D.H.WAGHELA,CJ. & B. RATH,J.

W.A. Nos. 525 & 300 OF 2013

S.D.O,TELECOM, JALESWAR ……Appellant

.Vrs.

PRESIDING OFFICER-CENTRAL GOVT. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT & ORS. …….Respondents.

INDUSTRIAL DISPUTES ACT, 1947 – S. 17-B

Payment of full wages to workman pending proceedings in higher Courts – Whether such benefit can be extended from the date of order of the learned Single Judge or from the date of the award ? Held, it must be from the date of the award. (Para 5)

For appellant : Mr. Hemant Ku. Mohanty.
For respondents : M/s. Ramanath Acharya , G.B.Barik and Mr. Anup Kr. Bose

---

Date of Hearing : 04.08.2015
Date of Judgment : 04.08. 2015

JUDGMENT

D.H.WAGHELA, C.J.

1. The appellant has sought to challenge the order dated 19.11.2013 in Misc. Case No. 14549 of 2013 which case appears to have been filed in the pending petition W.P.(C) No. 20504 of 2012. In that petition an interim order dated 25.4.2013 is already made in another Misc. Case No. 1999 of 2013 to pay to the respondent-workman the benefits under Section 17-B of the I.D.Act from the date of the award dated 17.4.2012. Thus, the original impugned award dated 19.11.2013 has not been complied with as yet.

2. The factual background as far as it is relevant for the present purpose is that the respondent-workman raised an industrial dispute which was decided by award dated 17.04.2012 in which it is recorded that the appellant herein did not file any reply or written statement despite sending notice

through registered post and the Management did not turn up to defend the case due to which the Labour Court had to proceed ex parte. The appellant is, by the award, directed to reinstate the respondent on the post from which he was disengaged as a contract labour and pay him back wages from the date of his disengagement within a period of three months from the date of the award. That award has been challenged by the appellant herein in W.P.(C) No. 20504 of 2012 and the interim impugned order as aforesaid is made.

3. Learned counsel for the appellant vehemently argued that, as observed by the Apex Court in *Anil Sood vs. Presiding Officer, Labour Court-II*, (2001)10 SCC 534, the interest of the Management must also be protected in a given case. He submitted that the respondent was not in the employment of the appellant at all and hence no backwages could be calculated on the basis of the salary last drawn by him. As against that, learned counsel for the respondent submitted that the respondent was in the regular employment of the appellant and was drawing minimum wages and in any case entitled to withdraw the minimum wages applicable to the respondent. Even as the rate of wages or daily wage is no where mentioned in the impugned award or the record of the case, it is submitted that as the erstwhile semi-skilled employee of the appellant, the respondent was entitled to draw the minimum wages. In spite of repeated query, learned counsel for the appellant has refused to divulge any information about the actual salary or daily wages drawn by the respondent-workman at or around the time of his disengagement from service. Instead, it was submitted that the appellant was prepared to deposit such lump sum amount in the Court as may be directed, pending adjudication of the main petition. That however, completely defeats the very purpose of Section 17-B of the I.D.Act, even as the workman is expected to face one after the other litigation, even after an award in his favour. His service appears to have been terminated by the end of November, 2010 and the appellants have neither reinstated him despite the award nor paid any wages by way of backwages.

4. It was also argued that the wages to be paid as per the provisions of Section 17-B of the I.D.Act ought to be counted from the date of the order of the Court whereas the interim direction of the Court in the impugned order is to pay the current wages from the date of the award.

5. Having regard to the facts and circumstances and recent judgment of the Apex Court, the impugned order directing to comply with the provisions of Section 17-B could not be found fault with. The direction in the impugned

order reiterating the direction by order dated 25.4.2013 to comply with the provisions of Section 17-B of the I.D.Act from the date of the award i.e. 17.4.2012 appears to be legal and correct. Since the appeals are directed against making any payment and without complying with the orders of this Court, both the appeals are dismissed with cost quantified at Rs.2500/- which the appellant shall pay to the respondent along with arrears of benefits in terms of Section 17-B within a period of fifteen days from today. In absence of any assistance or instruction in that regard from the respondent, the appellant is directed to calculate the amount of benefits @ Rs.180/- per day which is stated to be the minimum wages prevalent at the relevant time for the semi-skilled laborer.

