he has not committed such offence. So, undoubtedly, onus lies on the accused to prove that he has neither demanded dowry nor received any dowry either directly or indirectly. In addition to this, in the present case, the accused has taken the plea of alibi to the effect that during the death of the deceased, he was living at Rourkela. Since the appeal is concerned with demand of dowry, the plea of alibi by the accused is of no help. Now, the question arises as to how the accused has discharged the onus under section 8A of the Act. At the same time, it is the initial burden on the prosecution to prove that there was demand of dowry by the accused, either directly or indirectly and receipt of the same from bride or on her behalf, after which the same will be shifted to the accused to discharge onus under section 8A of the Act.

12. Before going to discuss on the evidences of prosecution witnesses, the principle of appreciation of evidence of a witness must be considered. In the case of ***Vadivelu Thevar*** Vs. ***State of Madras*** **(AIR 1957 SC 614),** Their Lordships have been pleased to observe at paras-11 & 12 that :

> "Hence, in our opinion, it is a sound and well-established rule of law that the Court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely :
>
> (1) Wholly reliable.
> (2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the Court should have no difficulty in coming to its conclusion either way it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in this third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if Courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses".

13. With due respect to the said decision, I find that it is not necessary that the evidences of witnesses should be rejected in toto, but the same should be scrutinized with caution to find out how far the statements of witnesses can be reliable and acceptable. If it is totally unreliable, then the same should be rejected; but if it is reliable, then the same should be accepted in toto. In the third category, the evidence of a witness may be partly reliable and partly unreliable. Moreover, in the decision reported in **(2008) 39 OCR (SC)-573** ***(Kunju @ Balachandran*** Vs. ***State of Tamil Nadu)***, Their Lordships have been pleased to observe at para-10 that :

"xxx xxx xxx

It is for the Court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise".

With due respect to the said decision, I find that a duty is cast on the Court to find out how far the evidence of a single witness passed the test of credibility for its acceptance. On the other hand for such acceptance cross-examination of witnesses must be taken into consideration. Section 138 of the Evidence Act has to be gone through to find out the purpose of cross-examination of the witnesses.

14. The examination in chief and cross-examination of a witness must relate to the relevant facts, but the cross-examination need not be confined

to the facts elicited in examination in chief. A witness must be asked the questions to test his veracity to discover who he is and what his position in life is and to ask his credibility by injuring his character. Cross-examination is an important purpose to achieve that has exposed the truth. Full opportunity should be given for the same. It should not be curtailed on one pretext or the other. He should not be cross-examined as to any collateral independent fact, irrelevant to the fact in issue ("Lecturers on the Indian Evidence Act, 1872" written by Justice U.L. Bhat), 2015 Edition at page 337). In the case of ***Gopal Saran*** Vs. ***Satyanarayan*** reported in **AIR 1989 SC 1141,** Their Lordships have been pleased to observe at paragraph-5 :

"…. Therefore, it would not be safe to rely on the Examination-in-chief recorded which was not subjected to cross-examination….."

15. With due respect to the said decision, I find that the evidence is substantive one if a person is given full opportunity to cross-examine a witness of the opponent. In addition to the provision of section 138 of the Evidence Act, section 146 of the Evidence Act can be pressed into service – (i) to test the veracity of a witness; (ii) to discover who he is and what is his position in life; or (iii) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture. Of course, there is a provision, which has been recently added by way of amendment for the witnesses to be cross-examined in cases of sexual offences. Be that as it may, the evidence of a witness can be a substantive piece of evidence provided he is tested during cross-examination, otherwise the evidence without cross-examination cannot be legally admissible as per the decision in the case of ***Gopal Saran*** Vs. ***Satyanarayan*** (supra).

16. Bearing in mind the settled principles, as discussed above, let me find out if at all the evidences of the witnesses examined from the side of the prosecution have proved the offence under section 4 of the Act against the accused.

