D.H.WAGHELA, C.J. & BISWANATH RATH, J.

W.P.(C) NOS. 10308, 10331 & 10961 OF 2015

M/S. ABC TRANS CARRIERS PVT. LTD. ……..Petitioner

.*Vrs.*

PARADIP PORT TRUST & ORS. ……..Opp. Parties

TENDER – Tender conditions can not be changed after the tender is opened.

In this case PPT issued e-Tender inviting eligible bidders for installation of three Harbour Mobile Cranes (HMCs) – No stipulation for grant of fourth HMC to M/s. Bothra by the same tender process – However after opening of tenders, the tender committee had decided to issue license for the fourth HMC without proper tendering process – It is also not proved on record that the petitioners were taken into confidence before the tender committee had decided to issue license for the fourth HMC – Denial of equal opportunity to the other prospective bidders in public interest – Action of PPT is violative of Article 14 of the Constitution of India which is to the benefit of M/s. Bothra Shipping Service Pvt. Ltd. and to the detriment of the petitioners – Some under hand dealing and prior understanding could be inferred from the demeanours of the tender committee – The action of the tender committee/authority has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism and in pursuit of promotion of healthy competition and equitable treatment – Held, tender conditions can not be changed after the tender is opened – Letter of intent Dt. 28.3.2015 for grant of license to M/s. Bothra Shipping Service Pt. Ltd. along with transactions consequential thereto are all set aside as illegal and arbitrary as far as the parties herein are concerned.

(Paras 10 to 14)

Case Laws Referred to :-

1. (2007) 14 SCC 517 : Jagdish Mandal vs. State of Orissa & Ors.
2. AIR 1993 SC 352 : R.N.Gosain v. Yashpal Dhir
3. (1994)6 SCC 651 : Tata Cellular Vs. Union of India,
4. (2006)11 SCC 548 : B.S.N.Joshi & Sons Ltd. v. Nair Coal Services Ltd.
5. AIR 1990 SC 393 : Raunaq International Ltd. v. I.V.R.Construction Ltd. & ors,

6. (2012)10 SCC.1 : Natural Resources Allocation, In re, Special Reference No.1 of 2012
9. AIR 1985 SC 1147 : Ram and Shyam Company v. State of Haryana & ors.,
10. AIR 2012 SC 2915: M/s. Michigan Rubber(India)Ltd. v. State of Karnataka,
11.(2012)5 SCC 559 : Arup Das & ors., v. State of Assam & Ors.
12.(2010) 10 SCC157 : M/s. Coal India Ltd. & Ors. v. Alok Fuels(P) Ltd,

For Petitioner : Dr. Ashok Ku. Mohapatra, Senior Advocate,
Mr. Sanjit Mohanty, Senior Advocate,
M/s.Digambara Mishra, S.K.Satapathy

For Opp. Parties : M/s.Goutam Mishra, D.K.Patra & A.Dash
Mr. B.Gupta, Senior Advocate,
M/s.Keshab Ch. Kar, G.M.Rath & S.S.Padhy
M/s.Bijay Laxmi Tripathy, CGC
M/s.Bibekananda Nayak,
S.K.Panda, C.Satapathy

Date of Hearing : 14. 07. 2015
Date of Judgment: 27. 07. 2015

JUDGMENT

D.H.WAGHELA, C.J.

1. These three petitions by successful bidders for license to supply, install, commission, operate and maintain three Harbour Mobile Cranes ('HMC' in short) are argued and heard together and disposed by this common judgment.

2. The petitioners M/s. ABC Trans Carriers Pvt. Ltd ('ABC' in short), M/s. Orissa Stevedores Ltd ('OSL' in short) and M/s. Viable Infrastructures & Logistic Pvt. Ltd. ('Viable' in short) have approached this Court mainly against Paradip Port Trust and its officers ('PPT' for short) and M/s. Bothra Shipping Service Pvt. Ltd ('Bothra' in short) with the main prayer to quash the decision of the Tender Committee to award license for fourth HMC in favour of M/s. Bothra.

The facts and contentions being similar in all the petitions, relevant facts are taken from W.P.(C) No. 10308 of 2015.

3. The facts relevant for the present purpose are that PPT had issued e-Tender or notice for online tender from eligible bidders for grant of license for supply, installation, commissioning, operation and maintenance of three 100 ton HMCs for five years inside PPT. Bids were opened on 2.3.2015. According to Clause-9 of the tender documents, there was scope for amendment of bid documents and, according to Clause-11, bidders were to quote revenue sharing per ton in percent of Tariff Authority for Major Ports ('TAMP' in short) rate. The highest revenue sharing offered by the bidders were to be accepted and separate bids were required to be submitted for each crane. By Clause-27, PPT reserved the right to reduce the number of cranes required to be deployed from 3 to 2 at the time of finalization of tender, depending on prevailing situation. The PPT was to award the contract to such bidders as were conforming to the techno- commercially responsive and highest evaluated bids. It was further indicated that the bidders shall have to match highest quoted rate. The second highest bidder had the first right of refusal and so on. If other bidders did not agree to match the highest rate, fresh offers were to be invited through open tender.

4. By issuing addendum on 23.2.2015 to the tender notice, PPT changed the dates of opening of the Tender and stipulated that bidder or its subsidiary or its associate could participate for one HMC only. By second addendum dated 24.2.2015 only time for the opening of the tenders was changed to 16.00 hours on 7.3.2015.

5. On 25.3.2015, the Tender Committee consisting of six officials of PPT met and found the petitioners and M/s. Bothra to be qualified bidders with OSL being highest bidder offering 9% of revenue sharing. Therefore, other bidders were called upon to match the rate offered by the highest bidder. It was also recommended by the Committee that in case all the bidders match the highest rate then four numbers of HMC might be deployed as against three, as there was further requirement. On the basis of such minutes of the meeting, M/s. Bothra was issued the letter of intent dated 28.3.2015 for grant of license for the fourth HMC.

6. The grievance of the petitioners is that fourth HMC was not part of the tender-notice and hence award of contract and license for the fourth HMC was contrary to the tender-notice and, it being a State largess, it was awarded without due process to the detriment and possible loss to the

petitioners. Under such circumstances, oblique motive and extraneous considerations were alleged against the PPT. It is averred by the petitioners that there was a hidden agenda to somehow accommodate M/s. Bothra in view of cancellation of two earlier tender notice dated 12.8.2014 and 4.12.2014 wherein only two bidders participated. While HMC could be procured and installed within a period of six months M/s. Bothra was so sure of getting the award that they moved the machine within a month. It is alleged that had there been an offer to the petitioners, they could make available and install fourth HMC, but before such opportunity arose, the addendum to the tender notice was issued. It is also averred that variation in the tonnage, the petitioner would get to handle with four new HMCs, would cause loss of Rs.2 crores per annum to the petitioner.

7. As against the above case of the petitioner in the respective writ petitions, PPT has contended that it had reserved the right to reduce number of cranes required to be deployed from 3 to 2 at the time of finalization of tender process, depending on the prevailing situation. Licensees were to be permitted to install HMCs inside port prohibited area to operate any cargo berths depending on the operational requirement of the Port. It is averred that PPT would ensure that quantity of cargo to be handled by the HMCs during the financial year would be rationalized on the basis of capacity as well as availability of HMCs, even as PPT did not give any commitment to the bidders or licensees. That there was adequate cargo for the petitioners and other crane operators to function round the clock. Thus, no prejudice would be caused to the petitioners, if the fourth HMC were allowed to operate in public interest and to cope with higher target fixed for the port by Ministry of Ports. On that basis, it is submitted that in view of increasing traffic at the port and increasing period of break down among the existing HMCs, the petitioners were not likely to suffer any loss due to installation and operation of the fourth HMC.

8. By filing an affidavit of its Vice-President, M/s. Bothra, respondent No.8 has opposed the petition with the contentions that the issues raised by the petitioners are speculative, misleading and based on suppression of material facts and without the petitioner having a *locus standi*. It is submitted that the petitioners have never raised any objection to the grant of license for the fourth HMC to respondent no.8 and they are estopped from raising objection at a belated stage as the respondent has already invested substantial amount of money and manpower in fulfillment of installation of the crane. That the petitioners' pleas are not in public interest. That the number of

cranes mentioned in the tender notice in question was never meant to be an essential term of the notice, even as the petitioners have already been favoured with the contract. It is also submitted that the tender committee had made its recommendation on March 25, 2015 after hearing all the bidders and letters of intent dated March 28,2015 were issued to all the four bidders, after approval by the Chairman of PPT, who is the Chief Executive Authority. M/s. Bothra has thereafter fulfilled the other conditions for grant of license vide its letter dated 15.4.2015 and 27.4.2015. That M/s. Bothra had already entered into a Memorandum of Understanding on September 30,2014 long before the tender notice in question, for supply of three HMCs from its supplier and already entered into contract on 22.2.2015 for supply of one HMC at Kakinada. After that, that HMC was requested to be diverted to PPT and the HMC scheduled for delivery to Kakinada Port was delivered at Paradip Port after award of letter of intent by PPT. Thus, one HMC had already reached Paradip Port on 18.5.2015 and landed on 20.5.2015. Thereafter, commissioning and trial of the HMC was completed on 8.6.2015 and test under the contract was conducted on 11.6.2015 making the crane ready for commercial operation on 19.6.2015. Thus, M/s. Bothra has already incurred substantial expenditure in procuring, arranging and commissioning the HMC as per the tender conditions and has also furnished bank guarantee of Rs.1,20,00,000/- to PPT. It is alleged that all the three petitioners are associates of one group and have formed a cartel to prevent other operators from functioning at PPT. Denying all the allegations made in the petitions, it is submitted that the petitioners had, by suppressing material facts, obtained an ex parte order on 10.6.2015 to maintain status quo as on that date in respect of the letter of intent dated 15.4.2015.

9. The following judgments and observations made therein were cited and discussed at the bar during the course of arguments.

(a) Jagdish Mandal vs. State of Orissa & Ors, [(2007) 14 SCC 517].

> "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions.

Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(*i*) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(*ii*) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

(b) R.N.Gosain v. Yashpal Dhir, [AIR 1993 SC 352]

"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and

that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See : *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co. Ltd.*, (1921) 2 KB 608, 612 (CA) Scrutton, L.J.] According to *Halsbury's Laws of England*, 4th Edn., Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside".

(c) Tata Cellular Vs. Union of India, [(1994)6 SCC 651]

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. *Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State*. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

"71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review."

xxx xxx xxx

"73. Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the *court's ability* to quash an administrative

decision on its merits. These restraints bear the hallmarks of judicial control over administrative action."

(d) B.S.N.Joshi & Sons Ltd. v. Nair Coal Services Ltd., [(2006)11 SCC 548]

"69. While saying so, however, we would like to observe that having regard to the fact that huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction."

(e) Raunaq International Ltd. v. I.V.R.Construction Ltd. & ors, (AIR 1990 SC 393)

"11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not

be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.

xxx xxx xxx

13. Hence before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene.

14. Where there is an allegation of mala fides or an allegation that the contract has been entered into for collateral purposes and the court is satisfied on the material before it that the allegation needs further examination, the court would be entitled to entertain the petition. But even here, the court must weigh the consequences in balance before granting interim orders.

15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene."

(f) Natural Resources Allocation, In re, SpecialReference No.1 of 2012, [(2012)10 SCC 1.]

"98. However, after the judgment of this Court in *E.P. Royappa* v. *State of T.N.*(1974) 4 SCC 3 the "arbitrariness" doctrine was introduced which dropped a pedantic approach towards equality and held the mere existence of arbitrariness as violative of Article 14, however equal in its treatment. Bhagwati, J. (as His Lordship then

was) articulated the dynamic nature of equality and borrowing from Shakespeare's *Macbeth****, said that the concept must not be "cribbed, cabined and confined" within doctrinaire limits: (SCC p. 38, para 85)

"85. … Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., 'a way of life', and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits."

His Lordship went on to explain the length and breadth of Article 14 in the following lucid words: (*Royappa case*, SCC p. 38, para 85)

"*85*. … From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

xxx xxx xxx

"105. However, this Court has also alerted against the arbitrary use of the "arbitrariness" doctrine. Typically, laws are struck down for violating Part III of the Constitution of India, legislative incompetence or excessive delegation. However, since *Royappa case*, the doctrine has been loosely applied. This Court in *State of A.P.* v. *McDowell & Co.(1996)3 SCC 709* stressed on the need for an objective and scientific analysis of arbitrariness, especially while striking down legislations. Jeevan Reddy, J. observed: (SCC pp. 737-38, para 43)

"*43*. … The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone viz. (*1*) lack of legislative competence and (*2*) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness—concepts inspired by the decisions of United States Supreme Court. Even in USA, these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (*a*) to (*g*) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament

and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds viz. (*i*) unreasonableness, which can more appropriately be called irrationality, (*ii*) illegality and (*iii*) procedural impropriety (see *Council of Civil Service Unions* v. *Minister for the Civil Service, 1985 AC 374* which decision has been accepted by this Court as well)."

xxx xxx xxx

"107. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as *McDowell case* has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India.

xxx xxx xxx

"167. In chronological sequence, the learned counsel then cited *Mahabir Auto Stores* v. *Indian Oil Corpn. (1990) 3 SCC 752.* Relevant observations made therein, with reference to the present controversy, are being placed below: (SCC pp. 760-61 & 763-64, paras 12, 17-20 & 23)

"*12*. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article

226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in *Radhakrishna Agarwal* v. *State of Bihar, (1977)3 SCC 457*. It appears to us, at the outset, that in the facts and circumstances of the case, the respondent Company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. *The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power*. Therefore, the action of State organ under Article 14 can be checked. See *Radhakrishna Agarwal* v. *State of Bihar* at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent Company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. *Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable*. In this connection reference may be made to *E.P. Royappa* v. *State of T.N.*, *Maneka Gandhi* v. *Union of India, (1978)1 SCC 248* , *Ajay Hasia* v. *Khalid Mujib Sehravardi (1981)1 SCC 72*, *Ramana Dayaram Shetty* v. *International Airport Authority of India,(1979)3 SCC 489* and also

Dwarkadas Marfatia and Sons v. *Port of Bombay (1989)3 SCC 293*. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. *Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case*.

"17. We are of the opinion that in all such cases whether public law or private law rights are involved, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any straitjacket formula. It has to be examined in each particular case. Mr Salve sought to urge that there are certain cases under Article 14 of arbitrary exercise of such 'power' and not cases of exercise of a 'right' arising either under a contract or under a statute. We are of the opinion that that would depend upon the factual matrix.

"18. Having considered the facts and circumstances of the case and the nature of the contentions and the dealing between the parties and in view of the present state of law, we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of corporation like IOC when without informing the parties concerned, as in the case of the appellant firm herein on alleged change of policy and on that basis action to seek to bring to an end to course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. *Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any straitjacket basis. It*

depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence.

"19. Such transaction should continue as an administrative decision with the organ of the State. *It may be contractual or statutory but in a situation of transaction between the parties for nearly two decades, such procedure should be followed which will be reasonable, fair and just, that is, the process which normally be accepted (sic is expected) to be followed by an organ of the State and that process must be conscious and all those affected should be taken into confidence*.

"20. Having regard to the nature of the transaction, we are of the opinion that it would be appropriate to state that in cases where the instrumentality of the State enters the contractual field, it should be governed by the incidence of the contract. It is true that it may not be necessary to give reasons but, in our opinion, in the field of this nature fairness must be there to the parties concerned, and having regard to the large number or the long period and the nature of the dealings between the parties, the appellant should have been taken into confidence. Equality and fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting. We must, however, evolve such process which will work.

xxx xxx xxx

"23. It is not our decision which is important but a decision on the above basis should be arrived at which should be fair, just and reasonable—and consistent with good Government—which will be arrived at fairly and should be taken after taking the persons

concerned whose rights/obligations are affected, into confidence. Fairness in such action should be perceptible, if not transparent."

(g) Ram and Shyam Company v. State of Haryana & ors., (AIR 1985 SC 1147)

"12. Let us put into focus the clearly demarcated approach that distinguishes the use and disposal of private property and socialist property. Owner of private property may deal with it in any manner he likes without causing injury to any one else. But the socialist or if that word is jarring to some, the community or further the public property has to be dealt with for public purpose and in public interest. The marked difference lies in this that while the owner of private property may have a number of considerations which may permit him to dispose of his property for a song. On the other hand, disposal of public property partakes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz. the welfare State may be able to expand its beneficent activities by the availability of larger funds. This is subject to one important limitation that socialist property may be disposed at a price lower than the market price or even for a token price to achieve some defined constitutionally recognised public purpose, one such being to achieve the goals set out in Part IV of the Constitution. But where disposal is for augmentation of revenue and nothing else, the State is under an obligation to secure the best market price available in a market economy. An owner of private property need not auction it nor is he bound to dispose it of at a current market price. Factors such as personal attachment, or affinity, kinship, empathy, religious sentiment or limiting the choice to whom he may be willing to sell, may permit him to sell the property at a song and without demur. A welfare State as the owner of the public property has no such freedom while disposing of the public property. A welfare State exists for the largest good of the largest number more so when it proclaims to be a socialist State dedicated to eradication of poverty. All its attempt must be to obtain the best available price while disposing of its property because the greater the revenue, the welfare activities will get a fillip and shot in the arm. Financial constraint may weaken the

tempo of activities. Such an approach serves the larger public purpose of expanding welfare activities primarily for which the Constitution envisages the setting up of a welfare State. In this connection we may profitably refer to *Ramana Dayaram Shetty* v. *International Airport Authority of India*[6] in which Bhagwati, J. speaking for the Court observed: (SCC p. 506, para 12)

"It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

xxx xxx xxx

"At one stage, it was observed that the Government is not free like an ordinary individual, in selecting recipient for its largesse and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well-settled that the Government need not deal with anyone, but if it does so, it must do so fairly and without discretion and without unfair procedure. Let it be made distinctly clear that Respondent 4 was not selected for any special purpose or to satisfy any Directive Principles of State Policy. He surreptitiously ingratiated himself by a back-door entry giving a minor raise in the bid and in the process usurped the most undeserved benefit which was exposed to the hilt in the court. Only a blind can refuse to perceive it."

(h) M/s.Michigan Rubber(India)Ltd. v. State of Karnataka, (AIR 2012 SC 2915.)

"19. From the above decisions, the following principles emerge:

(*a*) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(*b*) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(*c*) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(*d*) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(*e*) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

(i) Arup Das & ors., v. State of Assam & ors., (2012)5 SCC 559.

"17. It is well established that an authority cannot make any selection/appointment beyond the number of posts advertised, even if there were a larger number of posts available than those advertised. The principle behind the said decision is that if that was allowed to be done, such action would be entirely arbitrary and violative of Articles

14 and 16 of the Constitution, since other candidates who had chosen not to apply for the vacant posts which were being sought to be filled, could have also applied if they had known that the other vacancies would also be under consideration for being filled up."

(j) M/s. Coal India Ltd. & ors. v. Alok Fuels(P) Ltd, [(2010) 10 SCC157.]

"25. It is settled by a series of decisions of this Court starting from *Shrilekha Vidyarthi* v. *State of U.P, (1991)1 SCC 212* that even in the domain of contractual matters, the High Court can entertain a writ petition on the ground of violation of Article 14 of the Constitution when the impugned act of the State or its instrumentality is arbitrary, unfair or unreasonable or in breach of obligations under public law.

"26. In *Sterling Computers Ltd.* v. *M&N Publications Ltd. (1993)1 SCC 445* in SCC para 28, however, this Court held: (SCC p. 464)

"28. Philanthropy is no part of the management of an undertaking, while dealing with a contractor entrusted with the execution of a contract. The supply of the directories to public in time, was a public service which was being affected by the liberal attitude of the MTNL and due to the condonation of delay on the part of the UIP/UDI. There was no justification on the part of the MTNL to become benevolent by entering into the supplemental agreement with no apparent benefit to the MTNL, without inviting fresh tenders from intending persons to perform the same job for the next five years. Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a public authority must be guided by relevant considerations and not by irrelevant ones. If such decision is influenced by extraneous considerations which it ought not to have taken into account the ultimate decision is bound to be vitiated, even if it is established that such decision had been taken without bias. The contract awarded for the publication of the directories had not only a commercial object but had a public element at the same time i.e. to supply the directories to lakhs of subscribers of telephones in Delhi and Bombay, every year within the stipulated time free of cost. In such a situation MTNL could not exercise an unfettered discretion after the repeated breaches committed by UIP/UDI, by entering into a supplemental agreement with the Sterling for a fresh period of more than

five years on terms which were only beneficial to UIP/UDI/Sterling with corresponding no benefit to MTNL, which they have realised only after the High Court went into the matter in detail in its judgment under appeal.

10. Considering the relevant facts in light of the contentions of the parties and the legal dicta extracted hereinabove, it would appear that besides the grievance of the petitioners against the grant of fourth HMC to M/s. Bothra, challenge is to induct M/s. Bothra into PPT beyond the terms of the tender and without the fourth HMC being subjected to tender process. There is no dispute about the facts that PPT had reserved its right to reduce the number of cranes to be put for tender process from 3 to 2 at the time of finalization of the tender and the prevailing situation was relevant only for that purpose. There was no stipulation for bringing in a fourth HMC by the same tender process initiated by e-Tender call notice issued on 13.2.2015. By the addendum to that notice the bidders and their associates could participate in one HMC only. Thus, the consideration of the tenders by the tender committee was restricted to evaluating the bids for 3 to 2 HMCs only and bidders were restricted to bid for one HMC only. These conditions were significant in the context of requirement of the bids to make offers on revenue sharing basis per tons of cargo to be handled by each HMC, while overall rates were fixed by TAMP. In these circumstances, consideration of bid for the fourth HMC by the tender committee was unreasonable, arbitrary and without authority. Induction of fourth HMC was bound to affect the quantum of cargo to be handled by the three HMCs for which offers were invited. Therefore, it was unfair and unreasonable to refashion handling of cargo by four HMC and it would obviously prejudicially affect the prospect of profit out of three HMCs duly selected by the tender process. Consideration of offer for fourth HMC, without a proper tendering process for the purpose, also denied equality of opportunity to the other prospective bidders and therefore, it could not be said to be in public interest either.

11. An executive authority which is State within the definition of Article-12 must be rigorously held to the standards by which it professes its actions to be judged. There was a public law element in the tender process and selection in question obviously lacked in fairness, equality and fair procedure. Since the bids were on revenue sharing basis, there was inherent element of largess in awarding the contract for installation and operation of HMCs in the prohibited area of PPT. In view of these considerations, not only the number of HMCs to be deployed at PPT was essential condition of the notice calling for tender, but

12. consideration of offer of the fourth HMC was in violation of the tender conditions, particularly Clause-27 which reads as under:-

"Clause-27- AWARD CRITERIA

The officer inviting the bid on behalf of Paradip Port Trust will award the contract to the bidder whose bid has been evaluated to be techno-commercial responsive and the highest evaluated Bid. A system generated e-mail will be communicated to the successful bidder and un-successful bidder regarding their status. In case of different revenue sharing offered for the same type of crane by different bidders then the highest offer by the bidder shall prevail. Then for the same type of cranes, other bidders shall have to match the highest quoted price. The H2 bidder will be given the first right of refusal and so on. In the event no other bidders agreed to match the highest offered price for a particular type of crane then fresh offers shall be invited through open tender.

Paradip Port reserves the right to reduce the no. of the cranes required to be deployed from 3 to 2 at the time of finalization of this tender depending on the prevailing situation."

In the facts of this case M/s. Bothra Shipping Service Pvt. was the third bidder who came forward to match the highest quoted price, but it was the lowest bidder for whom no occasion to match the bid arose.

12. It may be pertinent to note here that PPT has not placed any material to justify the requirement by PPT of one more HMC, over and above three additional HMCs which were put up for tender process. Mere plea and prospect of higher amount of handling of cargo at PPT, as pleaded by PPT did not justify any variation in the conditions of tender in public interest. On the other hand, PPT could not have in fact or in law assure the petitioners of enough work round the clock for the three petitioners. Under such circumstances, some under-hand dealing and prior understanding could be inferred from the demeanours of the tender committee and M/s. Bothra in so far as orders were already placed by M/s. Bothra in advance and the fourth HMC was diverted from Kakinada to PPT to install it and make it operational much ahead of the appointed time. Thus, infringement of Article 14 is writ large in the sequence of events, particularly when no general power or privilege for changing the number of HMCs is claimed or substantiated. Even if such power were asserted or assumed, exercise

thereof would not be fair from bona fide in the facts of the case. As held in Special Reference No.1 of 2012, [(2012)10 SCC 1 supra, action of the authority has to be tested on the touchstone of Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism and in pursuit of promotion of healthy competition and equitable treatment. That mandate of Article 14 is clearly violated by PPT to the benefit of M/s. Bothra Shipping Service Pvt. and to the detriment of the petitioners. It is also not proved on record that the petitioners were taken into confidence before the bids were evaluated and the tender committee had decided to issue licence for the fourth HMC.

13. For the reasons recorded hereinabove and in view of the ratio of the judgment discussed hereinabove and to ensure sanctity of letters of intent and agreements entered into with the petitioner, letter of intent issued to the respondent no.8-M/s. Bothra Shipping Service Pvt. Ltd. has to be quashed regardless of the arrangements made and expenditures incurred by them for bringing in and making operational the fourth HMC.

14. Accordingly, petitions are allowed and the letter of intent dated 28.3.2015 for grant of license issued by the Executive Engineer, Workshop Division of the Paradip Port Trust to M/s. Bothra Shipping Service Pvt. Ltd. along with transactions consequential thereto are all set aside as illegal and arbitrary as far as the parties herein are concerned. There is no order as to cost.

Writ petitions allowed.

2015 (II) ILR - CUT- 443

D.H.WAGHELA, C.J. & BISWANATH RATH, J.

W.P.(C) NO. 17786 OF 2012

STATE OF ORISSA & ANR. .....Petitioners

.Vrs.

GOLEKHA CH. ROUTRAY & ANR. .....Opp. Parties

ODISHA CIVIL SERVICES (C.C.A.) RULES, 1962 – RULE 18

An order of dismissal should not be an automatic result of conviction of a government servant in a criminal case – Disciplinary authority has to apply its mind reasonably and fairly after considering the conduct of the employee which led to his conviction and arrived at a conclusion that the said conduct was such that further retention of the employee in public service is undesirable.

In the present case the Opp. Party was convicted and sentenced for the offence involving moral turpitude – No plausible reason was assigned for reducing the punishment or imposing lesser punishment in a case of acceptance of bribe – No case for consideration or judicial intervention – Held, the impugned order passed by the Tribunal quashing the order of dismissal and directing re-instatement of the Opp.Party is set aside. (Paras 9, 10, 11)

Case Laws Referred to :-

1. 2011(Suppl.II) OLR 848 : Prasant Kumar Sahoo vs. State of Orissa & Anr.
2. 2013(Suppl.I)OLR 736 : Surya Narayan Acharya vs. State of Orissa.
3. (1997)11 SCC 383 : Union of India vs. V.K.Bhaskar.
4. (2008)3 SCC 273 : State of Madhya Pradesh & ors., vs. Hazarilal.

For Petitioners : ASC
For Opp. Parties : M/s. Kalyan Patnaik

Date of order 27.07.2015

ORDER

PER : D.H.WAGHELA, C.J.

1. The petitioners-State has approached this Court to challenge the order dated 24.4.2013 of the Orissa Administrative Tribunal in Original Application No. 194 (C) of 1992 whereby the order dated 24.12.2011 dismissing the respondent has been quashed and he has been directed to be re-instated in service with immediate effect.

2. There is no dispute about the facts that the respondent had been dismissed by the order dated 24.12.2011 under the provisions of Rule-18 of the Orissa Civil Services (C.C.A.) Rules, 1962 which reads as under:-

"18. Special Procedure in certain cases- Notwithstanding anything contained in Rules 15,16, and 17-

(i) where a penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) where the disciplinary authority is satisfied for reasons to be recorded in writing by that authority that it is not reasonably practicable to follow the procedure prescribed in the said rules; or

(iii) where the Governor is satisfied that in the interest of the security of the State it is not expedient to follow such procedure,

the disciplinary authority may consider the circumstances of the case and pass such orders thereon as it deems fit :

Provided that the Commission shall be consulted before passing such orders in any case in which consultation is necessary."

3. In the facts of the present case, it is not in dispute that the opposite party-employee was charged for the offence punishable under Section 13(2) read with Section 13(1)(d)/7 of the Prevention of Corruption Act and the amount of bribe was alleged to have been recovered from the physical possession of the opposite party. After a full fledged trail, learned Special Judge (Vigilance), Sambalpur, by order dated 18.10.2011, found the opposite party guilty of the offence punishable under Section 7 of the Prevention of Corruption Act and Section 13(2) read with Section 13(i)(d) of P.C.Act. After such conviction and sentence, the Director of Town Planning Orissa made the order dismissing him from service under Rule 13 read with Rule 18 of the Orissa Civil Services (CCA) Rules, 1962.

4. Challenge to that order before the Orissa Administrative Tribunal was upheld on the basis of a Division Bench judgment of this Court in *Prasant Kumar Sahoo vs. State of Orissa & Anr.*, 2011(Suppl.II) OLR 848 wherein it was held that mere conviction of a Government servant in a criminal case did not automatically result in his dismissal from service.

5. Upon the petition being heard before this Court, it was argued for the respondent that the impugned order of dismissal was a non-speaking order passed without application of judicial mind.

6. Learned Senior Counsel Mr. Kalyani Patnaik appearing for the opposite party relied upon a Division Bench Judgment of this Court in *Surya*

Narayan Acharya vs. State of Orissa, 2013(Suppl.I)OLR 736 in support of the arguments that the Tribunal had rightly exercised its jurisdiction and the order of dismissal is liable to be quashed for want of consideration of circumstances and in view of the ratio of the Division Bench Judgment, it was deemed to be proper to refer the matter to Larger Bench and oral order was made in that regard. However, before that order could be signed, learned Addl. Government Advocate appearing for the petitioner has cited a judgment of the Apex Court in *Union of India vs. V.K.Bhaskar*, (1997)11 SCC 383 to submit that in view of the binding dicta of the Apex Court reference to a large bench was uncalled for and the present case could be decided following the judgment of the Apex Court which was rendered specifically with reference to the identical provisions of Central Civil Services (Classification, Control and Appeal) Rules, 1965.

7. Therefore, the arguments of the opposite party again heard and learned counsel has relied upon judgment of the Apex Court in *State of Madhya Pradesh & ors., vs. Hazarilal,* (2008)3 SCC 273 to emphasize the following observation.

> "7. By reason of the said provision, thus, 'the disciplinary authority has been empowered to consider the circumstances of the case where any penalty is imposed on a government servant on the ground of conduct which has led to his conviction on a criminal charge' but the same would not mean that irrespective of the nature of the case in which he was involved or the punishment which has been imposed upon him, an order of dismissal must be passed. Such a construction, in our opinion, is not warranted."

8. Provisions of Rule-18 applicable in the facts of the present case opens with non-obstante clause removing the effect and operation of Rules 15,16 and 17. Those Rules provide for procedure for imposing penalty and enquiry. Non-obstante clause contained in Rule-18 having excluded the application of Rules of Procedure incorporating principle of Natural Justice, the case of dismissal on the ground of conduct leading to conviction on a criminal charge directly empowers the disciplinary authority to consider the circumstances of the case and pass such orders thereon as deemed fit. Therefore, it is clear that the powers of considering the circumstances of the case are conferred upon the disciplinary authority and even if it is considered to be power couple with duty, it nowhere prescribes recording of reasons or affording an opportunity of hearing to the delinquent. At the same time, what

factors may go into consideration by the disciplinary authority are also not prescribed.

9. It was under such circumstances that the Apex Court observed in *Union of India vs. V.K.Bhaskar* (supra) that the statement contained in the order of dismissal indicates that the disciplinary authority had applied its mind and, after considering the conduct of the opposite party which led to his conviction on a criminal charge, has arrived at the conclusion that the said conduct was such as to render further retention of the opposite party in public service undesirable. It was only on such statement that it was held that the order of dismissal was passed after applying its mind to the nature of the conduct which led to his conviction.

10. In the facts of the present case, the opposite party is convicted and sentenced for the offence involving moral turpitude and the conduct leading to the conviction is directly related to the service of the opposite party under the petitioner. Therefore, it was specifically put to learned counsel for the opposite party that even if the question of penalty of dismissal were put to test, what could be the extenuating circumstances or the representation of the opposite party for awarding lesser punishment. No plausible reason was assigned for reducing the punishment or imposing lesser punishment in a case of acceptance of bribe.

11. In the facts and for the reasons discussed hereinabove, the case of the opposite party did not deserve reconsideration on the basis of any possible consideration of the circumstances although, in principle, an order of dismissal should not be an automatic result of conviction of a Government servant in a criminal case. In the peculiar facts of the case, the opposite party did not have any case for consideration or judicial intervention and hence the impugned order of the Tribunal is set aside. The petition is allowed accordingly with no order as to costs.

Writ petition allowed.

2015 (II) ILR - CUT- 448

P. MOHANTY,J & B.MOHANTY,J

O.J.C. NO. 10174 OF 2001

CHANCHALA TRIPATHY ……..Petitioner

.Vrs.

TAHASILDAR, BBSR & ANR. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – Art.226

Writ Petition – Delay of eighteen years in approaching this Court – No explanation for such inordinate delay – Doctrine of delay and laches should not be lightly brushed aside – A writ Court is required to weigh the explanation offered and the acceptability of the same.

In this case the petitioner has approached this Court at his own leisure and pleasure without adequate reasons – Held this Court is not inclined to interfere with the writ petition after such long delay.

(Para 7)

Case Laws Rreffered to :-

1. 2014 (1) OLR 871 : Rama Devi (dead) after her, her legal heirs Ch.Dhananjay Mohapatra and others -V- Government of Orissa and Ors.
2. AIR 2003 SC 234 : Northern Indian Glass Industries -V-Jaswant Singh & Ors.
3. AIR 2014 SC 1141 : Metropolitan Water Supply and Sewerage Board & Ors-V- T.T. Murali Babu.

For Petitioner - Mr. P.C.Rout.
For Opp.Parties - Jyoti Prakash Patnaik (A.G.A)

Date of Judgment: 13.05.2015

JUDGMENT

BISWAJIT MOHANTY, J.

The petitioner has filed this writ application with the following prayers;

"xxx xxx xxx

(i) Issue a writ in the nature of certiorari quashing the orders at Annexure-2 passed by the opposite party no.2 in Revision Case No.256/82;

(ii) Issue a writ in the nature of Mandamus restraining the opposite parties for taking further proceeding in pursuance to Revisional order of the opposite party no.2 as per Annexure-2;

(iii) Issue any such other writ(s) or pass such other order(s) as deemed fit and proper in the interest of justice and equity;

xxx xxx xxx"

2. According to Mr. Rout, learned counsel for the petitioner, the petitioner applied before the Tahasildar, Bhubaneswar (opposite party no.1) for taking lease of Ac.0.200 decimals of land for homestead purpose. Opposite party no.2 after maintaining proper procedure and complying the provisions laid down in Orissa Government Land Settlement Rules, 1974 passed the order granting lease of an area measuring Ac.0.200 decimals of land appertaining to Khata No.606, Plot No.55 in Mouza-Patrapada in favour of the petitioner. Accordingly, under Annexure-1 the Record of Right was issued in favour of the petitioner on payment of salami. Mr. Rout also submitted that the land in question was leased out /settled in accordance with G.O. No.6672/GC(GL) 358-72-R dated 20.10.1972. According to him, the aim and object of the said instruction/order was distribution of land available at the disposal of Government and settlement of unobjectionable encroachments and also to simplify the procedure for expeditious disposal of lease and encroachment cases. While such was the position, opposite party no.2, who happens to be the Additional District Magistrate, Bhubaeswar initiated Revision Case No.256/1982 under Section 7-A(3) of the Orissa Government Land Settlement Act, 1962 for short "the Act" against the petitioner and on 6.6.1983 cancelled the lease granted by opposite party no.1 in favour of the petitioner vide Annexure-2. From the said order of opposite party no.2 under Annexure-2, the petitioner came to know that the lease granted in her favour has been cancelled on account of non-compliance of Rule 3(3) and Rule 3(4) of the Orissa Government Land Settlement Rules, 1974. Challenging the order under Annexure-2, the petitioner filed the present writ application on 6.8.2001. According to Mr. Rout, since the lease was granted by opposite party no.1 in accordance with lease principles delineated under G.O. No.6672/GC(GL) 358-72-R dated 20.10.1972, the said order could not be set aside by opposite party no.2 while exercising his power under Section 7-A(3) of the Act. Thus, the impugned action was without any jurisdiction. According to the learned counsel for the petitioner, under Section 7-A(3) of the Act, the Collector may on his own motion or otherwise

can call for and examine the records of any proceeding in which any authority subordinate to him has passed an order under the Act. Since in the instant case the lease was granted by opposite party no.1 under the lease principles, therefore, opposite party no.2 had no authority to revise the same under the Act.

3. Mr. J.P. Patnaik, learned Additional Government Advocate for the State raised a preliminary objection with regard to maintainability of the writ application. According to him in the present case, the impugned order was passed on 6.6.1983 and the writ application was filed on 6.8.2001, i.e., more than eighteen years after the impugned order was passed. No explanation whatsoever was there in the writ application explaining such inordinate delay. Accordingly, Mr. Patnaik prayed that the present writ application ought to be dismissed.

4. Countering the submission of Mr. Patnaik, Mr. Rout, learned counsel for the petitioner submitted that the impugned order under Annexure-2 was passed without any notice to the petitioner. After the petitioner came to know about the said impugned order, certified copy of the same was applied on 27.12.2000. On 6.1.2001, certified copy was delivered and on 6.8.2001, she filed the present writ application.

5. Heard learned counsel for the parties and perused the records.

6. A bare perusal of the impugned order under Annexure-2, would show that the present petitioner has filed her written statement before opposite party no.2 and opposite party no.2 in the impugned order has indicated that he has gone through the records along with written statement submitted by the petitioner. Thereafter, opposite party no.2 has pointed out a number of defects committed by the Tahasildar, Bhubaneswar in granting lease. Accordingly, he came to the conclusion that in the case at hand lease was granted on account of fraud, mis-representation and material irregularity in the procedure. On such background, opposite party no.2 has set aside the order dated 4.2.1981 passed by the Tahasildar, Bhubaneswar. From the above discussion, it is clear that the submission of learned counsel for the petitioner that Revision Case No.256 of 1982 was disposed of without any notice to the petitioner is not correct. The impugned order makes it clear that the petitioner contested the matter before the Additional District Magistrate by filing her written statement though she remained absent on 6.6.1983, when the revision case was allowed. Secondly, a perusal of the writ application would show that the petitioner has offered no explanation whatsoever for

inordinate delay of more than 18 years in preferring the present writ application before this Court. On the question of delay, Mr. Rout relied on a decision of the Hon'ble Supreme Court in the case of **Dhiraj Singh (D) TR. LRS. ETC. ETC.** v. **Haryana State & ORS ETC. ETC.** reported in **2014 (9) SCALE 441** wherein it has been laid down that substantive rights of land owners should not be allowed to be defeated on technical grounds of limitation by taking hypertechnical view. Accordingly, Mr. Rout prayed for ignoring the long delay in filing the present writ application. We are unable to accede to such request of Mr. Rout for following reasons. That is a case relating to payment of enhanced compensation arising out of compulsory acquisition of land. In such matters for payment of compensation to peasants, it is well settled that a liberal approach has to be made for condoning delay as peasants are mostly illiterate, poverty stricken, ignorant & are not conversant with intricacies of law. The facts of present case are different and do not relate to payment of compensation/enhanced compensation to peasants. Thus, the Dhirjaj Singh's case (*supra*) is factually distinguishable. The principles delineated therein cannot be imported here. Secondly, in Dhiraj Singh's case (*supra*), at least a plea was taken by the agriculturists/peasants-appellants that they could not file LPAs on account of their weak financial condition. Here as indicated earlier no explanation whatsoever exists in the writ application for the long delay in filing the same. Rather an attempt was made to explain the delay by making a submission that the impugned order was passed without any notice to the petitioner, which has been found to be false.

7. Mr. Rout, learned counsel for the petitioner also cited two decisions of this Court for condoning delay as the opp.no.2 has acted without jurisdiction. The first decision is in the case of **Mrs. Sneha Mohanty** v. **State of Odisha and others** passed in W.P.(C) No.18936 of 2013 disposed of on 20.8.2013 and the other decision is in the case of **Rama Devi (dead) after her, her legal heirs Ch. Dhananjay Mohapatra and others** v. **Government of Orissa and others** reported in **2014 (1) OLR 871.** In W.P.(C) No.18936 of 2013, the petitioner challenged the order dated 15.7.2013. Thus there was no delay in filing the writ application unlike the present writ application. Similarly, in Ramadevi's case (*supra*), the writ application was filed in the year 2012 challenging the order dated 17.9.2012 passed by the Member, Board of Revenue. In that case also unlike the present case, there was no inordinate delay in approaching this Court. In this context, it is apt to refer to the decision of the Hon'ble Supreme Court in the case of **Northern Indian Glass Industries** v. **Jaswant Singh & others** reported in

AIR 2003 SC 234. There the writ application was filed challenging the land acquisition notification 17 years after finalisation of acquisition proceeding. In that case also there was no explanation for inordinate delay in approaching the High Court. However, the High Court allowed the said writ application. Allowing the appeal, the Hon'ble Supreme Court opined that the High Court ought to have dismissed the writ application on the ground of inordinate delay in approaching the High Court. Further, in the case of **Chennai Metropolitan Water Supply and Sewerage Board and others** v. **T.T. Murali Babu** reported in **AIR 2014 SC 1141**, an order of dismissal from the service was challenged after a delay of four years. While, allowing the appeal, the Hon'ble Supreme Court has stated that the High Court was wholly unjustified in entertaining a writ application after lapse of four years. At Paragraph-16 of the judgment, the Hon'ble Supreme Court opined as follows:

> "16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant – a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained

> unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons - who compete with 'Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."

We are in respectful agreement with the principles propounded by the Hon'ble Supreme Court in the said cases. In the present case, there exists no reason whatsoever for approaching this Court after a long delay of more than 18 years. For all these reasons, we are not inclined to interfere with the writ application.

8. Accordingly, the writ application is dismissed. No Costs.

Writ application dismissed.

2015 (II) ILR - CUT- 453

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

MATA NO. 34 OF 2014

DILIP KR. BEHERA ……..Appellant

.Vrs.

PUSPANJALI BEHERA ……Respondent

GUARDIANS AND WARDS ACT, 1890 – S.9(1), 25

Application for guardianship of the person of the minor – It shall be filed before the District Judge having jurisdiction where the minor "ordinarily resides", i.e., the present place of residence, which is not casual or temporary.