Appeals dismissed.

2015 (II) ILR - CUT- 621

D.H. WAGHELA, CJ.

L.P.A. NO.1 OF 2015

MIDEAST INTEGRATED STEEL LTD. & ORS. …….. Appellants

.Vrs.

INDUSTRIAL PROMOTION & INVESTMENT CORPORATION OF ORISSA LTD. ……...Respondent.

CIVIL PROCEDURE CODE,1908 – S. 100-A

Letters patent Appeal against the judgment of the learned single judge passed in First Appeal – Maintainability of appeal in view of the amendment of section 100-A by Act 22 of 2002 W.e.f. 1.7.2002 – Held, the appeal is not maintainable, hence dismissed. (Para 3 to 6)

Case Law Overruled :-

1. 2003 (Supp.) OLR 337 : Special Land Acquisition Officer, Talcher & Ors., v. Tankadhar Mana Bhoi & Ors.

Case Laws referred to :-

1. 2008(II) OLR (FB) 725 : Mahammed Saud & Ors., vs. Dr. (Maj) Shaikh Mahfooz & Anr.
2. .(2006) 7 SCC 613 : Kamal Kumar Dutta & Anr. v. Rubby General Hospital Ltd
3. AIR 2007 Orissa 146 (DB) : Ramesh Chandra Das v. Kishore Chandra Das & Ors.
4. 2003 (Supp) OLR 337 : Special Land Acquisition Officer, Talcher & Ors., v. Tankadhar Mana Bhoi & Ors.
5. (2012) 1 SCC 333 : Dayaram vs. Sudhir Batham & ors.

For Appellant - M/s. Avijit Pal
For Respondent

Date of order : 23.07.2015

ORDER

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

1. This appeal seeks to challenge the judgment dated 24.12.2014 of the learned Single Judge of this Court in Regular First Appeal No. 23 of 2010 which was filed invoking the civil appellate jurisdiction of the High Court.

In view of the express provision of Section 100-A of the Civil Procedure Code as amended by Act 22 of 2002 which came into effect w.e.f. 1.7.2002, the appeal is prima facie not maintainable. However, it is submitted by Mr. Ashok Mohanty, learned Senior Advocate that the original suit in the present matter was filed in the year 2000 and the right of appeal having been vested in the party since then, it could not have been taken away.

2. Learned Senior Counsel relied on judgment of the Division Bench of this Court in *Special Land Acquisition Officer, Talcher & Ors., v. Tankadhar Mana Bhoi & Ors.,* 2003 (Supp.) OLR 337 wherein on 7.3.2003 it was held by the Division Bench of this Court that the bar created by Section 100-A of the Code would have operation only in case suits are instituted subsequent to 1.7.2002.

3. It was however, fairly submitted by learned Senior Counsel that the aforesaid views have been expressed in several subsequent judgments which have to be taken note of by this Court. The Full Bench of this Court in *Mahammed Saud & Ors., vs. Dr. (Maj) Shaikh Mahfooz & Anr.,* 2008(II) OLR (FB) 725, clearly held that after introduction of Section 100-A in the

Code of Civil Procedure by Amendment Act 22 of 2002, no Letters Patent Appeal is maintainable against the judgment/order/decree passed by the learned Single Judge. The Full Bench has relied upon the observations made by the Apex Court in *Kamal Kumar Dutta & Anr. v. Rubby General Hospital Ltd.,* (2006) 7 SCC 613 for the proposition that the Parliament, while amending Section 100-A of the Code of Civil Procedure by Amendment Act 22 of 2002 with effect from 1.7.2002, took away the Letters Patent power of the High Court in the matter of appeal against an order of a learned Single Judge to the Division Bench.