17. P.W.1, who is none other than the unfortunate father of the deceased, has stated in examination-in-chief that he had given cash of Rs.1,500/-, along with other articles, and cash of Rs.500/- and a bicycle were to be given to the accused after the marriage. Due to paucity of funds, he could not give the cash of Rs.500/- and the bicycle to the accused. In

further examination-in-chief, he revealed that his son had gone to the house of his deceased daughter and after return suggested to give the cash and the bicycle. In cross-examination at para-4, he revealed that the entire talk of marriage, including 'Daba Neba' (give and take), was with Binod in presence of two others from their side and one of them was the brother-in-law of the accused, but he did not utter the name of other one. Further, he has stated in para-5 that they gave articles as per their sweet will; but pursuant to the demand, cash of Rs.1,500/- was given and the rest amount of Rs.500/- and a bicycle could not be given. They assured the accused side to give the bicycle and money afterwards. But, it is not revealed from his evidence that if the accused had demanded any cash of Rs.500/- or the bicycle, either directly or indirectly, as 'Daba Neba' was only made by Binod, who is said to be the elder brother of the accused, and other relatives of the accused. It is not forthcoming from his evidence as to whom he gave the demanded cash of Rs.1,500/-. So, the evidence of P.W.1 after cross-examination does not prove any demand of dowry by the accused or payment of dowry to the accused.

18. P.W.2 is not a witness to the demand of dowry or receipt of the dowry amount by the accused, although he is a witness to the rest of the allegations made against the accused. P.W.3, who is the mediator in the marriage, revealed that the accused side had demanded Rs.2,000/- and a bicycle; but, at the time of marriage, Rs.1,500/- with other articles were given. Again he has stated that after the marriage, the accused side created problem and demanded the residue amount of Rs.500/- and the bicycle from the bride side; but, he has not spelt out who demanded the dowry of Rs.2,000/- and the bicycle, to whom part amount towards dowry was paid and who demanded the residue amount of Rs.500/- and the bicycle. He has been cross-examined at length. Even if the statement of the witness does not spell out the material facts in examination-in-chief, but his cross-examination can be taken into consideration so as to evaluate his evidence as per the discussions made in the above paragraphs. In para-3 of his cross-examination, P.W.3 revealed that the marriage was finalized four days prior to its solemnization. Besides him, Bijay Jena & Binod Jena from Nandigaon, Jogi Naik & Narana Das from Nandapur and some others were present when the marriage was finalised. He further revealed that he himself had given Rs.700/- on the date of 'Lagna' and Rs.800/- on the date of marriage after 'Hastabandhana' by bringing the same from P.W.1. In para-4 of his cross-examination, it is revealed by him that P.W.1 expressed

his ability to give Rs.1,500/- and, if possible, to give the residue amount of Rs.500/- and the bicycle afterwards. In further cross-examination, he revealed that he had talked with accused Amara and his brother Binod for their unjust demand of Rs.500/- and a bicycle, but he has not told anyone about the residue demand from the accused side. Thus, he revealed such fact for the first time. He also revealed in the same para of cross-examination that the accused and Binod demanded Rs.500/- and a bicycle on the date of marriage for the first time to which P.W.1 agreed to give the same afterwards, if possible. Thus, the statement of P.W.3 has varied from stage to stage while he was grilled during cross-examination. If at all there was demand of Rs.2,000/- and a bicycle as dowry from the beginning and after the marriage, there was demand of Rs.500/- and a bicycle; but, subsequently, in cross-examination he stated that for the first time at the time of marriage Rs.500/- and a bicycle were demanded by the accused and his brother Binod Jena. So, the varied statement of P.W.3 lacks credibility being inconsistent. His statement is not cogent to show as to when and where such amount and the bicycle were demanded by the accused and his brother from P.W.1. Moreover, P.W.1 has not expressed in his evidence, as discussed, that the accused and his brother demanded Rs.500/- and a bicycle. So, the evidence of P.W.3 after vivid cross-examination is found to be not consistent, clear and trustworthy to prove that the accused had demanded Rs.2,000/- and a bicycle, received Rs.1,500/- and further demanded Rs.500/- and bicycle. The learned trial Court has failed to appreciate the evidence of P.W.3 properly, as transpired from the impugned judgment, and, consequently, the learned trial Court has erred in law by observing that 'Daba Neba', demand of cash of Rs.500/- and a bicycle have been proved by P.W.3.