In this case, the appellant-husband and the respondent-wife were residing at Rourkela with their only son and when family feud started the mother left the company of her husband with the son who was only two and half years of age and remained in the house of her parents at Berhampur – Husband filed application U/s. 25 of the Act before the Judge, Family Court, Rourkela to take custody of the son – Though father is the first natural guardian the child being of two and half years, would ordinarily reside with the mother as per proviso to section 6 (a) of the Hindu Minority and Guardianship Act – Mother of the minor is now residing at Berhampur – Held, the Judge, Family Court, Rourkela has committed no illegality in dismissing the application U/s. 25 of the Act filed by the husband.

(Paras 18, 19)

For Appellants : M/s. A.C.Panda, N.R.Mohanty, A.R.Mohanty, B.K.Choudhury & S.D.Ray

For Respondent : M/s. S.P.Mishra, S.Mishra, S.Moodi, D.Prinka & E.Agrawal

---

Date of hearing : 15. 04. 2015
Date of judgment: 15. 05. 2015

JUDGMENT

VINOD PRASAD, J.

In a spousal dispute the most vulnerable position is that of the child who bears the most deleterious and detrimental consequence of acrimony between his/her parents, who seldom considered his/her future life prospects and to nurture him/her in healthy atmosphere full of love, affection and caring. Whichever argument, howsoever undignified it may be, is raised to get an edge over the other. In such disputes, one of the most contentious sections invariably sought to be explained, determined and decided is section 9 of the Guardians and Wards Act, 1890 (hereinafter referred to as "the Act") concerning jurisdiction of the Court empowered to entertain a petition for the custody of the child/children, and the present appeal is one of such cases

where section 9(1) of the Act has been mooted for determination in the given set of factual matrix stated herein below:-

2. Appellant-father Dilip Kumar Behera, resident of district Ganjam tied nuptial knot with respondent Puspanjali Behera on 23.02.2004 as per Hindu rites and customs at Aska in the district of Ganjam. Since the appellant was having his vocation at Rourkela, post- marriage the spouses came to Rourkela and stayed there. On 16.06.2008, the male child-Nilesh was born. Thereafter, family feud between the spouses cropped up and attained such severity that respondent-mother had to leave her husband, and she with Nilesh, the infant boy, returned to her parental house at Berhampur on 13.02.2010. Since that date, the spouses are living separately.

3. Since the dispute could not be resolved amicably and none of the parties budged, the appellant-husband resorted to legal proceeding by filing Civil Proceeding No. 219 of 2012 for a decree of judicial separation under the Hindu Marriage Act, 1955. Notice was issued to the wife, but it seems that she did not contest and consequently the decree of judicial separation favouring the appellant husband was passed on 13.02.2013. Thereafter, as it emerges on scanning of the record, that the appellant-father filed an application under Section 25 of the Act for restoring custody of his son claiming himself to be his natural guardian. As the pleading in this appeal goes, the reason slated by the appellant-father prompting him to file the application under Section 25 of the Act, was that the son Nilesh was reluctant to go with his 'mother', but the respondent with ulterior motive to take revenge with the appellant took away the son. The appellant has bitter experience in past of witnessing the barbarous assault upon the son by the respondent on silly maters. Nilesh is a meritorious student, who was reading in a well known convent school at Rourkela and his career was at stake. The appellant has got medical facilities from his employer besides education. Last but not the least, he had requested the respondent wife to bring back his son which went unheeded.

4. Learned Judge, Family Court, Rourkela registered appellant's petition under Section 25 of the Act on 08.08.2013 as Civil Proceeding No. 207 of 2013 and directed the office to put up its note. On next two subsequent dates i.e., 16.08.2013 and 19.09.2013, the appellant-father was absent and no proceeding could take place to determine the jurisdiction of the Court to entertain the aforesaid application as the office had indicated that the same has been filed in a wrong jurisdiction. On 23.10.2013, the learned Judge,

Family Court, Rourkela heard the appellant-father on the question of jurisdiction and vide impugned order dated 01.11.2013 rejected his contentions regarding vesting of jurisdiction in him and, therefore, directed to file the petition before the appropriate Court, which decision is now under challenge in this matrimonial appeal under Section 47(c) of the Act.

5. We have heard learned counsel for both the sides.

6. The grounds for challenge to the impugned order have been inked in the memo of appeal. It has been stated that the impugned order is illegal, arbitrary, erroneous and against the settled principle of law and erroneous appreciation of the statute. Further challenge is that the learned Judge, Family Court has relied upon the unconcerned decisions to reject the claim of the appellant-husband. It had failed to understand the language of Section 25 of the Act, which envisages that for the welfare of the ward, the Court shall pass an order for return of the child. Further snipping is on the ground that the son was born at Rourkela and he was taken away from the custody of the natural guardian at Rourkela and therefore, Rourkela Family Court had jurisdiction. In this context, it was further stated that the application under Section 25 of the Act was filed immediately after the son was taken away from the custody of his father and therefore, his ordinary place of residence would be at Rourkela. Other objection to the impugned order is that there was no legal impediment or prohibition in making an order under Section 25 of the Act depriving the minor from getting better education, medical and other benefits.

7. Arguing conversely and giving an impetus to the impugned judgment, learned counsel for the respondent-wife urged that the view taken by the Judge, Family Court, Rourkela was appropriate, just and legal. The ordinary place of residence of the ward/minor, in the peculiar facts and circumstances of the case can never be said to be at Rourkela and therefore, the Family Court at Rourkela lacked inherent jurisdiction as the prohibition contained in Section 9(1) of the Act debars his jurisdiction.

8. Both the sides have relied upon various decisions, which shall be referred to in the subsequent part of the judgment at appropriate places.

9. Section 9 of the Act, which is the contentious issue between the rival sides reads as follows:-

> "**9.Court having jurisdiction to entertain application**.-(1) If the application is with respect to the guardianship of the person of the

minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

Here we are only concern with the interpretation of section 9(1) of the Act as rest of the two sub-sections are immaterial for determining the dispute between the spouses. Even in section 9(1), what is required to be determined is that in the present set of facts what will be the place of ordinary residence of the ward/minor Nilesh, as section 9(1) confers the power only on such a district court who has jurisdiction over the place where the minor ordinarily resides.

10. Place of ordinary residence in various dictionaries and lexicons has been described differently. In one of the law lexicons, 'ordinarily' does not mean solely or in the main. It only means regularly and habitually, not casually whether it be for a larger or smaller portion of the day. In yet another lexicon, the word 'ordinarily' means "habitually and not casually; it may not obviously means always". The plain and popular meaning of the word ordinarily means usually enormously and exceptionally as contrasted with extra-ordinarily. Thus, there is no gain saying that the aforesaid word 'ordinarily' has been given different contextual meanings in different factual situations.

11. Guardians and Wards Act is a beneficial legislation for the benefit of the minor/ward. The object and legislative intent is well perceptible from the various provisions of the Act, reading of which without ambiguity indicates that the same has only been for the benefit of the ward/minor. The interpretation of the term "ordinarily resides", therefore, has to be made in such a background. Since the term "ordinarily resides" is to be interpreted

contextually, therefore, it cannot be divested of the factual matrix. It is not a pure question of law, but much is dependent upon the concerned facts and circumstances. The solitary test for determining the scope of the term "ordinarily resides", therefore, depends upon the pleadings of the parties and the preceding happenings in between them. While analyzing the said aspect, the Hon'ble Supreme Court in the case of Ruchi Majoo Vrs. Sanjeev Majoo, 2011(I) OLR (SC) 1212, in paragraph-14 has observed thus"-

> "It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the Court under Section 9 if the Act is the 'ordinary residence' of the minor. The expression used is "Where the minor ordinarily resides". Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy….."

12. We, therefore, propose to examine the facts of the present appeal, which are discernible from the record.

13. The admitted facts are that the marriage between the appellant-husband and the respondent-wife was solemnized on 22.02.2004 at Aska. It is also not in dispute that the ward/minor Nilesh was born at Rourkela on 16.06.2008. Indisputable also is the fact that there were differences and dissentions between the spouses, because of which on 13.02.2010, the respondent-wife along with the infant child came back to her father's house at Berhampur, and since then both the parents are living separately away from each other. Further, it is not in dispute that earlier to filing of the application under section 25 of the Act, the appellant-husband had filed Civil Proceeding No.219 of 2012 seeking a decree of judicial separation, which ultimately was passed ex parte on 13.02.2013, as the wife did not participate in the legal battle at that stage. It is further evident that the present application under section 25 of the Act was filed near about six months after the decree of judicial separation was passed, and during this period the ward/minor remained with the mother. In fact, he was already with the mother ever since 13.02.2010, when both the spouses parted company of each other. Thus, on the day on which the application under section 25 of the Act was presented in Court and was registered, more than three and half

years had already elapsed since the appellant-father had separated from his son/ward Nilesh.

14. At this juncture, we would like to take stock of another provision, i.e., Section 6 of the Hindu Minority and Guardianship Act, 1956. A glimpse of the aforesaid provision leaves no manner of doubt that the only guardian of a Hindu minor respecting the minor's person as well as property in case of a boy or an unmarried girl is the father, and after him, the mother. But, the proviso attached to the said section is to the effect that the custody of a minor, who has not completed the age of five years, shall ordinarily be with the mother. Nilesh was born on 16.06.2008 and, therefore, the date on which the spouses parted, i.e., 13.02.2010, his age was just 2 years and 3 months. Therefore, his care and custody with the mother, according to section 6(a) proviso of the Hindu Minority and Guardianship Act was neither illegal nor unjust. Further, it is evident that it has not been pleaded by the father that during this period, i.e., after the spouses had parted company of each other, he had made any effort to get back his child. No such application was filed by him when he had approached the Court at the very first instance seeking a judicial separation. It is well writ large that five months after the decree was passed, the father woke up from his deep slumber to invoke the authority of the Court under section 25 of the Act. We note all these facts in extenso only for the reason that the background facts compel us to determine without any ambiguity the ordinary place of residence of the ward/minor Nilesh. We further find from the record the torture meted out to the wife. Since two and half years, the minor Nilesh is in the care and custody of his mother. As stated above, the paramount consideration is the welfare of the child.

15. At this juncture, it will but be appropriate to advert to some of the decisions relied upon by either side. Learned counsel for the appellant cited before us the decisions in (1) Acharya Sri Kundari Maharaj Vrs. Smt. Indra and another, AIR 2004 Rajsthan 90; (2) Jagdish Chandra Gupta Vrs. Dr. Kumari Vimla Gupta, 2003(3) AWC 2133; (3) Konduparthi Ventateswarlu Vrs. Ramavarapu Viroja Nandan and others, AIR 1989 Orissa 151; (4) Smt. Jeewanti Pandey Vrs. Kishan Chandra Pandey, AIR 1982 SC 3; (5)Jagir Kaur and another Vrs. Jaswant Ssingh, AIR 1963 SC 1521; (6) Union of India and others Vrs. Dudh Nath Prasad, AIR 2000 SC 524; and (7) Bhagwan Dass and another Vr. Kamal Abrol and others, AIR 2005 SC 2583.

16. In the first decision, the appellants were the grandfather and grandmother of the minor children Rohit and Mohit and they had approached the Family Court at Jodhpur for their custody. Father of the children Purandass had died on 09.08.1999. Post demise of the husband, the wife Smt. Indira was given compassionate appointment in the Municipal Corporation, Jodhpur, from where she sought transfer to Jaipur and settled there. The mother subsequently solemnized second marriage with one Krishna Kumar, with whom she gave birth to a female child. After vetting through the pleadings and looking to the facts and circumstances, in the aforesaid decision a Division Bench of Rahsthan High Court rejected the claim of the appellant-grand parents and held that the ordinary place of residence will be with the mother of the wards at Jaipur. This decision, in our opinion, is against the case pleaded by the appellant himself.

As regards the decision in Jagdish Chandra Gupta (supra), the same was rendered in altogether different facts and circumstances, which are not akin to the facts of the present appeal. That was a case where the child was adopted. The mother had paralysis stroke and, therefore, she along with the minor came to Kanpur. That is not the facts situation here. However, it was observed in the aforesaid decision in paragraph-20 as under:-

> " The expression 'ordinarily resides' and residing at the time of the application are not synonymous and stipulate different situations which are not inter-changeable. The place where the minor ordinarily resides indicates a place where the minor is expected to reside but for the special circumstances. It excludes places to which the minor may be removed at or about the time of filing of the application for the enforcement of the guardianship and custody of the minor. The place has to be determined by finding out as to whether the minor was ordinarily residing and where such residence would have continued but for the recent removal of the minor to different place."

So far as the decision in Konduparthy Ventateswarlu (supra) is concerned, what we find is that the same was also rendered in altogether different facts and circumstances. The appellants were in the custody of the minor child of respondent no.1 after the death of the wife of respondent no.1 at Visakhapatnam. Since the appellants were the in-laws of respondent no.1, they refused to return the child to the father-respondent no.1. Respondent no.1 approached the District Judge, Ganjam under section 25 of the Act, who

rejected the same opining that it is the District Judge having jurisdiction in the place where the minor ordinarily resides can entertain such an application. The Division Bench of this Court, after examining the facts and circumstances, ultimately concluded that the District Judge, Ganjam, who was apaproached by respondent no.1-father under section 25 of the Act, had the jurisdiction because the ordinary place of residence of the child would be with his father. The deceased mother had taken the child along with her to her parental house, where she had gone for the purpose of treatment, and, therefore, it will not make Visakhapatnam, where her parents lived, the ordinary place of residence of the child. This decision, in our humble opinion, goes against the case pleaded by the appellant.

The decision in Smt. Jeewanti Pandey (supra) has been rendered in entirely different set of circumstances. In paragraphs-12 and 13 of the said decision, it has been observed as below:-

> "12. In order to give jurisdiction on the ground of 'residence', something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the court in which the respondent is sued, is his natural forum. The word 'reside' is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one's own dwelling permanently as well as in its extended sense. In its ordinary sense 'residence' is more or less of a permanent character. The expression 'resides' means to make an abode for a considerable time; to dwell permanently or for a length of time, to have a settled abode for a time. It is the place where a person has a fixed home or abode. In Webster's Dictionary, 'to reside' has been defined as meaning 'to well permanently or for any length of time', and words like 'dwelling place' or 'abode' are held to be synonymous. Where there is such fixed home or such abode at one place the person cannot be said to reside at any other place where he had gone on a casual or temporary visit, e.g., for health or business or for a change. If a person lives with his wife and children in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hotels, boarding houses or houses of others, his actual and physical habitation is the place where he actually or personally resides.

> 13. It is plain in the context of Clause (ii) of Section 19 of the Act that the word 'resides' must mean the actual place of residence and not a legal or constructive residence; it certainly does not connote the place of origin. The word 'resides' is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation. It follows that it was the actual residence of the appellant, at the commencement of the proceedings, that had to be considered for determining whether the District Judge, Almora had jurisdiction or not. That being so, the High Court was clearly in error in upholding the finding of the learned District Judge that he had jurisdiction to entertain and try the petition for annulment of marriage filed by the respondent under Section 12 of the Act."

The said decision is also of no help to the appellant and it does not support the submission of the learned counsel for the appellant.

Coming to the decision in Jagir Kaur (supra), the same was rendered under the Code of Criminal Procedure in respect of maintenance and, therefore, has got no relevance to the facts of the present appeal.

The decision in Union of India Vrs. Dudh Nath Prasad relates to maintenance of Scheduled Castes and Scheduled Tribes order and, therefore, is also not relevant and germane to be discussed in detail.

The decision in Bhagwan Dass (supra), which is the last in the series, is also not relevant as it is relatable to Hindu Marriage Act and not the Guardians and Wards Act.

17. On the other hand, the decisions, which were relied upon and cited before us by the learned counsel for the respondent-wife are (1)Ruchi Majoo Vrs. Sanjeev Majoo, 2011(I) CLR (SC) 1212; (2) Harihar Prasad Jaiswal Vrs. Suresh Jaiswal and others, AIR 1978 AP 13; and (3) Smt. Vimala Devi Vrs. Smt. Maya Devi, AIR 1981 Rajasthan 211.

The observations made by the Hon'ble Apex Court in the first decision, relevant for the present purpose, have already been indicated at page-5 of this judgment.

In the next decision, the Hon'ble Apex Court has dealt with the concerned aspect from paragraph-4 onwards and has been pleased to lay down the following law:-

" If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

The expression 'Court' has been defined under S. 4(5)(a) as the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian. Hence we have to see which is the District Court that has got jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian. This is dealt with by S. 9 which says that if the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. From these provisions, it is clear that an application under S. 25 of the Guardians and Wards Act has to be filed in the District Court having jurisdiction in the place where the minor ordinarily resides. Hence the crucial question which falls for consideration is what is meant by the expression 'Where the minor ordinarily resides'.

In Lalita Twaif v. Paramatma Prasad (AIR 1940 A11 329), it is pointed out that the minor's actual place of residence at the time of application under S. 9(1) does not determine the jurisdiction of the Court. It must be proved where the minor ordinarily resides as laid down in S. 9)1) of the Act. Relying on this decision, the learned counsel for the petitioner contends that the minor must be deemed to be ordinarily residing at Hyderabad which is the place of residence of her natural guardian who is the father. In the aforesaid case, the facts are that the mother took away the minors to Shadibad where her parents resided about three or four months before the application was made. Before that the minors and their mother were living for several years in Benaras where her husband had lived, within the jurisdiction of the District Judge at Benaras. It was under those circumstances the Court has held that the Court at Benaras had jurisdiction as Beneras was the place where the minor should be deemed to have their ordinary residence. The mere fact that the minor had been taken by

their mother to Shadiabad when she went for a visit, would not make Shadiabad as the place of ordinary residence of the minor. I do not see how this decision helps the case of the petitioner and the said case is easily distinguishable on two grounds. One is that the mother had taken the children to her father's place to which she goes off an on, on some visits and it was only about three or four months before the filing of the application that the minors were taken away to their mother's place at Shadiabad and were staying there. But in the present case from the pleadings, it appears that the minor girl was living with the mother from the year 1970 either at Nagpur or at Tumsar in Maharashtra State and the present application has been filed in the year 1975. Further it was not for the purpose of any visit that the minor was taken by respondent No.3, but due to estrangement between herself and the petitioner whatever the reasons might be. Hence, this decision is of no use to the petitioner.

Coming to the last decision, i.e., Smt. Vimala Devi (supra), the opinion of the Hon'ble Single Judge of the Rajsthan High Court is contained in paragraphs-11 to 14, which is reproduced herein below:-

"11. Section 4(5) of the Act defines 'the Court'. Sub-clause (ii) of Clause (b) of sub-section (5) of Section 4 reads as follows:

(ii) in any matter relating to the person of the ward, the District Court having jurisdiction in the place where the ward for the time being ordinarily resides; or

Section 9 relates to the jurisdiction of theCourt to entertain an application. It is reproduced in extenso:-

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

Section 25(1) amongst others provides that if a ward is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of the guardian, may make an order for his return. An analysis of S. 9 shows (i) that if an application is for the guardianship for the person of the minor, it is required to be made to the District Court having jurisdiction in the place where the minor 'ordinarily resides'; (ii) if the application is with respect to the guardianship of the property of the minor, it can be made, (a) either to the District Court having jurisdiction in the place where the minor 'ordinarily resides', or (b) to a District Court having jurisdiction in a place where he has property; and (iii) if an application is made with respect to the guardianship of the property of a minor to a District Court other than that having jurisdiction I the place where the minor 'ordinarily resides', the Court has been empowered to return the application if in its opinion that application can be disposed of more justly or conveniently by any other District Court having jurisdiction. Thus, it follows from Section 9 of the Act that if a composite application for the guardianship of the person and property of the minor is made, it may be made to the District Court having jurisdiction in the place where the minor ordinarily resides. This is the case before me as a composite application for the guardianship of the person and property of the minor was moved before the District Judge, Bhilwara stating that the minor ordinarily resides within the jurisdiction of the District Court, Bhilwara and where he has property also. As a matter of fact, as is clear from the impugned order of the learned District Judge that on behalf of the appellant, it was submitted that as the minor (Sushree Meena) ordinarily resided at the time of the presentation of the application within the jurisdiction of the District Court, Bhilwara, that Court has jurisdiction to hear the application. It has not rightly been disputed that a question whether or not a minor ordinarily resides within the jurisdiction of the Court has to be decided on the

facts and circumstances of each case. This has necessitated the examination of the question whether the minor Sushree Meena will be deemed to have ordinarily resided at Bhilwara within the jurisdiction of the District Court, Bhilwara from where Smt. Maya Devi (respondent No.1) removed her from the custody of her natural guardian Sushil Kumar.

12. In Ram Sarup's case (AIR 1952 All 79). A Division Bench of the Allahabad High Court held that the place of resident of the minors at the time of application should be held to be the place where they resided with their mother.

13. A learned single Judge of the Allahabqd High Court in Smt. Kamla's case (AIR 1956 All 328) had occasion to consider the words 'Ordinarily resides' as used in S. 9 of the Act. It was observed as follows (at p. 330)

The past abode, for however long a period it may be, cannot be considered to be the place where the minors are residing. The words used are in the present tense, i.e., where the minor ordinarily resides.

In that case, the view taken by the learned Judges in Lakshman v. Ganga Ram, AIR 1932 Bom 592 was dissented from and after following the observations made in Ram Sarup's case (AIR 1952 All 79) and noticing Smt. Vimla Bai's case (AIR 1951 Nag 179), the learned Judge reached the conclusion that as the mother is actually residing at Roorkee and, therefore her children would also be deemed to be residing at Roorkee.

14. The same learned single Judge again explained the expression 'ordinarily resides' as used in Section 9 of the Act in Jamauna Prasad's case (AIR 1969 All 285). He, inter alia, noticed Vimlabai's case (AIR 1951 Nag 179), Ram Sarup's case (AIR 1952 All 79), Chandra Kishore's case (AIR 1955 All 611) and Smt Kamla's case (AIR 1956 All 328) and observed as under (at p. 288 of AIR 1960 All)

In my opinion the words 'ordinarily resides' have a different meaning than 'residence at the time of the application'. Both may be identical

> or my be different. That would depend on the facts of each particular case. To interpret the words 'where the minor ordinarily resides' to mean 'where the minor actually resides at the time of application' may in some cases amount to rendering nugatory all the provisions of the Guardians and Wards Act.
>
> It may be that persons who have absolutely no right may remove the minor forcibly and keep him at a distant place, when the application is made, where the minor was ordinarily residing, and objection may be taken that the application was not entertainable. In that event, the residence may depend on the machinations of recalcitrant persons. It may be that in the Bombay case on the facts the Bench had come to the conclusion that the place where he was residing at the time of the application was the place where he was ordinarily residing. But it cannot be held as a proposition of law that it will always be the same."

18. In view of the aforesaid decisions of various Courts, when the facts of the present appeal are expatiated and scanned, it becomes unambiguous that Nilesh was residing with his mother since last more than three years, who had left the company of her husband not to return again. The appellant-husband also never tried to resolve the dispute. On the other hand, he filed a suit for judicial separation. When Nilesh parted the company of his father, he was only two and half years of age. Therefore, his ordinary place of residence will be that of his mother (respondent no.1). At no point of time, the minor was taken away out of the care and custody of the mother, and mother being the second lawful guardian and the child being living with his mother, his place of ordinary residence would only be that of his mother. We are of the considered opinion that there is a world of difference between 'would have resided' and 'ordinary place of residence'. The connotation 'would have resided' indicates the prospective place of residence, whereas 'ordinarily resides' is the present place of residence, which is not casual or temporary. There is also difference between the expression 'should have resided' and 'ordinary residence'. The connotation 'should have resided' indicates intention of the person where to reside, whereas the expression 'ordinary residence' means the place where he is already residing. Section 9(1) does not speak of 'would have resided' or 'should have resided'. It has nothing to do with the legal entitlement respecting residence of the minor. If the minor ordinarily resides at a place of his car e and custody, which is not

illegal or sans law, ordinary place of residence would be where he has resided. As stated, when the mother left the company of her husband, the father of the minor, although father is the first natural guardian, the child, who was only an infant of two and half years, would ordinarily reside with the mother, which conclusion is not difficult to perceive.

19. In our estimation, the learned Judge, Family Court at Rourkela committed no illegality or infirmity in determining the jurisdiction not to entertain an application under section 25 of the Act filed on behalf of the appellant-husband.

20. In the net result, we do not find any merit in this Matrimonial Appeal, which, for the aforesaid reasons, stands dismissed.

Appeal dismissed.

2015 (II) ILR - CUT- 468

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

W.P.(C) NO. 19152 OF 2014 (WITH BATCH)

ORISSA MANGANESE AND MINERALS LTD. & ANR. .....Petitioners

.Vrs.

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

MINES AND MINERALS (DEVELOPMENT AND REGULATION) ACT, 1957 – S.8(3)

Petitioners are mining lessees of Iron ore, Manganese etc. in the State of Odisha – They have applied for renewal of their lease – During pendency of their applications for second or later renewals mining operations were stopped w.e.f. 16.05.2014 – Provision of "deemed renewal" under Rule 24-A (6) of Mineral Concession Rules, 1960 – Sub-rules (8) and (9) of Rule 24-A have no application to mining lessees in the state of Odisha – Petitioners pray for removal/transport/sale of the ore extracted by them on or before 16.05.2014 and to issue transit

permit to that effect – When mineral Ore has been extracted by a lessee during the validity of a mining lease, the lessee has a right to remove the same within six calendar months from the date of expiration of the mining lease – So the lessees have statutory right to remove the raised ore within six months from 16.05.2014 – Further if at the end of the above six calendar months, the mineral ore is not removed then one calendar month notice in writing is required to be issued to the lessees and only there after the extracted mineral ore to be deemed to become the property of the State.

In this case the petitioners have made applications for removal of ore excavated within six calendar months from 16.05.2014 –No mandatory notice of one month has been issued by the State and consequently there can not be any question that ore having been extracted by the lessees has become property of the State – Held, delay on the part of the State Government in granting permission to the petitioners to remove the ore excavated prior to 16.05.2014 is not justified – Directions issued to the Director of Mines to consider the applications of the petitioners within the time fixed.

(Paras 11, 12, 13)

Case Laws Referred to :-

1. 2014 (7) SCALE 91 : Common Cause -V- Union of India & Ors.
2. (2014) 6 SCC 590 : Goa Foundation -V- Union of India & Ors.

For Petitioners : M/s. R.K.Rath & D.K.Das
M/s. Sanjit Mohanty, S.P.Panda,
R.R.Swain, J.K.Naik & I.A.Acharya

For Opp.Parties : Additional Government Advocate

Disposed of: 04.03.2015

O R D E R

I.MAHANTY, J.

Since this batch of writ petitions involve common question of law and similar relief have been sought for, on the consent of the learned counsel for the respective parties, the cases are taken up for disposal by the following common order.

2. The admitted facts of the present cases are that the petitioners herein are all mining lessees of various mines of Iron ore, Manganese etc. in the State of Odisha and have made applications for renewal of their respective mining leases and are covered by the judgment of the Hon'ble Supreme

Court in the case of ***Common Cause Vs. Union of India and others***, reported in 2014 (7) SCALE 91. In the said judgment, the petitioners herein are included as 26 lessees operating second and subsequent renewal without any express orders of renewal passed by the State Government and directions were issued to the State Government to consider the renewal application of these petitioners for second or subsequent renewal, in consonance of Section 8(3) of the Mines and Minerals (Development and Regulation) Act, 1957 (for short, MMDR Act) within six months from the said judgment (which stood extended by the subsequent orders of the Hon'ble Supreme Court).

3. It is submitted on behalf of the petitioners that in view of the judgment of the Hon'ble Supreme Court in the aforementioned case, since the Hon'ble Supreme Court came to the conclusion that these 26 lessees cannot be allowed to operate their mines until the State Government passes express orders in terms of Section 8(3) of the MMDR Act after it forms an opinion that in the interests of mineral development it is necessary to renew the leases and recording reasons to that effect. Admittedly, petitioners herein have applied for renewal and their renewal applications are pending consideration in terms of the directives issued by the Hon'ble Supreme Court in the aforementioned matter. Prayer made in the present writ petitions is for seeking permission of the State Authorities, particularly Director of Mines to permit transportation of ore extracted by the petitioners on or before 16th May, 2014, i.e., the date on which the Hon'ble Supreme Court rendered the judgment in the case of Common Cause (supra).

4. Learned counsel for the State, on the other hand, places reliance on the judgment of the Hon'ble Supreme Court in the case of Common Cause (supra) as well as order dated 14.10.2014 passed by the Hon'ble Supreme Court in the Interlocutory Application No.86 of 2014 filed by applicant-M/s Bandekar Brothers Private Limited, in the case of ***Goa Foundation Vs. Union of India and others***, reported in (2014) 6 SCC 590. Learned Counsel for the State effectively contend that although it was claimed by M/s Bandekar Brothers that mineral ores had been extracted by them prior to 22.11.2007, i.e., the date on which the deemed first renewal of the mining leases expired, its prayer for permission to sell the ore has come to be rejected by the Hn'ble Supreme Court. Consequently, it is submitted that the prayer of the present petitioners also ought to be rejected on the selfsame ground.

The State also places reliance on the judgment of the Hon'ble Supreme court in the case of Common Cause (supra), to the effect that, the Hon'ble Supreme Court had reached the finding that the remaining 26 leases were operating the mines as second and subsequent deemed renewals were pending under Rule 24A(6) of the Mineral Concession Rules, 1960 (for short, 'MC Rules'), without any express order of renewal being passed by the State Government. In the case of *Goa Foundation (supra)*, the Hon'ble Supreme Court had came to the conclusion that provisions of "deemed renewal" under Rules 24A(6) of MC Rules shall not be available for second or subsequent renewal of mining leases. Placing reliance on the above, it is submitted on behalf of the State that operation of the mining lease have been stopped since no express order has yet been passed by the State and the "deeming" provision can no longer be extended to second or subsequent renewals, operation of the mining beyond 16.05.2014 is unauthorized in law and consequently prayer made herein for being granted with permission to sell and transport the ore extracted prior to 16.05.2014, i.e., the date of judgment in the case of Common Cause (supra), ought to be rejected.

5. In reply to the aforesaid contentions, learned counsel for the petitioners submitted that, submissions of the learned counsel for the State are based on incorrect facts. It is asserted on behalf of the petitioners that the case of Goa Foundation (supra) was a case, which was decided by the Hon'ble Supreme Court on the basis of law that applied to mining lessees in the State of Goa. The Hon'ble Supreme Court has dealt with in detail in paragraphs 2, 3 and 4 of the said judgment the fact situation that had arisen therein and their Lordships taken into account both the Goa, Daman and Diu Mining Concessions (Abolition and Declaration as Mining Leases) Act, 1987 (for short, 'Abolition Act') which got the assent of the President on 23.05.1987 and further amendment brought to the MC Rules, more particularly insertion of sub-rules (8) and (9) in Rule 24-A of the Mineral Concession Rules, 1960, the same are quoted herein below:

> "(8) Notwithstanding anything contained in sub-rule (1) and sub-rule (6), an application for the first renewal of a mining lease, so declared under the provisions of section 4 of the Goa, Daman and Diu Mining Concession (Abolition and Declaration of Mining Lease) Act, 1987, shall be made to the State Government in Form J before the expiry of the period of mining lease in terms of sub-section (1) of

section 5 of the said Act, through such officer or authority as the State Government may specify in this behalf:

Provided that the State Government may, for reasons to be recorded in writing and subject to such conditions as it may think fit, allow extension of time for making of such application upto a total period not exceeding one year.

(9) If an application for first renewal made within the time referred to in sub-rule (8) or within the time allowed by the State Government under the proviso to sub-rule (8), the period of that lease shall be deemed to have been extended by a further period till the State Government passes orders thereon."

6. In the said judgment, the Hon'ble Supreme Court came to the conclusion that sub-rules (8) and (9) of MC Rules, 1960, as amended apply only to the State of Goa and by the very nature of the said amendment the right of deemed renewal of leases in Goa are entitled only to "first renewal" and period of such first renewal expired on 22.11.2007. Paragraph 82 of the said judgment in Goa Foundation (supra), the Hon'ble Supreme Court has held as follows:-

"82. As we have held that the deemed mining leases of the lessees in Goa expired on 22.11.1987 and the maximum period (20 years) of renewal of the deemed mining leases in Goa has also expired on 22.11.2007, mining by the lessees in Goa after 22.11.2007 was illegal. Hence, the Order dated 10.9.2012 of the Government of Goa suspending mining operations in the State of Goa and the Order dated 14.9.2012 of MoEF, Government of India, suspending the environmental clearances granted to the mines in the State of Goa, which have been impugned in the writ petitions in the Bombay High Court, Goa Bench (transferred to this Court and registered as transferred cases) cannot be quashed by this Court. The Order dated 10.9.2012 of the Government of Goa and the Order dated 14.9.2012 of MoEF will have to continue till decisions are taken by the State Government to grant fresh leases and decisions are taken by MoEF to grant fresh environmental clearances for mining projects."

In view of the legal situation that arose in the State of Goa and in particular, due to amendment to Rule-24-A being bought by insertion of sub-

rules (8) and (9), various directions were issued by the Hon'ble Supreme Court and it would be relevant to extract those directions contained in paragraphs 85 and 88.7 of the said judgment.

> "85. As we have held that renewal of all the deemed mining leases in the State of Goa had expired on 22.11.2007, the mining lessees will not be entitled to the sale value of the ores sold in e-auction but they will be entitled to the approximate cost (not actual cost) of the extraction of the ores. On account of suspension of mining operations in the State of Goa, the workers who were employed by the lessees claim that they have not been paid their wages. Under Section 25-C of the Industrial Disputes Act, 1947, when a workman whose name is borne on the muster rolls of an industrial establishment and who has completed not less than one year of continuous service under an employer is laid off, he is entitled to be paid by the employer for all the days which he is so laid off, except for such weekly holidays as may intervene, compensation which shall be equal to 50% of the total of the basic wages and dearness allowance that would have been payable to him had he not been so laid-off. Following this principle of lay-off compensation, we hold that workers who could not be paid wages by the lessees will have to be paid compensation at the rate of 50% of their basic wages and dearness allowance during the period of non-employment on account of suspension of mining operations. Moreover, Marmagao Port Trust will have to be paid 50% of their charges for storage of the mineral ores after 5.10.2012."
>
> 88.7 The entire sale value of the e-auction of the inventoried ores will be forthwith realized and out of the total sale value, the Director of Mines and Geology, Government of Goa, under the supervision of the Monitoring Committee will make the following payments:

(a) Average cost of excavation of iron ores to the mining lessees;

(b) 50% of the wages and dearness allowance to the workers in the muster rolls of the mining leases who have not been paid their wages during the period of suspension of mining operations;

(c) 50% of the claim towards storage charges of Marmagao Port Trust.

> Out of the balance, 10% will be appropriated towards the Goan Iron Ore Permanent Fund and the remaining amount will be appropriated by the State Government as the owner of the ores."

7. It appears that after pronouncement of the aforesaid judgment, an applicant-M/s Bandekar Brothers Private Limited filed I.A. No.86 of 2014 of 2014, which came to be dismissed vide order dated 14th October, 2014 and while the Hon'ble Supreme Court dismissed the prayer of M/s Bandekar Brothers, it has recorded the following finding at paragraph 8 of the said order dated 14.10.2014:-

> 8. Additionally, the provisions of the Mineral Rules mandate that the excavated mineral ore is liable to be removed by the lessee within a period of six months, failing which, after the issuance of a notice, the same would stand forfeited to the State Government. On the issue of forfeiture, this Court clearly directed in Goa Foundation's case (supra), that all the extracted mineral ore contained in the inventory prepared by the Monitoring Committee, would vest in the State Government. The directions of this Court satisfy the vesting of the extracted mineral ore with the State Government, thus negating the requirement of the issuance of any formal notice to the mining lease holders. It is, therefore, difficult for us to accept, the prayers made by the applicant, either for the release of the extracted mineral ore to the applicant, or the liberty to sell the same at its own."

As would appear from the directions of the Hon'ble Supreme Court in I.A. No.86 of 2014, stated hereinabove, was satisfied the "vesting of the extracted mineral ore" with the State Government was by operation of the orders of the Apex Court, thus negating the requirement of issuance of any formal notice of forfeiture to the mining lease holders in Goa. Although aforesaid I.A. No.86 of 2014 came up to be dismissed by the Hon'ble Supreme Court, in the very same I.A., the Hon'ble Court had occasion to deal with the scope of Form-K (mining lease deed), more particularly, to Clauses- 5 and 6 of Part IX thereof, which is the statutory form in which mining leases for major minerals are granted, and concluded as follows:-

> "A perusal of the terms and conditions expressed in the lease required to be executed by a mining lease holders, leaves no room for any doubt, that the mineral ore extracted by the lessee, has to be removed

> within six calendar months from the date of expiration of the mining lease. And furthermore, if at the end of the above six calendar months, the excavated mineral ore is not removed, then within one calendar month after a notice in writing is issued to the lessee/lessees, the extracted mineral ore is deemed to become the property of the State Government. Accordingly, relying on the afore-stated statutory provisions, it was the submission of the learned amicus, that the ore which had remained unremoved after the expiration of the above period of six months, would be deemed to have vested in the State Government."

8. It is further submitted on behalf of the petitioners that the direction in I.A. No.86 of 2014 arising out of Goa Foundation (supra) were peculiar to the fact situation and law that is applicable to the State of Goa and consequently would have no direct application to the State of Odisha nor to the relief sought for in the present writ petitions.

9. It is further submitted that in view of insertion of sub-rules (8) and (9) of Rule-24-A to the MC Rules by way of amendment whereby the Hon'ble Supreme Court held that the lessees in the State of Goa have no right to seek any further relief beyond first renewal. Whereas, as per sub-rule (6) of Rule 24-A of MC Rules, all the petitioners have a right for their renewal applications to be considered since their applications for renewal do not fall under sub-rule (8) and (9), which only apply to Goa. In view of the finding of the Hon'ble Supreme Court as quoted hereinabove, petitioners herein submit that even though the judgment of the Hon'ble Supreme Court in the case of Common Cause (supra) was delivered on 16.05.2014 and since closure of mining operation was effected by the State, as a consequence of such judgment, the petitioners have a right under the MC Rules, more particularly Form-K (mining lease deed), paragraphs 5 and 6 of Part IX thereof to seek for permission to remove/utilize/transport/sale of ore raised/excavated by them, prior to 16.05.2014, of course on paying necessary royalty thereon and after obtaining necessary "transit permit".

10. At this juncture, it would be appropriate also to take note of the fact that the Union of India on 18th July, 2014 after the judgment of the Hon'ble Supreme Court of India in the case of Common Cause (supra), has brought amendment to sub-rule (6) of Rule 24A of the Mineral Concession Rules, 1960, which provides as follows:-

> "(6) If an application for first renewal of a mining lease made within the time referred to in sub-rule (1) is not disposed of by the State Government before the date of expiry of the lease, the period of that lease shall be deemed to have been extended by a further period of two years or till the State Government passes order thereon, whichever is earlier:
>
> Provided that the leases were applications for first renewal of mining lease have been made to the State Government and which have not been disposed of by the State Government before the date of expiry of lease and are pending for disposal as on the date of the notification of this amendment, shall be deemed to have been extended by a further period of two years from the date of coming into force of this amendment or till the State Government passes order thereon or the date of expiry of the maximum period allowed for first renewal, whichever is the earliest:
>
> Provided further that the provisions of this sub-rule shall not apply to renewal under sub-section (3) of Section 8 of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957)."

The aforesaid amendment was carried out by the Union of India as a consequence of Judgment dated 16.05.2014 rendered by the Hon'ble Supreme Court in the case of Common Cause (supra) and consequently, the aforesaid amendment i.e. the deemed operation of mining lease of the petitioners obviously remained valid at least till 16.05.2014, i.e., the date of the judgment of the Hon'ble Supreme Court and in the said judgment directions were also issued to the State Authorities to consider the petitioners' applications for renewal on its own merit, of course, petitioners were not allowed to carry on their mining activities including extraction of ore beyond 16.05.2014 and in view of the same, the petitioners only pray/seek for removal/utilization/transport/sale of the ore raised/extracted by them on or before 16.05.2014

11. After hearing learned counsel for the respective parties and having perused the judgment of the Hon'ble Supreme Court in Goa Foundation (supra) and Common Cause (supra) as well as order dated 14th October, 2014 passed in I.A. No.86 of 2014 filed by M/s Bandekar Brothers arising out of Goa Foundation (supra) and on consideration of the aforesaid judgments as cited by learned counsel for the petitioners as well as learned counsel for the

State, we are of the considered view that insofar as the petitioners herein are concerned, their renewal applications have been specifically directed by the Hon'ble Supreme Court to be considered for renewal under Rule 24-A(6) read with Section 8(3) of the MMDR Act. The only issue that arises for consideration is whether the prayer of the petitioners seeking direction to the State to allow transportation/sale/lifting of ore extracted/mined prior to 16.05.2014 and issue of transit permit can be considered at this stage while the renewal of applications remain pending for consideration.

In the light of the judgment of the Hon'ble Supreme Court in the case of Common Cause (supra), the interpretation given by the Hon'ble Supreme Court while dealing with mining activities in the State of Odisha in particular, since 26 lessees (petitioners form part of such 26 lessees) who are operating as second and/or subsequent renewals without any express orders of the State Government, in this respect, the Hon'ble Supreme Court came to hold that operation of "deemed extension" would not be extended to such applicants and directed immediate stoppage of all mining activities until "express orders" are passed by the State Government in terms of Section 8(3) of the MMDR Act and further directed the State Government to consider and dispose of such renewal applications for second or latter renewals within six months from the date of such judgment.

In view of the judgment of the Hon'ble Supreme Court in the case of Common Cause (supra), the mining activities of the petitioners have been brought to a stop. On reading of the judgments of the Hon'ble Supreme Court referred to hereinabove, we are of the considered view that sub-rules (8) and (9) of Rule-24-A have no application to mining lessees in the State of Odisha. Consequently, the judgment of the Hon'ble Supreme Court in Goa Foundation (supra) would have no applicability to the fact situation that arises for our consideration in the present case. Admittedly, the petitioners' applications for second or latter renewals remain pending consideration and the mining operations were stopped with effect from 16.05.2014. All the petitioners have made applications to the State Government for issue of transit permit and have given undertaking for payment of royalty, but no action has yet been taken on the same. Some petitioners have made advance deposit of royalty; however, no directions have been issued on such applications, hence, necessitating filing of the present batch of writ petitions.