It is important to note here that the Full Bench decision of this Court in LPA No.7/2008 (supra) was challenged in the Hon'ble Apex Court vide Civil Appeal No.9321-22 of 2011 with Nos.9323-24 of 2010 and the Hon'ble Apex Court decided the issue by the judgment as reported in (2010) 13 SCC 517, in paragraph 18 of the said judgment, the Hon'ble Apex Court held as follows:

> **"18.** For the reasons given above, we are of the opinion that the Full Bench of the High Court has taken a correct view. Thus, there is no force in the appeals, which are dismissed accordingly."

4. Another judgment of the Division Bench of this Court in *Ramesh Chandra Das v. Kishore Chandra Das & Ors.,* AIR 2007 Orissa 146 (DB) has held, after reference to the aforesaid judgment in Special Land Acquisition Officer, *Talcher & Ors., v. Tankadhar Mana Bhoi & Ors.,* 2003 (Supp) OLR 337 (supra), that the appeals filed after the Amendment Act 22 of 2002, taking effect from 1.7.2002, were not maintainable.

5. Learned Senior Counsel also pointed out from the Three Judge Bench judgment of the Apex Court in *Dayaram vs. Sudhir Batham & ors.,* (2012) 1 SCC 333 that in the facts of that case, even as the original petition was under Article 226 of the Constitution, it was clearly observed that right to file a writ appeal under the Adhiniyam (State Act) was a vested right to any person filing a writ petition. That right could be taken away only by an express amendment to the Act or by repeal of that Act, or by necessary intendment, that is, where a clear inference could be drawn from some legislation that the legislature intended to take away the said right. The right of appeal to a Division Bench, made available to a party to a writ petition, either under a statute or Letters Patent, cannot be taken away by a judicial order. The power under Article 142 is not intended to be exercised, when such exercise will directly conflict with the express provisions of a statute. However, in the

same judgment, it is repeatedly observed, on the basis of previous judgment of the Apex Court, that such a right of appeal could not be taken away except by express enactment or necessary implication and the vested right of appeal could be taken away by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise. The earlier observation of this Court could only be read in the context of facts of that case and the ratio of the judgment appears to be that vested right of appeal could be taken away by a subsequent enactment.

6. In view of the ratio of the above later judgments, the law laid down in *Special Land Acquisition Officer, Talcher & Ors., v. Tankadhar Mana Bhoi & Ors.,* 2003 (Supp) OLR 337 is no longer good law and stands overruled by necessary implication. In that view of the matter, the present appeal is not maintainable and dismissed as such.

Appeal dismissed.

2015 (II) ILR - CUT- 624

VINOD PRASAD, J. & RAGHUBIR DASH, J.

DSREF NO. 1 OF 2015 & JCRLA NO. 13 OF 2015

STATE OF ORISSA ……..Appellant

.Vrs.

GANIA @ GANESWAR MAHANTA ……..Respondent

CRIMINAL PROCEDURE CODE, 1973 – S. 366(1)

Death sentence – Reference for confirmation – Double murders of close relatives for greed to grab property – Incident occurred without pre meditation and pre-planning – Though grievous injuries caused to both the deceased there is absence of convincing evidence that the appellant acted cruelly and in a diebolical manner – So number of murders is not the safe criterion to determine the same a "rarest of rare case" – Since it is the first crime of the appellant he can not be considered as a hazardous person to the society and the collective conscience of the society was shaken – Possibility of the appellant for

reformation and penance in jail can not be ruled out – Trial Court failed to record sufficient reason while awarding death sentence – Held, death sentence of the appellant is commuted to life imprisonment with a condition that he has to suffer continuous incarceration of 25 years without parole and benefit of set off. (Para 43)