19. P.W.4 is none other than the brother of the deceased. So, being the brother of the deceased, his evidence requires close scrutiny. In the case of ***State of Rajasthan*** Vs. ***Chandgi Ram & Ors.*** **[2014 (6) Supreme 533],** Their Lordships have been pleased to observe at para-18 that :

"Reliance can also be placed upon Dinesh Kumar v. State of Rajasthan – 11 (2008) 8 SCC 270, wherein in paragraph 12, the law has been succinctly laid down as under :

12. In law, testimony of an injured witness is given importance. When the eye witnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to

conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence".

20. With due respect to the said decision, I find that the evidences of related witnesses cannot be thrown out outright, but their evidences should be scrutinized with caution. At times, the evidences of related witnesses carry much weight because in a family dispute it is the relatives who can speak the ring of truth and it is the duty of the Court to separate the grain from the chaff. At the same time, the Court is required to scrutinize the evidences of such related witnesses very carefully before placing reliance upon the same, not necessarily that corroboration to the evidences of related witnesses is always desirable. On the other hand, the evidences of related witnesses can be accepted subject to the facts and circumstances of each case. Keeping in mind these principles, the evidence of P.W.4 can be scrutinized to find out if at all he has proved the demand of dowry by the accused and receipt of dowry by the accused.

21. P.W.4 revealed in examination-in-chief that Rs.1,500/- was given to the accused side i.e. Rs.700/- on the date of 'Lagna' and Rs.800/- on the date of the marriage. According to him, he had been to the house of his sister on 24.03.1991 and found the accused beating her. On query, his sister informed that she was being beaten up and tortured for not giving cash of Rs.500/- and a bicycle. Thus, his evidence does not spell out the demand of dowry by the accused from him or from his father. In para-4 of his cross-examination, he revealed that he himself had not given the money nor he had seen it being given. So, he is not an witness to the payment of Rs.1,500/- to the accused side, as revealed from his evidence in cross-examination. In para-6 of cross-examination, denying the suggestion of defence, he stated to have mentioned before the Investigating Officer that his sister told that she was being beaten up and tortured for not giving cash of Rs.500/- and a bicycle; but P.W.5, the Investigating Officer, when was confronted with the same, denied about such statement made by P.W.4 before him. Thus, he has contradicted his earlier statement about the

allegation of his sister before him for not giving cash of Rs.500/- and a bicycle. So, the evidence of P.W.4, after proper scrutiny, does not inspire confidence to prove that the accused had received Rs.1,500/- as dowry amount and made further demand of cash of Rs.500/- and a bicycle from the bride side.

22. Now, after going through the impugned judgment, it appears from para-10 that the learned trial Court believed from the evidence of P.Ws.1 & 3 that there was demand of Rs.1,500/- and the same was paid to the accused; but the learned trial Court has lost sight of appreciation of their evidence, as discussed above, for which landed in a wrong conclusion that the offence punishable under section 4 of the Act has been established. On the other hand, the evidence of prosecution witnesses, as discussed in the foregoing paragraphs, did not establish by consistent, clear and cogent evidence that the accused had demanded Rs.2,000/- and a bicycle, received Rs.1,500/- and further demanded Rs.500/- and a bicycle from the deceased or her father. So, the initial burden on the prosecution has not been discharged for which the question of shifting the burden to the accused to prove his innocence does not arise. In view of the discussions indicated above, the order of conviction and sentence cannot be sustained and is liable to be set aside.

23. In the result, the appeal is allowed and the order of conviction and sentence is set aside. The appellant is acquitted of the charge of the offence under section 4 of the Dowry Prohibition Act, 1961 and the bail-bonds furnished by him stand discharged.

Appeal allowed.