12. We are of the view that although the order of the Hon'ble Supreme Court passed in I.A. No.86 of 2014 (M/s Bandekar Brothers) rejected the said

I.A., yet it also dealt with rights of a mining lessee under the M.C. Rules, whose lease has been terminated. In view of the above, it is clear that when the mineral ore has been extracted by a lessee during the validity of a mining lease, the lessee also has a right to remove the same within six calendar months from the date of expiration or termination of the mining lease. In the facts of the present case, the date of stoppage of mining i.e. 16.05.2014, even if, taken as the date of termination/stoppage, the lessees do possess the necessary statutory right to remove the raised ore within six months of such stoppage. Furthermore, if at the end of the above six calendar months, the mineral ore is not removed, then a one calendar month notice in writing is required to be issued to the lessee/lessees, and only thereafter the extracted mineral ore is to be deemed to become the property of the State.

Admittedly, in the present cases, petitioners have made applications for removal of ore excavated within six calendar months from the date of the judgment of the Hon'ble Supreme Court dated 16.05.2014 in the case of Common Cause (supra). Further, no mandatory notice of one month has been issued by the State and consequently there cannot be any question that ore having been extracted by the lessees has become property of the State.

13. In consideration of the above, in our considered view, the inaction and/or delay on the part of the State Government in granting permission to the petitioners to remove the ore excavated/raised prior to 16.05.2014, cannot be justified in law. We make it clear that this Court is fully conscious of the fact that consideration of petitioners' mining leases remain pending before the State Government and nothing stated hereinabove shall in any manner influence the consideration of the renewal applications. Further, we find no justification in denying the right of the petitioners available to them in terms of paragraphs 5 and 6 of Part IX of Form-K (mining lease deed) of MC Rules, and, accordingly, the writ petition is disposed of with the following directions:

(i) The Director of Mines shall consider and dispose of the petitioners' applications for removal of ore within a period of two weeks from the date of receipt of certified copy of this order. On such communication, the Director of Mines shall compute the royalty payable after adjusting any amount that may be in deposit with the Department in this regard and after service of notice of such demand, the petitioners shall make necessary deposit within a further period of two weeks therefrom.

(ii) On deposit of necessary royalty, transit permits shall be issued in favour of the petitioners and the petitioners shall remove the entire ore from the mining leasehold within a period of four months from the date of grant of transit permit.

(iii) All the opposite parties are directed to cooperate in this matter and not to cause any impediment in the movement of the ore.

(iv) It is made clear that the petitioners undertake to comply with all such directions and deposit all such royalty and fees etc. as may be required in accordance with law.

With the aforesaid observations and directions, the writ petitions are allowed to the extent indicated hereinabove.

Writ petitions allowed.

2015 (II) ILR - CUT- 479

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

W.P.(C) NO. 13723 OF 2014

M/S. UNIT CONSTRUCTION COMPANY PVT. LTD. ……..Petitioner

.Vrs.

THE COMMISSIONER OF COMMERCIAL TAXES, ORISSA, CUTTACK & ORS. …….Opp. Parties

(A) ODISHA VAT ACT, 2004 – S.60

Withholding of refund – Reason not assigned – Non-speaking order – Held, impugned order withholding refund is not legally sustainable. (Paras 16, 22, 23)

(B) ODISHA VAT ACT, 2004 – S.60

Withholding of refund – Order is detrimental to the interest of the dealer – Whether opportunity of hearing is required to be given to the dealer before passing of such order when the provision does not

provide such opportunity ? Held, yes –The impugned order withholding refund claims made by the petitioner is quashed.

(Paras 25 to 32)

(C) ODISHA VAT ACT, 2004 – S.60(1)

Withholding of refund – Discretion of the commissioner – Such order can be passed only upon subjective satisfaction of the following three conditions :-

(i) The order giving rise to the refund is the subject matter of an appeal or further proceeding ; and

(ii) The commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue ; and

(iii) It may not be possible to recover the amount later.

In this case the impugned order reveals that only the first condition is satisfied but not the other two conditions – Held, though the provision confers discretion upon the commissioner to withhold refund but it does not confer absolute power on him to withhold refund in each and every case. (Paras 7 to 10)

Case Laws Referred to :-

1. (1971) 1 All ER 1148 : Breen V. Amalgamated Engg. Union
2. (1974) ICR 120 : Alexander Machinery (Dudley) Ltd. V. Crabtree.
3. AIR 1990 SC 1984 : S.N. Mukherjee –v- Union of India .
4. (1999) 1 SCC 45 : Vasant D. Bhavsar V. Bar Council of India.
5. (1987) 2 SCC 510 : Baldev Singh and others vs. State of Himachal Pradesh & ors,
6. (1994) 5 SCC 267 : Dr. Rash Lal Yadav –v- State of Bihar and others.
7. (1998) 8 SCC 194 : Basudeo Tiwary –v- Sido Kanhu University
8. AIR 1988 Orissa 96 : Dr. Sarojini Pradhan vs. Union of India and anr.

For Petitioner : M/s. A.N.Das, S.K.Raychoudhury & S.Satpathy
For Opp.Parties : Mr. R.P.Kar, Standing Counsel

Date of Judgment: 26.09.2014

JUDGMENT

B.N. MAHAPATRA, J.

In the present writ petition, challenge has been made to the order dated 14.5.2014 passed under Annexure-3 by which opposite party no. 3-

Sales Tax Officer, Bhubaneswar II Circle, Bhubaneswar informed the petitioner that as per provisions under Section 60 (1) of the OVAT Act, the Commissioner of Sales Tax, Odisha, Cuttack has been pleased to withhold the refund claim of Rs. 26,86,357/- for the period from 1.10.2008 to 30.6.2011 in case of the petitioner till disposal of the Second Appeal filed against the First Appellate Order.

2. Petitioner's case in a nutshell is that it is a Private Limited company under the Companies Act, 1956 and carries on business of execution of works contract under different contractees. It is registered under the Orissa Value Added Tax Act, 2004 (hereinafter referred to as 'the OVAT Act'). It was assessed by the Sales Tax Officer, Bhubaneswar II Circle, Bhubaneswar-opposite party no. 3 under Section 42 of the OVAT Act for the period from 10.10.2008 to 30.6.2011 vide order dated 1.10.2012 under Annexure-1 and an extra demand of Rs. 4,68,507/- was raised towards tax, interest and penalty. Being aggrieved by the order of assessment, the petitioner preferred First Appeal under Section 77 of the OVAT Act before opposite party no. 2-Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar-opposite party no. 2, who vide order dated 30.11.2013 allowed the appeal and held that the petitioner is entitled to get refund of Rs. 26,86,357/- as per the provisions of law. Pursuant to the said order passed in the appeal, no refund was granted to the petitioner and on 20.5.2014, the petitioner received the impugned order passed under Annexure-3 withholding the amount of refund till disposal of the Second Appeal. Hence, the present writ petition.

3. Mr. Das, learned counsel appearing on behalf of petitioner submitted that the impugned order withholding refund of claim under Section 60 of the OVAT Act is bad in law as all the conditions precedent for exercising power of withholding refund are not satisfied. Withholding of excess tax paid by the petitioner as determined by the First Appellate Authority violates Article 265 of the Constitution of India, which enjoins that no tax shall be levied or collected except by authority of law. No reason has been assigned in the impugned order for withholding refund claimed. The Assessing Officer instead of granting refund which flows from the First Appellate order within sixty days from the date of receipt of the said order as per Section 57 of the OVAT Act issued the impugned order after about five months from the date of passing of the first appellate order. The opposite party no. 1 has issued a circular bearing no. 2211/CT dated 18.2.2014 instructing strict compliance of

Section 57 of the OVAT Act and disposal of refund claims. The petitioner being a Private Limited Company substantiates movable and immovable properties in its name. Further, the petitioner is a regular tax payer under the OVAT Act and has been doing business in the State and filing periodical returns with the opposite party-Department. Hence, the action of the opposite parties in withholding the claim of refund is arbitrary or unreasonable. Even though the petitioner has succeeded before the First Appellate Authority, it is suffering for passing of the impugned order withholding the claim of refund legally due to it. Concluding his argument, Mr. Das prayed to quash the impugned order under Annexure-3.

Mr. Das further submitted that no opportunity of hearing has been given to the petitioner before passing of the impugned order withholding the claim of refund due to the petitioner. Thus, action of opposite party is violative of principles of natural justice.

4. Mr. R.P. Kar, learned Standing Counsel for the Revenue submitted that there is no illegality in the impugned order passed under Annexure-3 withholding refund which flows from the first appellate order. It was further submitted that where any order giving rise to a refund is subject matter of an appeal or further proceeding or where any other proceeding is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the Revenue and that it may not be possible to recover the amount later, the Commissioner may withhold the refund till final order is passed in such appeal or proceeding. Mr. Kar further submitted that if the dealer becomes entitled to the refund as a result of the appeal or further proceeding, the dealer is entitled to interest as provided under sub-section (1) of Section 59 of the Act. It was further argued that Section 60(1) of the OVAT Act does not provide any opportunity of hearing before passing any order withholding the claim of refund due to a dealer. Therefore, allegation of violation of the principles of natural justice in the present case for not granting opportunity of hearing to the petitioner is not correct.

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

> (i) Whether the impugned order passed under Annexure-3 withholding refund of Rs. 26,86,357/- which flows from the first appellate order is legally sustainable?

(ii) Whether a dealer is entitled to any opportunity of hearing before passing of order under Section 60 of the OVAT Act withholding the claim of refund due to the dealer?

(iii) What order?

6. To deal with the above two questions, it is necessary to extract hereunder Section 60 of the OVAT Act.

"**60. Power to withhold refund in certain cases** – (1)

Where any order giving rise to a refund is the subject matter of an appeal or further proceeding, or where any other proceeding under this Act is pending and the Commissioner is of the opinion that the grant of such refund is likely to adversely affect the Revenue and that it may not be possible to recover the amount later, the Commissioner may withhold the refund till the final order is passed in such appeal or proceeding.

(2) Where a refund is withheld under sub-section (1), the dealer shall be entitled to interest as provided under sub-section (1) of Section 59, if he becomes entitled to the refund as a result of the appeal or further proceeding or as the case may be, any other proceeding, under this Act."

7. A bare reading of sub-section (1) of Section 60 of the OVAT Act would go to show that for exercising power of withholding refund, the following three conditions are to be satisfied.

(i) The order giving rise to the refund is the subject matter of an appeal or further proceeding; and

(ii) The Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue; and

(iii) It may not be possible to recover the amount later.

8. Thus, it is only upon subjective satisfaction of the aforesaid three conditions, an order withholding refund can be passed by the Commissioner. Fulfilment of all the above three conditions is *sine qua non* for passing the order under sub-section (1) of Section 60 of the OVAT Act withholding refund due to a dealer arising from an order.

9. Perusal of the impugned order reveals that the first condition is satisfied i.e. the order from which the refund flows is the subject mater of Second Appeal. The impugned order does not speak anything about the satisfaction of other two conditions. The said order also does not contain the basis for forming the opinion by the Commissioner that grant of refund would adversely affect the Revenue.

10. The use of expression 'may' as in Section 60 of the OVAT Act in the context, confers discretion upon the Commissioner to withhold refund but it does not confer an absolute power on the Commissioner to withhold refund in each and every case where an order gives rise to refund is the subject matter of an appeal or further proceeding. Therefore, the Commissioner must exercise the discretion on relevant grounds and for germane reasons. Language of Section 60 (1) of the OVAT Act does not reveal that the legislative intent is to withhold refund wherever an order giving rise to refund is the subject matter of an appeal or further proceeding or other proceedings pending under the OVAT Act. Had it been so, the provisions would have been clearly enjoined that no refund shall be granted till the conclusion of the appeal or further proceeding.

11. It is needless to say that the discretion vested with the Commissioner to withhold refund due to the dealer arising out of an order passed by the quasi judicial authority must be exercised judicially as Article 265 of the Constitution enjoins that no tax shall be levied or collected except by authority of law.

12. The matter can be looked at from a different angle. Under the Scheme of the OVAT Act, a dealer need not make an application for refund arising out of the first appellate order and under Section 57 of the OVAT Act, the Assessing Authority is obliged to refund the excess tax paid within a period of 60 days from the date of receipt of the said order giving rise to such refund. In the present case, refund of Rs.26,87,357/- flows from the first appellate order dated 30.11.2013. The impugned order under Annexure-3 withholding refund was passed on 14.5.2014. The first appellate order dated 30.11.2013 (Annexure-2) shows that a copy of the said order was sent to the Sales Tax Officer, Bhubaneswar II Circle, Bhubaneswar vide memo 3203 dated 3.12.2013. The offices of the Assessing Officer and First Appellate Authority function in one building. Therefore, the first appellate order dated 30.11.2013, which was sent to the Sales Tax Officer on 3.12.2013, would hardly take one or two days to reach the office of the Sales Tax Officer, who

passed the order of assessment. Therefore, in terms of Section 57 of the OVAT Act, the refund should have been granted to the petitioner by 1st week of February, 2014. No reason whatsoever has been assigned as to why refund has not been granted to the petitioner by 1st week of February, 2014 in terms of Section 57 of the OVAT Act, when no order withholding refund was in existence, which was passed only on 14.5.2014 under Annexure-3.

13. At this juncture, it may be relevant to refer to the Circular bearing No. 2211/CT dated 18.2.2014 issued by the Commissioner of Commercial Taxes, Odisha, Cuttack instructing strict compliance of Section 57 of the OVAT Act and disposal of refund claims within the prescribed period failing which appropriate action will be initiated against the erring officials, who will also be accountable for the interest borne on such refund. Nothing is brought to our notice by Mr. Kar appearing for the Department to show whether any action has been taken against the Assessing Officer, who apparently has not granted such refund in terms of Section 57 of the OVAT Act and the Circular of the Commissioner of Commercial Taxes dated 18.2.2014.

14. We are shocked that the learned Commissioner of Commercial Taxes instead of taking any action against the Assessing Officer for violating the mandate of Section 57 of the OVAT Act and not following/obeying instruction of the Commissioner for strict compliance of Section 57 of the OVAT Act has passed the impugned order withholding the claim of refund due to the petitioner.

15. It is needless to say that if a subordinate authority will not obey the instruction/order/circular issued by the higher authority in the hierarchy of administration, it would cause chaos in the field of administration and certainly not help in smooth functioning of administration.

16. We further notice that the impugned order has been passed without assigning any valid reason. Virtually it is a non-speaking order.

17. Even in respect of administrative orders Lord Denning, M.R. in ***Breen V. Amalgamated Engg. Union*** (1971) 1 All ER 1148, observed: "The giving of reasons is one of the fundamentals of good administration."

18. In ***Alexander Machinery (Dudley) Ltd. V. Crabtree*** (1974) ICR 120 (NIRC) it was observed: "Failure to give reasons amounts to denial of justice".

19. The Hon'ble Supreme Court in ***S.N. Mukherjee –v- Union of India***, AIR 1990 SC 1984, held that the recording of reasons by an administrative authority serves a salutary purpose namely; it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. The need for recording of reasons is greater in a case where the order is passed at the original stage.

20. Every administrative decision must be hedged by reasons. [See *Life Insurance Corporation of India and another –v- Consumer Education and Research Centre and others*, (1995) 5 SCC 482)].

21. In ***Vasant D. Bhavsar V. Bar Council of India*** (1999) 1 SCC 45, the apex Court held that an authority must pass a speaking and reasoned order indicating the material on which its conclusions are based.

22. Law is well-settled that reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same it becomes lifeless. (See *Raj Kishore Jha –v- State of Bihar*, (2003) 11 SCC 519.

23. For the reasons stated above, the impugned order passed under Annexure-3 withholding refund of Rs. 26,86,357/- which flows from the first appellate order is not legally sustainable.

24. Question No. (ii) is whether a dealer is entitled to any opportunity of hearing before passing of order under Section 60 (1) of the OVAT Act withholding claim of refund due to the dealer.

25. It may be relevant to note here that if an order has civil consequence and adversely affects the party; the affected party must be given an opportunity of hearing before such order is passed. The order passed in exercise of power vested under Section 60 (1) of the OVAT Act withholding refund due to the dealer is certainly detrimental to the interest of the dealer. Therefore, even though Section 60(1) of the OVAT Act does not say for providing an opportunity of hearing to the dealer before passing the order withholding refund, such opportunity of hearing should be afforded to the dealer in the interest of natural justice.

26. At this juncture, it would be beneficial to refer to the following decisions of the Hon'ble Supreme Court and this Court which are relevant for our purpose.

27. The Hon'ble Supreme Court in the case of ***Baldev Singh and others vs. State of Himachal Pradesh and others, (1987) 2 SCC 510*** has held as under:

> ".....but the settled position in law is that where exercise of a power results in civil consequences to citizens, unless the statute specifically rules out the application of natural justice, the rules of natural justice would apply. We accept the submission on behalf of the appellants that before the notified area was constituted in terms of Section 256 of the Act, the people of the locality should have been afforded an opportunity of being heard and the administrative decision by the State Government should have been taken after considering the views of the residents. Denial of such opportunity is not in consonance with the scheme of the Rule of Law governing our society. We must clarify that the hearing contemplated is not required to be oral and can be by inviting objections and disposing them of in a fair way."

28. The Hon'ble Supreme Court in the case of ***Dr. Rash Lal Yadav –v- State of Bihar and others,*** *(1994) 5 SCC 267,* has held as under:

> "The concept of natural justice is not a static one but is an ever expanding concept. In the initial stages it was thought that it had only two elements, namely, (*i*) no one shall be a judge in his own cause, and (*ii*) no one shall be condemned unheard. With the passage of time a third element was introduced, namely, of procedural reasonableness because the main objective of the requirement of rule of natural justice is to promote justice and prevent its miscarriage. Therefore, when the legislature confers power in the State Government to be exercised in certain circumstances or eventualities, it would be right to presume that the legislature intends that the said power be exercised in the manner envisaged by the statute. If the statute confers drastic powers, such powers must be exercised in a proper and fair manner. Drastic substantive laws can be suffered only if they are fairly and reasonably applied. In order to ensure fair and reasonable application of such laws courts have, over a period of time, devised rules of fair procedure to avoid arbitrary exercise of such powers. True it is, the rules of natural justice operate as checks

> on the freedom of administrative action and often prove time-consuming but that is the price one has to pay to ensure fairness in administrative action. And this fairness can be ensured by adherence to the expanded notion of rule of natural justice. Therefore, where a statute confers wide powers on an administrative authority coupled with wide discretion, the possibility of its arbitrary use can be controlled or checked by insisting on their being exercised in a manner which can be said to be procedurally fair. Rules of natural justice are, therefore, devised for ensuring fairness and promoting satisfactory decision-making. Where the statute is silent and a contrary intention cannot be implied the requirement of the applicability of the rule of natural justice is read into it to ensure fairness and to protect the action from the charge of arbitrariness. Natural justice has thus secured a foothold to supplement enacted law by operating as an implied mandatory requirement thereby protecting it from the vice of arbitrariness. Unless the expressly or by necessary implication excludes the application of the rule of natural justice, courts will read the said requirements in enactments that are silent and insist on its application even in cases of administrative action having civil consequences."

29. In ***Basudeo Tiwary –v- Sido Kanhu University***, (1998) 8 SCC 194, the Hon'ble Supreme Court held that in order to impose procedural safeguards, the Court has read the requirement of natural justice in many situations when the statute is silent on this point. The approach of the Hon'ble Supreme Court in this regard is that omission to impose the hearing requirement in the statute under which the impugned action is being taken does not exclude hearing- it may be implied from the nature of the power – particularly when the right of a party is affected adversely. The justification for reading such a requirement is that the Court merely supplies omission of the Legislature.

30. This Court in the case of ***Dr. Sarojini Pradhan vs. Union of India and another, AIR 1988 Orissa 96,*** *has held as under:*

> "THE Law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable. "it cannot be disputed that refusal by the Central Government exercising its jurisdiction under S. 5 (2) Involves civil consequences of

considerable magnitude for the applicant for grant of mining lease. If an opportunity is afforded, the applicant may possibly convince the Central Government why approval should be accorded, to use the words of Lord Parker, to disabuse the Central Government of its impression inclining it not to accord approval. The applicant may show that the grounds on which the Central Government is not inclined to accord approval are unsustainable, erroneous, even absurd. The wisest even is liable to err. The situation or nature of the exercise is not such as to attract the exclusionary principles. Whereas an opportunity of hearing does not prejudice the Central Government, the denial of it might prejudicially affect the applicant. Even assuming that the exercise under S. 5 (2) is of administrative character, what heavens would fall if an opportunity of hearing is given. By grant of lease, there is augmentation of the revenue of the State by way of royalty. Exploitation of minerals leads to economic development of the State and the nation. Refusal to accord approval also affects the State Government where the State Government is inclined in favour of the grant. Therefore, when by the refusal not only the applicant but also the State Government, where it is inclined in favour of the grant, would be so prejudicially affected, in our opinion, the principles of natural justice would supplement the law contained in S. 5 (2). Our view gets support from the decision of the Patna High Court in Ramnik Lal Kothari v. Govt. of India, AIR 1970 Pat 189. Therein, Untwalia, J. (as he then was) speaking for the Court observed :". . . . THE order of the Central Government in exercise of the said power may be executive in character, as contended on its behalf by the learned Government pleader. Yet I am of the opinion that if the exercise of power under S. 5 (2) of the Act and the order made thereunder adversely affects or prejudices a person, the trend of the decisions of the Courts in India as also in England is that such a person must be given an opportunity to have his representation or say in regard to the matter which is going to affect him adversely. To put it briefly, the power may be executive, but it has to be exercised in accordance with the principles of natural justice which are generally applicable for the exercise of power in a judicial manner. Reference in this connection may be made to a recent decision of the Supreme Court in the Union of India v. M/s. Anglo Afghan Agencies, AIR 1968 SC 718. I do not mean to suggest that invariably in all cases, the power under S. 5 (2) of the Act has got to be exercised by the Central

> Government keeping in view the principles for the exercise of a judicial power. But by and large it may affect or prejudice the rights or interest of a person; in all fairness, the person concerned must be given a reasonable opportunity to make his representation. "we are in respectful agreement with the aforesaid view. Inasmuch as the petitioner was not afforded an opportunity, and, therefore, the principles of natural justice were violated, the decision of the Central Government as per Annexure-5 is invalid and void."

31. In the present case, admittedly petitioner was not afforded an opportunity of hearing before the impugned order withholding refund claimed by the petitioner was passed.

32. In view of the above, the impugned order dated 14.5.2014 (Annexure-3) passed by the Sales Tax Officer, Bhubaneswar II Circle, Bhubaneswar withholding refund claims made by the petitioner is hereby quashed.

33. In the result, this writ petition is allowed, but in the circumstances without any order as to costs.

Writ petition allowed.

2015 (II) ILR - CUT- 490

S. PANDA, J.

W.P.(C) NO. 10251 OF 2015

SUPRAVA SAMAL .....Petitioner

.Vrs.

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

ODISHA GRAMA PANCHAYAT ACT, 1964 – S. 24(2)(c)

Notice issued for no confidence motion against Sarpanch with 15 clear days time between the date of issuance of notice and the date of the meeting – As the place of meeting was not clearly reflected in the notice a corrigendum was issued subsequently to rectify the mistake –

Petitioner raised objection that the gap of 15 days should have been from the date of issuance of corrigendum and the date of the meeting – Objection turned down by O.P.3 – Hence the writ petition – Corrigendum is issued to correct a mistake in the notice and it would relate back to the date of issuance of the original notice so again 15 days time need not be given from the date of corrigendum – Held, there is no error in the notice calling for interference by this Court.

(Para 8)

Case Laws Rreffered to :-

1. 2005 (II) OLR 659 : Nilambar Majhi Vs. Secretary to Government of Orissa Panchayat Raj Deptt and others.
2. 1988 (I) OLR 80 : Sarat Padhi Vs. State of Orissa and others.

For Petitioner : M/s. S.K.Padhi, Manoj Ku.Mohanty & M.R.Pradhan

For Opp. Parties : Standing Counsel M/s. B.Nayak, B.R.Sahu & S.Samal

---

Date of Judgment : 07.08.2015

JUDGMENT

S.PANDA, J.

The short question involved in this Writ Petition whether the Notice No.724 dated 22.05.2015 issued by the Sub-Collector, Jajpur - opposite party No.3 under Section 24 (2) (c) of the Orissa Grama Panchayat Act, 1964 fixing the meeting for moving No-Confidence Motion without fixing the place of meeting is valid and sustainable.

2. The petitioner was elected as Sarpancha of Taliha Grama Panchayat under Dasarathpur Panchayat Samiti in the district of Jajpur. The total number of members of the Grama Panchyat including the petitioner is twenty one and the petitioner is continuing as Sarpancha since the month of February, 2012 and also discharging her duties accordingly. While matter stood thus, 14 members of the said Grama Panchayat passed a resolution to move No Confidence Motion against the present petitioner and they have issued the requisition to the Sub-Collector, Jajpur - opposite party no.3. On receipt of a copy of the resolution as well as requisition, opposite party no.3 issued the impugned notice after due verification of the signatures of the Ward Members.

3. Learned counsel appearing for the petitioner contended that in the impugned notice opposite party no.3 has specified the date and time of the meeting without mentioning the place of meeting as required under Section 24 (2) (c) of the Orissa Grama Panchayat Act, 1964 (hereinafter referred to as 'the Act'). He further submitted that 15 days time as provided under Section 24(2)(c) of the Act has not been given from the date of the corrigendum issued by opposite party no.3 and only after two days the meeting was held. Therefore, the impugned notice as well as the consequential notice for No Confidence Motion is liable to be quashed. In support of his contention, he has relied on the decisions reported in **2005 (II) OLR 659** and **1988 (I) OLR 76**.

4. Learned Standing Counsel submits that a corrigendum was issued by opposite party no.3 on 08.6.2015 and the same was duly served on the concerned Executive Officer of Taliha Grama Panchayat. Therefore, the requirement of the statutory provisions is fulfilled and since the corrigendum is only issued as a curative measure, no illegality has been committed by opposite party no.3. A counter affidavit has also been filed by opposite party no.3 stating that as the place of meeting was not clearly reflected in the notice, the same was issued by a corrigendum rectifying the omission in the impugned notice.

5. Learned counsel appearing for opposite party nos.4 to 17, who are the members of the Grama Panchayat, moved the resolution of No-Confidence Motion and issued requisition to opposite party no.3, also supported the contention raised by the learned Standing Counsel. It is submitted that the impugned notice issued by opposite party no.3 clearly reflects that a meeting of the Grama Panchayat is to be held on 10.6.2015 at about 9 A.M. and the meeting of the Grama Panchayat obviously to be held in the premises of the Grama Panchayat. In view of the above, the place of meeting was implied in the notice and the statutory requirements are fulfilled. In the meantime the No Confidence Motion has already been moved, however, result of the same has not been published due to interim order passed by this Court and the same is required to be published.

6. In the case of **Nilambar Majhi Vs. Secretary to Government of Orissa Panchayat Raj Deptt. and others** reported in **2005 (II) OLR 659**, a Division Bench of this Court held that 15 days clear notice must be there and the date of meeting fixed for No Confidence Motion are to be excluded in computing the notice period of 15 days. Non compliance of the same, the No-

Confidence Motion and the consequence thereof is invalid and the same is liable to be quashed**.**

7. In the case of **Sarat Padhi Vs. State of Orissa and others** reported in **1988 (I) OLR 80** a Division Bench of this Court held that the scheme of the notice contemplated under Section 24 (2) (c) of Orissa Grama Panchayat Act, 1964 may be divided into three parts; i) requirement of giving the notice, ii) fixing the margin of time between the date of the notice and the date of the meeting, and iii) service of notice on the members. The first two parts are mandatory but the third condition i.e. the mode of service of the failure by any member to receive the notice at all or allowing him less than 15 clear days before the date of the meeting will not render the meeting invalid. This requirement is only directory and based on a sound public policy.

8. Considering the rival submissions of the parties and after going through the materials available on record, it appears that in the present case the question is whether the aforesaid 15 days to be calculated again from the date of corrigendum issued by the opposite party no.3 or as the corrigendum was issued only statutory requisition of 15 days from that date for the meeting as stipulated under Section 24(2) (C) of the Act is necessary. The meaning and application of the word 'corrigendum' has been considered by the Courts time and again. It was held that corrigendum is issued to correct a mistake in the notification. Therefore, it would relate back to the date of issuance of the original notification. In view of the settled position that a corrigendum can be issued only to correct typographical error, accidental slip or omission therein, it is meant to correct such mistake (See (2000) 5 SCC 765, 92 STC 571 - Commissioner of Sales Tax, U.P. Vs. Dunlop India Ltd.). The place of meeting was implied in the impugned notice and corrigendum was issued accordingly by opposite party no.3 on 6.8.2015 to rectify the mistake. Therefore again 15 days time need not be given from the date of corrigendum issued, which was made as a curative measure. Hence this Court is not inclined to interfere with the matter in exercise of the jurisdiction under Article 227 of the Constitution of India as there is no error apparent of law on the face of the record.

9. In view of the discussions made hereinabove, the interim order dated 03.6.2015 passed by this Court in Misc. Case No.10025 of 2015 directing that No Confidence Motion may continue but the result thereof shall not be published without leave of this Court stands vacated and the Sub-Collector, Jajpur – opposite party no.3 is directed to publish the result of the No

Confidence Motion and take consequential steps on production of certified copy of this order. The Writ Petition along with Misc. Case is accordingly disposed of.

Writ petition disposed of.

2015 (II) ILR - CUT- 494

B.K.NAYAK, J.

O.J.C. NO. 4914 OF 1996

EJAZ ALAM SIDDIQUE ……..Petitioner

.Vrs.

PRESIDING OFFICER,
INDUSTRIAL TRIBUNAL & ANR. ……Opp.Parties

INDUSTRIAL DISPUTES ACT, 1947 – 33 (2)(b)

Disciplinary Proceeding – Disciplinary Authority himself was a witness in the proceeding – He has no competence to appoint the inquiry officer and acted as disciplinary authority – Violation of principles of natural justice as no person can be a judge in his own cause and no witness can certify that his own testimony is true – Held, the impugned order of removal of the workman and its approval by the Industrial Tribunal are quashed – The petitioner is deemed to be continuing in service – Direction issued to the employer to reinstate him with 50% back wages from the date of removal from service till the date of reinstatement. (Paras 11,12 & 13)

For Petitioner : Mr.Sanjit Mohanty, Sr. Advocate.
For Opp. Partties : Mr. B.P.Tripathy.

Date of hearing : 03.03.2014
Date of judgment: 02.04.2014

JUDGMENT

B.K.NAYAK, J.

This writ application has been filed by the petitioner-workman challenging the order dated 06.12.1995 (Annexure-10) passed by the Presiding Officer, Industrial Tribunal, Orissa, Bhubaneswar in I.D. Misc.

Case No.28 of 1992 filed by the employer-opposite party no.2 under Section 33 (2) (b) of the I.D. Act 1947 (in short 'the Act') approving the action of the employer in removing the petitioner from service with effect from 15.07.1992.

2. The petitioner was appointed as a Khalasi on 07.11.1986 in the Rourkela Steel Plant under sports quota and was subsequently promoted to L-2 Grade in November,1989. In order to enable him to attend the practice for International Steel Boxing Championship, his duty hours were relaxed by the employer for the period from 10.08.1990 to 09.09.1990. A Departmental Proceeding was drawn up against him with charges on two counts, namely, one, for abscondance from working spot at about 9.15 A.M. till the end of the shift on 30.08.1990 and, secondly, for theft of a piece of nonferrous casting metal weighing 46 kgs having approximate value of about Rs.2,760/- in the front dickey of his scooter amounting to contravention of clause-28 (vi) and (ii) of the standing orders. In the domestic enquiry, the Inquiring Officer exonerated the petitioner from the charge of abscondance from duty holding that the petitioner's duty hours was relaxed as he was required to practice in the stadium daily from 6.00 A.M. to 11.00 A.M in order to participate in the International Steel Boxing Championship. However, the Inquiring Officer found the other charge of committing theft of a nonferrous casting metal proved. On the basis of such enquiry report, the disciplinary authority passed the order of removal of the petitioner from service. Since the petitioner was a concerned workman in pending I.D. Case No.25 of 1990, the employer filed application under Section 33 (2)(b) of the I.D. Act before the Industrial Tribunal, Orissa, Bhubaneswar for approval of the removal order and the application was registered as Industrial Misc. Case No. 28 of 1992.

3. The plea of the petitioner-workman before the Industrial Tribunal was that the domestic enquiry was not conducted in accordance with the principles of nature justice; that the charge against him is based on conjecture and surmises; that he was not given opportunity of going through the document relied upon by the management during the enquiry; and that the subject matter of theft has not been proved by any witness to be the property of the employer-company.

4. Rejecting the pleas taken by the workman, the learned Presiding Officer of the Industrial Tribunal came to the conclusion that the report of the Inquiry Officer was wholesome and keeping in the principles of nature justice and fair play at every stage of domestic enquiry and that the disciplinary

authority had applied his mind to the enquiry report and the materials and, therefore, the order of removal of the workman from service did not suffer from any infirmity.

5. In assailing the impugned award, the learned Senior Counsel raised the contentions that there was violation of principles of natural justice in conducting the domestic enquiry inasmuch as there was non-supply of list of witnesses and material documents to the petitioner before the initiation of the enquiry, which fact has been admitted by the management witness in his cross-examination and taken note of by the learned Tribunal, but all the same the Tribunal erroneously held that there is no violation of principles of nature justice. It is also submitted that the proceeding is vitiated as Sri R.K. Mohanty, the disciplinary authority was a witness to the alleged seizure of the stolen metal and, therefore, he himself could not have appointed the Inquiry Officer and acted as the disciplinary authority as he was accentuated by bias. It is also submitted that the order of removal of the petitioner passed by the disciplinary authority is without jurisdiction inasmuch as, as per the delegation of disciplinary powers for employees governed by the standing orders Mr. R.K. Mohanty, Chief Superintendent (Mech.) Blast Furnace could not have acted as the disciplinary authority. It is also submitted that the punishment awarded is disproportionate to the charge.

6. The learned counsel appearing for the management-opposite party no.2 submitted that there is no violation of principles of natural justice and that the petitioner has not been prejudiced for non-supply of list of witnesses and copies of documents to him. It is also submitted by him that merely because the disciplinary authority was a witness to the detection of theft, his acting as the disciplinary authority would not amount to violation of principles of natural justice. It is also submitted that while exercising the limited power under Section 33 (2) (b) of the I.D. Act, the Industrial Tribunal cannot go into the question of proportionality of the quantum of punishment.

7. The scope of the power and jurisdiction, which the Industrial Tribunal exercises under Section 33 (2) (b) of the I.D. Act has been elucidated by the Hon'ble apex Court in the case of ***Lalla Ram v. Management of D.C.M. Chemical Works Ltd and another : AIR 1978 SC 1004***. It has been held therein that the jurisdiction of the Tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based on legal evidence

adduced before the domestic tribunal is made out; (iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimize the employee. Regard being had to the position settled by the Supreme Court that though generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe yet an inference of mala fides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shocking disproportionate punishment; (iv) whether the employer has simultaneously or within such reasonably short time as to form part of the same transaction supplied to the authority before which the main industrial dispute is pending for approval of the action taken by him.

If these conditions are satisfied, the Industrial Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If however, the domestic enquiry suffers from any defect or infirmity, the labour authority will have to find out on its own assessment of the evidence adduced before it whether there was justification for dismissal and if it so finds it will grant approval to the order of dismissal.

8. It has been contended by the learned Senior Counsel appearing for the petitioner that there was violation of principles of natural justice for non-supply of list of witnesses and copies of documents to the petitioner before the domestic enquiry was conducted and, therefore, the whole proceeding stands vitiated including the ultimate punishment of removal from service. In this connection attention of this Court was drawn to the standing orders of the Rourkela Steel Plant. Rule-30 (ii) of the Standing Order prescribes the procedure for imposition of major penalty. Clause (a) of the said Rule among others requires that copies of all relevant documents in connection with the enquiry shall be supplied to the employee concerned on request. It transpires from the enquiry report of the domestic enquiry committee that different documents including a seizure list with regard to the seizure of the stolen nonferrous casting metal and the statements of different seizure witnesses said to have been recorded at the time of seizure and the statement of the petitioner-workman himself were relied upon by the one-man enquiry committee. It transpires from the evidence of the management witness examined as witness no.1 for the applicant before the Industrial Tribunal that to a court question during the course of cross-examination the said witness

admitted that list of witness as well as the copies of documents relied upon by the management were not supplied to the workman-petitioner before the domestic enquiry began and it is also admitted by him that the copy of the enquiry report was supplied to the workman after the final order of removal was passed by the disciplinary authority. This piece of oral testimony was considered by the Presiding Officer, Industrial Tribunal, who has held that on going through all the relevant documents relating to the domestic enquiry he was satisfied that the workman has not been prejudiced in any manner due to non-supply of list of the witnesses and the documents.

It is crystal clear from the enquiry report itself that the workman took the plea and deposed during enquiry that after he was intercepted at the traffic gate by the CISF personnel on duty there, he was taken to the 'C' Post and that he was forcibly made to sign on some papers, which were blank. With reference to the seizure list itself (M-Ext-1), the workman explained that alleged stolen metal was not seized from his person in presence of the seizure witnesses and that he was made to sit at 'C' Post from 11.00 A.M till 10.00 P.M. and that even though his superior officer Sri R.K. Mohanty and Sri A.K. Panda came to the said Post at 6.00 A.M. he was not allowed to meet them. It also appears that these two Officers have become witnesses to seizure and their statements along with the seizure list have been accepted by the enquiry committee in finding guilt of the workman. Keeping in view the defence of the workman, he should have been supplied with the copy of the seizure list and the statements of seizure witnesses before conducting the enquiry. The Industrial Tribunal, therefore, was not right in observing that non-supply of the documents to the workman did not prejudice his case. It has been held by the Hon'ble apex Court in the case of ***Union of India and others v. S.K. Kapoor (2011) 4 SCC 589*** as follows :

> "**5.** It is a settled principle of natural justice that if any material is to be relied upon in departmental proceedings, a copy of the same must be supplied in advance to the charge-sheeted employee so that he may have a chance to rebut the same."

Having regard to the facts discussed above, it must be held that the petitioner-workman has been prejudiced and the domestic enquiry against him stood vitiated for non-supply of list of the witnesses and material documents.

9. The second limb of argument with regard to the violation of principles of natural justice is that Sri R.K. Mohanty, Superintendent (Mech.) Blast Furnace, who is the disciplinary authority and passed the order of punishment of removal of the petitioner from service was a witness to the alleged seizure of the stolen article. It is very much apparent from the enquiry report itself that Mr. R. K. Mohanty was himself a witness to the alleged seizure of the stolen article and his statement along with the statement of one Mr. A.K. Panda, Manager, Blast Furnace was recorded and proved on behalf of the management as M-Ext.2 and the seizure list itself, which was also signed by Mr. R.K. Mohanty as a witness has also been exhibited as M-Ext.1 and these two exhibits were relied upon by the enquiry committee to find the workman guilty of the misconduct.

10. It has been held by the apex Court in the case of ***Mohd. Yunus Khan v. State of Uttar Pradesh and others : (2010) 10 SCC 539*** as follows :

> "**23**. A Constitution Bench of this Court in *State of U.P. v. Mohd.* Nooh rejected a submission made on behalf of the State that there was nothing wrong with the Presiding Officer of a Tribunal appearing as a witness and deciding the same case, observing as under: (AIR p.91, para-7).
>
> "7….. The two roles could not obviously be played by one and the same person. … the act of Shri B.N. Bhalla in having his own testimony recorded in the case indubitably evidences a state of mind which clearly discloses considerably bias against the respondent. If it shocks our notions of judicial propriety and fair play, as indeed it does, it was bound to make a deeper impression on the mind of the respondent as to the unreality and futility of the proceedings conducted in this fashion. We find ourselves in agreement with the High Court that the rules of natural justice were completely discarded and all canons of fair play were grievously violated by Shri B.N. Bhalla continuing to preside over the trial. Decision arrived at by such process and order founded on such decision cannot possibly be regarded as valid or binding."
>
> **24.** A similar view was taken by this Court in *Rattan Lal Sharma v. Dr. Hari Ram (Co-education) Higher Secondary School* observing that a person cannot be a witness in the enquiry as well as the enquiry officer.

25. The legal maxim *nemo debet esse judex in propria causa (*no man shall be a judge in his own cause) is required to be observed by all judicial and quasi-judicial authorities as non-observance thereof is treated as a violation of the principles of natural justice. (Vide *Secy. to Govt., Transport Deptt. V. Munuswamy Mudaliar, Meenglas Tea Estate v. Workman* and *Mineral Development Ltd. v. State of Bihar.)*

26. This Court in *A.U. Kureshi v. High Court of Gujarat* placed reliance upon the judgment in *Ashok Kumar Yadav v. State of Haryana* and held that no person should adjudicate a dispute which he or she has dealt with in any capacity. The failure to observe this principle creates an apprehension of bias on the part of the said person. Therefore, law requires that a person should not decide a case wherein he is interested. The question is not whether the person is actually biased but whether the circumstances are such as to create a reasonable apprehension in the minds of others that there is a likelihood of bias affecting the decision.

27. The existence of an element of bias renders the entire disciplinary proceedings void. Such a defect cannot be cured at the appellate stage even if the fairness of the appellate authority is beyond dispute. (Vide *S. Parthasarathi v. State of A.P. and Tilak Chand Magatram Obhan v. Kamala Prasad Shukla.)*

28. In *Arjun Chaubey v. Union of India* a Constitution Bench of this Court dealt with an identical case wherein an employee serving in the Northern Railway had been dismissed by the Deputy Chief Commercial Superintendent on a charge of misconduct which concerned himself, after considering by himself the explanation given by the employee against the charge and after thinking that the employee was not fit to be retained in service. It was also considered whether in such a case, the Court should deny the relief to the employee, even if the Court comes to the conclusion that the order of punishment stood vitiated on the ground that the employee had been guilty of habitual acts of indiscipline/misconduct. This Court held that the order of dismissal passed against the employee stood vitiated as it was in utter disregard of the principles of natural justice. The main thrust of the charges against the employee related to his conduct qua the disciplinary authority itself, therefore, it was not open to the disciplinary authority to sit in judgment over the explanation

furnished by the employee and decide against the delinquent. No person could not be a judge in his own cause and no witness could certify that his own testimony was true. Anyone who had a personal stake in an enquiry must have kept himself aloof from the enquiry. The Court further held that in such a case it could not be considered that the employee did not deserve any relief from the Court since he was habitually guilty of acts subversive of discipline. The illegality from which the order of dismissal passed by the authority concerned suffered was of a character so grave and fundamental that the alleged habitual misbehaviour of the delinquent employee could not cure or condone it.