Case Laws Referred to :-

1. AIR 2013 SC 1764 : Habib v. State of U.P.WITH Manuwa -v- State of U.P
2. AIR 2012 SC 956 : Lokesh Shivakumar -v- State of Karnataka
3. AIR 2011 SC 255 : Ranjit Singh and Ors. -v-State of M. P.
4. AIR 2011 SC 280 : Brahm Swaroop and Anr. v. State of U. P.:
5. AIR 1979 SC 916 : Rajendra Prasad -v- State of U.P
6. AIR 1980 SC 898 : Bachan Singh -v- State of Punjab:
7. AIR 1983 SC 957 : Machhi Singh v- State of Punjab
8. (2015) 4 SCC 467 : State of U.P. -v- Om Prakash:
9. (2013) 10 SCC 421 : Deepak Rai -v- State of Bihar

For Appellant : Mr. J.Katikia, Addl.Govt.Adv.
For Respondent : Mrs. Saswata Pattnaik

Date of hearing : 23.07. 2015
Date of Judgment : 18.08. 2015

JUDGMENT

VINOD PRASAD, J.

Insatiable nagging rapacious desire to accumulate property tormented the appellant Gania @ Ganeshwar Mahanta so irresistibly that he committed most scurrilous act of annihilating two of his close relatives in broad day light, for which crime he has been convicted and sentenced to death by the learned Sessions Judge, Jajpur in C.T.No. 232 of 2011, State of Orissa versus Ganeshwar Mahanta, by impugned judgment and order dated 13.1 2015.For confirmation of the death sentence, learned trial Judge has made a reference u/s 366(1) Cr.P.C., in short code, to this court and has submitted the essential record for the said purpose. Contrarily, to avert going to gallows and intense feeling of self preservation compelled the convict accused appellant to prefer Criminal Appeal no. 13 of 2015, Gania @ Ganeshwar Mahanta versus State Orissa, challenging his aforesaid conviction and sentence u/s 374(2) of the Code. Since both, the Reference and Criminal Appeal, arises out of self same judgment and both the *lis* are intertwined, they are being decided by this common judgment.

2. As is gathered from the oral and documentary evidences trotted out during the trial, the incident in question had its genesis in an agrarian property dispute amongst the two deceased and the appellant from the rival sides. A priory, it is discernible that one Hatiram Mahanta of village Rangita Nagar(also known as Madhapur) under police station Sukinda district Jajpur, had a son Dukhbandhu Mahanta(the first deceased in the concerned incident and herein after referred to as D1), who was the father of the informant Jaidev Mahanta/ PW3, Smt. Kanchan @ Tarini Mahanta (Second deceased in the incident in question and herein after referred to as D2), Prem Lata Mahanta/ PW7, Kajri Mahanta(not examined). Smt. Diptimayee Mahanta/ PW1 is the maternal niece being daughter of sister of the informant. D2 was married to one Muralidhar Mahanta of village Natisahi (also known as Bandhagaon), P.S. Sukinda, district Jajpur whose brother is Laxman Mahanta. Appellant accused is the son of Laxman Mahanta and hence stands in relationship as nephew of D2. Prior to the incident in question Murlidhar Mahanta, husband of D2, had expired and hence D2, a widow, was left with her daughters including Saraswati Mahanta/ PW9 to foster. Chintamani Mahanta/PW 8 is the brother –in-law of D2, being husband of her younger sister. It is further discernible from the evidences that because of avarice and sinister intent to grab the entire real estate of the deceased D2, acrimony and hostile feelings existed between the families of D2 and that of the appellant and because of that, albeit, appellant had separated from rest of the family, but he, intermittently, hurled life threats to the entire family of D2 including her son-in-law.