29. Thus, the legal position emerges that if a person appears as a witness in disciplinary proceedings, he cannot be an enquiry officer nor can he pass the order of punishment as a disciplinary authority. This rule has been held to be sacred. An apprehension of bias operates as a disqualification for a person to act as adjudicator. No person can be a judge in his own cause and no witness can certify that his own testimony is true. Anyone who has personal interest in the disciplinary proceedings must keep himself away from such proceedings. The violation of the principles of natural justice renders the order null and void."

11. Indisputably, Mr. R.K. Mohanty, the seizure witness, whose statement and the seizure list very much weighed with the enquiry committee to reach the conclusion about guilt of the workman, acted as the disciplinary authority and also himself appointed the one-man enquiry committee to conduct the domestic enquiry against the workman and also ultimately he himself after receipt of the enquiry report passed the order of punishment. In view of the position of law as laid down by the apex Court, it must be held that since Mr. R.K. Mohanty became a witness to the seizure, he should not have acted as the disciplinary authority and passed the punishment order. Therefore, the appointment of the one-man enquiry committee, the enquiry itself and the order of punishment stand vitiated and became void for violation of principles of natural justice.

12. With regard to the contention that Sri R.K. Mohanty, Chief Superintendent (Mech.) Blast Furnace had no competence to act as disciplinary authority of the petitioner, learned counsel for the petitioner has invited the attention of this Court to Annexure-11, i.e., the Personnel Policy

No.283 regarding delegation of disciplinary powers for employees covered under standing orders of Rourkela Steel Plant dated 08.09.1986. Under the circular the Managing Director of the employer-company has delegated different disciplinary powers to different categories of executives in respect of non-executive employees. As per the said circular Superintendents are delegated with the disciplinary powers for imposing major punishment other than removal or dismissal from service. They have also been empowered to act as appellate authority for minor punishment. The circular further indicates specifically that the powers for removal/dismissal shall continue to be exercised by the appointing authority. As per the appointment order of the petitioner filed as Annexure-2, the Deputy Manager, Personnel (Recruitment) has signed the appointment letter as the appointing authority on behalf of the employer-company.

As has been held by the Hon'ble apex Court in the case of ***Steel Authority of India v. The Presiding Officer, Labour Court at Bokaro Steel City, Dhanbad and another: AIR 1980 SC 2054*** a person not authorized under the Rules/Standing Orders to act as the disciplinary authority has no competence to find the charge-sheeted employee guilty and impose punishment.

In reply to the contention that Mr. R.K. Mohanty, Chief Superintendent (Mech.) Blast Furnace had no competence or authority to act as disciplinary authority of the petitioner, the learned counsel appearing for the employer-opposite party no.2 submitted, with reference to paragraph-16 of the counter affidavit, that the plea should be ignored since it was never raised at any stage, not even before the Industrial Tribunal and further that the Chief Superintendent is the appointing authority of the petitioner. But no document showing that the Superintendent is the appointing authority has been filed. On the contrary, the appointment order of the petitioner reveals that the Dy. Manager, Personnel is the appointing authority. The contention of the learned counsel for the opposite party that the plea was not raised before the Industrial Tribunal and as such should not be allowed to be raised in this writ application, is unacceptable in view of the law laid down by Hon'ble apex Court in the case of ***Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others : AIR 1993 SC 2155*** wherein it has been held as follows :

> "**12.** .... … … Generally, a point not raised before the Tribunal or administrative authorities may not be allowed to be raised for the first

> time in the writ proceeding, more so when the interference in the writ jurisdiction which is equitable and discretionary is not of course or must as indicated by this Court in A.M. Allison v. State of Assam, AIR 1957 SC 227 particularly when the plea sought to be raised for the first time in a writ proceeding requires investigation of facts. But if the plea though not specifically raised before the subordinate Tribunals or the administrative and quasi-judicial bodies is raised before the High Court in the writ proceeding for the first time and the plea goes to the root of the question and is based on admitted and uncontroverted facts and does not require any further investigation into a question of fact, the High Court is not only justified in entertaining the plea but in the anxiety to do justice which is the paramount consideration of the Court, it is only desirable that a litigant should not be shut out from raising such plea which goes to the root of the lis involved. The aforesaid view has been taken by this Court in a number of decisions and a reference may be made to the decisions in A.S. Arunachalam Pillai v. M/s. Southern Roadways Ltd., AIR 1960 SC 1191; The Cantonment Board, Ambala v. Pyarela, (1965) 3 SCR 341 : (AIR 1966 SC 108) … … …"

Since the question of competence of Mr. R.K. Mohanty, Chief Superintendent (Mech.) Blast Furnace, who passed the order of punishment of removal as disciplinary authority of the petitioner goes to the very root of the matter, the plea is allowed to be entertained and in view of the discussion made above, it must be held that Mr. R.K. Mohanty, Chief Superintendent (Mech.) Blast Furnace had no competence to act as disciplinary authority of the petitioner and pass the punishment order.

13. In the light of the foregoing discussions, the writ petition is allowed. The impugned order dated 06.12.1995 (Annexure-10) passed by the Presiding Officer, Industrial Tribunal, Orissa, Bhubaneswar in I.D. Misc. Case No.28 of 1992 and also the punishment order passed by the disciplinary authority under Annexure-9 are quashed. It is directed that the petitioner be deemed to be continuing in service. He shall be reinstated forthwith, but in the facts and circumstances of the case, with 50% of back wages from the date of removal from service till the date of reinstatement. No costs.

Writ petition allowed.

2015 (II) ILR – CUT -504

B.K.NAYAK, J.

CRP NO. 19 OF 2013

KEDAR NATH NAYAK & ORS. ……..Petitioners

.Vrs.

SISIRA DEI (DEAD) ……...Opp.Parties
SUBSTITUTED BY L.R.s & ORS.

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

Language of Rule 3A read with Rule 3 of order 23 C.P.C. is clear that the provision is confined to the parties to the compromise and its lawfulness – A person not a party to the suit in which compromise was effected can not be prevented to file a separate suit for declaration that he or she is not bound by such compromise decree – Held, in that event order-23, Rule-3A shall not operate as a bar to maintain the separate suit. (Para 8 to 10)

For Petitioners : M/s. Bibhu Pr.Tripathy
For Opp. Parties : M/s. Prasant Ku. Satapathy

Date of order 15.07.2015

ORDER

B.K.NAYAK, J.

Heard learned counsel for the parties.

Perused the records.

Order dated 03.05.2013 passed by the Learned Additional Civil Judge (Sr. Division) 1st Court Cuttack in C.S. No.373 of 2009 rejecting the petition filed by the petitioners, who were defendant Nos.2,3,4,12,20(b) and 20(c), under order 7 rule 11 of C.P.C. for rejecting the plaint as being barred by the previsions of Order-23 Rule 3-A, C.P.C., is challenged in this revision.

2. The present opposite party had filed T.S. No.314 of 1998 for partition without making the plaintiff in the present suit (C.S. No.373 of 2009) a party to that suit. The said earlier suit was disposed of on compromise between the parties thereto. The present plaintiff having come to know about the said compromise decree has filed the present suit claiming share in the property which was partitioned in the earlier suit, on the ground that she is a class-I

heir of the original owner and entitled to 1/9th share in the property and that the decree for partition in the earlier suit on the basis of compromise between the parties thereto is not binding on her.

3. The present petitioner filed a petition under Order 7 Rule 11, C.P.C. for rejection of plaint on the ground that the present suit was barred by law, i.e. under Rule-3-A of Order 23, C.P.C. The Court below has rejected the said petition stating that the present suit was one for declaration that the earlier compromise decree is fraudulent and not binding on the plaintiff, who was not made a party to that suit which was disposed of on compromise.

4. Learned counsel for the petitioners submits that the bar under Order-23, Rule 3-A, C.P.C. operates against a person who was a party to the suit which was compromised as also to a person who was not a party to the said suit, the object being to avoid multiplicity of litigations and to allow the Court which passed the compromise decree to consider the question of correctness or lawfulness of the compromise decree. He relied upon the decision of the Hon'ble Apex Court in the case of **Banwarilal v. Chando Devi and Anr., AIR 1993 SC 1139** and the decision of the Calcutta High Court in the case of **Ashis Kumar Ghosh And Others v. Gopal Chandra Ghosh; 2004(3)CHN 146** (down loaded from the "indiankanoon.org")

5. Learned counsel appearing for the contesting opposite party on the other hand submits that Order 23, Rule-3A, C.P.C. is confined only to the parties to the suit in which the compromise was effected, and it has no application to persons who are not parties to the said suit.

6. Order 23, Rule-3 and 3-A are extracted hereunder:

> " **3**.**Compromise of suit.—**Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by the parties), or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith (so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:

> Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.
>
> *Explanation*.—An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule."
>
> " **3-A**: **Bar to suit.—**No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

7. The decision in the case of **Banwari Lal (Supra)** has no application because in that case the compromise petition had been filed by the appellant, who subsequently filed a petition before the Court stating that he had never compromised the case and had not advised his counsel to file the petition for compromise. Similarly the decision in **Ashish Kumar Ghosh And Ors. (supra)** cannot have application as because there the legal representative of a party filed a separate suit challenging the compromise made by his predecessor-in-interest in the previous suit.

8. The language of Rule 3-A read with Rule 3 of Order 23, C.P.C. makes it clear that it is confined to the parties to the compromise and further only with regard to the question of lawfulness of such compromise. But where a third party/stranger was not a party to the suit in which compromise was effected and who claims independent title or interest to himself is the subject matter and seeks certain reliefs with a declaration that he or she was not bound by the previous compromise decree, cannot be prevented to file a separate suit. The reason being that the stranger plaintiff in the subsequent suit who seeks to avoid the earlier compromise decree and claims relief to himself cannot get such relief by merely filing a petition in the previous suit to set aside the compromise decree passed therein. In order to get a relief from the Civil Court a party has to file a suit as plaintiff or raise a counter claim if he is a defendant. Merely filing a petition in terms of Rule-3-A of Order 23, C.P.C. on the ground that the compromise was not lawful would not ipsofacto entitle the petitioner to any relief.

9. This Court has held in the case of **Sushila Panda & Ors. v. Loknath Panda; 2015(I) ILR-CUT-1119** as follows:

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

10. Essentially in the case in hand the plaintiff seeks declaration that she was not bound by the compromise decree passed in the earlier suit to which she was not a party, with further prayer for partition and allotment of 1/9th share to her in the suit property which was the subject matter of the earlier suit. Order-23, Rule-3A shall not operate as a bar for her to file the present suit. In such view of the matter there is no infirmity in the impugned order passed by the Court below and therefore the revision is dismissed.

Revision dismissed.

2015 (II) ILR - CUT-508

C.R.DASH, J.

W.P.(C) NOS.35,1795 & 1799 OF 2013

M/s. GULF OIL CORPORATION LTD. .....Petitioner

.*Vrs.*

SRI MANOJ KUMAR SAHU .....Opp. Party

INDUSTRIAL DISPUTES ACT, 1947 – S.33 (2)

Termination of workman – Labour Court directed reinstatement with full back wages from the date of termination till reinstatement – For non-payment of the dues workman field petition U/s. 33 (2) of the Act for computation of the award – Maintainability questioned by the employer – When a workman is entitled to receive any money from his employer which can be computed in terms of money and the employer denied such benefit the workman can approach the Labour Court U/s. 33 (2) of the Act – Held, the O.P.-workman has got a pre-existing right to get his claim computed in terms of money U/s 33 (2) of the Act - The Labour Court having not done that, has committed an error –The matters are remanded back to the Labour Court with a direction to the management to supply all the documents required and the workman to Co-operate in the case without making any frivolous claim.

(Paras 14to 19)

Case Laws Rreffered to :-

1. 2001 (IV) LLJ – 17 : S.G. Ramalingam *vrs.* Management of Tamilnadu State Transport Corporation. Madras,
2. A.I.R. 2001 SC 2270 : Regional Authority, Dena Bank and another *vrs.* Ghanashyam.
3. 2001 (1) LLJ – 46. : Piara Lal *vrs.* Lt. Governer and others
4. 1995 (1) LLJ – 395 : Municipal Corporation of Delhi *vrs.* Ganesh Razak & Another.
5. 2001 SCC (L & S) – 3 : State Bank of India *vrs.* Ram Chandra Dubey & Others
6. 2006 LLR 494 : Union of India and Another *vrs.* Kankuben (Dead) by LRs. and Ors
7. 2006 LLR 494 : Union of India and Another *vrs.* Kankuben (Dead) by LRs. and others,

For Petitioner : M/s. Narendra Kumar Mishra, N.K Mishra, D.K. Pani, A.K. Roy and A. Mishra

For Opp. Party : M/s. Ramanath Acharya, Basudev Barik and P.M. Rao.

Date of Judgment : 10.07.2015

JUDGMENT

C.R. DASH, J.

Above noted three writ petitions arise out of I.D. Misc. Case No.23 of 2006, I.D. Misc. Case No.2 of 2008 and I.D. Misc. Case No.7 of 2011 respectively. All the aforesaid I.D. Misc. Cases are proceedings under Section 33 C (2) of the Industrial Disputes Act, 1947 ("I.D. Act" for short) relating to different periods, as claimed by the present opposite party workman. As the proceedings are between the same parties and involve same facts and questions of law, they are taken up together for disposal by this common order.

2. In all the I.D. Misc. Cases under Section 33 C (2) of the I.D. Act the present opposite party workman had prayed to determine his dues relating to salary, etc. against the employer Management on the basis of the award passed by the Labour Court on 31.03.1999 in I.D. Case No.9 of 1997.

3. The brief facts relevant for disposal of these writ petitions are as follows :-

The present opposite party workman, while working as a Senior Laboratory Technician under the petitioner Management, was terminated from service on 16.04.1996. He raised an Industrial Dispute before the District Labour Officer, Rourkela, which ended in submission of a Failure Report to the appropriate government. The appropriate government, in turn, referred the matter under Section 10 read with Section 12 of the I.D. Act for adjudication. The P.O., Labour Court, Sambalpur passed the award in the aforesaid I.D. Case No.9 of 1997 on 31.03.1999 directing reinstatement of the present opposite party workman in service with full back wages from the date of his termination till his reinstatement. It was further directed that, in the event of failure to implement the award, the Management shall be liable to pay interest @ 15% per annum on the back wages till actual payment is made.

4. The Management (present petitioner) challenged the award before this Court under the writ jurisdiction, vide O.J.C. No.7086 of 1999. Stay was granted in the writ petition subject to compliance of the provision of Section

17-B of the I.D. Act. While the matter was pending, the award was implemented by giving some back wages and the aforesaid O.J.C. was disposed of on 27.04.2005 with the following order :-

> "Heard.
>
> The award dated 31st March, 1999 passed by the Presiding Officer, Labour Court, Sambalpur in I.D. Case No.9 of 1997 is assailed by the petitioner-management in this writ petition.
>
> Mr. Nanda, learned counsel for the petitioner-management submitted that in the meanwhile the management has complied with the direction issued in the award. In that view of the matter, nothing remains to be decided in this writ petition. Accordingly, the writ petition is disposed of giving liberty to the workman to pursue any other grievances before the appropriate forum, if he is so advised."

5. The present opposite party workman submitted his Joining Report on 24.06.2004, which was duly accepted. In the petition under Section 33 C (2) of the I.D. Act he alleged that from the date of joining he is drawing pay of Rs.3,894/- per month, which was his existing pay at the time of his termination from service and his pay structure has not been regularized in consonance with the pay drawn by his co-workers in the same position. The applicant thus filed a statement of claim amounting to Rs.15,50,796/- in two schedules, which include differential salary, differential allowances, etc. including interest.

6. The present petitioner Management filed objection stating that the opposite party workman was, in fact, working in a Junior Management Cadre and he has already been paid full salary for the period of his non-employment due to termination and that, he is not entitled to the claim regarding L.T.C., Bonus, etc. It was specifically averred that the present workman was paid a sum of Rs.1,13,621/- under Cheque bearing No.238018 dated 23.09.2004 and he was supplied with a calculation sheet. According to the Management, the application under Section 33 C (2) of the I.D. Act is not maintainable on the ground that the amount claimed is not based upon any pre-existing right.

7. To substantiate their claim, both the parties adduced evidence. The present opposite party workman examined himself and one ex-employee of the Management. The present petitioner Management examined one of its Senior Assistant Manager and one Assistant Manager. Both the parties also

relied on several documents, which were marked Exts.1 to 7 (for present opposite party workman) and Exts. A to D (for present petitioner Management).

8. Learned Labour Court, dealing with the question as to whether the workman was working in the Junior Management Cadre or as a Senior Laboratory Technician at the time of his termination from service, held that the opposite party workman at the time of his reinstatement as per the award of the Labour Court in I.D. Case No.9 of 1997, joined as a Member of Junior Management Cadre and not a Senior Laboratory Technician, as claimed by him. Discussing different dates from the initial date of his appointment, learned P.O., Labour Court held that the opposite party workman was selected for a post in the Junior Management Cadre with effect from 01.08.1990 and he was confirmed in that cadre w.e.f. 01.11.1991. While working in the said cadre he was served with one month's Notice on 05.03.1996 and was removed from service after completion of the Notice period.

It was further specifically held by the learned P.O., Labour Court that the opposite party workman has to be paid back wages from the date of his termination, i.e. 05.03.1996 till date in the scale (basic pay, DA, HRA, Special Allowances and Rourkela Allowance) at par with any member of the Junior Management Cadre out of those listed in Exhibit 7, whose increments were not stopped for any reason whatsoever. In reaching such conclusion and entitlement of the petitioner on the basis of the award passed by the Labour Court in I.D. Case No.9 of 1997, learned P.O., Labour Court, Sambalpur relied on the cases of **S.G. Ramalingam *vrs.* Management of Tamilnadu State Transport Corporation,** 2001 (IV) LLJ – 17 Madras, **Regional Authority, Dena Bank and another *vrs.* Ghanashyam,** A.I.R. 2001 SC 2270 and **Piara Lal *vrs.* Lt. Governer and others,** 2001 (1) LLJ – 46.

9. So far as the claim of Bonus, L.T.C. and Leave Salary is concerned, learned P.O., Labour Court disallowed such claim of the opposite party workman on the reasoning that the opposite party workman had not physically rendered service to the Management from 05.03.1996 to 24.06.2004 and the Management was not at all benefited by the opposite party workman during the said period. Learned P.O., Labour Court, on consideration of the effect of the stay order passed by this Court in O.J.C. No.7086 of 1999 and other materials, held that the opposite party workman is entitled to interest awarded by the Labour Court in I.D. Case No.9 of 1997.

Learned Labour Court disposed of I.D. Misc. Case No.23 of 2006 and adopted the reasoning of the said order in disposing I.D. Misc. Case No.2 of 2008 and I.D. Misc. Case No.7 of 2011, which relates to claims for different periods by the opposite party workman. Learned P.O., Labour Court however did not compute the money claim of the opposite party workman and directed the Management to prepare a fair statement of calculation of wages of the opposite party workman deducting the amount already paid to him as monthly salary from the date of reinstatement and the amount of Rs.11,362/- paid vide Ext.4. In the ordering portion liberty was given to the opposite party workman to challenge the discrepancy in the calculation and file separate petition for realization of the discrepant amount, if any. Direction was further issued to the Management for paying a sum of Rs.5,00,000/- (five lakhs) to the opposite party workman within a period of one month, as the amount is far below the amount claimed by the opposite party workman.

10. Mr. N.K. Mishra, learned senior counsel appearing for the petitioner in all the three writ petitions impugns the award passed by the learned P.O., Labour Court, Sambalpur on different grounds, inter alia, that the learned P.O., Labour Court, in absence of any pre-existing right of the opposite party workman, has travelled beyond the scope of Section 33 C (2) of the Act. In the fitness of things the matter should have been dealt with under Section 36-A of the I.D. Act and not otherwise. The P.O., Labour Court having acted as an Executing Court under Section 33 C (2) of the Act, could not have created right in favour of the claim of the workman for the first time in absence of one.

He relies on the cases of **Municipal Corporation of Delhi *vrs.* Ganesh Razak & Another,** 1995 (1) LLJ – 395, **State Bank of India *vrs.* Ram Chandra Dubey & Others,** 2001 SCC (L & S) – 3, and **Union of India and Another *vrs.* Kankuben (Dead) by LRs. and others,** 2006 LLR 494 to substantiate his submissions.

11. Mr. Ramanath Acharya, learned counsel for the opposite party workman on the other hand submits that, award was passed in favour of the opposite party workman reinstating him in service with full back wages. The Management did not pay to the opposite party workman the back wages he was entitled to get. He claimed the benefit due from his employer capable of being computed in terms of money under Sub-section (2) of Section 33 C of the I.D. Act. The aforesaid claim having been made on the basis of pre-

existing right decided in I.D. Case No.9 of 1997, it cannot be held that the claim as laid by opposite party workman before the P.O., Labour Court, Sambalpur in the aforesaid I.D. Misc. Cases is not maintainable.

12. Mr. N.K. Mishra, learned senior counsel relies on the case of **Union of India and Another *vrs.* Kankuben (Dead) by LRs. and others,** 2006 LLR 494. In the said decision a claim for over-time duty by a workman under Section 33 C (2) of the I.D. Act was held to be not tenable in view of the settled law that such a claim is to be adjudicated on the basis of pre-existing right of the workman. Hon'ble Supreme Court in clear terms held that benefit sought to be enforced under Section 33 C (2) of the Act is a pre-existing benefit or one flowing from pre-existing right. The aforesaid principles being well settled law, none is in disagreement with the principles. At the appropriate stage I shall discuss as to whether in the present case the claim of the opposite party workman is based on existing right or pre-existing right.

Mr. Mishra further relies on the case of **State Bank of India *vrs.* Ram Chandra Dubey & Others,** 2001 SCC (L & S) – 3, where Hon'ble Apex Court had set aside the order passed by the Labour Court under Section 33 C (2) of the I.D. Act and affirmed by the High Court under Article 226 of the Constitution of India on the ground that the Labour Court under Section 33 C (2) of the Act could not have computed the claim of the workman, as there was no order for back wages while passing the award. This case is however distinguishable so far as the facts of the present case is concerned. In the case of **State Bank of India *vrs.* Ram Chandra Dubey & Others** (supra) award was passed for reinstatement only and the learned Tribunal was silent about back wages. In the present case however award has been passed for reinstatement of the workman with full back wages. Hon'ble Supreme Court, in paragraph-9 of the judgment, has held thus :-

> "9. Whenever a workman is entitled to receive from his employer any money or any benefit, which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit, can approach Labour Court under Section 33 C (2) of the Act. The benefit sought to be enforced under Section 33 C (2) of the Act is necessarily a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit, which is considered just and fair on the other hand, is vital. The former falls

> within jurisdiction of Labour Court exercising powers under Section 33 C (2) of the Act while the latter does not. It cannot be spelt out from the award in the present case that such a right or benefit has accrued to the workman as the specific question of the relief granted is confined only to the reinstatement without stating anything more as to the back wages. Hence, that relief must be deemed to have been denied for what is claimed but not granted necessarily gets denied in judicial or quasi-judicial proceeding. ……."

From the aforesaid ruling of the Hon'ble Apex Court it is clear that the proceeding in the case of **State Bank of India *vrs.* Ram Chandra Dubey & Others** (supra) was held to be untenable under Section 33 C (2) of the Act, as there was no award of back wages by the Tribunal on the reference made by the appropriate government and there was no pre-existing right of the workman in that case for getting such back wages computed. In the present case however facts are different and the learned P.O., Labour Court under reference has awarded the benefit of reinstatement as well as full back wages to the opposite party workman. The claim of the opposite party workman, in the present case, is that he is not getting salary, etc. at par with his co-workers working in the same position after his reinstatement. The opposite party workman has therefore got a pre-existing right and not merely an existing right to get his claim computed in terms of money under Section 33 C (2) of the Act.

So far as the decision of the Hon'ble Apex Court in the case of **Municipal Corporation of Delhi *vrs.* Ganesh Razak & Another,** 1995 (1) LLJ – 395 is concerned, it is also on the similar point where it has been held that the Labour Court cannot determine the dispute of entitlement or the basis of claim under Section 33 C (2) of the Act in absence of prior adjudication or recommendation of the employer. So far as the present case is concerned, the claim petition filed by the opposite party workman does not in any way seek determination of the dispute of entitlement or the basis of the claim. The opposite party workman simply asks his employer to pay him his salary on his reinstatement at par with his co-workers working in the same position. The aforesaid decision therefore has no application so far as the facts of the present case is concerned.

13. Perusal of the impugned order passed in I.D. Misc. Case No.23 of 2006 makes it abundantly clear that learned Presiding Officer has discussed different evidence and especially Exhibit 7 in absence of any co-operation by

the Management to furnish Pay-Structure, Standing Order, Seniority List or Pay Roll of the employees, etc. working in the same cadre as that of the opposite party workman. Learned P.O., Labour Court has also taken into consideration the settled law on the point by referring to different decisions including the decision of the Hon'ble Apex Court in the case of **Regional Authority, Dena Bank and another *vrs.* Ghanashyam,** A.I.R. 2001 SC 2270 (supra), wherein it has been held that it needs no debate to conclude that on reinstatement the respondent will be entitled to his salary at par with other employees working in the same post. In absence of proper co-operation by the Management to prove particulars, learned P.O., Labour Court has rightly fallen back on Exhibit 7 and other documents furnished by the opposite party workman.

14. So far as the claim is concerned, learned Labour Court has accepted the claim of the opposite party workman with respect to Basic Pay, D.A., H.R.A., Special Allowances and Rourkela Allowance. But he has disallowed the claim of the opposite party workman so far as Bonus, L.T.C. and Leave Salary, etc. are concerned.

The claim of Mr. N.K. Mishra, learned senior counsel to the effect that there is no existence of right to claim benefit under Section 33 (c) (2) of the I.D. Act so far as the opposite party workman is concerned, is a spacious submission in as much as the benefit claimed by the opposite party workman here is relatable to his pre-existing right on reinstatement on the basis of the award passed in I.D. Case No.9 of 1997. Hence, raising dispute by the Management now as to existence of right cannot take away the jurisdiction of the Labour Court to deal with entitlement of the workman to the benefits claimed by him. The contention of Mr. Mishra, learned senior counsel to the effect that the matter could have been dealt with under Section 36-A of the I.D. Act and not otherwise is also a spacious argument, in as much as Section 36-A deals with power of the appropriate government in case of any difficulty or doubt arising out of or regarding interpretation of any provision of an award or settlement to refer the question to the Labour Court or Tribunal. In the present case, such a situation has not arisen. The opposite party workman has claimed salary at par with his co-workers working in the same cadre and same post, and such claim has been made on the basis of the award of reinstatement and back wages passed in I.D. Misc. Case No.9 of 1997. In view of the nature of the claim made by the opposite party workman, Section 33 C (2) of the I.D. Act is the appropriate proceeding and not Reference under Section 36-A of the said Act.

15. Learned P.O., Labour Court has however erred in not computing the claim of the opposite party workman. From the impugned order it is found that the Management did not supply or furnish relevant documents like Pay-Structure, Standing Order, Seniority List or Pay-Roll of the employees working in the same cadre as that of the opposite party workman.

16. Mr. Ramanath Acharya, learned counsel for the opposite party workman submits that, in this regard petitions were filed in all the Misc. Cases to call for the documents from the Management. Said petitions were allowed and in spite of order passed by the learned Labour Court, the Management did not furnish the relevant documents. It is a matter of common knowledge that so far as Salary, Pay-Structure, Standing Orders, etc. are concerned, the Management can give the best evidence and best support for adjudication. The workman can only provide the basis of his claim and a rough claim, which the Management may not agree with. In that view of the matter, it was the duty of the Management to co-operate in the trial of the proceeding by providing all relevant documents and materials.

17. Taking into consideration the scope and ambit of Section 33 C (2) of the I.D. Act, I am of the considered view that learned P.O., Labour Court, Sambalpur should have disposed of the proceeding without leaving anything to be done by the Management, by computing the entire claim of the petitioner for the periods set out in all the Misc. Cases, i.e. I.D. Misc. Case No.23 of 2006, 2 of 2008 and 7 of 2011. Learned P.O., Labour Court having not done that, has committed an error, and therefore the matter is liable to be remanded for the aforesaid exercise.

18. Learned P.O., Labour Court has awarded Rs.5,00,000/- (five lakhs) in favour of the opposite party workman, but there is no basis for such award. In view of such fact, I deem it proper to modify the order on the aforesaid aspect directing the petitioner Management to pay Rs.2,50,000/- (rupees two lakh fifty thousand) to the opposite party workman within 30 (thirty) days from the date of receipt of a certified copy of this order. The said amount shall be paid to the opposite party workman to defray the expenses of the litigation. If, on conclusion of the proceeding he is found to have been entitled to get any amount, that amount shall be adjusted against payment of Rs.2,50,000/- (rupees two lakh fifty thousand).

19. In view of the above, all the three writ petitions are disposed of. The matters are remanded back to the learned P.O., Labour Court, Sambalpur for

computation of the claim of the opposite party workman fully on the basis of materials supplied by the parties. Learned P.O., Labour Court, if necessary, may also take resort to Sub-section (3) of Section 33 C of the I.D. Act for computing the claim of the opposite party workman. The petitioner Management is directed to supply all the documents as required by the learned Labour Court or as called for at the behest of the opposite party workman for just adjudication of the matter in dispute. Opposite party workman is also directed to co-operate in the trial without making any frivolous claim. The proceeding be concluded within 4 (four) months from the date of receipt of a certified copy of this order or within such extended time not exceeding six months on the discretion of the P.O., Labour Court. The petitioner Management is directed to pay Rs.2,50,000/- (rupees two lakh fifty thousand) to the opposite party workman within one month from the date of receipt of a certified copy of this order, subject to the adjustment as outlined in the preceding paragraph.

20. No order as to cost.

Writ petitions disposed of.

2015 (II) ILR - CUT-517

DR. A.K. RATH, J.

W.P.(C) NO. 10718 OF 2015

BUDHURAM BHOE & ANR. ……..Petitioners.

.Vrs.

TAHASILDAR, LAKHANPUR ……Opp. Party

(A) ODISHA SURVEY AND SETTLEMENT RULES, 1962 – RULE 34(e)

Correction of record of right – Facts existed prior to the preparation of ROR – Tahasildar corrected the ROR by initiating suo motu proceeding under Rule 34(e) of the Rules – Maintainability of the proceeding challenged – Held, Tahasildar has no jurisdiction to correct the ROR where cause of action arose prior to the publication of the

ROR – However if any cause of action arose prior to the publication of the ROR and thereafter ROR is finally published, the aggrieved party may avail the remedy provided under sections 15, 25 or 32 of the Odisha Survey and Settlement Act, 1958 or by filing a civil suit.

(Paras 6 to 13)

(B) ODISHA SURVEY AND SETTLEMENT RULES, 1962 – RULE 34(e)

Correction of record of right – Facts arising after the publication of the ROR and not on the basis of facts existed prior to the preparations of the ROR – Tahasildar has jurisdiction to correct the ROR where facts arise after publication of ROR by initiating proceeding under Rule 34(e) of the Rules which is popularly known as "mutation proceedings" to maintain the record upto date.

(Para 6)

Case Laws Referred to :-

1. 1997 (I) OLR 13 : Ganesh Prasad Das -V- Tahasildar, Dhamnagar & Ors.
2. 1998 (II) OLR 495 : Harihar Mohapatra & Ors. -V- Commissioner of Land Records and Settlement, Orissa & Ors.

For Petitioners : Mr. Ashok Mohanty, Senior Advocate
For Opp.Party : Mr. S.P.Mishra, Advocate General

Date of hearing : 20.07.2015
Date of judgment: 31.07.2015

JUDGMENT

DR. A.K.RATH, J

In this writ petition, challenge is made to the order dated 15.4.2015, vide Annexure-4, passed by the Tahasildar, Lakhanpur, opposite party, in Misc. Case No.1 of 2015, whereby and whereunder the opposite party corrected the record-of-right (hereinafter referred to as "the ROR") under Rule 34(e) of the Orissa Survey & Settlement Rules, 1962 (hereinafter referred to as "the Rules").

2. The case of the petitioners is that their forefathers were the recorded tenants of the land appertaining to Khata No.137 of Mouza-Sashajbhal under Lakhanpur Tahasil of Jharsuguda District in the Hamid settlement. The petitioners are in possession of the said property. While the matter stood thus, the opposite party initiated a s uo motu proceeding, which is registered as

Misc. Case No.1 of 2015 and issued notice to them and other co-sharers. In the notice, vide Annexure-2, it is stated that as per verification, Plot No.752, Khata No.137 has an area Ac.1.090 dec., but in the ROR the area is mentioned as Ac.0.040 dec. Similarly, Plot No.753 appertaining to Khata No.161 is a Government plot having area of Ac.0.040 decimal as against Ac.1.090 dec. As per ROR, Plot No.753 is a pond, whereas Plot No.752 is the cultivable land. On verification, it was found that Plot No.752 is a pond and Plot No.753 is a cultivable land. Pursuant to issuance of notice, the co-sharers including the petitioners entered appearance and filed their objections, inter alia, challenging the maintainability of the proceeding. It is stated that the Settlement Commissioner has the jurisdiction to make any changes in the ROR and Map. Further, the proceeding was initiated to acquire the land appertaining to Plot No.753 for establishment of industry. By order dated 15.4.2015 opposite party allowed the misc. case.

3. Heard Mr. Ashok Mohanty, learned Senior Advocate along with Mr. K.A Guru, learned counsel for the petitioners and learned Advocate General for the opposite party.

4. The sole question, inter alia, hinges for consideration is as to whether after publication of ROR, the Tahasildar, Lakhanpur has the jurisdiction to correct the same under Rule 34(e) of the Rules ?

5. Rule 34 of the Rules, which is the hub of the issue, is quoted below;

> "**34. Grounds on which correction of the record-of-rights and map is to be made-** The Tahasildar may on application in that behalf of any person interested or on receipt of a report from any of his subordinate officers or on receipt of a notice from the Registrar or Sub-Registrar appointed under the Indian Registration Act, 1908, or from a Court or on his own motion, order any change of any entry in the record-of-rights according to the rules hereinafter prescribed on any one or more of the following grounds, namely;
>
> (a) that all persons interested in any entry in the record-of-rights wish to have it changed;
>
> (b) that by a decree in a civil suit, any entry therein has been declared to be erroneous;
>
> c) that being founded on a decree or order of a Civil Court or on the order of any competent authority, the entry therein is not in accordance with such decree or order;

(d) that such decree or order has subsequently been varied on appeal, revision or review;

(e) that any entry therein has no relationship with the existing facts; and

(f) that by preparation of a survey record under Chapter II of the Act, any change is necessitated in the record-of-rights."

6. The subject-matter of dispute is no more res integra. An identical question came up for consideration before a Division Bench of this Court in the case of Ganesh Prasad Das v. Tahasildar, Dhamnagar and others, 1997 (I) OLR 13. The Bench, speaking through Justice P.K.Misra (as then he was), in paragraph-2 of the report came to hold that the provisions contained in Rule 34 (a) to (f) are self-explanatory and envisage various circumstances necessitating correction of ROR. Rule 34(e) has been couched in wide terms. It was further held that in view of the nature of jurisdiction conferred under Section 16 of the Orissa Survey and Settlement Act, 1952 which relates to maintenance of record and other clauses contained in Rule 34, clause (e) is to be confined to matters arising after the publication of the ROR and not on the basis of facts which existed prior to the preparation of the ROR. Rule 34(e) can cover a case where the entry has become redundant in view of any fact arising after the preparation of the ROR and existing at the time of the application on consideration thereof. To construe otherwise would defect the very purpose for which provision has been made for maintenance of ROR under Section 16 of the Act as well as Chapter-IV of the Rules and would ultimately vest with the Tahasildar unbridled power to change any entry in the ROR on the ground that there is no relationship with the existing facts, even though the said facts existed prior to the preparation of the ROR. The proceedings, which are undertaken pursuant to Rule 34 are popularly known as "mutation proceedings", which are undertaken to maintain and keep the record upto date.

7. The same view has been taken in the case of Harihar Mohapatra and others v. Commissioner of Land Records and Settlement, Orissa and others, 1998 (II) OLR 495. It was held that a conjoint reading of the provision makes it clear that correction of ROR and map to be made on the grounds enumerated in Rule 34 have to be based on cause of action which arose after preparation of ROR.

8. On the anvil of the decisions cited supra, the case of the petitioner is required to be examined.

9. The suo motu proceeding was initiated by the opposite party and notice was issued to the petitioners as well as other co-sharers. The notice dated 2.2.2015, vide Annexure-2, reveals that as per verification it is ascertained that Plot No.752, Khata No.137, area Ac.0.040 dec. has been recorded as Ac.1.090 dec. Similarly, Plot No.753 appertaining to Khata No.161, a Government plot, area Ac.1.090 dec. has been recorded as Ac.0.040 dec. in the major settlement ROR. Further, as per the ROR, Plot No.753 is a pond whereas Plot No.752 is a cultivable land. On verification, it was found that Plot No.752 is a pond and Plot No.753 is a cultivable land.

10. On a cursory perusal of the notice, vide Annexure-2, as well as the order dated 15.4.2015 passed by the opposite party in Misc. Case No.1 of 2015, it is evident that the fact existed prior to the preparation of ROR. In view of the same, the opposite party has travelled beyond his jurisdiction in initiating the suo motu proceeding and issued direction to correct the ROR.

11. The logical sequitur of the analysis made in the preceding paragraph is that the order dated 15.4.2015, vide Annexure-4, passed by the Tahasildar, Lakhanpur, opposite party, in Misc. Case No.1 of 2015 is not sustainable in the eye of law. Accordingly, the same is quashed.

12. The writ petition is allowed.

13. Before parting with the case, this Court observers that if any cause of action arose prior to the publication of the ROR and thereafter ROR is finally published, the aggrieved party may avail the remedy provided under Sections 15, 25 or 32 of the Orissa Survey & Settlement Act or by filing a civil suit.

Writ petition allowed.

2015 (II) ILR - CUT- 522

DR. A.K. RATH, J.

W.P.(C) NO. 3453 OF 2013

NIRMALI SAMAL .....Petitioner

.Vrs.

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

(A) ODISHA CIVIL SERVICES (PENSION) RULES 1992 – RULE 56(6)

Second marriage contracted by a Hindu male during the life time of his first wife shall be void and the second wife shall not be entitled to the family pension as a legally wedded wife.

In this case petitioner married late Abhiram Samal, a Government Servant, while his first wife was alive in contravention of Rule 24 of the Odisha Government Servant's Conduct Rules, 1959 – Held, the petitioner is not entitled to family pension.

(Paras 6,7)

(B) ODISHA CIVIL SERVICES (PENSION) RULES, 1992 – RULE 46

Petitioner got married to late Abhiram Samal, a government employee, while his first wife was alive – Whether the petitioner is entitled to compassionate allowance under Rule 46 of the above Rules ? Held, No – Compassionate allowance can only be granted to a government servant who is dismissed or removed from service by the authorities. (Para 9)

(C) HINDU MARRIAGE ACT, 1955 – S.16

Children born to deceased Hindu employee from second wife during subsistence of first marriage, whether entitled to family pension and other retiral dues of their father ? Held, children born through the second wife shall be entitled to family pension, gratuity, provident fund and unutilized leave salary in equal shares in accordance with the provisions of the OCS Pension Rules. (Para 13)

For Petitioner : Mr. S.K. Nath
For Opp.Parties : Mr. B.P.Pradhan, A.G.A.

Date of hearing : 03.07.2015
Date of judgment : 08.07.2015

JUDGMENT

DR. A.K.RATH, J

The instant challenge is to laciniate the office order dated 24.3.2012, vide Annexure-7, passed by the Principal Secretary to Government rejecting the prayer of the petitioner for grant of family pension.

2. Bereft of unnecessary details the short facts of the case of the petitioner are that Abhiram Samal was working as a Havildar in the Orissa State Armed Police, 4th Battalion, Rourkela. A disciplinary proceeding was initiated against him on the ground that while his first legally married wife Smt. Nalini Samal is alive, he married Smt. Nirmali Samal, the present petitioner, in contravention of Government Servants Conduct Rules, 1959 without obtaining prior permission. He was dismissed from service on 23.6.1990 by opposite party no.4. Thereafter, he challenged the order before the learned Orissa Administrative Tribunal in O.A. No.1799(C) of 1993. The same having been dismissed, he filed a writ petition being WP(C) No.16910 of 2007 before this Court. While the matter stood thus, Abhiram Samal died. Thereafter, the present petitioner was impleaded as petitioner. The said writ petition was dismissed on 26.2.2010 with an observation that it is open to the Government to decide if pension is to be paid to both the wives of the petitioner. Thereafter, she made an application before opposite party no.1 on 7.4.2010 to grant minimum pension. Since the same was not disposed of, she again filed a writ petition being WP(C) No.379 of 2010 with a direction to the opposite parties to pay the minimum pension. The writ petition was disposed of on 25.01.2011 with a direction to the opposite party no.1 to dispose of the representation. While the matter stood thus, by order dated 24.3.2012, the representation of the petitioner was rejected relying on Rule 56 of the Orissa Civil Services (Pension) Rules 1992 (hereinafter referred to as "the OCS Pension Rules").

3. Heard Mr. S.K. Nath, learned counsel for the petitioner and learned Addl. Government Advocate for the opposite parties.

4. Mr. Nath, learned counsel for the petitioner, submitted that since Smt. Nalini Samal first wife of Abhiram Samal died in the meanwhile, there is no impediment to grant family pension to the petitioner. He further submitted that the petitioner is entitled to compassionate allowance under Rule 46 of the OCS Pension Rules. Lastly he submitted that a direction may be given to the opposite parties to grant family pension and other retiral dues to her children.

5. Three points really arise for consideration of this Court.

"I. Whether the second wife is entitled to family pension ?

II. Whether the petitioner is entitled to compassionate allowance under Rule 46 of the OCS Pension Rules ?

III. Whether the children born through the second marriage are entitled to family pension and other retiral dues of their father ?

Point No.I

6. Rule 24 of the Orissa Government Servants' Conduct Rules, 1959 deals with bigamous marriage. The Rule provides that no Government servant shall enter into, or contract a marriage with a person having a spouse living; and no Government servant, having a spouse living shall enter into, or contract, a marriage with any person. Proviso to the said Rule stipulates that the Government may permit a Government servant to enter into or contract, any such marriage as is referred to in clause (1) or clause (2), if they are satisfied that such marriage is permissible under the personal law applicable to such Government servant and the other party to the marriage and there are other grounds for so doing. Further the note appended to sub-rule (6) of Rule 56 of the OCS Pension Rules provides that after the commencement of the Hindu Marriage Act, 1955, any second marriage contracted by a Hindu male during the life-time of his first wife shall be void and the second wife shall not be entitled to the family pension as a legally wedded wife.

7. In the instant case, no permission has been accorded by the Government to the employee. Thus the conclusion is irresistible that the petitioner is not entitled to family pension.

Point No.II

8. Though the learned counsel for the petitioner submitted that the compassionate allowance under Rule 46 of the OCS Pension Rules can be granted to the petitioner, this Court is unable to accept the prayer of the learned counsel for the petitioner. Rule 46 of the OCS Pension Rules provides as follows;

> "**46. Compassionate allowance** – (1) A Government servant who is dismissed or removed from service shall forfeit his pension and gratuity:

Provided that the authority competent to dismiss or remove him from service may, if the case is receiving of special consideration, sanction a compassionate allowance not exceeding two-third of pension or gratuity or both which would have been admissible to him if he had retired on compensation pension.

(2) A compassionate allowance sanctioned under the proviso to Sub-rule (1) shall not be less than the amount of minimum pension admissible.

(3) On receipt of the order of the competent authority removing an officer from service for misconduct, insolvency, or inefficiency, the Head of Office, if he proposes to grant compassionate allowance shall fill in the application form for pension and send the same to the Accountant General for necessary action after due concurrence of Finance Department. The Head of Office shall not wait for receiving the application from the Officer."

9. A bare perusal of the said Rule would show that compassionate allowance can be granted to a Government servant who is dismissed or removed from service by the authorities. Thus Rule 46 of the OCS Pension Rules cannot be pressed into service by the petitioner.

Point No.III

10. Section 16 of the Hindu Marriage Act deals with legitimacy of children of void and voidable marriages. The same is quoted hereunder;

"**16 Legitimacy of children of void and voidable marriages.** — (1) Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976)*, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been

dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."

11. On an interpretation of the above quoted provision, the apex Court, in the case of *Rameshwari Devi v. State of Bihar and others, AIR 2000 SC 735*, held that the children born out of a second marriage performed during the subsistence of the previous marriage are entitled to their legal share in the death benefits of the father even though the second marriage is otherwise void in law.

12. Relying on Rameshwari Devi (supra), this Court, in the case of *Smt. Kanakalata Maharana v. Smt. Shantilata Maharana & others, 94 (2002) CLT 53,* came to hold that the children born through the second wife are also entitled to a share of the family pension, but the exact share of the said children would have to be determined by the employer in accordance with the family pension rules. In Kanakalata Maharana (supra) it was further held that the children born from the second marriage are also entitled to other benefits like gratuity, provident fund, unutilized leave salary in equal shares. The said decision was subsequently followed in the case of *Smt. Sudha Das and others v. Collector, Rayagada and others, 2009 (I) OLR 44*.

13. On taking a holistic view of the matter, this Court holds that the children of late Abhiram Samal born through first wife Smt. Nalini Samal as well as children born through Smt. Nirmali Samal, the present petitioner, shall be entitled to family pension, gratuity, provident fund and unutilized leave salary in equal shares in accordance with the provisions of the OCS Pension Rules.

14. No clear picture emerges as to who are the sons and daughters of the deceased through first wife and second wife. In view of the same, the writ petition is disposed of with a direction to the petitioner to produce the legal heir certificates before opposite party no.4 who shall examine the same and

allow the family pension to the children in accordance with the provision of OCS Pension Rules. This Court further observes that the children born through the petitioner are also entitled to get other benefits like gratuity, provident fund and unutilized leave salary.

Writ petition disposed of.

2015 (II) ILR - CUT- 527

DR. A.K. RATH, J.

W.P.(C) NO. 11660 OF 2015

KASHINATH DAS MOHAPATRA ……..Petitioner

.Vrs.

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

SHREE JAGANNATH TEMPLE ACT, 1954 – Ss. 21-A, 21-B

Suspension of the petitioner as "Daita Sevak" of Shree Jagannath Temple – Action challenged – "Ghata paribartan" ritual of the Lords during Nabakalebar, 2015 – Four numbers of "Badagrahi" engaged/required to change the "Ghata" – They were obstructed and abused by the petitioner during the sacred ritual – For which there was disturbances and unreasonable delay in the 'Niti' of the Lords, which not only brought disrepute to the ancient temple but also shocks the devotees – An interim suspension can be passed against a sevak while an inquiry is pending into his misconduct – Held, the impugned order of suspension as well as charges does not suffer from any infirmity calling for an interference by this court. (Paras 12, 13)

Case Laws Referred to :-

1. AIR 1994 SC 2296 : State of Orissa -V- Bimal Kumar Mohanty

For Petitioner : Mr. Pitambar Acharya, Sr. Adv.
Mr. Biren Sankar Tripathy.

For Opp.Parties : Addl. Govt. Advocate (For O.P. No.1)
Mr. Patitapaban Panda (For O.Ps. 2 & 3)

Date of Hearing : 17.07.2015
Date of Judgment: 24.07. 2015

JUDGMENT

DR.A.K.RATH, J.

The instant challenge is to laciniate the order of suspension dated 24.6.2015 passed by the Chief Administrator, Shree Jagannath Temple, Puri-opposite party no.2, vide Annexure-2 and the memorandum of charges dated 24.6.2015, vide Annexure-3.

2. Shorn of unnecessary details, the short facts of the case of the petitioner are that he is a Daitapati Sevak of Shree Jagannath Temple. In the record of rights of Shree Jagannath Temple, late Adhar Das Mohapatra, father of the petitioner, has been recorded as "Daita". Being the successor, the petitioner used to do seva puja of Lord Shree Jagannath, Balabhadra and Devi Subhadra in the Nabakalebar as per the record of rights. Though it is the duty of the 'Badagrahi' to change the "Ghata" of the Lords, other "Daitapaties" may also remain present inside the temple. On 16.6.2015 four numbers of "Badagrahi" had been to the temple to change the "Ghata". The petitioner, being a "Daitapati", was also present inside the temple to perform the seva puja. It is further stated that due to delay in "Niti", there was delay in change of "Ghata" for about four hours, which created dissatisfaction amongst the devotees. While the matter stood thus, vide Office Order No.17/Con dated.24.6.2015, the opposite party no.2 placed the petitioner under suspension pending drawal of disciplinary proceedings against him, vide Annexure-2. The order of suspension was passed under Section 21-B of Shree Jagannath Temple Act, 1954 (hereinafter referred to as "the Act") during morning hours of 24.6.2015. In the evening of the same day, the petitioner received a notice issued by the opposite party no.2 under Section 21-A of the Act calling upon him to file reply within a period of thirty days on the allegations that he created disturbance for which there was delay in "Niti" of changing "Ghata" by the Badagrahis, vide Annexure-3. With this factual scenario, the present writ application has been filed.

3. Pursuant to issuance of notice, a counter affidavit has been filed by the opposite parties 2 and 3. It is stated that as per the temple record of rights, "Ghata Paribartan" ritual is a secret/gupta ritual. For performance of the said ritual, four main doors of the temple were closed from about 3.30 A.M. on 15.6.2015 till 8.00 P.M. of the next day. As per the prevailing custom and

tradition, only Daita Sevaks, Pati Mahapatra were supposed to stay in the inner bedha of the temple and Deulakaran and Tadhau Karan in outer bedha of the temple for performance of "Ghata Paribartan" ritual. No staff or officer of the temple administration was present inside the temple during the said period. Since reports have been published in print as well as electronic media that there was delay and disturbance in performance of "Ghata Paribartan" ritual, the Chief Administrator initiated proceeding, being Misc. Case No.8 of 2015, to enquire into the cause of alleged delay and disturbance in "Ghata Paribartan" ritual. During preliminary inquiry, it was prima facie revealed that there was delay and disturbance in "Ghata Paribartan" ritual. The petitioner was the instrumental in causing delay and disturbance in "Ghata Paribartan" and his continuance will seriously subvert the smooth performance of Ratha Yatra, 2015. The opposite party no.2 in exercise of its power conferred under Section 21-B of the Act, pending drawal of disciplinary proceedings has placed the petitioner under suspension with immediate effect until further order, vide Office Order No.17/Con dated 24.6.2015. On the same day show cause notice under Section 21-A of the Act has also been issued to the petitioner, vide Notice No.23/Con dated 24.6.2015 directing him to submit his reply on the charges levelled against him within thirty days from the receipt of notice. The misconduct is serious in nature and detrimental to the interest of the temple administration as well as the devotees. The opposite party no.2 prima facie taking into consideration the gravity and seriousness of the allegations has issued the order of suspension against the petitioner. It is further stated that father of the petitioner, namely, Adhar Das Mohapatra has been recorded in the temple record of rights as a "Daita Sevak". The petitioner and his son, being the successors of late Adhar Das Mohpatra, are performing the "Daita Seva". The details of "Daita Seva" have been recorded at Seva Sl. No.20 of the temple record of rights. Daita Seva is a group seva. All Daita Sevaks perform their seva during Nabakalebar as a team. This being a group seva, absence of one or two Daita Sevaks no way affects smooth performance of rituals required to be performed by Daita Sevaks. In the remark column of Seva Sl. No.20, it is mentioned that only the Badagrahis perform the "Ghata Partibartan' ritual. The other Daitas may be present and work. As per the custom and tradition prevailing since long, only four Badagrahis are competent to enter the Anasar Pindi to perform the "Ghata Paribartan" ritual. The other Daita Sevaks may remain present inside the temple, but they have no right to enter the Anasar Pindi with the Badagrahis. It is further stated that enquiry is going on. None of the witnesses, so far examined, has alleged that due to negligence of Badagrahis,

"Ghata Paribartan" ritual was delayed by four hours. Prima facie, it is found that the petitioner insisted to remain present in the Anasar Pindi along with the Badagrahis to witness the "Ghata Paribartan" ritual. Since the Badagrahis opposed to the same, the petitioner and his son, Jayakrushna Das Mohapatra, obstructed the Badagrahis to enter the Anasar Pindi for performing "Ghata Paribartan' ritual and scolded them. The misconduct and unruly behavior of the petitioner and his son acted as a catalyst in causing delay in performance of "Ghata Paribartan". The assertion of the petitioner that in the "Ghata Paribartan" 1977 and 1996 Nabakalebar, except four Badagrahis, other sevaks/Badagrahi were allowed to perform the change of "Ghata" ritual has been specifically denied.

4. Heard Mr.Pitambar Acharya, learned Senior Advocate along with Mr.Biren Sankar Tripathy, Advocate for the petitioner, learned Additional Government Advocate for the opposite party no.1 and Mr. Patitapabana Panda, learned Advocate for the opposite parties 2 and 3.

5. Mr.Acharya, learned Senior Advocate argued with vehemence that the impugned order of suspension smacks mala fide and violative of Articles 14 and 21 of the Constitution of India. No opportunity of hearing was provided under Section 21-A of the Act before placing the petitioner under suspension. He submitted that the grounds/charges mentioned in the show cause notice, vide Annexure-3, are not so grave, which warrants a drastic action by the Chief Administrator, Shree Jagannath Temple-opposite party no.2. He further submitted that the petitioner is a hereditary sevak of Lord Jagannath Mahaprabhu. In the record of rights prepared by Shree Jagannath Temple Administration Act, 1952 and Rules made thereunder, name of Adhar Das Mohapatra, father of the petitioner, has been mentioned in Chapter-20 Form-'D'. Drawing attention of this Court to the record of rights, Mr. Acharya, learned Senior Advocate submitted that Badragrahis perform the "Ghata Partibartan" ritual. At the same time other Daitas may also remain present. He further submitted that the allegations made in the show cause notice are unfounded and baseless. Neither the petitioner nor his son created any disturbance during "Ghata Paribartan" ritual. An attempt has been made to oust the petitioner from doing seva puja of the Lords during Nabakalebar, 2015. He further submitted that delay in causing the "Ghata Paribartan" cannot be attributed to the petitioner.

6. Per contra, Mr.Panda, learned Advocate for the opposite parties 2 and 3 submitted that since there was delay and disturbance in the "Ghata Paribartan" ritual, the opposite party no.2 initiated proceeding, being

Misc.Case No.8 of 2015, to enquire into the cause of delay and disturbance in performance of "Ghata Paribartan" ritual. Enquiry is going on. During enquiry, it is prima facie revealed that the petitioner and his son obstructed the Badagrahis, insisted upon to enter the Ansar Pindi and abused the Badagrahis in the obscene language, for which the opposite party no.2 in exercise of power under Section 21-B of the Act placed the petitioner under suspension. Section 21-B of the Act does not contemplate to provide opportunity of hearing to the petitioner. He further submitted that the charges levelled against the petitioner are very serious warranting no interference of this Court in the order of suspension as well as memorandum of charges. He further submitted that misconduct of the petitioner is serious in nature and detrimental to the interest of the temple administration as well as the devotees.

7. Provisions of Sections 21-A and 21-B of the Act, which are relevant, may be noticed. The same are quoted hereunder:-

> **"21-A. Control of Sevaks, etc**. –All sevaks, office-holders and {Employees} attached to the Temple or in receipt of any emoluments or perquisites the reform shall, whether such service is hereditary or not, be subjected to the control of [Chief Administrator] who may, subject to the provisions of this Act and the regulations, made by the Committee in that behalf, after giving the person concerned a reasonable opportunity of being heard.-
>
> (a) withhold the receipt of emoluments or requisites;
> (b) impose a fine of an amount not exceeding [two thousand rupees];
> (c) suspend; or
> (d) dismiss;
>
> any of them for breach of trust, incapacity, disobedience of lawful orders, neglect of or willful absence from duty, disorderly behaviour or conduct derogatory to the discipline or dignity of the Temple or for any other sufficient cause.
>
> **21-B. "Suspension pending inquiry**- The Chief Administrator may place any sevak, office holder or employee attached to the Temple under suspension,-
>
> (a) where a disciplinary proceeding against him is contemplated or is pending; or

(b) where a case against him in respect of any criminal offence is under investigation, inquiry or trial."

8. The general law on the subject of suspension has been laid down by the apex Court in a catena of judgments. After survey of the earlier decision, the apex Court in the case of ***State of Orissa v. Bimal Kumar Mohanty,*** AIR 1994 Supreme Court 2296 in paragraph-12 of the report held as follows:-

> "It is thus settled law that normally when an appointing authority or the disciplinary authority seeks to suspend an employee, pending inquiry or contemplated inquiry or pending investigation into grave charges of misconduct or defalcation of funds or serious acts of omission and commission, the order of suspension would be passed after taking into consideration the gravity of the misconduct sought to be inquired into or investigated and the nature of the evidence placed before the appointing authority and on application of the mind by disciplinary authority. Appointing authority or disciplinary authority should consider the above aspects and decide whether it is expedient to keep an employee under suspension pending aforesaid action. It would not be as an administrative routine or an automatic order to suspend an employee. It should be on consideration of the gravity of the alleged misconduct or the nature of the allegations imputed to the delinquent employee. The Court or the Tribunal must consider each case on its own facts and no general law could be laid down in that behalf. Suspension is not a punishment but is only one of forbidding or disabling an employee to discharge the duties of office or post held by him. In other words it is to refrain him to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty would pay fruits and the offending employee could get away even pending inquiry without any impediment or to prevent an opportunity to the delinquent officer to scuttle the inquiry or investigation or to win over the witnesses or the delinquent having had the opportunity in office to impede the progress of the investigation or inquiry etc. But as stated earlier, each case must be considered depending on the nature of the allegations, gravity of the situation and the indelible impact it creates on the service for the continuance of the delinquent employee in service pending inquiry or contemplated inquiry or investigation. It would be another thing if the action is actuated by

> mala fides, arbitrary or for ulterior purpose. The suspension must be a step in aid to the ultimate result of the investigation or inquiry. The authority also should keep in mind public interest of the impact of the delinquent's continuance in office while facing departmental inquiry or trial of a criminal charge."

9. On the anvil of the decision citied supra, this Court has examined the case. The submission of Mr.Acharya, learned Senior Advocate for the petitioner that the order of suspension is an infraction of principles of natural justice though at first blush appears to be attractive, but on a deeper scrutiny of the provisions contained in Sections 21-A and 21-B of the Act, the same is like a billabong.

10. On a conspectus of Section 21-B(a) of the Act, it is evident that the Chief Administrator may place any sevak, office holder or employee attached to the temple under suspension, where a disciplinary proceeding against him is contemplated or is pending. (emphasis laid)

11. On a cursory perusal of Section 21-A of the Act, it is manifest that the Chief Administrator after giving the person concerned a reasonable opportunity of hearing may impose any of the punishment prescribed under Clauses "a to d". The same can only be done after conclusion of inquiry. Under Section 21-A of the Act, the Chief Administrator may impose penalty of suspension, but the same can be imposed after the charges levelled against the person concerned is proved. Sections 21-A and 21-B of the Act operate in different filed.

12. It is trite that suspension pending inquiry is not a punishment. An interim suspension can be passed against a sevak while an inquiry is pending into his misconduct as has been held by the apex Court in the case cited supra. Suspension is not a punishment, but is only one of forbidding or disabling a sevak to discharge the duties of office, it is to refrain him to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of the public that dereliction of duty would pay fruits and the offending sevak could get away even pending inquiry without any impediment or to prevent an opportunity to the delinquent to scuttle the inquiry. A Daita Sevak performs the seva for a limited period of the Lords starting from Jyestha Sukla Trayadoshi Tithi till Niladree Bije and on some festive occasions, such as Chitalagi Amabasya, Gamha Purnami, Radhastami, Kumar Purnima and Rekha Panchami. From the charge-sheet, it

is vivid and luminescent that the allegations made against the petitioner are grave. The charges reveal that not only the petitioner obstructed the Badagrahis for performance of "Ghata Paribartan", but also abused them. The "Ghata Paribartan" is a sacred ritual of the Lords. Due to unreasonable delay and disturbance in performance of "Ghata Paribartan", the same brought disrepute to the ancient temple. Devotees were shocked and flabbergasted. The temple administration apprehends that continuance of the petitioner will cause serious bottleneck in the smooth conduct of the Rath Yatra, 2015. The submission of Mr.Acharya, learned Senior Advocate for the petitioner that the order of suspension smacks mala fide and violative of Articles 14 and 21 of the Constitution of India has no legs to stand. There is no material on record to justify the stand of the learned Senior Counsel.

13. On taking a holistic view of the matter, this Court is of the opinion that the order of suspension dated 24.6.2015 passed by the Chief Administrator, Shree Jagannath Temple, Puri-opposite party no.2, vide Annexure-2 as well as the memorandum of charges dated 24.6.2015, vide Annexure-3 does not suffer from any illegality and infirmity so as to warrant interference of this Court. The writ application, sans any merit, is dismissed. No Costs.

14. Before parting with the case, this Court observes that various words pertaining to Seva Puja and Nitikranti of the Lords have been used, taking a cue from the record of rights. This Court does not find any synonyms words in English.

Writ petition dismissed.

2015 (II) ILR - CUT- 534

DR. B.R.SARANGI, J

W.P (C) NO. 21856 OF 2010

YUDHISTIRA JENA & ORS. ……..Petitioners

.Vrs.

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

ODISHA HOME GUARDS ACT, 1961 – S.8(2)

Disengagement of Home Guards – Action challenged – No material before the Court relating to unsatisfactory performance of the petitioners – They were not given one months prior notice for their disengagement as required under Rule 10 of the Odisha Home Guards Rules 1962 – Action taken by the Commandant General U/s 8 (2) of the Act without complying Rule 10 of the 1962 Rules is nonest in the eye of law – Held, impugned order of disengagement is quashed – The petitioners be given engagements with regular wages and they be paid back wages for the periods they were unjustly prevented from discharging their duties.

Case Laws Rreffered to :-

1. AIR 1992 SC 1981 : (1992) 4 SCC 711 : Nelson Motis v. Union of India
2. AIR 2001 SC 1980 : (2001) 4 SCC 534 : Gurudevdata VKSSS Maryadit v. State of Maharastra
3. AIR 2005 SC 294 : State of Jharkhand v. Govind Singh.
4. AIR 2005 SC 648 : (2005) 2 SCC 271 : Nathi Devi v. Radha Devi Gupta.

For Petitioner : M/s. Mr. S.C. Routray
For Opp. Partties : Addl. Standing Counsel.

Date of hearing : 24.06.2014
Date of judgment : 24.06.2014

JUDGMENT

DR. B.R. SARANGI, J.

The petitioners, who were working as Home Guards under the Badchana Police Station, have challenged the order of discharge from their engagement, the order passed in the year 1997 vide D.O. No.4 of 3.3.2000, D.O. No.21/2000 dated 26.06.2000, D.O. No. 144 dated 22.12.2002 and D.O. No. 148/2002 dated 27.12.2002, issued by the Superintendent of Police-cum-Commandant, Home Guards, Jajpur at Panikoili. The petitioners have averred that though the aforesaid disengagement orders have not been served on them, they are not allowed to discharge their duty.

2. The petitioners who were working as Home Guards under the Badchana P.S. have challenged the order of discharge from their engagement,

the order passed in the year 1997 vide D.O. No.4 of 3.3.2000, D.O. No.21/2000 dated 26.06.2000, D.O. No. 144 dated 22.12.2002 and D.O. No. 148/2002 dated 27.12.2002, issued by the Superintendent of Police-cum-Commandant, Home Guards, Jajpur at Panikoili. The petitioners have averred that though the aforesaid disengagement orders have not been served on them, they are not allowed to discharge their duty.

3. Mr. S.C. Routray, learned counsel for the petitioners, states that against the orders of their discharge from duty, the petitioners preferred appeal before the appellate authority namely the Commandant General, (Home Guards) Orissa, Cuttack, opposite party no.2. While the appeal was pending, the petitioners approached this Court by filing the writ petition praying for issuance of direction to the opposite parties to pass appropriate order in accordance with the provisions of law.

4. The sole contention raised before this Court is that the petitioners were discharged from their duties under sub-section (2) of Section 8 of the Orissa Home Guards Act, 1961. If the petitioners were discharged from their duties under the said provision, then Rule 10 of the Home Guards Rules, 1962 was to be followed. For non-compliance with the said provision, the orders impugned being vitiated in law, the Superintendent of Police-cum-Commandant, Home Guards-opposite party no.4 as well as Appellate Authority may be directed to allow the petitioners to discharge their duties.

5. Mr. A.K. Mishra, learned Addl. Government Advocate for the State relying on the counter affidavit filed by opposite party no.4 in paragraph-10 stated that due to non-satisfactory performance of the petitioners they had been disengaged from duty. It is stated that as on 14.08.2008 no appeal had been filed and on the other hand the appellate authority-opposite party no.2 has passed order in conformity with the provisions of law. Therefore, this Court may not entertain this writ petition.

6. Considering the contentions raised by the learned counsel for the parties and perusing the records, it appears that the petitioners were discharging their duties and responsibility of Home Guards under opposite party no.4. So far as unsatisfactory performance of the petitioners is concerned, no material has been produced before this Court in that regard for consideration. This Court had given opportunity to the opposite parties by order dated 23.04.2014 to file counter affidavit, but in spite of that no counter affidavit from the side of opposite party nos. 1 and 2 is forthcoming. In

addition to that, the orders of opposite party no. 4 as well as the appellate authority-opposite party no.2 are not reasoned ones, inasmuch as the orders had been passed in mechanical manner without applying mind.

7. Section 8 of the Orissa Home Guards Act, 1961 provides for punishment of members of Home Guards for neglect of duties, etc. Sub-section (2) of Section 8 reads as follows:

> "Notwithstanding anything contained in this Act the Commandant shall have the authority to discharge any member or the Home Guards at any time subject to such condition as may be prescribed by rules made under this Act, if in the opinion of the Commandant the services of such member are no longer required and the Commandant-General shall have the like authority in respect of any member of the Home Guards under his control."

8. The ultimate power to discharge a member of the Home Guards from duty is vested on the authorities, namely Commandants/Commandant General if not satisfied with the performance of any member of the Home Guards. This power of Commandant/Commandant General is not in dispute. But while exercising the said power, the said authorities ought to have glanced through the mandatory requirement of law as per rule 10 of the Home Guards Rules 1962. Rule-10 provides compliance with a pre-condition, subject to which power of discharge may be exercised. Rule 10 is quoted hereunder, which is as follows:

> "No member of the Home Guards shall be discharged under Sub-Section(2) of Section-8 without being given one month's notice thereof."

9. In view of the above-mentioned provisions, no member of the Home Guard shall be discharged under sub-section(2) of Section-8 without being given one month's prior notice. Therefore, the power can be exercised by the authorities namely the Commandant and the Commandant General under sub-section (2) of Section 8; provided Rule-10 of the Orissa Home Guards Rules, 1962 is complied with. As it appears, Rule-10 of the 1962 Rules has completely been given a go-by by the authorities in the present case. It is well settled principle of law laid down by the apex Court in catena of decisions that when the words of statute are clear, plain or unambiguous, i.e., they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences. **Nelson Motis v. Union**

of India, AIR 1992 SC 1981 : (1992) 4 SCC 711, **Gurudevdata VKSSS Maryadit v. State of Maharastra,** AIR 2001 SC 1980 : (2001) 4 SCC 534, **State of Jharkhand v. Govind Singh,** AIR 2005 SC 294**, Nathi Devi v. Radha Devi Gupta,** AIR 2005 SC 648 : (2005) 2 SCC 271. Therefore, the action taken by the Commandant General in non-compliance with the provision of Rule-10 of the 1962 Rules is nonest in the eye of law, inasmuch as it is contrary to the provisions of law. Accordingly, the impugned discharge orders of the petitioners passed by opposite party no.4 being absolutely unsustainable in law, are liable to be struck down on judicial scrutiny.

10. The order of the Commandant General, Home Guards, Orissa, Cuttack, the Appellate Authority, vide Annexure-14, is hereby quashed as the same has been passed in utter contravention of the provisions of Sec. 8(2) of the Orissa Home Guards Act, read with Rule 10 of the 1962 Rules.

11. The petitioners being treated not to have been disengaged pursuant to the order of the Commandant-opposite party no.4 and the order in Appeals there from by the Commandant General, opposite party no.4, be given engagements with regular wages and be also paid their back wages for the periods they were unjustly prevented from discharging their duties within one month hence.

12. The writ petition is allowed. No cost.

Writ petition allowed.

2015 (II) ILR - CUT-538

DR. B.R. SARANGI, J.

W.P.(C) NO. 9279 OF 2015

PREMALATA PANDA ……..Petitioner

.Vrs.

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

SERVICE LAW – Age of retirement on Superannuation – Enhancement of retirement age from 58 to 60 years – Petitioner is an employee under CDA – Vide office order Dt. 22. 05. 2014 it was notified that the petitioner would retire by 30.06.2015 on attaining the age

of 58 years – In the meantime Government passed resolution Dt. 28.06.2014 enhancing the age of retirement of its employees from 58 to 60 years and made necessary amendment to Rule 71(a) of the Odisha Service Code – Government has extended such benefit to the employees of State Public Sector Undertakings but so far as the employees of CDA, though recommendation has been made by CDA till date no decision has been taken – Hence the writ petition – CDA through erstwhile GCIT adopted Orissa Service Code as it did not have any rule of its own, so in view of amendment to Rule 71(a) there was no necessity to direct the petitioner to retire at the age of 58 years – Held, employees of CDA moved the Court shall be entitled full salary/arrear salary upto the age of 60 years and employees not moved the Court will not be entitled to any salary but deemed to be continuing in service upto the age of 60 years and their pay be fixed for the purpose of refixation of the retirement benefits – So far petitioner is concerned direction issued to O.P. 2 to bring her back in to service forthwith and allow her to continue till she attains the age of 60 years and grant her all consequential service and financial benefits due and admissible to her as per law. (Paras 15,16)

CONSTITUTION OF INDIA, 1950 – ART.226

Writ Petition – Prayer not made specifically – Power of High Court – In the interest of justice and equity High Court in exercise of its high prerogative jurisdiction can mould the relief in a just and fair manner and pass order/direction as deemed fit and proper as required by the demands of the situation. (Paras 13,14)

Case Laws Referred to :-

1. AIR 2013 SC 3066 : State of U.P -V- Dayanand Chakrawarty & Ors.
2. AIR 2006 SC 365 : Harwindra Kumar -V- Chief Engineer, Karmik & Ors.
3. 2007 (11) SCC 507 : Chairman, Uttar Pradesh Jal Nigam & Anr. -V- Radhey Shyam Gautam & Anr.
4. AIR 1988 SC 1621=(1988) 3 SCC 449 : State of Rajasthan -V- M/s. Hindustan Sugar Mills Ltd. & Ors.

For Petitioner : M/s. Susanta Ku. Dash, A.K.Otta, A.Dhalsamanta & S.Das

For Opp.Parties: M/s. Dayananda Mohapatra, M.Mohapatra, G.R.Mohapatra, A.Dash
Mr. A.K.Mishra, Addl.Govt.Adv.

Date of hearing : 01.07.2015
Date of Judgment : 14.07.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner who was working as a Senior Stenographer in the Office of the Cuttack Development Authority (in short CDA) has filed this application seeking for following relief:

> "issue RULE NISI calling upon the opposite parties to show cause as to why the petitioner shall not be entitled to get the benefit under Section 71(a) of the Odisha Service Code as amended as 25.07.2014 and on their failure to show cause or showing insufficient cause, to make the said RULE absolute and may also be pleased direct the opposite party no.1 to take a decision on the resolution under Annexure 6 series within a stipulated period and in case of approval, to give retrospective effect to the same i.e. the day from which the age of superannuation has been enhanced in the case of employees of Urban Local Bodies, Odisha Small Industries Corporation and other Public Sector Units/Undertakings and may be pleased to pass such other/further order/orders, direction/directions considering the facts and circumstances of the case."

2. The skeletal facts outlining the factual conspectus would be briefly narrated so as to better comprehend the issues seeking adjudication.

3. The petitioner having successfully completed Short Hand and Typewriting Test conducted on 05.12.1983 was given appointment for the post of Junior Stenographer in the office of the Cuttack Development Authority, hereinafter to be referred to as 'CDA'- opposite party no.2 herein. Accordingly, she joined in service on 13.07.1984 on contractual basis. After rendering service for a period of one year, vide Memo No. 6477 dated 23.07.1985, she was allowed to continue in service until further orders. Considering her efficiency and ability she was promoted to the post of Senior Stenographer. While she was so continuing, vide Office order No. 7903 dated 22.05.2014, Annexure-2, the CDA published the name of persons to retire during the year 2015-16 on attaining the age of superannuation at the age of 58 years, which includes the name of the petitioner at serial no.06 and her date of superannuation being 30.06.2015 on attaining the age of 58 years. When the matter stood thus, a resolution was passed by the Government of Odisha in Finance Department on 28.06.2014 enhancing the retirement age of the State Government employees on superannuation and thereafter

necessary amendment to Rule 71(a) of the Odisha Service Code by revising the same from 58 years to 60 years was done. Such enhancement has been made considering the significant improvement in average life expectancy in recent years and also following the foot print of Central Government modifying the age of superannuation of the employees of the State Government by enhancing the age from 58 years to 60 years. The Government of Odisha vide Resolution No. 1775-Cor.-I-45/2014-PE dated 02.08.2014 allowed the enhancement of age of retirement on superannuation in respect of the employees of the State Public Sector Undertakings from 58 years to 60 years, which was published in the Official Gazette on 18th August, 2014, vide Annexure-4. Pursuant to such notification, employees of the Orissa Small Industries Corporation Limited have been extended with such benefits with immediate effect. So far the employees of Urban Local Bodies are concerned, the Government of Odisha by resolution dated 07.02.2015 enhanced the retirement age from 58 years to 60 years, but so far as the employees of CDA are concerned, though recommendation has been made by CDA vide Annexure-6 series, till date no decision has been taken. Hence this petition.

4. Mr. S.K. Dash, learned counsel for the petitioner strenuously urged that the petitioner being a regular employee under the CDA, her service condition is regulated under the Orissa Service Code and accordingly, she was drawing her salary and other allowances as per the provisions under the Code since the date of her appointment. In view of the amendment made in Rule 71(a) of Odisha Service Code, there is absolutely no requirement to direct the petitioner to retire at the age of 58 years, rather the resolution passed by the Government dated 28.06.2014 enhancing the age of superannuation of State Government employees from 58 years to 60 years, will ipso facto apply to the employees of the CDA and the same does not require any further recommendation by CDA for approval from the Government for its employees. Accordingly, the petitioner could not have been noticed for superannuation on attaining the age of 58 years on the basis of the pre-amended Rule 71(a) of Orissa Service Code. It is further urged that since in respect of employees of other Public Sector Undertakings namely, Orissa Small Scale Industries Corporation Ltd. benefit has been extended from the date of notification itself, the employees of the CDA could not have been discriminated in any manner whatsoever and as such, the petitioner could not have been asked to retire when her counterparts in Government, are still continuing even though they would have retired on the

basis of the pre-amended age of superannuation under the Orissa Service Code. As such, in absence of any further Rules by the CDA, no approval would be necessary for adopting the amendment made to the Orissa Service Code and therefore, the age of superannuation of the employees of CDA is deemed to have been enhanced from the date such benefit has been granted to the employees of the State Govt. To substantiate his contentions, he has relied upon the Judgments in **Santosh Kumar Mohanty v. State of Orissa and others** (OJC No. 15530 of 2001 disposed of on 05.02.2015), **State of UP V. Dayanand Chakrawarty & Ors.** AIR 2013 SC 3066, **Harwindra Kumar v. Chief Engineer, Karmik & Ors,** AIR 2006 SC 365, **The Bihar State Food & Civil Supplies Corporation Ltd. and others v. Mahendra Pratap Singh,** decided in LAP No. 850 of 2009 disposed of on 22.02.2011.

5. Mr. A.K. Mishra, learned Addl. Government Advocate for the State states that the application is premature one in view of the fact that the recommendation made by the CDA for approval is still pending for consideration and therefore, the petitioner could not have approached this Court by filing the present writ petition and has referred to the prayer portion of the writ petition and stated that since the matter is pending with the Government for consideration, the writ petition should not be entertained at this juncture.

6. Mr. Dayananda Mohapatra, learned counsel for opposite party no.2-CDA vehemently refuted the contentions raised by the learned counsel for the petitioner and stated that the reference made in Annexure-4, the Resolution passed by the Department of Public Enterprises dated 02.08.2014 speaks about the conditions to be fulfilled with regard to enhancement of retirement age from 58 to 60 years with concurrence of the administrative department. The criteria having been fulfilled as mentioned in Annexured-4 enhancement of the age of superannuation from 58 years to 60 has been granted and therefore, the employees of the CDA having not stood in the same footing, the benefit cannot be extended as the recommendation made by the CDA is still pending for approval by the Administrative Department. Unless the same is approved, no benefit can be extended to the CDA employees with regard to enhancement of age of retirement pursuant to resolution passed by the State Government in Annexure-2. Reference has been made to the extract of G.C.I.T. resolution dated 08.02.1971 in item no. 11/48 where there is an adoption of Orissa Service Code and T.A. Rules governing Trust employees. It is urged that merely on the basis of adoption

of Service Code applicable to the employees of CDA, the benefit of enhancement of retirement age from 58 to 60 years cannot be extended to its employees in view of the resolution passed in the proceedings of the 106th meeting made dated 16.12.2014 in item no. 23/106 so far as enhancement of retirement age on superannuation of CDA employees, it was decided to submit the proposal to Government for orders. In consonance with the resolution passed by the authority, proposal has been sent to the Government but till date no approval has been made. In that view of the matter the petitioner is not entitled to get any benefit as claimed for continuance in service till attaining the age of 60 years.

7. On the basis of the facts pleaded above, it is to be considered whether the resolution passed by the Government in Annexure-2 enhancing the age of retirement of State Govt. employees on superannuation from 58 years to 60 years will be applicable to the employees of the CDA.

8. It appears that the employees of the Greater Cuttack Improvement Trust were transferred to CDA by virtue of Section 128-2(a) of the Development Authority Act, 1982. Greater Cuttack Improvement Trust, in its resolution No.11/48, dated 08.02.1971 in Annexure-B/2, resolved as under:

> " Item No.11/48 Adoption of Orissa Service Code and T.A. Rules govern Trust employees.
>
> The Trust adopted the Orissa Service Code and T.A. Rules and resolved that the Trust employees shall be governed by the provisions of the Orissa Service Code and T.A. Rules."

The authority of CDA in its resolution No.4 dated 11.06.1984 adopted the Government Servant Conduct Rule, Orissa Civil Services (Classification, Control and Appeal) Rule and T.A. Rule for the employees of CDA. As per Rule 71 of the Orissa Service Code, the retirement age of the employees of the Government excepting Group-D has been fixed at 58 years. In view of such adoption of Orissa Service Code, the petitioner was to retire at the age 58 years. But subsequently, the Government amended the Rule 71(a) by enhancing the age of superannuation of the State Government employees from 58 years to 60 years and consequential resolution was passed vide Annexure-3 dated 28.06.2014, by which benefit of enhancement of age of superannuation from 58 years to 60 years has been granted to the State

Government employees. Since the CDA has adopted the Orissa Service Code for its employees in absence of Rules framed by it, the enhancement age of superannuation made by the State Authority by virtue of the resolution vide Annexure-3 so far it relates to the State Government Employees, is also applicable to the employees of the CDA.

9. In **Santosh Kumar Mohanty** (supra) this Court has held that so far service condition of the Bhubaneswar Development Authority constituted under Orissa Development Authority Act, 1982 is concerned, the employees of Greater Bhubaneswar Regional Improvement Trust were transferred and treated as employees of BDA and became amenable to the Rules framed by the Government and adopted by the BDA. Therefore, there is no doubt to the extent that the service condition of employees of Cuttack Greater Development Authority, whose services have been taken over by the CDA, are being regulated by the Orissa Service Code which was duly adopted by virtue of the Resolution passed in Annexure-B/2 referred to above.

10. In **Harwindra Kumar** (supra) in paragraphs- 9, 10 and 11 the apex Court has held as follows:

> "9. Reference in this connection may be made to a decision of this Court in the case of V.T. Khanzode and others v. Reserve Bank of India and another, AIR 1982 SUPREME COURT 917. In that case, under Section 58(1) of the Reserve Bank of India Act, powers were conferred upon the Central Board of Directors of the Bank to make regulations in order to provide for all matters for which provision was necessary or convenient for the purpose of giving effect to the provisions of the Act which section in the opinion of their Lordships included the power to frame regulation in relation to service conditions of the bank staff. In that case, instead of framing regulations, the bank issued administrative circulars in relation to service conditions of the staff acting under Section 7(2) of the Reserve Bank of India Act which was a general power conferred upon the bank like Section 15(1) of the present Act. It was laid down that "there is no doubt that a statutory corporation can do only such acts as are authorized by the statute creating it and that, the powers of such a corporation cannot extend beyond what the statute provides expressly or by necessary implication." It was further laid down that "so long as staff regulations are not framed under Section 58(1), it is open to the Central Board to issue administrative circulars regulating

the service conditions of the staff, in the exercise of power conferred by Section 7(2) of the Act." As in the said case, no regulation was at all framed under Section 58 of the Reserve Bank of India Act, as such, the administrative circulars issued by the Central Board of Directors of the Bank under Section 7(2) of the Reserve Bank of India Act in relation to service conditions were held to be in consonance with law and not invalid.

10. In the present case, as Regulations have been framed by the Nigam specifically enumerating in Regulation 31 thereof that the Rules governing the service conditions of government servants shall equally apply to the employees of the Nigam,it was not possible for the Nigam to take an administrative decision acting under Section 15(1) of the Act pursuant to direction of the State Government in the matter of policy issued under Section 89 of the Act and directing that the enhanced age of superannuation of 60 years applicable to the government servants shall not apply to the employees of the Nigam. In our view, the only option for the Nigam was to make suitable amendment in Regulation 31 with the previous approval of the State Government providing thereunder age of superannuation of its employees to be 58 years, in case, it intended that 60 years which was the enhanced age of superannuation of the State Government employees should not be made applicable to employees of the Nigam. It was also not possible for the State Government to give a direction purporting to Act under Section 89 of the Act to the effect that the enhanced age of 60 years would not be applicable to the employees of the Nigam treating the same to be a matter of policy nor it was permissible for the Nigam on the basis of such a direction of the State Government in policy matter of the Nigam to take an administrative decision acting under Section 15(1) of the Act as the same would be inconsistent with Regulation 31 which was framed by the Nigam in the exercise of powers conferred upon it under Section 97(2)(c) of the Act.

11. For the foregoing reasons, we are of the view that so long Regulation 31 of the Regulations is not amended, 60 years which is the age of superannuation of government servants employed under the State of Uttar Pradesh shall be applicable to the employees of the Nigam. However, it would be open to the Nigam with the previous

approval of the State Government to make suitable amendment in Regulation 31 and alter service conditions of employees of the Nigam, including their age of superannuation. It is needless to say that if it is so done, the same shall be prospective."

11. In **Dayanand Chakrawarty (supra),** the apex Court has taken note of the Harwinder Kumar (supra) and held that so long as Regulation-31 is not amended, 60 years which is age of superannuation of the Government employees shall be applicable to the employees of the Nigam. It is further held that it was not possible for the Nigam to take an administrative decision pursuant to the direction of the State Government in the matter of policy issued under Section 89 of the Act and directing that the enhanced age of superannuation of 60 years applicable to the Government servants shall not apply to the employees of the Nigam. In view of such finding of the apex Court, the Nigam cannot act on the basis of the State Government orders on 29.09.2009 providing uniform age of superannuation as 58 years. Accordingly, the apex Court allowed the age of employees of Nigam to continue till the age of superannuation in view of the Regulation 31 and ordered that no recovery shall be made from those who continued till the age of 60 years. It is further observed by the apex Court that the employees who have not been allowed to continue after completing age of 58 years by virtue of the erroneous decision taken by the Nigam for no fault of theirs, they would be entitled to payment of salary for the remaining period up to the age of 60 years.

12. In **Chairman, Uttar Pradesh Jal Nigam & another v. Radhey Shyam Gautam and another,** 2007 (11) SCC 507, following the decision of Harwindra Kumar (supra) the apex Court held that the employees of the Nigam shall be entitled to full salary for the remaining period up to the age of 60 years. Similar question so far as it relates to the employees of BDA is concerned, came up for consideration of this Court in W.P.(C) No. 4641 and 6821 of 2015 and this Court issued notice on the question of admission as well as interim application, for allowing the petitioners therein to continue in service till attaining the age of superannuation at the age of 60 years pursuant to the resolution passed by the Government dated 28.6.2014. As an interim measure, this Court passed an order that pendency of the writ petition is not a bar to consider the grievance of the petitioners in the said cases to continue in service till they attains the age of superannuation at the age of 60 years by virtue of the amendment made in the Code 71(a) of the Orissa Service Code,

which is applicable to the employees of the BDA pursuant to the resolution passed by the authority. Considering such interim order, the BDA allowed the petitioners in the said cases to continue in service and the aforementioned writ petitions are still pending for consideration by this Court. But the petitioner in W.P.(C) No. 7945 of 2015, who is an employee of BDA approached this Court to quash the notice of superannuation considering the case of **Sarat Chandra Tripathy v. Odisha Forest Development Corporation & others** in W.P.(C) No. 1636 of 2015, this Court dismissed the writ petition vide order dated 05.05.2015. Challenging the said order, a writ appeal has been preferred bearing W.A. No. 370 of 2015 and this Court passed an interim order on 30.06.2015 in Misc. Case No. 474 of 2015 directing to maintain status quo in respect of the appellant making it clear that the appellant will be allowed to continue in service subject to further orders to be passed in due course. Therefore, by virtue of said order passed by this Court, the appellant in the said writ appeal, who is the employee of BDA has been allowed to continue in service.

13. Mr.A.K.Mishra, learned Addl.Govt. Advocate for the State referring to the prayer portion of the writ petition states that the relief sought for allowing the petitioner to continue in service cannot be granted as the matter is pending before the State Government for approval. To such contention, Mr.S.K.Dash, learned counsel for the petitioner strenuously urged that in the interest of justice and equity, relief can be moulded by the Court to the extent as if it had been asked for and it has been prayed for specifically.

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

15. Taking into consideration the ratio decided in **Harwindra Kumar** (Supra) and **Chairman, Uttar Pradesh Jal Nigam** (supra) and various orders passed by this Court as mentioned supra, since there is an amendment to Rule 71(a) of the Code enhancing the age of superannuation of the State

Government employees from 58 to 60 years, that will ipso facto apply to the employees of the CDA by virtue of the resolution passed in Annexure-B/2 and no further approval is required by the Administrative Department, unless the CDA frames its own Rules regulating the service condition of its employees where the age of superannuation of the employees is to be incorporated. In absence of the same, any change in service Code with regard to the age of superannuation in respect of the employees of the State Government will also apply to the employees of the CDA. So far as the contention raised with regard to the recommendation made by the CDA for approval by the State Government is concerned, it may be its own internal arrangement for regularizing the matter in proper perspective, but that itself cannot stand on the way of allowing the benefits to its employees to continue in service till attaining the age of superannuation, i.e., 60 years.

16. Keeping in view the law laid down by the apex Court in **Dayanand Chakrawarty (supra)**, this Court is of the opinion that the following consequential and pecuniary benefits should be allowed to different sets of CDA employees including the petitioner who were ordered to retire at the age of 58 years and this Court so directs.

(a) The employees, who moved the Court of law irrespective of the fact whether interim order was passed in their favour or not, shall be entitled to full salary up to the age of 60 years and arrear salary shall be paid to them after adjusting the amount, if any, paid.

(b) The employees, who never moved before any Court of law and had retired on attaining the age of superannuation, shall not be entitled for arrears of salary. However, they will be deemed to be continuing in service up to the age of 60 years. In their case, the CDA shall treat their age of superannuation as 60 years, fix the pay accordingly and re-fix the retirement benefits like pension, gratuity etc. On such calculation, they shall be entitled to arrears of retirement benefits after adjusting the amount already paid.

(c) Needless to say that the arrears of salary and arrears of retirement benefits should be paid to such employees within a period of six months from the date of receipt of copy of the judgment.

(d) So far as the petitioner is concerned, since she had approached this Court before completion of 58 years of age and during pendency of the writ petition, she was made to retire on attaining the age of 58

years, this Court directs the opposite party no.2 to bring her back into service forthwith and allow her to continue till she attains the age of 60 years and grant all the consequential service and financial benefits as due and admissible to her in accordance with law.

17. With the aforesaid observation and direction, the writ petition is allowed. No cost.

Writ petition allowed.

2015 (II) ILR - CUT- 549

DR. B.R. SARANGI, J.

O.J.C. NO. 2120 OF 2001 & CONTC NO. 1386 OF 2007

SURESH CHANDRA SINGH .....Petitioner

.Vrs.

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

SERVICE LAW – Promotion – Promotion Order of the petitioner was kept in abeyance without any reason and there after cancelled – Action challenged – Petitioner was not called upon to show cause before such cancellation – Non compliance of the principles of natural justice – Subsequent filing of affidavits by the authorities assigning reasons not permissible in law – Order of promotion being a public order made by public authorities on certain grounds are meant to have public effect which can not be cancelled without complying with the principles of natural justice – Held, impugned orders are quashed – The petitioner is entitled to get all the consequential promotional benefits as due and admissible to him in accordance with law.

(Paras 10 to 14)

Case Laws Referred to :-

1. (2007) 1 SCC (L&S) 247 : Sekhar Ghosh -V- Union of India & Anr.
2. AIR 1952 SC 16 : Commissioner of Police Bombay -V- Gordhandas Bhanji
3. AIR 1978 SC 851 : Mohinder Singh Gill & Anr. -V- The Chief Election Commission, New Delhi & Ors.

For Petitioner : Mr. H.M.Dhal
For Opp.Parties : Mr. A.K.Mishra, AGA
Mr. S.B.Jena

Date of hearing : 17.07.2014
Date of judgment : 22.07.2014

JUDGMENT

DR. B.R. SARANGI, J

The petitioner has filed this writ application challenging the order dated 09.05.2000 keeping in abeyance the order of his promotion dated 18.03.2000 and cancellation thereof by order dated 20.11.2000 under Annexure-11 pursuant to a letter dated 3.11.2000 of the Government of Orissa Housing and Urban Development Department.

2. The brief fact of the case, in hand, is that the petitioner was appointed as Warrant Sarkar under the Balasore Municipality on 22.07.1983 vide Annexure-1 pursuant to which he joined on 26.07.1983 vide Annexure-2. Subsequently, the said post of Warrant Sarkar was re-designated as Assistant Tax Collector. While the petitioner was continuing as such, on 11.01.1995 he was directed to collect Holding Tax in Circle-1 of Balasore Municipality in place of Ananta Prasad Mohanty (on leave) till he joined his duty vide Annexure-3. Thereafter the petitioner was directed to collect Holding Tax in Circule-1 until further orders and also to take charge of the copy demand and receipt book etc from Tax Daroga on dated 20.09.1995 vide Annexure-4. On 01.12.1997, the petitioner made a representation vide Annexure-7 to the Chairperson, Balasore Municipality with a prayer to give him promotion to the post of Holding Tax Collector. By following a due procedure of selection and pursuant to the resolution of the Selection Committee dated 03.01.2000, the petitioner was promoted to the post of Holding Tax Collector against a permanent vacancy as per the order of the opposite party no.3 dated 18.03.2000 under Annexure-8. Accordingly, the petitioner joined on the very same date vide Annexure-9. Without assigning any reason, the promotion accorded to the petitioner was kept in abeyance as per the order of the opposite party no.3 dated 09.05.2000 under Annexure-10 and subsequently, the promotion accorded to the petitioner was cancelled as per the order of the opposite party no.3 dated 20.11.2000 under Annexure-11. Finding no other way out, the petitioner made representation on 27.11.200 under Annexure-12 praying to revoke the cancellation order of promotion and to allow him to continue in the post of Holding Tax Collector. When that representation was pending, the petitioner filed the writ application seeking to quash Annexures-10 and 11.

3. While entertaining the writ application, this Court issued notice to the opposite parties and passed interim order on 14.03.2001 in Misc. Case No. 2100 of 2001 directing maintenance of status quo with regard to the post of Holding Tax Collector of the Balasore Municipality. Violating the said interim order dated 14.03.2001, the petitioner, who was collecting the Holding Tax from Circle No.1, was withdrawn from the said Circle and was posted as Octroi Tax Peon (O.T.P.) on 13.09.2007. Therefore, CONTC No.1386 of 2007 was filed by the petitioner for violation of the interim order dated 14.03.2001.

4. Mr. H.M. Dhal, learned counsel for the petitioner strenuously urged that the petitioner was given promotion vide Annexure-8 to the post of Holding Tax Collector in the scale of pay was Rs.800-1150/- by following due procedure of selection pursuant to the selection committee resolution dated 03.01.2000. In compliance with the same, the petitioner joined on the very same date. While he was continuing in the said promotional post, without following due procedure of selection, the order of promotion dated 18.03.2000 under Annexure-9 was kept in abeyance vide Annexure-10. Thereafter, without affording opportunity of hearing to the petitioner, the order of promotion was cancelled vide order dated 20.11.2000 under Annexure-11, thereby, violating the principles of natural justice. Due to arbitrary and unreasonable exercise of power by the authorities, the impugned orders have been passed depriving the petitioner of continuing in the promotional post.

5. To substantiate his contention he has relied upon the judgment of the Apex Court in **Sekhar Ghosh v. Union of India and Another,** (2007) 1 SCC (L&S) 247.

6. Mr. A.K. Mishra, learned Addl. Government Advocate for the State referring to the counter affidavit filed by opposite party no.1 urged that the petitioner was appointed as a Warrant Sarkar and he had been given promotion to the post of Holding Tax Collector. It is stated that the post of Warrant Sarkar under the Municipality comes under Group-D category post and promotion had been given to the petitioner in the post of Holding Tax Collector, which is Group-C category post without observing due formalities there being no valid gradation list. Therefore, the order of keeping promotion order in abeyance, and the subsequent the Government Order under Annexures-10 and 11 are just and legal as the provisions contained under Rule 426(3) of Odisha Municipal Rules, 1953 contemplates that promotion to

non-selection posts shall be made on the basis of seniority only. Therefore, in order to judge the seniority, a valid gradation list of the employees was essential. Since the selection committee of the Balasore Municipality had not adopted the aforesaid procedure while promoting the petitioner, action was taken for keeping the promotion of the petitioner in abeyance and thereafter, cancellation has been made, which was in conformity with the provisions of law.

7. Mr. S.B. Jena, learned counsel for opposite party nos. 2 and 3, submitted that admitting the fact that the petitioner was promoted pursuant to the report of the selection committee to the post of Holding Tax Collector and he had joined the new post and discharged his duty as Holding Tax Collector, the said order was subsequently cancelled in view of the instruction received from the Government in Housing and Urban Development Department vide Annexure-11. The said action was taken basing on the representation submitted by the Octroi Employees Union for promotion of Octroi Tax Peons to the post of Holding Tax Collector. The Collector, Balasore directed the Additional District Magistrate, Balasore to make an enquiry regarding the promotion of the Assistance Tax Collector to the post of Holding Tax Collector and for that the promotion of the petitioner was kept in abeyance vide Annexure-10. Subsequently his promotion was cancelled by Government under Annexure-11.

8. The admitted fact is that the petitioner was appointed initially as a Warrant Sarkar, which was re-designated as Assistant Tax Collector. He was given promotion to a vacant post of Holding Tax Collector pursuant to order dated 18.03.2000 vide Annexure-8 and he joined the said post on the very same day. Having got promotion, the petitioner while discharging his duty w.e.f. 18.03.2000, all of a sudden, without assigning any reason the order of promotion dated 18.03.2000 under Annexure-8 was kept in abeyance on 09.05.2000 as per Annexure-10. By the time the order keeping in abeyance the order of promotion dated 18.03.2000 was passed, the same had acted upon, the petitioner being allowed to join the promotional post and he discharged his duty against the said post. Therefore, the direction given to keep the order dated 18.03.2000 in abeyance was absolutely a misconceived attempt made by the authority. Then subsequently, the promotion given to the petitioner vide order dated 18.03.2000 under Annexure-8 was cancelled on 20.11.2000 vide Annexure-11. No reasons were assigned why the order of promotion of the petitioner was cancelled save and except mentioning that

pursuant to letter dated 03.11.2000 of Government of Orissa Housing and Urban Development Department, such promotion had been cancelled.

9. As it appears from the counter affidavit filed by the opposite party nos. 2 and 3, on the basis of a representation filed by the Octroi Employees Union, the Collector, Balasore directed to Addl. District Magistrate, Balasore to conduct an inquiry and the Additional District Magistrate having conducted such inquiry with regard to promotion of the Assistant Tax Collectors to the post of Holding Tax Collector furnished a report and on that basis the Government of Orissa vide Housing and Urban Development Department vide letter dated 03.11.2000 directed opposite party no.3 to cancel the promotion of the petitioner as the promotion was given without valid gradation list. The petitioner has stated that the reasons assigned in the counter affidavit have not been indicated in the impugned order.

10. The Apex Court in **Commissioner of Police Bombay v. Gordhandas Bhanji,** AIR 1952 SC 16 has held as follows:

> "Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Referring to said judgment, the Apex Court in **Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others,** AIR 1978 SC 851 in paragraph-8 has held as follows:

> "The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out."

11. Keeping in view the above mentioned principle of law, it is made clear that no reasons were assigned in the impugned orders under Annexures-10 and 11 and rather opposite party nos. 2 and 3 by filing an affidavit have assigned reasons by supplanting a fresh reason thereby by making an additional ground by way of bringing the same in the affidavit, which is not permissible under law.

12. As regards the averment made in the counter affidavit filed by the opposite party nos. 2 and 3 that an inquiry was conducted by the Additional District Magistrate, Balasore pursuant to the direction given by the Collector, Balasore on the basis of a representation made by the Octroi Employees Union is concerned, but no copy of such representation was ever communicated to the petitioner nor had he been called upon to participate in the process of hearing being affording opportunity nor was any documents supplied to him before taking any action revoking his order of promotion on the plea that no gradation list had been prepared earlier.

13. This Court while disposing of W.P.(C) No.22319 of 20011 on 4.7.2014 in **Jayanta Kumar Goswami v. Governing Body of Akhandalamani College (+2), Betaligaon and others** has dealt with the question of "natural justice", wherein it has been held that a proceeding can be vitiated due to non-supply of materials basing upon which charge has been framed as the rudiment of principles of natural justice has not been followed. Applying the same analogy to the present context, it appears that neither any opportunity had been given to the petitioner nor had any document been supplied to him or he had been called upon to show cause before cancellation of such order of promotion pursuant to the letter of the Government in Housing and Urban Development Department. May it be that promotion had been given to the petitioner without preparing any gradation list and the same might be an irregularity in the eye of law, but that ipso facto cannot entitle the opposite parties to cancel the promotion of the petitioner without following observing the principles of natural justice. Referring to the law laid down in **Sekhar Ghosh case (supra)**, it is held that before taking any action, all the necessary ingredients of the principles of natural justice are required to be complied with.

14. For the foregoing reasons, this Court is of the view that since the impugned orders have been passed without complying with the principles of natural justice, the same cannot stand the judicial scrutiny and are hereby

quashed. The petitioner is entitled to get all the consequential promotional benefits as due and admissible to him in accordance with law.

15. The writ application is allowed. No cost.

16. With the disposal of the writ application, the contempt petition is dropped.

Writ application allowed.
Contempt petition dropped.

2015 (II) ILR - CUT- 555

D. DASH, J.

CRIMINAL APPEAL NO.113 & 114 OF 1991

CHUDAMANI PATEL & ANR ……Appellant

.Vrs.

STATE OF ORISSA ……...Respondent

ODISHA RICE AND PADDY CONTROL ORDER, 1965 – CLAUSE-3

Transportation of Q 36.29 Kgs of rice in a mini truck – Contravention of clause 3 of the order – Conviction U/s. 7 of the E.C.Act, 1955, Challenged – Seizure of rice bags during transit – Carrying goods in a vehicle can not per se be "storing" although it may be possible that a vehicle can be used as a store house – It is not the prosecution case that the truck loaded with rice bags was used as storage for being sold at different points – So mere transportation is not storage and does not amount to contravention of clause 3 of the control order – Held, impugned judgment of conviction and sentence is set aside. (Paras 6, 7)

Case Laws Referred to :-

1. 1989(1) OLR 66 : B.K.Agarwalla -V- State

For Appellant : M/s. D.P.Sahoo, S.N.Naik
For Respondent : Mr. A.K.Mishra, Standing Counsel

Date of hearing : 20 .10.2014
Date of judgment : 20 .10.2014

JUDGMENT

D. DASH, J.

Both these appeals arise out of the judgment of conviction passed by the learned Special Judge, Sundargarh in 2(c)C.C. No. 08 of 1990 (T.R. No. 08 of 1990 convicting the appellants for commission of offence under section 7 of Essential Commodities Act, 1955 for contravention of Clause-3 of the Odisha Rice and Paddy Control Order, 1955 and sentence to undergo rigorous imprisonment for a period of 1 (one) year and to pay a fine of Rs. 5000/- in default to undergo rigorous imprisonment for 3 months. Therefore, both the appeals having been heard are being disposed of by the common judgment.

2. Prosecution case is that on 05.12.1988 information was received by the Marketing Inspector Civil Supplies (Sadar), Sundargarh that a mini truck bearing registration No. ORN-8251 was transporting rice unauthorisedly. Therefore, he with the Executive Magistrate and Asst. Civil Supply Officer proceeded towards Balijor. At around 8.30 pm seeing the truck, they detained it when appellant Chandiram who was driver of the vehicle fled away. It was then detected that the truck was carrying 43 bags of rice. The rice found to have been loaded in the truck with also the truck and other documents were seized. It being night, weighment was not possible and therefore on the next day the weighment of the contents of the bags was made followed by preparation of detail chart showing the quantity of seized rice as Q. 36.29 kgs. The prosecution report being submitted against the appellants who are the owner and driver of the said truck, they faced the trial.

3. It is seen that the appellant-owner of the truck has taken the plea to have no knowledge about the movement of the rice and the appellant who is the driver of the truck has named two other persons to be carrying the said rice in the truck. The trial court on analysis of evidence have held both the appellants to have acted in contravention of clause – 3 of the said control order by carrying Q. 36.29 kgs. of rice in the truck and being as such in possession of the same and to have been stored those accordingly. Therefore, the appellants have been found guilty for commission of offence under section 7 of the Essential Commodities Act and accordingly they have been convicted and sentenced as stated above.

5. Learned counsel for the appellant at the outset submits that even accepting for a moment that there was seizure of Q. 36.29 kgs. of rice from the mini truck, no offence can be said to have been committed by the appellants. It is his submission that as provided in clause – 2(B) of the Control Order, it can be said according to the very case of the prosecution that the rice have not been seized from the appellant but seizure was when the rice was being carried in the mini truck and as per settled law, the commodities while on transit cannot amount to storage. Therefore, he urges that the prosecution is to be held to be misconceived. So, he contends that the appellants cannot be found guilty of convention of the provision of Clause 3 of the Control Order, when it is also not the case of prosecution nor any such evidence has been led that the appellant was doing business of purchase or sale of rice which also cannot be presumed from one instance in the absence of proof of regularity.

Learned counsel for the State supports the finding rendered by this learned Special Judge. It is his submission that the prosecution having established by leading clear, cogent and acceptable evidence that the rice was being carried in the truck of the appellant Chudamani when appellant-Chandiram was the driver, they cannot escape from the liability. He further submits that appellant-Chudamani the owner of the truck even in the absence of any evidence that he had direct knowledge about the said carriage of rice in his truck, is liable for the act of appellant-Chandiram who is his employee being the driver. Therefore, he contends that the order of conviction and sentence are not liable to be set at naught.

6. In the facts and circumstances of the case and in view of the rival submission, it is profitable to strait-way refer to the decision of the Hon'ble Apex Court in case of ***B.K. Agarwalla v. State***; 1989(1) OLR 66.

> "The question that came up for consideration is whether paddy loaded in truck in excess of the permissible limit while on transit can be deemed to have been 'stored' within the meaning of the word 'storage' in the said Control Order. Their Lordships referring to the dictionary meaning of the word 'store' in "Blacks Law Dictionary, Webster's Comprehensive Dictionary, (International Edition) and Concise Oxford Dictionary have held that 'storing' has an element of continuity as the purpose is to keep the commodity in store and retrieve it at some future date, even within a few days. If goods are kept or stocked in a warehouse, it can be immediately described as an

act of 'storage'. A vehicle can also be used as a storehouse. But, whether in a particular case, a vehicle was used as a 'store' or whether a person had stored his merchandise in a vehicle would be a matter of fact in each case. Carrying goods in a vehicle cannot per se be 'storing' although it may be quite possible that a vehicle is used as a store. Transporting is not storing."

7. Averting to the fact of the case as projected by the prosecution, the seizure of the rice bags took place when those were being carried in the mini truck i.e., during transit while being transported from one place to another and that too on the way. The prosecution case is not that the truck being loaded with rice bags was used as storage for being sold at different points. Mere transportation does not amount to contravention of said clause of the control order. Therefore, no offence under Section 7 of the Essential Commodities Act can be said to have been made out against the appellants even accepting the entire case of the prosecution as laid. The judgment of conviction and order of sentence thus are unsustainable.

8. In the wake of aforesaid the judgment of conviction and order of sentence impugned in these appeals are set aside and accordingly the appeals stand allowed.

Appeal allowed.

2015 (II) ILR - CUT- 558

D. DASH, J.

F.A.O. NO. 476 OF 2003

DEBI PRASAD MOHAPATRA ……..Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

INDIAN SUCCESSION ACT, 1925 – S.276

Probate of will – Appellant is the son of testatrix's own brother – Evidence shows that the testatrix got the will written as per her

instruction, put her LTI and stood before the Sub-Registrar for registration – Finding of the learned Court below that there is no evidence about voluntary execution of the will can not sustain – Age of the testatrix being 78, that itself is no ground that she was not in a fit state of mind, in the absence of any other evidence – There is no legal bar for the beneficiary to examine both the attesting witnesses but the mandate of law is at least to examine one as required U/s. 68 of the Evidence Act – So non-examination of the other attesting witness should not be taken as a suspicious circumstance or can not be viewed otherwise – In the other hand the testatrix having expressed in the will that she was dependant upon the appellant, her death in the village of the appellant should not be viewed adversely – Held, finding of the learned Court below that appellant failed to prove due execution of the will and its attestation under law is set aside – The probate of the will to the estate of the testatrix stands granted.

(Paras 7, 8)

For Appellant : M/s. R.C.Rath, B.Das, S.K.Acharya & S.K.Swain

For Respondent : Additional Standing Counsel

Date of hearing :11.02.2015
Date of judgment :11.02.2015

JUDGMENT

D.DASH, J.

The appellant's petition under Section 276 of the Indian Succession Act, 1925 having been dismissed by the learned Civil Judge (Sr.Divn.), Khurda, the present appeal has been preferred.

2. Facts necessary for the purpose of this appeal are as under:

The appellant being armed with a will said to have been executed by testatrix Dinamani Mohapatra who is the father's sister of the appellant filed an application on her death for grant of a probate with the copy of the said will annexed to it. It is stated that Dinamani Mohapatra was being taken care of by this appellant for a long period and she was staying with him. Therefore, on 7.10.95 she executed her last will bequeathing all her properties both moveable and immovable in favour of the appellant. It is further stated that the will was written under the instruction of Dinamani Mohapatra and she had voluntarily executed the same in presence of the attesting witnesses namely, Mina Mohapatra P.W.2 and Santosh Pradhan

(not examined). It is the further case of the appellant that prior to the execution of the will by the testatrix after the will was written, its contents were readover and explained to her, when the attesting witnesses namely, Mina Mohapatra and other were present and in their presence testatrix put her LTI followed by necessary endorsement to that effect on each of the page of the will whereafter the attesting witnesses put their signatures. So, it is asserted that the will was duly executed and attested as required under the law.

As per the case of the appellant since no near relations of the testatrix to his knowledge are there general citation being issued, no objection from any quarter has been received.

3. In the proceeding the appellant examined himself as also one of the attesting witness and tendered the will in original and the death certificate of the testatrix in evidence which are marked Exts. 1 and 2.

4. The court below having gone through the evidence has assigned the following reasons in holding that the appellant has failed to prove due execution and attestation of the said will by the testatrix:

i. the appellant has not adduced cogent evidence with regard to sound disposing state of mind of testatrix at the time of executing the will.

ii. the witnesses have not stated in clear terms that testatrix was not in a sound state of health at the relevant time; the witnesses have not stated that the testatrix executed the will voluntarily on her own will and in a free mind.

iii. there appears discrepancy with regard to date of death of testatrix in the evidence of the appellant and the death certificate Ext. 2; second attesting witness has not been examined and no explanation has been given as to how the testatrix died at village Harirajpur, the native village of the appellant.

In view of all these, the prayer for grant of probate has been refused.

5. Learned counsel for the appellant submits that the reasons assigned by the court below in holding that the will has not been duly executed, attested and proved in view of the evidence tendered as required under law, are unsustainable. In this connection with great pain he has taken me through the depositions of the witnesses which have remained unchallenged. According to him, the reasons pointed out by the court below against the grant of probate holding that the appellant has failed to prove the will by adducing

proper evidence as regards its execution and attestation removing all such suspicious circumstance are baseless and thus cannot be accepted. Therefore, he contends that the court below has erred both in law and fact by refusing to grant the probate as prayed for by the appellant.

Learned counsel for the State being the respondent contends that the reasons assigned by the court below in ultimately rejecting the petition for grant of probate are not unjust and improper and rather, the court below has found those to have emerged out of evidence on record and it being the duty of the court to see that all the suspicious circumstances surrounding the execution of the will and attestation are eliminated, right approach has been given by the court below and no fault can be found with it.

6. On such rival submission, this court is now called upon to examine the evidence on record and side by side look at the reasons assigned by the court below.

7. P.W. 2 is the attesting witness. She has stated that the will was written by one Dillip, a registered deed writer as per the instruction of the testatrix in her presence and in presence of Santosh the other attesting witness as well as one identifying witness. She has also stated that the contents of the will were readover and explained to testatrix in Oriya whereafter she put her LTI in all the pages in their presence and thereafter she and others signed. The witness has not been cross examined. So, it appears from the evidence of this witness that Dinamani putting her LTI after having found the contents of the will to have been correctly written when others present have also seen it. The will is a registered one. Evidence of the appellant is that he is the father of Dinamani's own brother. He has also stated about the execution of the will by Dinamani in presence of the attesting witness and also the identifying witness. The will, Ext. 1 also finds mention the endorsement regarding the contents of the same being readover and explained to the testatrix with further explanation as to why her LTI was taken that since her hand was trembling and thereby stating that she though usually sign why the course was not so adopted in the case.

True it is that the age of the testatrix at the relevant time as indicated in the will Ext. 1 was 78 years but that itself is no ground in the absence of any other evidence to come to a conclusion that she was not in a fit state of mind. It can not be generally said that the person at those age does not remain mentally fit and in sound state of health. Even the health condition of the testatrix is not a ground to discard the factum of execution of will unless

it is shown by evidence that the beneficiary or any one interested for him has taken advantage of it in getting the document executed without the knowledge, by some misrepresentation etc. Normally, common experience go to show that a person at that age with such failing health condition when feels to have been reaching at the end of the road in the journey of life, instinct comes for execution of such type of documents. So, there cannot be any strait jacket approach in such matter as has been done by the court below.

It's no doubt true that the beneficiary under the will is to show by evidence that the testatrix was in a fit state of mind. Here the court below has probably given more emphasis that the witnesses must state in specific words as regards the fitness of the state of mind. It has been lost sight of that the action and conduct of a person as shown in evidence is the real test to conclude with regard to the fit state of mind of a person. So as here in the present case, the witnesses have stated that the testatrix had gone, got the will written as per her instruction, put her LTI and stood before the Sub-Registrar for the purpose of registration. In view of all these, the reason given by the court below that there is no evidence to that effect is not at all acceptable. Next, the court below has gone to say that no evidence is there about voluntary execution of the will out of free will and mind. What has been stated about again just leads me to say that the conclusion is contrary to the weight of evidence on record. The other reason with regard to non-examination of the second attesting witness is legally unsustainable. Here there is no specific challenge to the will from any quarter. One attesting witness has been examined which is the mandate of law under Section 68 of the Evidence Act that a document which is required by law to be attested, here the will, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there being an attesting witness alive and subject to the process of the court and capable of giving evidence. There is no legal bar for the beneficiary to examine both the attesting witnesses but the mandate of law is that he has at least to examine one. So that having been done in the present case, it is not understood as to how the non-examination of the other attesting witnesses can be taken either as a suspicious circumstance or be adversely viewed for the execution of the will. The other suspicious circumstance pointed out is that the appellant has not led evidence as to how the testatrix died at Harirajpur i.e. in the village of the appellant. A bare reading of the will, Ext. 1 shows that the testatrix had disclosed therein that she was a dependant

upon the appellant who is a resident of village Harirajpur. Therefore, it is not understood as to for what purpose the appellant was again required to prove that why testatrix died at that village and how that is affecting the execution of the will when no other evidence to create any such doubt in mind surfaces. The non-explanation of the fact as to how the attesting witness P.W. 1 remained present at the time of execution of the will is not to be taken as a suspicious circumstance particularly when the will is not facing a challenge from any quarter and there is no evidence to show any connivance of this P.W. 1 with the beneficiary under the will.

8. For the aforesaid discussion of evidence and reasons as stated above, finding of the court below that the appellant has not been able to prove due execution of the will and its attestation in accordance with law is held to be unsustainable and is accordingly set aside. The probate of the will (Ext.1) to the estate of Dinamani Dibya @ Mohapatra stands granted.

9. In the result, the appeal stands allowed. No order as to cost.

Appeal allowed.

2015 (II) ILR - CUT- 563

SATRUGHANA PUJAHARI, J.

CRA NO. 201 OF 1991

BAIKUNTHANATH SITHA ……..Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

N.D.P.S. ACT, 1985 – S.20(b)(i)

Seizure of 6 Kgs of Ganja – Violation of section 8(c) of the Act – Conviction U/s. 20(b)(i) of the Act by the trial Court – Hence the appeal – Seizure not supported by independent witnesses – No evidence that the articles seized from the appellant on 1 7.09.1990 were kept

in police malkhana – Articles seized was all along with P.W.7 and not forwarded to the Court alongwith the accused – Though 200 gms of Ganga sent for chemical examination, the report shows that 70 gms of Ganja was sent for that purpose – Seizure of Ganja from the appellant becomes doubtful – Learned trial Court is grossly erred in appreciation of evidence on record – Held, the impugned judgment of conviction and sentence are set aside. (Paras 9 to 12)

For Appellants : M/s. Biswajit Nayak
For Respondent : Addl. Govt. Advocate

Date of hearing : 24.04.2015
Date of judgment: 24.04.2015

JUDGMENT

S.PUJAHARI, J.

The appellant here in this appeal, assails the judgment and order of conviction and sentence passed against him by the learned Sessions Judge, Koraput, Jeypore, in Sessions Case No. 226 of 1991. The learned trial court vide the impugned judgment and order of conviction and sentence held the appellant guilty of the charge under Section 20 (b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the N.D.P.S. Act") and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,000/-, in default to undergo rigorous imprisonment for four months more.

2. The prosecution came to the trial Court with a case that one Sanatan Panigrahi (P.W. 7), the then Officer-in-Charge of Kalimela Police Station, on 17.9.1990, at about 9.20 A.M received a reliable information about trafficking of 'Ganja' in village M.P.V. 23. To verify the information, he proceeded to the village and on his arrival in the village, he found the appellant loitering in front of the hotel of one Subash Haldar (P.W. 2) located near the bus stop carrying an attache (M.O.I) and one Air Bag (M.O. III). On being asked, the appellant told that he was carrying 'Ganja' in the attache (M.O.I). Hence, P.W.7 opened the attache (M.O. I) in presence of the witnesses with the key in possession of the appellant and found the same containing six kilograms of 'Ganja'. He made seizure of the attache (M.O. I) with 'Ganja' along with its key and the Air Bag (M.O.III) vide Seizure list (Ext. 1) and sealed the attache (M.O.I) in presence of the witnesses with the

'Ganja', drew plain paper FIR (Ext. 6) at the spot and brought the appellant along with the seized articles to the police station. Thereafter, on the next day P.W. 7 intimated the Circle Inspector of Police, Malkangiri about the detection of 'Ganja' and on 14.10.1990 in presence of the witnesses he opened the attaché (M.O. I) and collected 500grams of 'Ganja' out of it in a polythene bag (M.O. II) and produced the same through Havildar A. Patra (P.W. 8) before the Inspector of Excise, Malkangiri (P.W. 5) for examination, who after examining the same opined the same to be 'Ganja' vide Ext. 4. Again on 13.11.1990, P.W. 7 collected sample of 200 grams of 'Ganja' from the attache (M.O. I) in a polythene bag, which was sent for chemical examination to State Forensic Science Laboratory at Bhubaneswar for chemical examination vide forwarding letter of J.M.F.C. (Ext.8) and the chemical examination report (Ext.9) confirmed the same to be 'Ganja'. On completion of investigation, final form was filed against the appellant for alleged commission of offence punishable under Section 20 (b)(i) of the N.D.P.S. Act for trafficking of 'Ganja' in violation of Section 8(c) of the N.D.P.S. Act.

3. Taking into consideration the aforesaid case of the prosecution which was supported by the material on record collected during investigation, the trial court framed the charge against the appellant for alleged commission of offence punishable under Section 20 (b)(i) of the N.D.P.S. Act. As the appellant denied the charge, prosecution examined eight witnesses and also exhibited certain documents and the material objects to bring home the charge against the appellant. The appellant though had taken a plea of denial, but adduced no independent rebuttal evidence to substantiate his plea.

4. On conclusion of trial, basically relying on the evidence of P.W. 7 and other official witnesses and also the evidence with regard to chemical examination, the trial Court returned the judgment and order of conviction and sentence as stated earlier.

5. Learned counsel appearing for the appellant assails the same to be unsustainable in the eye of law inasmuch as there is no convincing evidence on record disclosing the fact that the appellant was found trafficking 'Ganja'. According to him since in this case no material is there disclosing the fact that the samples sent for chemical examination was the representative of the sample of the articles seized from the possession of the appellant even if for a moment it is admitted that the appellant was found in possession of some articles inside the attache, the same cannot be said to be 'Ganja'. Hence, he

submits to set aside the impugned judgment and order of conviction and sentence.

6. In response, the learned counsel for the State submits that there being convincing material disclosing the fact that the appellant was found to be in possession of 6kgs of 'Ganja' in the attache, as disclosed from the evidence of P.W. 7 and the same was examined by an experienced officer (P.W.5) soon after that and he opined the same to be 'Ganja', so also in the chemical examination report (Ext.9), it was found that the representative samples of articles drawn from the attache found to be 'Ganja', there is no reason to disbelieve that the articles that was found in the attache which was in the possession of the appellant was 'Ganja'. The appellant as such, was found to be in unauthorized possession of 6kgs of 'Ganja' and as such violated Section 8(c) of the N.D.P.S. Act punishable under Section 20(b)(i) of the N.D.P.S. Act as it then was. Hence, he submits the impugned judgment of conviction and sentence needs no interference.

7. On perusal of the evidence on record, particularly the evidence of P.W. 7, who seized the 'Ganja', it is disclosed that he had seized the attache (M.O. I) from the possession of the appellant on 17.9.1990 while he was loitering in front of the hotel of Subash Haldar (P.W. 2) and on search of the attache he found the same to be containing 'Ganja' and as such he seized and sealed the same, drew plain paper FIR (Ext.6) and forwarded the accused-appellant to Court. It appears from his evidence that the articles seized were never forwarded to the Court along with accused-appellant and the same was all along in the possession of P.W. 7. The Independent witnesses such as P.W. 1 and P.W. 2 have not supported the seizure made by him. On 14.10.1990 as appears from his version, he broke open the seal, collected ½ kg of sample in presence of witnesses and produced the same in a packet before the Inspector of Excise, Malkangiri (P.W.5), through Havildar A. Patra (P.W. 8) and received a report from him that the representative sample collected therefrom was found to be 'Ganja' vide Ext-4. Again it appears from his evidence that on 13.11.1990, he broke open the seal of the attache (M.O. I) in presence of the Constable (P.W.6) and collected another sample of 200gms and kept the same in a polythene bag, sealed the same and produced the same before the learned J.M.F.C. to send the same for chemical examination and the learned J.M.F.C. with a forwarding letter vide Ext. 8 sent the same for chemical examination.

The chemical examination report (Ext.9) which is available on record reveals that the samples examined were found to be 'Ganja'. From the chemical examination report (Ext.9), it appears that 70gms of 'Ganja' was sent for chemical examination in a polythene packet was examined.

8. No evidence has been led to show that the articles which were seized from the possession of the appellant on 17.9.1990 were kept in police malkhana and in safe custody in the police station. There is also no evidence that when the seal was broken, the witnesses present there on the date of seizure and seal of the articles had witnessed regarding the collection of the samples that was examined by the Inspector of Excise, Malkangiri (P.W.5). Furthermore, there is also no evidence that in whose custody the bulk in the attache (M.O. I) were kept after collecting first sample till the next sample were collected on 13.11.1990. Furthermore, from the evidence of P.W. 7 though it is disclosed that he had collected 200gms and same was forwarded vide Ext-8 for chemical examination, but Ext-9 does not agree with the same inasmuch as the sample which was produced for chemical examination was only containing 70gms representative samples.

9. The evidence of P.W. 7 does not disclose the reasons for non-drawal of the sample for chemical examination by the expert in presence of the seizure witnesses as well as the appellant on the very date of seizure. So also virtually no explanation is there with regard to safe custody of the articles seized from the possession of the appellant after the seizure and what actuated the investigating officer (P.W. 7) not to produce the articles seized before the Magistrate along with the appellant. So far as the representative samples drawn on first occasion for examination by P.W. 5, no convincing evidence is there disclosing the fact that the same was drawn from the attache (M.O. I) which was seized and sealed inasmuch as its safe custody till the date of drawal of the sample for examination by the P.W. 5 has not been proved. There was long delay in drawal of the sample coupled with witnesses to the original search and seizure in whose presence the attache (M.O. I) containing 'Ganja' was seized and sealed were also not witness to the subsequent breaking of the seal and also the drawal of the sample. There is no convincing evidence with regard to the safe custody of the attache (M.O. I) with the bulk before the drawal of the sample to send the same for chemical examination through the learned J.M.F.C. vide forwarding letter (Ext. 8). Added to the same, the chemical examination report (Ext.9) does not agree with the evidence of P.W. 7 inasmuch as though he deposed that he had

drawn 200gms of sample for chemical examination by the State Forensic Science Laboratory and sent the same vide Ext. 8, the representative samples that was examined by the laboratory is of 70gms as disclosed from Ext. 9. The aforesaid discrepancies coupled with the evidence of independent witnesses not supporting the seizure makes the evidence of the investigating officer with regard to seizure of 'Ganja' from the possession of the appellant to be doubtful one. Even for the sake of argument, the evidence of the investigating officer is accepted that he had seized the attache (M.O. I) said to be containing 'Ganja' from the possession of appellant still then there being no convincing material to show that any representative sample drawn therefrom were examined by the expert (P.W. 5) and also chemically examined, the evidence of P.W. 5 and the chemical examination report (Ext.9) is of no assistance to the prosecution to prove that the article found in the possession of the appellant was 'Ganja".

10. In absence of any convincing evidence with regard to the safe custody of the articles seized and also ruling out the possibility of meddling of the articles seized as well as nexus of the articles seized from the possession of the appellant with the representative sample drawn, the appellant could not have been made liable for possession of 'Ganja' violating the provision of 8(c) of N.D.P.S. Act punishable under Section 20(b)(i) of the N.D.P.S. Act as it then was.

11. Hence, on reappraisal of the evidence on record, this Court is of the view that the trial Court grossly erred in appreciation of evidence on record to come to a conclusion that the appellant was found to be possessing the 'Ganja' of 6kgs violating the provisions of 8(c) of the N.D.P.S. Act and as such convicted under Section 20(b)(i) of the N.D.P.S. Act.

12. Resultantly, for the forgoing reasons, this criminal appeal is allowed. The judgment of conviction and order of sentence are set aside. Consequently, the appellant is acquitted of the charge under Section 20(b)(i) of N.D.P.S. Act. He be discharged from his bail bond. LCR be returned forthwith.

Appeal allowed.

2015 (II) ILR - CUT- 569

B.RATH, J.

O.J.C. NO. 5746 OF 1996

DAMODAR JENA ……..Petitioner

.Vrs;

CHAIRMAN-CUM- M.D, GRID CO. LTD& ANR. ……Opp.Parties

SERVICE LAW – Rehabilitation Assistance Scheme – Petitioner's father expired on 13.12.95 while in service under OSEB – He applied for employment under OSEB service (Rehabilitation Assistance) Regulation, 1992 – He was denied service on the ground that Regulation, 1992 was repealed vide notification Dt 29.03.1996 – Action challenged – Since Regulation 1992 was in operation till 29.03.1996 and application by the petitioner was made much before 29.03.1996, Regulation 1992 had application to the case of the petitioner – Held, direction issued to the Gridco. Authority to provide employment to the petitioner befitting to his qualification.

(Para 3)

For Petitioner - M/s. J. Mohanty, & D.Samal (S.C.)
For Opp.Parties - M/s.P.K.Mohanty, M.Das & T.Mohanty

Date of Hearing : 01.12.2014.
Date of Judgment : 09.12.2014.

JUDGMENT

BISWANATH RATH,J.

This is a writ petition filed by the petitioner praying for quashing of Office Order No.4504(570)/Dt.28.5.1996/AW-LW-1-22/96 and for giving a direction to the opposite parties to issue appointment letter in absorbing the petitioner under the Rehabilitation Assistance Scheme.

2. Facts as borne from the writ petition is that the petitioner's father, late Surendra Jena was working as a Helper in the Paralakhemundi Electrical Division under the OSEB establishment in the year 1981. He became a regular Helper in the year 1988. While the father of the petitioner was in employment and residing at his home, on 13.12.1995 he fell down from a tree and he was immediately shifted to District Headquarter Hospital,

Paralakhemundi where he was declared dead. At the relevant time, the OSEB on account of death of his father paid Rs.1,000/- towards funeral expenses. At this stage, the petitioner made an application to the authority concerned to give him appointment under the Rehabilitation Scheme on the plea that there was nobody in the family to take care of the mother and the others. It is contended by the petitioner that while the petitioner's father was in employment of OSEB, the OSEB by virtue of Notification No.13108 dated 18th April, 1992 passed a Regulation, namely, Orissa State Electricity Board Service (Rehabilitation Assistance) Regulation, 1992 which came into force at once facilitating giving appointment to one of the family members under the rehabilitation scheme in the event of unnatural death and accident of natural death during service career. On submission of the application of the petitioner, the matter was enquired at the level of Collector. The Collector after due inquiry submitted his report to the concerned authority favouring the petitioner. In the meanwhile, the Orissa State Electricity Board was renamed as "Grid Corporation of Orissa Limited. After taking over of the liabilities, assets and employees, the Board of Directors of Gridco in their 3rd meeting held on 30.3.1996 approved a Rehabilitation Scheme for providing financial relief to the eligible family members of the employees in lieu of compassionate appointment provided under the existing regulation, consequent upon which the Grid Corporation by Resolution dated 28.5.1996 issued an order passing total ban on engagement of NMR/Casual/Contingent/Temporary/Daily rated/ work charge Labourers under all the Officers and establishments of Grid Corporation. Petitioner contended that the rehabilitation scheme of OSEB was very much in existence till 27.5.1996 and since the father of the petitioner expired on 13.12.1995, he would have been benefited under the OSEB Rehabilitation Scheme. It is alleged by the petitioner that the petitioner has been denied with an employment in the garb of new provision contained in the replaced regulation which has its prospective effect.

3. Per contra, the Grid Corporation authorities on their appearance filed a counter affidavit inter alia contending that it is a fact that the father of the petitioner died on 13.12.1995. They have also admitted to have received the application at the instance of the petitioner seeking employment under the Rehabilitation Assistance Scheme under the OSEB Service (Rehabilitation Assistance) Regulation, 1992. They have also admitted that on their request, an inquiry has also conducted at the level of Collector, but denied the benefit on the ground that the report of the Collector being received in the Office of

Executive Engineer on 18.4.1996 and by which time, the Regulation, 1992 was repealed vide Notification dated 29.3.1996 and the old Regulation has no application at this point of time. It is an admitted fact that the petitioner's father died on 13.12.1995 and the application for Rehabilitation appointment was also made during the existence of the Regulation,1992. From the submissions of opposite parties made at Paragraph-6 of the counter affidavit, it is clear that the request of the petitioner for appointment under Rehabilitation Scheme was turned down solely on the plea that the particular scheme was repealed on 29.3.1996, much before the report from the Collector, Ganjam was received in the Office of the Executive Engineer on 8.4.1996. The stand of the opposite parties is wholly unsustainable in the eye of law for the reason that the particular Regulation, 1992 was in vogue till 29.3.1996 and the application at the instance of the petitioner having been made much before 29.3.1996, the Regulation, 1992 had the application in the case of the petitioner. Receipt of the report of the Collector in relation to the petitioner on 8.4.1996, it is wholly irrelevant. Since the application of the petitioner for appointment under Rehabilitation Assistance Regulation was received when the Regulation 1992 was in operation and since it contained a provision for providing employment even in case of an unnatural death, the petitioner is very much entitled to an employment in the Gridco.

Under the circumstances, I direct the Gridco Authority to provide employment to the petitioner befitting to his qualification within a period of six weeks from the date of this judgment. The writ petition succeeds. However, there shall be no order as to cost.

Writ petition allowed.

2015 (II) ILR - CUT- 571

B.RATH, J.

MISCE CASE NO. 98 OF 2014
(Arising out of Election Petition No.21 of 2014)

SURENDRA SINGH BHOI ……..Petitioner

.Vrs.

TUKUNI SAHU ……..Respondent

LIMITATION ACT, 1963 – S.5

Election case – Delay of two days in filing written statement – Delay not intentional but due to unavoidable circumstances – A litigant does not stand to benefit by resorting to delay – Held, delay condoned – However for causing harassment to the election petitioner and causing delay in disposal of the election petition, acceptance of Written Statement shall be subject to payment of cost of Rs. 5000/- to be paid to the Election Petitioner. (Para 5)

For Election Petitioner- M/s. P. Acharya,S.R.Pati, S.Rath, B.P.Das, B.K. Jena, P.K.Ray & J.P.Parida.
For Respondent - Mr. A.K.Mishra(sole respondent)
Mr. B.Mishra(Sr.Adv.)
M/s.S. Lal, K.Sahu, R.K.Mahanta & P. Bharadwaj

Date of Hearing : 19.11.2014
Date of judgment : 21.11.2014

JUDGMENT

BISWANATH RATH, J.

This is an application filed by the sole-respondent for condonation of delay of two days in filing written statement.

2. The respondent in filing this application submitted that by order dated 30.10.2014 two weeks time was granted as a last chance to the respondent to file the written statement and the Election petition was posted to 14.11.2014. The respondent submitted that even though the written statement was prepared in time but for unavoidable circumstance the respondent signed, verified and sworn the same on 14.11.2014 for which the written statement could not filed within time stipulated by this Court. The respondent further pleaded that delay caused for filing of written statement is bona fide could not intentional but due to unavoidable circumstances at the end of the respondent. In the above premises the respondent claimed for condonation of two days delay in filing the written statement and for acceptance of the written statement already submitted in Court.

3. Per contra, the Election petitioner filed an objection to the aforesaid application indicating therein that in spite of repeated direction, the written

statement was not filed in time. However, on consideration of request of the respondent, by order dated 30.10.2014 this Court was pleased to grant two weeks time to the respondent for filing of written statement, fixing the election petition to 14.10.2014. The Election petitioner further contended that the trial of the election petition is a time bound process. Following Section 86 (6) of the Representation of the People Act, 1951, trial of election petition shall so far as practicable consistently with the interest of justice be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded thereon. Following Section 86(7) of the said Act, provision has been made for concluding the election petition as expeditiously as possible so as to be concluded within six months from the date of which the election petition is presented to the High Court for trial. Election petitioner further contended that that in spite of grant of time to the respondent to file the written statement awarding a cost of Rs.10,000/-, the respondent could not became fairful and in the above premises, the election petitioner objected the petition for condonation of delay in filing the written statement.

4. There is admittedly delay of two days in filing the written statement. There is also no dispute that last adjournment was granted in favour of the respondent subject to payment of cost of Rs.10,000/-. I do not find any plussible reason assigned in the application for condonation of delay in filing written statement after two days of the time fixed. There is stray response of the respondent that for unavoidable reason the written statement even though was prepared in time but could not be signed, verified and sworn within the stipulated time. There is no other satisfactory explanation.

A) Considering the filing of written statement in election matter beyond the time fixed the Hon'ble Apex Court in a decision rendered in the case of ***Kailash v. Nankhu and others***, (2005) 4 Supreme Court Cases-480 considering the fact that the written statement has already been filed in the High Court directed for acceptance of the written statement subject to payment of cost payable by the respondent to the election petitioner.

B). Similarly in another decision enunciated in the case of ***Bibhabati Chakrabarti and others v. Major Rama Chandra Mishra and others***, (2010) 15 Supreme Court Cases-441 taking into resort to the provisions contained in Order 8, Rule 1 and Sections 35, 35-A and 35-B of the Code of Civil Procedure, 1908 the Hon'ble Apex Court directed the Trial Court to accept

the written statement filed beyond 90 days period on payment of Rs.2,000/- as cost.

C). Law is also well settled as enunciated by the Hon'ble Apex Court between ***Collector, Land Acquisition, Anantnag and another v. Mst. Katiji and others***, AIR 1987 Supreme Court-1353 particularly holding that when substantial justice and technical considering are pitted against each other, cause substantial justice deserves to be preferred for the other side cannot claim to have right in injustice being done because of non-deliberate delay.

5) In view of the aforesaid three citations of the Hon'ble Apex Court and considering the submissions of respondent that he was unable to file the written statement for unavoidable circumstances and taking note of the fact that there is only two days delay in filing the written statement, on the premises that a litigant does not stand to benefit by resorting to delay as in such event he runs to serious risk, I am inclined to accept the petition for condonation of delay in filing the written statement. However for causing harassment to the election petitioner and for causing delay in disposal of the Election petition, I direct acceptance for written statement subject to payment of cost of Rs.5,000/-(rupees five thousand) only which amount to be paid to the Election petitioner within a period of three days. The Misc. Case is accordingly allowed.

Petition allowed.

2015 (II) ILR - CUT- 574

B. RATH, J.

W.P.(C) NO.7687 OF 2009

BIBHAS RANJAN PRUSTY ……...Petitioner

.Vrs.

THE SENIOR D.M, L.I.C. OF INDIA
CUTTACK DIVISION & ORS. …… Opp. Parties

INSURANCE ACT, 1938 – S. 45

INSURANCE CLAIM – Suppression of actual health condition at the time of entering into the policy – Policy vitiated due to fraudulent

suppression of material facts – Rejection of claim of the policy holder is justified.

In this case brother of the petitioner undertook an Endowment Assurance Policy for Rs. 1,00,000/- through LIC of India – Policy purchased on 23.09.2002 which is to mature on 23.09.2018 – Policy holder expired on 27.05.2003 – Claim made under the policy stating that the policy holder died bieng suffered from fever and dysentery – On enquiry it is found that the policy holder was suffering from kindney problems prior to commencement of the policy – Held, there is no illegality in the impugned order rejecting the claim of the petitioner.

(Para 5)

Case Laws Referred to :-

1. AIR 1962 SC 814 : Mkithoolal Nayak -V- L.I.C. of India
2. (2001) SCC 160 : L.I.C. of India & Ors. -V- Asha Goel (Smt.) & Anr.

For Petitioner : M/s. P.Prusty & P,Swain
For Opp. Parties : M/s. A.K. Mohanty & B.Mohapatra

Date of hearing : 04.03.2015
Date of Judgment : 11.03. 2015

JUDGMENT

BISWANATH RATH, J.

This case is filed by the petitioner seeking quashing of order vide Annexure-5 passed by opposite party no.1 and thereby further issuing a writ of mandamus directing the opposite parties to make payment of Rs.1,00,000/- (rupees one lakh) towards the whole insured money as against the particular insurance policy in respect of the brother of the petitioner.

2. Fact as revealed from the case is that the brother of the petitioner undertook a Endowment Assurance Policy bearing No.584714018 amounting to Rs.1,00,000/-(rupees one lakh) through Life Insurance Corporation of India. The policy was purchased on 23.09.2002 bearing Policy No.584714018 to mature on 23.09.2018. The petitioner's case is that his brother went on making the premium till he last breathed on 27.05.2003. His brother died suffering from fever and dysentery and on his death the petitioner claimed the amount involved under the Life Insurance Policy concerning his brother from Insurance Company which claim has been

denied by the Insurance Company by a reply dated 15.03.2004 under the premises that the policy was obtained making deliberate mis-statement and withholding material informations with regard to his health condition at the time of entering into the policy contract from the Insurance Company. The petitioner further contended that his father died suffering from fever and dysentery as per Medical Certificate granted by a competent Doctor on 25.05.2003. The Death Certificate clearly discloses that the policy holder died on account of fever and dysentery while remaining under consultation of one Dr. Jagannath Sarangi at Barchana. On refusal of claim of the petitioner, the petitioner submitted a representation to the Insurance Company for reconsideration of the issue and there is no response to the same by the Insurance Company. It is under these premises, the petitioner sought for quashing of the rejection order passed by the Insurance Company and also for issuing a writ of mandamus directing the insurance company for making sum assured. Learned counsel for the petitioner submits that since the Insurance Company had a test on his brother's life condition before entering into the policy contract they are estopped from claiming now that the petitioner's brother had suppressions on his health condition and therefore he is not entitled to the amount insured.

3. Per Contra, on its appearance, the opposite parties have filed a counter affidavit inter alia contending therein that the claim under the policy having resulted within eight months from the date of commencement of the policy an enquiry was conducted involving the brother of the deceased and it is at this stage revealed from him that the deceased was suffering from Kidney problems prior to the commencement of the Insurance and he was being treated at Vesaj Patel Hospital and Research Center at Rourkela and taking Haemo Dialysis starting from 30.08.2002 and continuing till 06.05.2003. The deceased submitted his proposal for insurance on 16.09.2002 during which time he was under treatment of Kidney related problems. During enquiry communication was also made by the Vesaj Patel Hospital and Research Center at Rourkela as appearing at Annexure-B addressed to the Branch Manager, LIC of India, Uditnagar Branch Office, Rourkela clearly disclosing that the deceased was taking Haemo Dialysis in this particular hospital starting from 30.08.2002 and the last dialysis was conducted on 09.05.2003. It is on these premises, the Insurance Company justified its action refusing to entertain the claim of the petitioner and submitted for dismissal of the writ petition. The opposite parties claimed that the particular claim was being considered up to the level of Zonal Claim Review

Committee and a final decision was take in the matter at a very high level and, therefore, there is no scope for interfering in such matter.

During course of hearing I had the occasion to go through the policy vide Annexure-1 and I find the policy is an Endowment Assurance Policy bearing No. 584714018 and the said policy was started on 23.09.2002 with quarterly premium of Rs.1607/-(rupees one thousand six hundred seven). In the 1st page of the claim form of the insured as appearing at Annexure-A discloses that the brother of the petitioner died on account of suffering from fever and the 2nd page of the claim form discloses that the claimant is the brother of the deceased. In Column-5 place meant for disclosing the names of medical attendants (doctors) during the last illness indicated 'Nil' which means the petitioner did not choose to indicate the name of the treating doctor, if any, taken by his brother at the time of death. This claim application was filed on 21st August, 2003.

4. Now coming back to the Medical Certificate filed by the petitioner that is the brother of the deceased as appearing at Annexure-2 series to have been obtained on 25.05.2003, if the petitioner was in a possession of such medical certificate since 25.05.2003 nothing prevented the petitioner to fill the Column-5 in the claim application giving such information and copy of such certificate could have been attached therein. Further, when the medical certificate discloses that the deceased was suffering from fever and dysentery, the claim application discloses that the deceased was suffering from fever only. Therefore, it appears that the petitioner made serious attempts in arranging concocted documents but subsequently to justify his claim. Reading of both the documents make it clear that the Medical Certificate is filed at Page-16 of the writ petition was probably not existed on the date of submission of the claim statement and has been procured subsequently with deliberate intention.

5. Now coming to the other aspects involved in the matter of genuineness in the claim application from the petitioner, it appears that an enquiry was conducted by the Insurance Company to find out the genuineness in the claim and during enquiry it was revealed that the deceased insured was suffering from serious Kidney ailment. It is on the basis of such revelations on contacting the Vesaj Patel Hospital and Research Center at Rourkela the said hospital vide Annexure-B communicated the Insurance Company that the deceased is the brother of the petitioner and that the policy holder was suffering from Kidney ailment and was taking Haemo Dialysis in

the particular hospital at Rourkela. The dialysis on him got started on 30.08.2002 whereas the last dialysis was given on 09.05.2003 and the brother of the petitioner died on 24.05.2003. Under these premises also it becomes clear that the deceased policy holder was suffering from serious ailment and there has been material suppression of information while entering into the policy contract. Perusal of the Medical Certificate vide Annexure-2 would reveal that although the issuing doctor has mentioned about the fact of his treating the insured on 20.05.2003 for fever and dysentery but has very quietly and deliberately disconnected these facts from the reason of the death of the deceased and it no where mentioned the reason of death. Further perusal of documents vide Annexure-D and from No.3816 and 3784 clearly demonstrates deliberate suppression of material facts. Petitioner's contention in the matter of reliance of Section 45 of the Insurance Act has no application in the present case as the death of the policy holder occurred within eight months of the entering into the policy contract and that too there exist an established complain on suppression of material fact at the time of entering into the policy by the policy holder himself. Thus, I find force in the submissions of the opposite parties. There is no illegality in rejecting the claim of the petitioner in relation to the policy holder and the matter did not deserve any reconsideration.

6. From the materials available on record, it appears that there is suppression of material facts and such suppression is fraudulently made by the policy holder, deliberately made, knowing it well that such statement/disclosure is false and under the circumstance I hold that the policy holder has obtained the policy on deliberate suppression of material particular and thus the Insurance Company is entitled to the benefit of Section 45 of the Insurance Act. In my conclusion the appellant is clearly out of Court and cannot claim the benefit since the contract which has been entered into as a result of fraudulent suppression of material facts by the insured himself. While holding so, I am also of the further opinion that when the policy is vitiated by reason of a fraudulent suppression of material facts by the insured, the claimant ought to be denied with any benefit. Law as enunciated in the Case of ***Mithoolal Nayak vrs. Life Insurance Company of India;*** A.I.R. 1962 S.C. 814 categorically held that the cases in which there is a stipulation that by reason of breach of warranty by one of the parties to the contract the other party shall be discharged from the performance of his part of contract, neither Section 65 nor Section 64 of the Indian Contract Act has any application. Similarly in another decision reported in the case of (***Life***

Insurance Corporation of India and others vrs. Asha Goel (Smt.) and another; (2001) Supreme Court Case 160 the Hon'ble Apex Court held as follows:-

> "the contracts of insurance including the contract of life assurance are contracts uberrima fides and every fact of material (sic material fact) must be disclosed, otherwise, there is good ground for rescission of the contract. The duty to disclose material facts continues right up to the conclusion of the contract and also implies any material alteration in the character of the risk which may take place between the proposal and its acceptance. If there are any misstatements or suppression of material facts, the policy can be called into question. For determination of the question whether there has been suppression of any material facts it may be necessary to also examine whether the suppression relates to a fact which is in the exclusive knowledge of the person intending to take the policy and it could not be ascertained by reasonable enquiry by a prudent person."

For the reasons given above and under the above settled position of law, this Court comes to conclusion that there is no merit in the writ petition, which is accordingly dismissed, however, without cost.

Writ petition dismissed.

2015 (II) ILR - CUT- 579

S. K. SAHOO, J.

JCRLA NO. 20 OF 2007

RABINDRA SAHOO …….Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

A. EVIDENCE ACT, 1872 – S.6

Res gestae – Meaning of – Things said and done in the course of a transaction – Res gestae of a crime includes all occurrences and statements immediately after the crime – The essence of the doctrine

of res gestae in evidence is that the facts which though not in issue are so connected with the fact in issue as to form part of the same transaction and thereby become relevant like fact in issue – If there is an interval between the fact in issue and the fact sought to be proved, then such statement can not be described as falling under 'res gestae' as the same would allow fabrication.

In this case immediate conduct of the victim in making an attempt to commit suicide and disclosing about the incident before P.W.s 2, 5, 6, 7 & 8 is admissible U/s. 6 of the Evidence Act as res gestae. (Para 10)

B. PENAL CODE, 1860 – S.376

Rape – Mother is the victim by her son – Unheard of – Medical report as well as chemical examination report do not support the prosecution case – However testimony of the prosecutrix is found to be cogent, convincing, reliable and trustworthy – Held, impugned judgment of conviction and sentence is upheld.

(Paras 13 to 15)

For Appellant : Miss Mandakini Panda
For Respondent : Mr. Jyoti Prakash Patra, Addl.Standing Counsel

---

Date of Hearing : 25.06.2015
Date of Judgment : 06.07.2015

JUDGMENT

S.K.SAHOO, J.

"Api Swarnamayi Lanka Na Mein Lakshmana Rochate Janani Janmabhumischa Swargadapi Gariyasi"

("Lakshmana, even this golden Lanka does not appeal to me. Mother and motherland are greater than heaven.")

Adi Kavi Valmiki in his epic Ramayana has mentioned that Lord Rama told these lines to his younger brother Lakshmana after their victory over Ravana, the king of Lanka.

Mother is the epitome of love, sacrifice and strength. Carrying all pain of childbearing for months together, she gives birth to the baby with all smiles and satisfaction. The kid is brought up under her care and affection. She

understands what her child does not say. Her arms become the most comfortable and safest place for her child. She is the first and best teacher of her child. No child can compensate what his mother does for him. That is why it is told that mother is superior to heaven.

Can a mother be raped by her own son? Can a mother bring false allegation of rape against her son?

These are the questions which have cropped up in this appeal. The appellant Rabindra Sahoo faced trial in the Court of learned Addl. Sessions Judge, Fast Track Court No.II, Cuttack in Session Trial No. 442 of 2005 for offences punishable under section 341, 506 and 376 of Indian Penal Code for wrongfully restraining her mother one "M" (hereafter 'the victim'), threatening the victim with injury on her person and also committing rape on the victim on 23.3.2005 at about 9 a.m. at village Jayarampur under Salipur Police Station in the district of Cuttack.

The learned trial Court vide impugned judgment and order dated 29.4.2006 though acquitted the appellant of the charges under section 341 and 506 IPC but found him guilty under section 376 IPC and accordingly convicted him of such offence and sentenced him to undergo rigorous imprisonment for a period of ten years.

2. The prosecution case, as per the First Information Report lodged on 23.3.2005 by the victim (P.W.1) before the Inspector-in-charge, Salipur Police Station is that on that day at about 9.00 a.m. while the husband of the informant was not present in the house, the appellant who is the son of the victim and was addicted to liquor and ganja wrongfully confined the victim inside a room and assaulted her by means of a bamboo stick on her left hand and left leg vigorously for which the victim became senseless. The appellant torn the saree of the victim and committed rape on her and also abused her in filthy languages. The victim was virtually dumb founded as she could not believe that her son would commit such an offence with her. The appellant pressed the neck of the victim and asked her to pay Rs.5000/- within three days or else she would be cut into pieces by means of bhujali and saying so, the appellant left the house. At that time the husband of the victim arrived at the house and found her crying sitting on the outside verandah and on being asked by her husband, the victim narrated the incident before him.

3. On receipt of the written report from P.W.1, the Inspector- in-Charge of Salipur Police Station namely Trinath Mishra (P.W.12) registered Salipur P.S. Case No.74 dated 23.3.2005 under sections 323, 506 and 376 IPC at about 5.30 p.m. and he himself took up the investigation. He examined the informant and recorded her statement so also the statement of her husband Babaji Sahu. Then the I.O. visited the spot and in presence of the informant and other witnesses prepared the spot map Ext.8. The I.O. also seized one bamboo lathi, one lock with two keys from the spot room on production by the informant in presence of the witnesses under seizure list Ext.4. He further examined the witnesses and recorded their statements on 24.3.2005. The I.O. seized the wearing apparels of the appellant under seizure list Ext.9. Then he seized the wearing apparels of the victim under seizure list Ext.3 and then both the appellant and the victim were sent for medical examination under police requisition to S.C.B. Medical College & Hospital, Cuttack. The vaginal swab of the victim as well as her pubic hair were seized so also the semen and pubic hair of the appellant. The appellant was arrested and forwarded to Court on 25.3.2005. The I.O. received the medical examination report of the victim as well as of the appellant. On 15.7.2005 the seized exhibits were sent to SFSL, Rasulgarh for chemical examination and after completion of investigation, charge sheet was submitted on 20.7.2005 under sections 341, 506 and 376 IPC.

4. After submission of charge-sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned trial Court charged the appellant under sections 341, 506 and 376 of Indian Penal Code on 19.9.2005 and since the appellant refuted that charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

5. During course of trial, in order to prove its case, the prosecution examined twelve witnesses.

P.W.1 is the victim and she is the mother of the appellant and she stated to have taken the zima of lock along with key ring under Zimanama Ext.2 and she is also a witness to the seizure of her wearing apparels under seizure list Ext.3.

P.W.2 Babaji Sahu is the father of the appellant before whom the victim narrated about the incident on the date of occurrence.

P.W.3 Snehalata Sahu and P.W.4 Namita Sahu did not support the prosecution case for which they were declared hostile by the prosecution.

P.W.5 Sabitri Sahu, P.W.6 Mataji Sahu, P.W.7 Mataji Sahu and P.W.8 Lata Sahu stated that the victim narrated the incident before them.

P.W.9 Siba Mallik is a witness to the seizure of lock and keys and one bamboo lathi under seizure list Ext.4.

P.W.10 Dr. Nirupama Samantaray stated to have examined the victim on 24.3.2005 and proved his report Ext.6.

P.W.11 Dr. Brajakishore Dash examined the appellant and proved the medical report Ext.7.

P.W.12 Trinath Mishra was the Inspector-in-charge of Salipur Police Station who is the investigating officer in the case.

The prosecution also exhibited thirteen numbers of documents. Ext.1 is the F.I.R., Ext. 2 is the Zimanama, Exts.3, 4, 5 and 9 are the seizure lists, Exts. 6 and 7 are the medical examination reports, Ext.8 is the spot map, Ext.10 and 11 are the police requisitions, Ext.12 is the forwarding report of sending the articles for chemical analysis and Ext.13 is the chemical examination report.

The prosecution also proved some material objects. M.O.I is the lathi, M.O.II is the lock and M.O.III is the ring having one key.

6. The defence plea of the appellant is one of denial and it is pleaded that the victim was a characterless lady and many notorious persons were coming to her for which his (appellant's) wife left her in-laws' house and stayed at her father's place. It is further pleaded that as the appellant was addicted to liquor, ganja and opium and was regularly assaulting the victim, he has been falsely entangled in the case.

7. The learned trial Court vide impugned judgment and order dated 29.4.2006 held that in the facts and circumstances of the case, while the main aim of the appellant, in terrorizing and assaulting the victim was to commit rape on her in an intoxicated mood, it can be safely said that the appellant had no intention either to detain or to criminally intimidate her. Accordingly,

the learned trial Court acquitted the appellant of the charges under sections 341 and 506 IPC but found him guilty under section 376 IPC and convicted him of such offence and sentenced him as noted above.

8. Being dissatisfied with the impugned judgment and order of conviction, the instant appeal has been preferred by the convicted accused-appellant.

Miss Mandakini Panda, learned counsel for the appellant submitted that the judgment and order of conviction of the learned trial Court is perverse and the learned trial Court has not assessed the evidence on record properly. She further submitted that it sounds improbable that the appellant would commit rape on her mother and further submitted that the ocular testimony of the victim runs contrary to medical evidence. She also submitted that the chemical examination report findings goes against the prosecution case and since the appellant was a drug addict and extracting money from his parents on different occasions, he has been falsely entangled in the crime and accordingly she urged that it is a fit case for grant of benefit of doubt to the appellant.

Mr. Jyoti Prakash Patra, learned Addl. Standing Counsel on the other hand submitted that the victim being a married lady, injuries are not expected on her private parts and there was no earthly reason on the part of the victim to falsely entangle the appellant who is none else than her son in such a heinous crime. The learned counsel further submitted that since the victim disclosed about the occurrence before number of co-villagers, her conduct also strengthens her evidence and accordingly urged that the impugned judgment is well merited and therefore it be concurred and the appeal being devoid of merits be dismissed.

9. To appreciate the rival submissions raised at the bar, it is felt necessary first to analyse the evidence of the victim thoroughly as in a case of this nature, she is the best witness.

P.W.1 is the victim who in her deposition clearly and unequivocally stated that the appellant is her son and on the date of occurrence while she was sitting in the house of her nephew, the appellant called her to cook food for which she came to the house. When she started preparation for cooking food, the appellant assaulted her by means of lathi and then opened her clothes, tore it and tried to rape her. The victim asked the appellant as to why

he was doing all these things; he replied that since his wife was not there, he would have sexual intercourse with her. When the victim protested, the appellant tried to push a lathi into her private parts. Even though the victim requested the appellant to leave her but the appellant made her fall on the ground and committed sexual intercourse. The appellant then provided water to the victim so also rescued her while she was attempting to commit suicide by hanging herself and thereafter the appellant left the spot. The victim narrated about the incident before some co-villagers. After sometime when her husband came, the victim also told him about the incident.

In the cross-examination, it is elicited from the victim that she had sustained a swelling on her left arm and left leg and she had shown the swelling to the doctor. She has further stated that the appellant was addicted to liquor, ganja and opium. It has been suggested to the victim that as the appellant was addicted to liquor, ganja and opium and regularly assaulting her, he has been falsely entangled in a case. The victim has categorically denied such suggestion. The appellant has not placed on record any material to substantiate his defence and therefore, the plea taken by the appellant cannot be accepted. It is improbable that a mother would bring false allegation of rape against a son because the son was a drug addicted.

There is no contradiction in the evidence of the victim rather her evidence appears to be consistent, absolutely trustworthy, unblemished and of sterling quality. The first information report was lodged by the victim and the statement made by the victim in Court is almost identical as has been narrated in the FIR.

10. On scrutiny of the evidence of the victim, it appears that mentally and emotionally she felt so depressed and humiliated by the cruel act of the appellant that she tried to take the extreme step of ending her life by committing suicide by hanging but the appellant forcibly brought her outside by dragging.

The other witnesses like P.W.2 Babaji Sahu, the husband of the victim as well as P.Ws.5, 6, 7 and 8 have stated that the victim disclosed before them that the appellant raped her. Nothing has been also elicited from their evidence to disbelieve the same. The immediate conduct of the victim in making an attempt to commit suicide and disclosing about the incident before others is admissible under section 6 of the Evidence Act as res gestae.

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

Thus the evidence of the victim gets full support from the testimonies of other witnesses.

11. The learned counsel for the appellant Miss Panda submitted that the victim has stated that the appellant assaulted her by means of a lathi and also made her fall on the ground and committed sexual intercourse but there is no corresponding injury on the person of the victim to corroborate such statement and as such her testimony should be discarded.

At this juncture, it would be better to analyse the evidence of the doctor. P.W.10 Dr. Nirupama Samantray who examined the victim on 24.3.2005 i.e. on the next day of occurrence on police requisition stated that no bodily injury was present, there was no injury around the private part, no medical evidence of the sexual intercourse and further stated that the blood and pregnancy test were found negative.

However the doctor P.W.10 has clarified that since the victim was accustomed to sexual intercourse being a married lady, ordinarily no injury would be found on her body. In view of the clarification of the doctor, absence of the condition of the floor where she was made to fall or raped or any evidence that the victim was made complete naked during the commission of rape, in my humble view the negative medical report cannot negative the statement of the victim which is otherwise reliable. On medical examination of the appellant on 24.03.2005, the doctor P.W.11 found the appellant to be capable of performing sex but found no evidence of recent sexual intercourse.

Law is well settled that even in the absence of corroboration from medical evidence, the oral testimony of the prosecutrix, if found to be cogent, reliable, convincing and trustworthy can be accepted. However if the sole testimony of the prosecutrix appears to be wholly improbable and unsupported by any medical evidence then the Court shall be extremely careful before acting upon such testimony. Absence of injuries on the private parts of the victim that to a married lady who was accustomed to sexual intercourse would not by itself falsify the case of rape. The assault by a lathi on her by the appellant as stated by the victim may be an exaggerated version but for such exaggeration, the entire evidence of the victim cannot be thrown overboard straightway.

12. The victim has stated that the appellant tore her cloth which was seized under seizure list Ext.3. Ext.3 indicates that a yellow colour saree in torn condition and one black colour old saya having semen stain like were seized. Thus the seizure of torn saree also lends support to the evidence of the victim.

The vaginal swab of the victim, her pubic hair, saya and saree of the victim as well as semen of the appellant, his pubic hair and lungi were sent for chemical examination and the chemical examination report Ext.13

indicates that blood stain and semen stain could not be detected in the vaginal swab, pubic hair of the victim and her saya and saree so also in the lungi and pubic hair of the appellant. Vaginal fluid stains could not be detected in the lungi of the appellant. Thus the chemical examination report no way helps the prosecution.

13. Even though the medical examination report of the victim as well as the chemical examination report do not support the prosecution case but the statement of the victim, her conduct in attempting to commit suicide after the occurrence, the statements of the witnesses before whom the victim disclosed about the incident immediately after the occurrence, the lodging of the FIR on the same day of occurrence after the arrival of the husband of the victim, the seizure of torn saree of the victim as well as the surrounding circumstances clearly establishes the case against the appellant.

14. Upon critical analysis of the evidence led in the case, I find that the prosecution has succeeded in establishing the guilt of the appellant beyond all reasonable doubt. The conclusions reached by the learned trial Court cannot be said to be palpably wrong or based on erroneous view of the law, so as to call for interference in appeal.

15. Accordingly, the appeal stands dismissed. The impugned judgment and order of conviction of the appellant under section 376 Indian Penal Code and sentence of rigorous imprisonment for ten years as was imposed by the learned trial Court which cannot be considered to be excessive or unwarranted on the facts of the case, is hereby upheld.

It appears from the record that the appellant was forwarded to Court on 25.03.2005 after arrest and since then he remained in jail custody. He was neither on bail during trial or during pendency of the appeal. Thus the appellant has already undergone the period of sentence as was imposed on him by the learned trial Court which is confirmed in this appeal. The appellant, if he is still in jail should be released forthwith, if his detention is not required in any other case.

Before parting, I would humbly say that a mother plays a very special and important role in a man's life. The son gets unconditional love from his mother. The son completes the womanhood of his mother. Mother makes a man out of a boy. The mother-son relationship and their emotional bond are dynamic. It is said that God cannot be everywhere and that is why he made mothers. Let us respect our mothers who not only brought us to this world but

struggled so hard to make us a complete man. The Jail Criminal Appeal is dismissed.

Appeal dismissed.

2015 (II) ILR - CUT- 589

S. N. PRASAD, J.

W.P.(C) NO. 13277 OF 2005

MIR NAGVI ASKARI …….Petitioner

.Vrs.

ANDHRA BANK & ORS. ……..Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART.226

Service Law – Bank employee – Conviction on charges of moral turpitude – Acquittal from the charge – Reinstatement made without back wages on principles of "no work no pay" – Action challenged – No specific statement supported with document that the petitioner was not gainfully employed during the intervening period – Held, no reason to interfere with the part of the order Dt. 09.10.2009 by which claim of the petitioner for back wages has been denied basing on the principles of "no work no pay". (Paras 47 to 52)

Case Laws Referred to :-

1. (2009) 15 SCC 643 : Mir Nagvi Askari vrs. C.B.I.
2. (2014) 3 SCC 610 : State of West Bengal and others vrs. Sankar Ghosh
3. (2013) 11 SCC 626 : Shiv Nandan Mahto Vrs. State of Bihar and others
4. (2009) 2 SCC 592 : Somesh Tiwari Vrs. Union of India and others
5. (2007) 5 SCC 524 : Mahadeo Bhau Khilare (Mane) and others vrs. State of Maharastra and others
6. 2014 (II) OLR 421. : Nigamananda Mangaraj vrs. The Chairman-cum-Disciplinary Authority, Koraput Panchabati Gramya Bank

For Petitioner : M/s. P.Behera, M.R.Tripathy
For Opp. Parties : M/s. C.A.Rao, S.K.Behera & A.K.Rath

Date of hearing : 09.07.2015
Date of judgment : 09.07.2015

JUDGMENT

S.N.PRASAD, J.

Heard learned counsels for the petitioner and learned counsel for the opposite party nos.1 to 3.

2. This writ petition has been filed for following reliefs:-

(i) For quashing the order of dismissal dated 05.01.2005 passed by the General Manager (Personnel) and Competent Authority of Andhra Bank (Annexure-7) by which the petitioner has been dismissed from service.

(ii) The order dated 16.01.2005 passed by the Appellate Authority confirming the order as contained in Annexure-7 passed by the Disciplinary Authority.

(iii) Quashing the part of the order dated 8.10.2009 issued by the General Manager (HR) and Competent Authority by which the back wages for the period of dismissal has been denied and application of principles of "no work and no pay" to release all consequential benefits.

3. The case of the petitioner is that he had joined in his service as a Clerk (Temporary) in Andhra Bank at the Head Office, Hyderabad on 12.10.1973. Then he was confirmed and permanently appointed as Clerk in Andhra Bank at the Head Office 27.03.1974. The petitioner was promoted as Officer in Scale-I (Junior Management) and posted at Pentavellie Branch, Andhra Pradesh w.e.f. 31.12.1980 and then promoted to Scale-II (Middle Management) and posted as Branch Manager, Karwan Branch, Hyderabad, A.P. w.e.f. 31.10.1988. The petitioner thereafter transferred and posted at Bills Department, Fort Branch, Bombay on 09.07.1991 and thereafter posted at funds Section of Funds and Securities Department of the said Fort Branch, Bombay w.e.f. 19.11.1991.

4. While the petitioner was posted at Funds and Securities Department of the Fort Branch in Mumbai an allegation was levelled against him regarding credit facilities of Rs.7 Crore having been extended in favour of one Hiten Prasad Dalal who was a Stock Broaker on the basis of Banker's

Cheque dated 04.12.1991 issued by the Bank of Karad, Fort Branch, Mumbai in favour of Hiten Prasad Dalal.

5. Regarding this action of the petitioner along with two others, enquiry was conducted and was found that irregularities have been committed by the petitioner along with two others and thereafter one F.I.R. was lodged on 02.06.1993 bearing No. RC.3(BSC)/93/BOM under Sections 120-B read with Section 13(1) (d) of Prevention of Corruption Act, 1988 and for the offences under Section 420, 468, 471 and 477 (A) of the I.P.C.

6. The matter was investigated by the C.B.I. and thereafter the charge-sheet was submitted and regular trial was started being Special Case no. 5 of 1994 before the Special Court at Mumbai. Simultaneously, the Bank has also initiated a departmental proceeding against the petitioner and three senior officers of the Bank after following due procedure as provided in the appeal and discipline rule Enquiry Officer has found the charges levelled against the petitioner proved which was accepted by the Disciplinary Authority, vide Order dated 08.01.1998, the petitioner was imposed with the punishment of "reduction of Pay by one stage" with immediate effect (Annexure-2).

7. The petitioner has preferred an appeal against the order dated 08.01.1998 which has been confirmed by the Appellate Authority vide order dated 24.03.1998(Annexure-3).

8. After the order of punishment having been passed on 08.01.1998 the competent court of criminal jurisdiction has pronounced its judgment dated 19.10.2004 in S.C. Case No.5 of 1994 the petitioner was found guilty for the offence and was convicted for the offence under Section 120(B), 409, 467, 471 of IPC read with Section 13(1)(c), 13(1)(d) and 13(2) of Prevention of Corruption Act, sentenced to undergo rigorous imprisonment for one month and pay of fine of Rs. 1000/-.

9. The petitioner has filed an appeal against the order of conviction before the Hon'ble Supreme Court being in Criminal Appeal No.1477 of 2004. The Bank has passed an order dated 05.01.2005 dismissing the petitioner from service in exercise of power under Section 10(1) (b) (i) of Banking Regulation Act, 1949 with the order that terminal benefits will be settled and paid to the petitioner in due course.

10. The petitioner at this stage has challenged the order of dismissal before this Court vide W.P.(C) No. 2913 of 2005 and this Court has directed the petitioner to prefer an appeal before the Competent Authority.

11. In pursuance to the order passed by this Court the petitioner has preferred an appeal before the Competent Authority who has passed an order on 16.08.2005 declining to interfere with the order of dismissal on the ground that the petitioner has been convicted for the criminal charge since there is specific provision under Section 10 (1) (b) (i) of the Banking Regulation Act, 1949 as such only by virtue of interim order passed by the Hon'ble Supreme Court keeping sentence in abeyance the order of dismissal cannot be recalled.

12. The Criminal Appeal pending before the Hon'ble Supreme Court, has ultimately been decided on 07.08.2009 which has also been reported in (*2009) 15 SCC 643* in the case of **Mir Nagvi Askari vrs. C.B.I**. whereby and hereunder the order of conviction passed against the petitioner by the Trial Court has been quashed.

13. After quashing of the order of conviction, the petitioner has made representation before the authorities for recall of the order of dismissal, the authorities have passed an order dated 8.10.2009 reinstated the petitioner in service but without back wages on the principles of "no work and no pay". But the period of dismissal will be treated as service for the purpose of seniority, computation of terminal and pensionary benefits.

14. The petitioner originally, has preferred the instant writ petition for quashing the order of dismissal but during the pendency of the writ petition after passing of the order of reinstatement on 8.10.2009 has filed misc. petition for amending the prayer and accordingly the misc. petition being Misc. Case No.16073 of 2014 was allowed vide order dated 15.10.2014.

15. In course of argument, learned senior counsel for the petitioner has submitted that since the order of reinstatement has been passed by the Bank on 08.10.2009 and as such only question which is to be decided by this Court is regarding the entitlement of the petitioner with respect to back wages which has been denied on the ground of the principle of "no work and no pay".

16. Challenging the part of the order dated 08.10.2009 by which the back wages has been denied learned senior counsel for the petitioner has submitted that the petitioner has wrongly been dismissed from service because in the departmental proceeding the petitioner has already been punished with the punishment of withholding one annual increment and thereafter on the ground of conviction in criminal case by the trial Court he was dismissed from service w.e.f. 05.01.2005.

17. Thus the sole ground taken by the authority in dismissing the petitioner from service was conviction in the criminal case and as such the moment criminal case has ended in acquittal, the petitioner will be deemed to be in employment and he will be entitled to get entire back wages because the petitioner has been deprived from discharging his duty forcefully having no fault of his own.

18. Learned senior counsel for the petitioner has relied upon judgment as reported in *(2009) 2 SCC 592 and 2014 (II) OLR 421*.

19. Per contra the learned counsel for the Bank has contested the case by stating that the petitioner is not entitled to get the benefit of back wages on the ground that there is charge of moral turpitude and on that ground a departmental proceeding was initiated in which the charge levelled against the petitioner was found to be proved which was accepted by the Disciplinary Authority and thereafter the order of punishment was imposed upon him withholding one annual increment vide order dated 08.10.2009, the said order was never been assailed before the higher Court.

20. Subsequently, the petitioner was convicted in the criminal cases sentence to go rigorous imprisonment for one month and a fine of Rs. 1000/-.

21. There is a provision under Section 10 (1) (b) (i) of Banking Regulation Act, 1949 that in case of conviction of an employee in the criminal case the employee shall be dismissed from service as such invoking the said power the petitioner was dismissed from service.

22. It has further been submitted that in case of charge of corruption against a public servant, the said public servant is not entitled to remain in service and the authority also cannot wait for the outcome of the appeal otherwise it will lead to sending a wrong message to other public servant hence Bank has taken a conscious decision by dismissing the petitioner from service.

23. However, after acquittal of the petitioner by the order passed by the Hon'ble Supreme Court Bank has shown its bona fide and has reinstated the petitioner in his service but without any back wages because during the said period, the petitioner has not performed any duty hence applying principle of "no work and no pay" back wages has been denied.

24. It has further been contended that now it is settled that back wages can only be paid if the employee who is out of service is coming forward

with a specific case that he was not gainfully been employed during the said period. But from perusal of entire pleading it is apparent that there is no specific statement made by the petitioner that he was not gainfully employed and as such no direction can be issued by this Court regarding release of back wages.

25. Heard the parties and perused the documents on record.

26. The undisputed question of fact in this case is that a departmental proceeding along with a criminal case was initiated against the petitioner for the offence under various Sections of I.P.C. and under the Prevention of Corruption Act.

27. The departmental proceeding has been ended with the proof of charges imposition of major punishment withholding one annual increment with cumulative effect.

28. The charge before the Department was that "*the petitioner has released credits unauthorisedly in the account of Sri H. P. Dalal on two occasions involving huge amounts. It is also alleged that an amount of Rs.40.00 crores was borrowed and lent on 30.11.1991 without any directions from Central Accounts Department, Central Office. Thus you have failed to discharge your duties with diligence and devotion*."

29. These charges relates to the involvement of moral turpitude by the petitioner which was found to be proved by the Enquiry Officer, thereafter order of punishment was passed, which was challenged by the petitioner before the Appellate Authority and the same was confirmed by the Appellate Authority on 24.03.1998.

30. But the order passed by the Disciplinary Authority or Appellate has not been challenged before any court of law which suggests that the order of punishment passed by the Disciplinary Authority was accepted by the petitioner and as such the charge levelled against the petitioner was also deemed to be accepted by him. Thereafter criminal case was ended with the order of conviction for the offences under various Sections of I.P.C. and Prevention of Corruption of Act.

31. All the Banks in the country is running under the statutory provision known as Banking Regulation Act, 1949 where there is provision governing the service conditions and other requirements, in which there is a provision as

contained in Regulation 10 (1) (b) (i) which are reproduced herein below:-

"10. Prohibition of employment of managing agents and restrictions on certain forms of employment

(1) No banking company

(b) shall employ or continue the employment of any person-

(i) who is or at any time has been, adjudicated insolvent, or has suspended payment or has compounded with his creditors, or who is, or has been, convicted by a criminal court of an offence involving moral turpitude."

32. In view of the said regulation the Bank has dismissed the petitioner from service vide order dated 05.01.2005 (Annexure-7) the said order of dismissal was challenged before this Court vide W.P.(C) No.2913 of 2005 the same was disposed of directing the authority to decide the appeal (Annexure-8).

33. Accordingly, the petitioner has preferred an appeal in terms of the order against the order of dismissal dated 05.01.2005 the same was disposed of confirming the order of dismissal on the ground that in view of order of conviction having been passed by the competent court of criminal jurisdiction the order of dismissal cannot be interfered with in view of the specific provision as contained in Section 10 (1) (b) (i) of Banking Regulation Act, 1949.

34. Moreover, the ground taken by the petitioner is that the order of sentence since been suspended by the Hon'ble Supreme Court, the same will be deemed to be stay of conviction and as such the order of dismissal may be recalled but that has not been considered on the ground that the order of conviction was in operation since the Hon'ble Supreme Court has not passed any stay order on the conviction of the petitioner rather only sentence was suspended in exercise of power conferred under Section 389 (i) of Cr.P.C.

35. In the meanwhile the Hon'ble Supreme Court has been pleased to acquit the petitioner from the criminal charges thereafter the petitioner has represented before the authorities for reinstating in service with retrospective effect and to pay all consequential benefits.

36. In terms of the order dated 08.10.2009 the petitioner has been reinstated in service but without any back wages applying the principle of "no work and no pay". But however, the intervening period will be treated as

service period for the purpose of seniority, computation of terminal benefits and pensionary benefits.

37. For adjudicating the grievance of the petitioner regarding the back wages it is to be seen that whether the petitioner is entitled for the same or not and for that, relevant facts needs to be considered which is as follows:-

(i) The petitioner was charged with the allegation of moral turpitude, allegation of failing to discharge duties with diligence and devotion thereafter he was proceeded departmentally charge has been proved, order of punishment has been passed which has been confirmed by the Appellate Authority but not challenged before any court of law.

This means that the charge which was framed and the order of punishment which was passed had attained its finality.

However, the Bank has decided to keep the petitioner in service by imposing punishment provided under the discipline and Appeal rule but after conviction in the criminal case.

(ii) The Bank has resorted to the provision of Section 10 (b) (1) (i) and dismissed the petitioner from service.

The petitioner has been acquitted by the Hon'ble Supreme Court in this regard the relevant paragraph of the judgment needs to be considered as to whether the conviction of the petitioner was on merit or on benefit of doubt for that paragraph-131 of the judgment reported in *(2009) 15 SCC 643 (supra)* which is being quoted herein below:-

> *"**131.** We may also notice that accused 5 was acquitted by the trial court in respect of transaction dated 16.12.1991 despite the consolidated debit voucher not tallying with the total as reflected in the BCR register. Thus being only involved in these two transactions having similar facts, and being acquitted in one, he is, in our view, entitled to the same benefit in the other transaction too. Benefit of doubt given in respect of one transaction would apply on all fours to the other, as both of them are of similar nature. Further, is also needs to be considered that the prosecution has not been able to produce any evidence to prove a Accused 5's involvement in the conspiracy. Therefore, we are of the opinion that the learned Special Judge erred in holding that Accused 5 was a party to the conspiracy with regard to the instant transaction."*

This finding of the Hon'ble Supreme Court clearly shows that the trial Court has not found the petitioner guilty with respect to one transaction by giving benefit of doubt as such the Hon'ble Supreme Court has passed the order when the benefit of doubt has been given regarding one transaction which was related to the petitioner then why said benefit has not been given related to other four transactions since all transactions were similar in nature, on that ground the trial Court judgment to that extent was quashed.

This finding clearly shows that the petitioner was acquitted on the basis of benefit of doubt.

After acquittal the representation of petitioner was considered he was reinstated in service, however, it is settled there cannot be automatic reinstatement in service in absence of any provision provided under the statute for reinstatement after its acquittal.

In the Banking Regulation there is no provision of automatic reinstatement in service.

In this regard the judgments rendered by of the Hon'ble Supreme Court needs to be refered in the case of **State of West Bengal and others vrs. Sankar Ghosh** reported in *(2014) 3 SCC 610* at para-18 which is being quoted herein below:-

> *"**18**. We indicate that the respondent could not lay his hand to any rule or regulation applicable to the police force stating that once an employee has been acquitted by a criminal court, as a matter of right, he should be reinstated in service, despite all the disciplinary proceedings. Even otherwise there is no rule of automatic reinstatement on acquittal by a criminal court even though the charges levelled against the delinquent before the enquiry officer as well as the criminal court are the same."*

But however, the Bank has considered representation of the petitioner and reinstated the petitioner in service hence this Court is not making any comment on the decision of the Bank.

38. Admittedly, the petitioner was out of service on the grave charge of moral turpitude in which was ended in acquittal, the petitioner was reinstated in service.

39. Regarding claim of back wages learned counsel appearing for the petitioner has cited judgment rendered by the Hon'ble Supreme Court in the

case of **Shiv Nandan Mahto Vrs. State of Bihar and others** reported in *(2013) 11 SCC 626*.

40. From perusal of the said order no ratio has been laid down moreover, the facts of the said case is quite different from the facts of the petitioner, because in the case cited not related with any allegation rather the case is with respect to adjustment of service of **Shiv Nandan** (petitioner) of the judgment cited and as such the same is not applicable.

41. So far as the judgment referred in the case of **Somesh Tiwari Vrs. Union of India and others** reported in *(2009) 2 SCC 592* the facts of the said case is also not similar to the facts of this case because fact of the case cited was regarding the issue in case of transfer of an employee and not related with any of the charges or allegation.

42. The other judgment in which reliance has been placed is of the case of **Mahadeo Bhau Khilare (Mane) and others vrs. State of Maharastra and others** reported in (2007) 5 SCC 524 the fact of the case is also different from the fact of the petitioner because the cited case is regarding regularisation.

43. Reliance has been placed in the case of **Nigamananda Mangaraj vrs. The Chairman-cum-Disciplinary Authority, Koraput Panchabati Gramya Bank** reported in *2014 (II) OLR 421*. The facts of the said case is also not applicable because the said case was related to solemnisation of second marriage and it does not relate with the conduct of the petitioner while discharging official duty, this aspect of the matter has been taken into consideration by this Court vide paragraph-12 placing reliance the judgment referred in the case of **Allahabad Bank vrs. Deepak Kumar Bhola** reported in *(1997) 4 SCC 1* wherein the definition of "moral turpitude" has been discussed which relates to dealing with money of general public commits forgery, unlawful withdrawal which he is not entitled to be withdrawn.

44. For getting back wages for the intervening period the law is well settled as has been held by the Hon'ble Supreme Court where in the case of **P.G.I. of Medical Education and Research vrs. Raj Kumar** reported in (2001) 2 SCC 54 wherein at para-12 it has been held as follows:-

> *"Payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straitjacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety."*

45. The similar view has been taken in other judgments of Hon'ble Apex Court in the case of **Hindustan Motors Ltd. Vrs. Tapan Kumar Bhattacharya** reported in *(2002) 6 SCC 41*, **Indian Railway Construction Co. Ltd. Vrs. Ajay Kumar** reported in *(2003) 4 SCC 579* and **MPSEB vrs. Smt. Jarina Bee** reported in (2003) 6 SCC 141. Applying the said principle, the Hon'ble Supreme Court in the case of **Kendriya Vidyalaya Sangathan vrs. S.C. Sharma** reported in (2005) 2 SCC 363 wherein their lordships has been pleased to refer at para-16 it has been held as follows:-

> *"Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person to back wags is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."*

46. In other judgment rendered by the Hon'ble Supreme Court in the case of **Deepali Gundu Surwase vrs. Kranti Junior Adhyapak Mahavidyalaya (D.ED)** and others reported in *(2013) 10 SCC 324* has been pleased to hold at paragraph-33 which is being quoted herein below:-

> ***33**. Procedure for inflicting major panalties -(1) If an employee is alleged to be guilty of any of the grounds specified in sub-rule (5) of Rule 28 and if there is reason to believe that in the event of the guilt being proved against him he is likely to be reduced in rank or removed from service, the management shall first decide whether to hold an inquiry and also to place the employee under suspension and if it decides to suspend the employee, it shall authorise the Chief Executive Officer to do so after obtaining the permission of the Education Officer or, in the case of the Junior College of Educational and Technical High Schools, of the Deputy Director. Suspension shall not be ordered unless there is a prima facie case for his removal or there is reason to believe that his continuance in active service is likely to cause embarrassment or to hamper the investigation of the case. If the management decides to suspend the*

employee, such employee shall, subject to the provisions of sub-rule (5), stand suspended with effect from the date of such orders.

(2) If the employee tenders resignation while under suspension and during the pendency of the inquiry such resignation shall not be accepted.

(3) An employee under suspension shall not accept any private employment.

(4) The employee under suspension shall not leave the headquarters during the period of suspension without the prior approval of the Chief Executive Officer. If such employee is the Head and also the Chief Executive Officer, he shall obtain the necessary prior approval of the president.

Their lordships have also given reliance upon the judgment rendered by the Hon'ble Apex Court in the case of **Hindustan Tin Works (P) Ltd. Vrs. Employees of Hindustan Tin Works** reported in *(1979) 2 SCC 80* and differing with the view taken in the case of **J.K. Synthetics Ltd. Vrs. K.P. Agrawal and another** reported in *(2007) 2 SCC 433* has been pleased to hold that the onus is first upon the employee to prove that he was not gainfully employed and if such ground taken by the employee, the employer has to falsify the same.

47. In view of such proposition, the requirement for getting back wages during the period of termination at any case on wrongful termination of service, reinstatement and continuing in service and back wages is to subject to rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any found proved against the employee/workman, the financial conditions of the employer and similar other factors for getting back wages it is required either to plea or at least to make statement before adjudicating, authority or the Court at the first instance he/she was not gainfully employed or was employee with lesser wages.

48. In this case, the petitioner although is claiming back wages but from entire pleading, nowhere it has been stated that he has not gainfully been employed, however at para-53 and 54 of writ petition, statement has been made that he was out of job due to disqualification for future employment on account of order of dismissal.

49. This statement cannot be said to be sufficient because in the summary proceeding like writ jurisdiction the party is supposed to give specific statement then only question of its rebuttal by opposite side will arise, no specific statement supported with document regarding not gainfully employed during the intervening period has been given by the petitioner hence in absence of that the decision taken by the Bank cannot be said to be without any application of mind.

50. Considering the nature of the misconduct related to financial transactions, the punishment has been imposed upon the petitioner after conclusion of the departmental proceeding which has never been challenged by the petitioner. So the case of the petitioner for getting back wages cannot be said to be under the normal rule rather it is coming under the rider and in absence of the specific pleading regarding not gainfully employed the petitioner cannot be said to be entitled for getting back wages.

51. The principle of "no work and no pay" has been adopted because if the employee has not performed his duty, the employer cannot be over burdened.

52. In view of the reasons stated hereinabove, I find no reason to interfere with the part of the order dated 08.10.2009 by which the claim of the petitioner for back wages has been denied on the basis of principle of "no work and no pay".Hence, I find no merit in this writ petition. Accordingly, the writ petition is dismissed.

Writ petition dismissed.

2015 (II) ILR - CUT-601

DR. D.P.CHOUDHURY, J.

CRIMINAL APPEAL NO. 249 OF 1992

BENUDHAR MAHALIK & ANR. ……..Appellants

.Vrs.

STATE OF ORISSA ……Respondent

PROBATION OF OFFENDERS ACT, 1958 – S.4 r/w Section 360 Cr.P.C.

Conviction of accused Benudhar U/s. 324 I.P.C – He was 21 years of age on the date of occurrence – Section 360 Cr.P.C. relates only to persons not under 21 years of age but the scope of section 4 of the Act is much wider – Learned trial Court has neither made any endeavour to find out whether the beneficial provisions of probation of offenders Act or section 360 of the Code would be applicable to him nor he has assigned any reason to that effect – Held, it is the duty of the Court below to assign reasons in the judgment for not applying such provisions of law. (Paras 23 to 27)

Case Laws Referred to :-

1. AIR 2003 SC 976 ; (Rizan & Another Vs. State of Chhatishgarh)
2. AIR 2003 SC 3609 : (State of Punjab Vs. Karnail Singh)
3. AIR 2003 SC 3811 : (Surinder Singh And Anr. Vs. State of U.P.)
4. AIR 2007 SC 1299 : (Kalegura Padma Rao & Anr. Vs. State of A.P.)
5. AIR 1953 SC 364 : Dalip Singh And Others Vs. State of Punjab)
6. AIR 1981 SC 1390 : State of Rajasthan Vs. Smt. Kalki & Anr.
7. AIR 2008 SC 920 : Dharam Pal And Ors. Vs. State of U.P.
8. AIR 2008 SC 2438 : Ashok Kumar Chaudhary & Ors. Vs. State of Bihar
9. AIR 1983 SC 484 : Solanki Chimanbhai Ukabhai Vs. State of Gujurat

For Appellants : M/s. D.P.Dhal, D.K.Mohapatra, D.K.Das & A.K.Acharya
For Respondent : Addl. Standing Counsel

Date of Argument:13. 05.2015
Date of Judgment : 02.07.2015

JUDGMENT

DR. D.P. CHOUDHURY, J.

The captioned appeal challenges the judgment and order of conviction and sentence dated 23.06.1992 passed by learned Addl. Sessions Judge, Bhadrak in S.T. Case No.48/10 of 1992, whereby appellant No.1 was sentenced to undergo rigorous imprisonment for three years after being convicted under section 324 of the I.P.C. and appellant No.2 was sentenced to undergo rigorous imprisonment for one year after being convicted under section 323 of the I.P.C. In this judgment, appellant No.1 and appellant No.2 will be addressed as accused Benudhar and accused Rabindra respectively.

FACTS :

2. The factual matrix leading to the case of the prosecution is that on 03.07.1991 at 7.30 P.M., the accused persons, including the present appellants, being armed with deadly weapons, namely, tenta, sword, lathi and by forming an unlawful assembly reached in front of the house of informant Gorachand Mahalik. They abused the informant in obscene language. When the accused persons attempted to assault the informant and his brother Pagal Mahalik, the latter tried to flee away from the verandah of their house; but accused Benudhar assaulted by tenta on the left side abdomen of the informant causing bleeding injury on his person. It is alleged, inter alia, that accused Kalandi assaulted by sword to the brother of the informant. Accused Benudhar again assaulted by tenta to Pagal Mahalik causing bleeding injury on his person. Hearing cry of the injured persons, Jemamani Mahalik, the sister-in-law of the informant, came to the spot; but accused Rabindra assaulted by lathi on the right hand of Jemamani causing fracture injury on her person. When the injured persons made hullah for help, the accused persons fled away from the spot. While going away from the spot, they threatened the informant and his brother to kill if they would inform the matter to police. Thereafter, F.I.R. was lodged. During investigation, witnesses were examined, injured persons were sent for medical examination, police visited the spot and prepared spot map. In course of investigation, police also seized one tenta, the weapon of offence, on production by Gramarakhi. The Investigating Officer sent the same to doctor for opinion and the opinion was also received by police. After completion of investigation, charge-sheet was submitted against the accused persons. Hence the case of prosecution.

3. Plea of the accused persons, as revealed from the cross-examination made to P.Ws. and from their statements recorded under section 313 of the Cr. P.C., is that there was previous enmity between the parties for which a police case has been filed against the accused persons. On the other hand, they squarely denied the charges levelled against them.

4. Learned Trial Court considered the oral evidence of eight witnesses examined from the side of prosecution, so also the documents submitted by prosecution and found accused Benudhar and Rabindra guilty under sections 324 & 323 of the I.P.C. respectively and acquitted rest of the accused persons of the charges levelled against them. It is profitable to mention here that

learned Trial Court framed charges under sections 148/307/34 of the I.P.C. against all the nine accused persons, including the present appellants.

SUBMISSIONS :

5. Learned counsel appearing for the appellants submitted that the order of conviction and sentence passed against the appellants is illegal and erroneous. Learned trial Court has erred in law by reposing confidence on the evidence of the Investigating Officer on accepting the seizure list prepared by him being anti-dated. He further submitted that learned trial Court has lost sight of sequence of events, as given in the F.I.R., and place of assault, as stated by P.W.1, which is not matching with the F.I.R. Learned trial Court has erred in law by relying upon the evidences of P.Ws.1 to 4, who are none other than the family members of the informant, including the injured, who are highly interested and partisan to the family of the accused. According to him, learned trial Court has acted illegally by not rejecting the evidences of P.Ws.1 to 4, whose evidence are full of conjectures and surmises. Submission was also advanced that learned trial Court has erred in law by not taking into consideration the material discrepancies in the evidence on record. When prosecution has not examined the material independent witnesses, learned trial Court should have rejected its case on that score alone. Further submission was made by learned counsel for the appellants that accused Benudhar was 21 years old and the age of accused Rabindra was 17 years on the date of occurrence for which learned trial Court should have considered the case of the appellants for extending the beneficial provisions of the Probation of Offenders Act, having regard to the facts and circumstances of the case even if an order of conviction is recorded. However, he challenged the entire order of conviction and sentence passed against the appellants and submitted to set aside the same and acquit the appellants.

6. On the contrary, learned Addl. Standing Counsel appearing for the State submitted that the judgment passed by learned Court below is legally correct. According to him, learned trial Court has rightly appreciated the evidence of prosecution witnesses in proper prospective and after separating the grain from the chaff. He further submitted that learned trial Court has appropriately convicted the appellants under the respective offences and also proportionately sentenced them to undergo the imprisonment, as stated above. It was his submission that the order of conviction and sentence passed by learned trial Court is justified and the appeal is liable for dismissal.

DISCUSSIONS :

7. Out of eight witnesses examined by prosecution, P.W.1 is injured; P.W.2 is another injured and sister-in-law of P.W.1; P.W.3 is brother of P.W.1 and also an injured; P.W.4 is elder brother of P.W.1 and husband of P.W.2; P.Ws.5 & 6 are outsiders; P.W.7 is doctor; and P.W.8 is Investigating Officer. Defence has not examined any witness.

8. The contention of learned counsel for the appellants is that P.Ws.1 to 4 being related to each other, their evidence should not be accepted. On the other hand, learned Addl. Standing Counsel submitted that evidence of such witnesses cannot be outright rejected. Their Lordships of the Hon'ble Apex Court in the decisions reported in **AIR 2003 SC 976** (***Rizan & Another*** Vs. ***State of Chhatishgarh***); **AIR 2003 SC 3609** (***State of Punjab*** Vs. ***Karnail Singh***); **AIR 2003 SC 3811** (***Surinder Singh And Anr.*** Vs. ***State of U.P.***); and **AIR 2007 SC 1299** (***Kalegura Padma Rao & Anr.*** Vs. ***State of A.P.***) have been pleased to observe that close relatives of the deceased are unlikely to falsely implicate anyone. Sometimes, such relationships are guarantee of truth. When feelings run high on enmity, prudence may compel the Court to seek corroboration. But, general statement in cross-examination or bald assertions of relationship when questioned is not sufficient to make anyone interested (See **AIR 1953 SC 364**, ***Dalip Singh And Others*** Vs. ***State of Punjab***).

9. It is also the settled principle of law that evidence of eye witnesses, who are relatives of the victim, has to be considered from the point of view of trustworthiness. Credibility and relationship have to be tested, with reference to the way they fared in cross-examination and the nature of impression created in the mind of the Court. If the presence of witnesses at the scene at the time of occurrence is proved or considered to be natural and their evidence is found to be true in the light of surrounding circumstances and probabilities of the case, it can provide a good basis for conviction. Strained relationship with the accused of eye witnesses, closed related to the deceased, cannot be an yardstick to test their credibility (See ***State of Rajasthan*** Vs. ***Smt. Kalki & Anr.,*** **AIR 1981 SC 1390**). On the other hand, their evidence cannot be discarded in the absence of any infirmity in their evidence (See ***Dharam Pal And Ors.*** Vs. ***State of U.P.***, **AIR 2008 SC 920**; ***Ashok Kumar Chaudhary & Ors.*** Vs. ***State of Bihar***, **AIR 2008 SC 2438**).

10. From the aforesaid legal positions, as ascertained in different authorities of the Hon'ble Apex Court, I am of the view that dubbing a

witness as interested, if related to the injured, cannot be sole ground to reject the prosecution case; but, on the other hand, as per the decisions noted above, his evidence requires deeper scrutiny. Now, adverting to the case at hand, let me examine the evidence of each witness to arrive at a just conclusion.

11. It is revealed from the evidence of P.W.1 that while he and his brother were sitting on the verandah, he found that the accused persons teased his sister-in-law, who was returning with water. On her protest, accused Rabindra assaulted her by means of a stick. Further, it is reveled from his evidence that all the accused persons came being armed with tenta, sticks and thenga. When he and his brother tried to escape from the accused persons, accused Benudhar assaulted by tenta on the left side of his chest causing bleeding injury. According to him, his brother Pagal was also assaulted by accused Benudhar by means of tenta. He stated to have lodged F.I.R. vide Ext.1. During vivid cross-examination, his evidence remained unblemished. At the same time, it is elicited during cross-examination that he had seen the assault on his sister-in-law; but, in para-7 of cross-examination, he expressed his ignorance as to on which place, P.W.3 was assaulted. Defence has tried to confront the contents of the F.I.R. to which P.W.1 has clarified that the scribe wrote the FI.R. as per his instructions; but he could not say whether all the instructions were reduced into writing. It is quite natural for an injured not to wait for verification of the F.I.R. after the same was scribed as per his instructions, because an injured with bleeding injury has hardly any mind of verifying the F.I.R. Moreover, F.I.R. is not an encyclopaedia – it is only lodged to initiate the investigation. Be that as it may, defence could not elicit any major discrepancies between the F.I.R. and his statement. However, in the F.I.R., it is stated that while P.W.2 was coming to protest the action of the accused persons, she was assaulted by accused Rabindra, whereas P.W.1 has explained that while he and his brother were sitting on the verandah, they saw that all the accused persons abused her in obscene language and on protest, accused Rabindra assaulted P.W.2 by means of a stick. So, the sequence of events, as depicted in the F.I.R. and disclosed by P.W.1 so far as assault on P.W.2 is concerned, are contradictory to each other. Moreover, P.W.1 in cross-examination has categorically stated that he was assaulted subsequent to Jemamani (P.W.2). But, at the same time, he has admitted that he has not marked whether glass bangles of P.W.2 were broken. Thus, the statement of P.W.1, after proper scrutiny, is found to be consistent and clear so far as assault by accused Benudhar on his person is concerned; but, at the same

time, his evidence is not cogent and creditworthy to prove the assault on P.Ws.2 and 3.

12. P.W.2 has revealed that while she was returning after collecting water from the well, the accused persons abused her in filthy language to which she protested. According to her, accused Rabindra assaulted her two to three times by means of a stick for which she sustained injury on her right wrist. Her husband took her to their house. She admitted to have not seen the assault on her brother-in-law. In cross-examination, at para-3, she admitted that accused Rabindra assaulted on her right hand with all force and she received the stick blow on her right hand after it slipped from her shoulder. She stated to have sustained bleeding injury on her hand as glass bangles were broken. She has not stated as to what type of injuries she sustained on her right hand due to assault by stick, except bleeding injury due to damage of glass bangles. On the other hand, she has not clarified as to the nature of injuries sustained after having received the forceful stick blow from accused Rabindra. Thus, the statement of P.W.2 is not clear and consistent to prove the nature of injuries sustained by her due to the assault by accused Rabindra. On the other hand, she has categorically stated to have not seen the assault on other injured persons.

13. P.W.3, who is another injured, stated that while his sister-in-law was returning, the accused persons abused her. On protest, accused Rabindra assaulted P.W.2 with two stick blows for which she fell down and taken to her house. At the same time, he stated that the accused persons being armed with tenta, sword and sticks came there. Accused Benudhar stabbed informant Gorachand Mahalik by means of tenta and the said accused also stabbed him (P.W.3) by means of tenta. In cross-examination, he stated that first he was assaulted by accused Benudhar and, thereafter, accused Kalandi assaulted him. He also clarified that P.W.1 was assaulted prior to the assault received by him. In cross-examination, he also categorically stated that accused Benudhar stabbed him once by tenta. He admitted to have sustained bleeding injury on his person. In para-5, he clearly stated that accused Benudhar stabbed by means of tenta on his left side belly, shoulder and leg. The evidence of P.W.3 has got self-contradictory statement as to number of tenta blow he received. But, such minor discrepancy cannot be counted much because an injured is not supposed to count the number of blows while being assaulted. It requires only corroboration. On scrutiny of the evidence of this witness, it is found that he being injured and brother of P.W.1 has

categorically corroborated the evidence of P.W.1 as to the assault by accused Benudhar on the persons of P.Ws.1 & 3. At the same time, his evidence is not clear as to what happened to P.W.2 on the assault made by accused Rabindra by stick. In para-5 of cross-examination, denying the suggestion of defence, he stated to have stated before police that P.W.2 fell down and was carried by her husband. In fact, P.W.8 denied about such statement of P.W.3 before him. So, the assault by accused Rabindra on the person of P.W.2 and falling of P.W.2 on the ground are found as contradictions in the evidence of P.W.3. So, the evidence of P.W.3 so far as assault on P.W.2 and sustaining injury by her is not credible one, even if he is a relative of P.W.2. Thus, after scrutiny, the evidence of P.W.3 remains consistent and clear, as observed earlier, that he has seen the assault on P.W.1 by accused Benudhar causing stab injury on his person (P.W.1) and also sustaining stab injuries on his person having received the same from said accused Benudhar by means of tenta.

14. P.W.4, who is the husband of P.W.2, stated that while he along with P.Ws.1 & 3 were sitting on the verandah, they saw P.W.2 returning after collecting water from the well. But, all the accused persons abused her in filthy language. On her protest, accused Rabindra assaulted by means of stick on her right hand for which she fell down. He took P.W.2 to their house. He further revealed that accused Benudhar assaulted by tenta to P.Ws.1 & 3 causing bleeding injuries on their persons. He clearly stated that P.Ws.1 and 3 were assaulted after he left his wife in his house. But, at para-7 of cross-examination about the weapons each and every accused was holding, he explained that accused Benudhar was holding a tenta, accused Kalandi was holding a sword, accused Rabindra and Madhusudan were carrying stones and other accused persons were holding lathies. When there was no lathi held by accused Rabindra, it is not known how the said accused assaulted his wife (P.W.2) by lathi. But, in para-9 of cross-examintion, he has categorically stated that he has seen the tenta used. The statement of P.W.4 also does not disclose if P.W.2 has sustained any injury or any of her glass bangles was damaged. So, the evidence of P.W.4 is not clear and cogent to prove the assault by accused Rabindra to his wife by lathi causing injury on her person. On the other hand, the evidence of P.W.4 is very clear, cogent and above reproach to prove that accused Benudhar assaulted P.Ws.1 and 3 by tenta causing bleeding injuries on their persons and defence could not shake the evidence of P.W.4 well in this regard. Even if P.W.4 is the husband of P.W.2 and brother of P.Ws.1 and 3, after being properly scrutinized stands to the

test and has corroborated the prosecution case to the extent, as discussed above.

15. P.W.5 happens to be a post-occurrence witness because in cross-examination, he revealed that when he reached, he saw injured Gorachand (P.W.1) and Pagal (P.W.3) in an injured condition on the ground. His evidence lends corroboration as to the injuries sustained by P.Ws.1 and 3.

16. P.W.6, who is an outsider, revealed that after hearing hullah, they came to outside and he saw that while P.Ws.1 and 3 were trying to escape, accused Benudhar stabbed them for which they fell down on the ground and the accused persons left the spot. In cross-examination, he categorically stated that he had seen the occurrence, which is ten cubits away from the spot. In para-3, he categorically stated that when he reached, P.Ws.1 and 3 were sitting on the verandah. Accused Benudhar was holding a tenta and others were holding lathi. He categorically revealed in cross-examination at para-4 that P.W.1 was assaulted near Pindha and P.W.3 was assaulted when he went to rescue P.W.1. It appears that defence has failed to shake the evidence of P.W.6 well. At the same time, the evidence of P.W.6 does not disclose any assault by accused Rabindra to P.W.2. Defence has tried to bring the relationship of P.W.6 with the injured persons, but failed in its attempt. On the other hand, the evidence of P.W.6 is clear, cogent and consistent to prove the assault by accused Benudhar by means of tenta to the persons of P.Ws.1 and 3, who received bleeding injuries thereby. So, the evidence of P.W.6 amply corroborates the evidence of P.Ws.1 and 3 as to causing injuries to their persons by means of tenta used by accused Benudhar.

17. P.W.7, who is the doctor, has stated that on 03.07.1991, on police requisition, she examined P.W.1 and found the following injury :

i) Stab wound elliptical in shape with two clean cut margins one of which partially ragged, meeting at two sharp angles, each 4 cm in length, 3 cm in breadth and 3.2 cm in depth upto the upper and superficial surface of ninth intercontinental mussle, present on left lateral surface of chest wall on 9^{th} instercostal space 6 cm lateral to midline.

According to her, the wound was simple in nature caused by sharp pointed cutting weapon. She proved the injury report vide Ext.3. She further stated that on the same day, on police requisition, she examined P.W.3 and found the following injuries:

i) Abrasion 4 cm x 3 cm on left suprascapular region over head of humerous.

ii) Abrasion 1.2 cm x 0.5 cm on middle of dorsum of right little finger.

iii) Stab wound triangular in shape with two clean cut edges, one of the edge is sharp and the other is slightly ragged out and have two sharp angles. Length – 1.2 cm and 1.2 cm. Breadth – 2 cm with a depth of 4.5 cm present on left upper abdominal wall in the middle. Depth upto the upper end of left rectus sheath.

iv) Incised wounds conical in shape 3 cm x 0.5 cm bone depth of each meeting at the apex with a skin flap hanging downwards on size lateral malleolus of left ankle joint.

According to P.W.7, all the injuries on P.W.3 were simple in nature and injury Nos.(i) & (ii) were caused by hard and blunt object; but injury Nos.(iii) & (iv) might have been caused by sharp cutting weapon. She categorically stated in para-4 that injury No.(iii) on the person of P.W.3 must have been caused by a tenta. She proved the injury report vide Ext.4. She further revealed that she examined P.W.2 on police requisition and found one abrasion 1 cm x 1 cm on dorsum of lower end of right radius bone, which was simple in nature. She proved the injury report vide Ext.5. In cross-examination in para-7, she stated that P.W.2 could have sustained more severe injury had there been infliction of blows with a lot of force. As it appears from the evidence of P.W.2, she was assaulted by accused Rabindra with lot of force and her glass bangles were damaged. There was no such bleeding found by the doctor, except a simple abrasion. So, the doctor's evidence does not tally with the injured so far as the nature of injury, the kind of weapon used and the manner of assault on the person of P.W.2. At the same time, the doctor has clarified in para-8 of cross-examination that if a double edged knife or tenta pierced in the body and dragged back straight, it would cause an elliptical injury. According to her, one side sharp edged knife or tenta will cause triangular injury if dragged straight. In para-9, she has clarified that the injuries found on P.Ws.1 & 3 must have been caused by the same weapon. Nothing is elicited by defence from the cross-examination of P.W.7 to make her evidence improbable as to the nature of injuries found by her on the persons of P.Ws.1 & 3. On the other hand, the evidence of P.W.7 amply lends corroboration to the evidence of P.Ws.1 and 3 as to the nature of injuries caused and the kind of weapons used.

18. In this regard, Their Lordships of the Hon'ble Apex Court in the case of ***Solanki Chimanbhai Ukabhai*** Vs. ***State of Gujurat*** reported in **AIR 1983 SC 484** have been pleased to observe that if eye witnesses' testimonies are clear and convincing, discrepancies cannot matter. Doctor is a witness to both facts and opinion. Medical evidence is also direct evidence as far as it establishes fact i.e. tattooing according to the nature and dimension of injury, etc. Medical evidence is also corroborative of eye witnesses, etc., unless it may show that injury might have been caused in the manner alleged. Defence could use the medical evidence to show that the injuries could not have been caused, as alleged, and thereby tried to discredit the eye witnesses' testimonies. However, unless medical evidence shows so far that it completely rules out all possibilities whatever the injuries taking place in the manner alleged by eye witnesses, prosecution version cannot be thrown out on the ground of alleged inconsistencies between the two items of evidence. Now, adverting to the case at hand, it appears that there is no inconsistencies between ocular evidence and medical evidence so far as injuries on P.Ws.1 and 3 are concerned for which the prosecution is well corroborated by the evidence of doctor to prove the injuries sustained by P.Ws.1 and 3.

19. It is revealed from the evidence of P.W.5 that one tenta was seized by police vide Ext.2, but he has not spelt out from whom it was seized. P.W.8 revealed that he seized one tenta on production by Gramarakhi Kasinath Mahalik and prepared seizure list vide Ext.2. But, said Gramarakhi has not been examined by prosecution. On going through the seizure list vide Ext.2, it appears that in the column meant for “circumstances of seizure”, it has been stated that the Gramarakhi was asked to find out the tenta, i.e. weapon of offence, who recovered the same from the bari of accused Benudhar and, thereafter, the tenta was seized on production by Gramarakhi Kasinath. Such part of evidence has not been challenged by defence while cross-examining P.Ws.5 & 8. Of course, in cross-examination, P.W.8 admitted that he has not examined Gramarakhi Kasinath Mahalik, who produced the said weapon of offence, and he has not mentioned the place in the spot map wherefrom such weapon of offence was found. There is flaw in the investigation. Even if there is flaw in the investigation, defence has not challenged about seizure of such tenta from the bari of accused Benudhar. Not only this, but also P.W.8 has produced such weapon of offence in Court vide M.O.I. When seizure list and M.O.I are not challenged by defence during cross-examination to witnesses, mere flaw in the investigation will not be sufficient to reject the evidence with regard to seizure of the weapon of offence (M.O.I). The circumstance of

seizure, as mentioned in the seizure list, assumes much significance because the seizure list, which is prepared by the Investigating Officer, should confirm the basic formalities of seizure. The circumstance of seizure mentioned in the seizure list cannot be discarded when the material object is produced in the Court. So, the seizure list, along with the evidences of seizure witness and Investigating Officer, assumes greater importance giving rise to circumstantial evidence against the appellants. Not only this, but also such M.O.I was sent by P.W.8 to the doctor for opinion. P.W.8 has proved the report of the doctor vide Ext.7, which shows that on 24.09.1991, the doctor opined that such injury was possible by the said tenta. Of course, prosecution has not examined P.W.7 as to examination of such M.O.I by him. This is a lapse on the part of the prosecution.

20. The duty of the prosecutor is to place all the cards before the Court to take final opinion. Even if the prosecutor has committed lapse on his part, the prosecution case cannot be allowed to suffer. It is the duty of the prosecutor to perform his homework properly and then produce evidence before the Court so that none of the documents, which are material for prosecution, would be lost sight of, making the prosecution case vulnerable. Moreover, when Gramarakhi is not examined by the Investigating Officer, prosecutor could have examined him to fill up lacuna. It is the duty of the prosecutor to be vigilant in all aspects so that guilty will not go unpunished. On the other hand, it is high time for the State Government to take urgent steps for imparting training to the prosecutors in a systematic way and evaluate their performances at regular intervals so that the prosecutors as well as the investigating agency will leave no stone unturned in due discharge of their duties. At times, the confidence on the Court is eroded for the lapses committed by the investigating agency and the prosecutors as well. But, this aspect can be well taken care of if the prosecutors/investigating agency are provided with proper training and their performances pertaining to the conduct of criminal cases, including sessions cases, are placed under deeper scrutiny and evaluation.

21. Be that as it may, in the present case, even if fault lies with the prosecutor and the Investigating Officer, but the facts remains that M.O.I was seized from the bari of accused Benudhar and such M.O.I was used as weapon of offence because of doctor's opinion contained in Ext.7. So, it is reiterated that the seizure of tenta is a circumstantial evidence against accused Benudhar.

22. From the foregoing discussion, it is crystal clear that there are consistent evidence, both oral and circumstantial, adduced by prosecution to show that accused Benudhar has voluntarily caused hurt to Gorachand (P.W.1) and Pagal (P.W.3) by means of tenta, which has sharp cutting edges. But, at the same time, as discussed above, prosecution has not been able to prove by consistent, clear and trustworthy evidence with regard to voluntarily causing hurt to P.W.2 by accused Rabindra. So, the finding of learned Court below as to the complicity of accused Benudhar with the offence under section 324 of the I.P.C. is well confirmed, whereas his finding with regard to the complicity of accused Rabindra with the offence under section 323 of the I.P.C. is not agreed with and, as such, the conviction and sentence passed against accused Rabindra is not sustainable in eye of law as he is not found guilty thereunder. Resultantly, the order of conviction and sentence passed against accused Rabindra is set aside and he is acquitted of the charge under section 323 of the I.P.C.

23. So far as accused Benudhar is concerned, learned trial Court has not made endeavour to find out whether the beneficial provisions of Probation of Offenders Act or section 360 of the Cr. P.C. would be applicable to him. Section 235(2) of the Cr. P.C. provides that if the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence. Since the prosecution case has been started under Sessions trial, at least the trial Court could have considered the case under section 360 of the Cr. P.C. But, no such reason has been assigned as to why the provision of section 360 of the Cr. P.C. was not resorted to. Even if section 360 of the Cr. P.C. was not felt expedient, but the provisions of the Probation of Offenders Act could have been considered and resorted to when the imprisonment prescribed for the offence under section 324 of the I.P.C. is only three years and the reasons for not extending such Act should have been mentioned in the judgment.

24. Section 361 of the Cr. P.C. states as follows :

> "**361. Special reasons to be recorded in certain cases.** - Where in any case the Court could have dealt with, -
>
> (a) an accused person under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or
>
> (b) a youthful offender under the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training

or rehabilitation of youthful offenders, but has not done so, it shall record in its judgment the special reasons for not having done so".

25. The aforesaid provision casts a duty on the Court to mention the special reasons in judgment for not applying such provision of law. His Lordship in the case of ***Saradhakar Sahu*** Vs. ***State of Orissa*** reported in **1985 CRI. L.J. 1591** has been pleased to observe at para-12 as follows :

xxx xxx xxx

....in each case where an offender has been convicted of an offence coming within the purview of S.3 or S.4 or where the offender is below 21 years of age and has been convicted of an offence not punishable with imprisonment for life, there ought to be an exercise to find out if the provisions can be applied or not; not a routine or mechanical but a genuine, earnest and sensitive exercise. Let not the wind of change pass us by without inspiring us".

With due respect to the said decision, it appears that the Court has to assign the reasons for not applying such provisions of law. Even if the offender is not below 21 years of age but has been convicted of the offence punishable upto seven years of imprisonment, as embodied under section 360 of the Cr. P.C., there also the Court has to assign the reason for not extending such provisions of law, as stipulated under section 361 of the Cr. P.C.

26. Apart from this, in the case of ***Gulzar*** Vs. ***State of M.P.*** *r*eported in **AIR 2008 SC 383,** Their Lordships of the Hon'ble Apex Court have been pleased to observe at para-12 as under :

"Section 360 of the Code relates only to persons not under 21 years of age convicted for an offence punishable with fine only or with imprisonment for a term of seven years or less, to any person under 21 years of age or any woman convicted of an offence not punishable with sentence of death or imprisonment for life. The scope of Section 4 of the P.O. Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. Section 360 of the Code does not provide for any role for Probation Officers in assisting the Courts in relation to supervision and other matters while P.O. Act does make such a provision".

With due respect to the above decision, it appears that the scope of section 4 of the P.O. Act is much wider than section 360 of the Cr. P.C. and the Court is required to apply such beneficial provisions wherever it is necessary.

27. After going through the provisions of law and the authorities, as mentioned above, it is observed that it is the duty of the Court below to assign the reasons for not extending the benefit of the provisions of the Probation of Offenders Act or section 360 of the Cr. P.C., as the case may be, when the accused is convicted for the offence punishable with imprisonment or fine for which such beneficial provisions or law apply. So, it is expected that the Courts below must act in accordance with law. Be that as it may, in the case at hand, since accused Benudhar has been convicted under section 324 of the I.P.C., report of the Probation Officer was called for and it was found therefrom that dispute arose owing to enmity between the parties and accused Benudhar had no such criminal antecedents. At the same time, the fact remains that accused Benudhar assaulted P.W.1 and his brother P.W.3 by tenta following which both of them sustained bleeding injuries on their persons. When previous enmity is considered as a double-edged weapon and the injuries sustained by both the injured persons had profuse bleeding, the facts and circumstances and the evidence by which accused Benudhar has been convicted do not warrant his release under the provisions of Probation of Offenders Act or under section 360 of the Cr. P.C.

28. While awarding sentence, the Court has to consider the aggravating circumstance and mitigating circumstance and, accordingly, balance between the same should be chalked out. In the present case, learned trial Court has sentenced accused Benudhar to undergo rigorous imprisonment for three years, which is the maximum punishment provided under section 324 of the I.P.C. Of course, there is no reason assigned for awarding such sentence. Having regard to the fact that there is no criminal antecedent against accused Benudhar, the matter relates to the year 1992 and in the meanwhile he must have got family, in my considered view the same are mitigating circumstances. But, the aggravating circumstances are that he used tenta to cause bleeding injury on the left side abdomen, which is vital part of P.W.1, also caused multiple injuries on P.W.3 by the same weapon of offence (M.O.I) and those are serious injuries. In order to maintain balance between the said circumstances and for the interest of justice, the sentence awarded against accused Benudhar by learned trial Court is reduced and he is sentenced to undergo rigorous imprisonment for a period of one year. The

period undergone, if any, by him as UTP be set off against the substantive imprisonment awarded. Bail-bonds furnished by him stand cancelled and he must surrender forthwith to serve the sentence.

29. The Registrar General is directed to communicate copy of this judgment to the Principal Secretary to Government of Odisha, Home Department; Director General of Police, Odisha; and the Director of Public Prosecutions, Odisha, Bhubaneswar to do the needful in such cases where it is evident that the investigating agencies and prosecutors have not properly discharged their duties, in order to ensure quality of investigation and prosecution, which will ultimately enhance the administration of criminal justice system. At the same time, the Registrar General is directed to circulate copy of this judgment to all Courts below in the State. The appeal is allowed in part and accordingly disposed of.

Appeal allowed in part.