3. 13.3.2011 was the day on which one of the daughters of D2 was to solemnise her nuptial knot for which her near relatives had conglomerated at D2's house in village Natisahi including her father Dukhabandhu Mahanta/D1, and other relative witnesses examined during the trial. It is alleged that following day of the marriage i.e., 14.3.2011, Dukhabandhu Mahanta/D1 started return journey on his Atlas cycle at 10 a.m. and when he reached near the pond called Sologadia tank, in front of the house of one Indramani Mahanta, all of a sudden the appellant, armed with a *Bhujali (*a sharp cutting weapon) appeared at that spot and assaulted D1 on his back and neck with *Bhujali.* While he was recovering *Bhujali* from the neck, its handle came out and fell down on the ground. Sustaining fatal injury, which had substantially dissected his neck, D1, fell down on his cycle. In the process to ward off the blows D1 had also sustained injuries on his hand. Appellant, thereafter, tramped towards Natisahi with blood stained *Bhujali.*

Quarter to an hour later(15 minutes) appellant came to the second spot, near a Mahua tree, where D2 was standing and assaulted her with *Bhujali* on her neck, face, forehead, and other parts of her body. Onlooker witnesses, including D2's family members PWs 1,2,6,7,8,&9, were accosted and threatened by the appellant that whosoever will endeavor to rescue D2 will also be murdered kept the witnesses at bay and desisted them from taking any life saving endeavour. Sustaining injuries D2 fell down on the ground supinely and succumbed instantaneously to the fatal injuries inflicted on her. Sarswati Mahanta/PW9 daughter of D2 along with one Sarita tried to help her mother but they were chased by the appellant to be annihilated, however they sprinted and took shelter in a house. Appellant thereafter retreated from the incident scene towards canal Bandha road along with *Bhujali*. PW9 and Sarita thereafter poured some water into D2's mouth.

4. Gruesome murders of father and the sister was reported to the informant/PW3 by his niece Smt. Diptimayee Mahanta@ Sunei Mahanta/ PW1 on phone. Arriving at the incident village, informant inspected both the dead bodies and spotted the injuries and then on his dictation FIR Ext.1 was scribed by Budhadev Behra/ PW19 and after confirming the contents of the written script, that the informant signed on it and then alongwith PW2 came to the police station Sukinda at a distance of 8 KMs and lodged his report same day at 11.35 a.m as P.S.Case no. 22 of 2011 u/s 302 I.P.C. arraigning the appellant as the sole perpetrator of double murders.

5. Baidya Narayan Bhoi Inspector –in- charge, police station Sukinda/PW22, registered the crime and prepared formal FIR Ext.13 and immediately initiated investigation into the offence, during course of which he interrogated the informant and witnesses, visited the spot, conducted inquest over both the cadavers and inked inquest memos Ext.2/3 and Ext. 1/3. Dead bodies Chalan of the corpses are Exts. 14 and 15.Wearing attires of both the deceased and some of the ornaments belonging to D2, exhibited as M.O.VI to M.O.XI, produced by the constables after their return from the hospital, were also seized vide seizure list Ext 10. PW22/I.O. also seized one Atlas cycle, half bag potatoes, one bag mudhi, an empty cup, a pair of plastic chappal, and other articles vide seizure list Ext. 11/2. Following day of the murder I.O. also seized sample and blood stained earth, collected by S.O.DSFL, Cuttack, (M.O.I to M.O.IV) vide Ext.16. On 28.3.2011 investigating Officer/ PW 22 received information that the appellant had surrendered in the court of J.M.F.C., Jajpur and hence I.O. took him on

remand and during his interrogation, while making confessional statements, Ext.17,appellant made a disclosure statement that he had concealed *Bhujali*, the weapon of assault, near farm Bandha and thereafter led the police party and the witnesses to the concealing spot and gave recovery of *Bhujali*, M.O.XIV which was seized vide seizure list Ext. 8. Apparels of the accused appellant, M.O. XV to M.O.XVII, were also seized on 29.3.2011, vide seizure list Ext. 18. Accused appellant was medically examined on 30.3.2011 and same day he was produced before the Magistrate. One Hercules cycle of the appellant, M.O.XVIII, was seized the same day vide seizure list Ext. 19. Informant was given custody of seized articles vide Ext. 11/2 on 2.4.2011 vide Zimanama Ext.5. Post Mortem examination reports were received by the I.O./PW22 on 3.4.2011. A query was made by the I.O. from Dr. Preeti Nayak/PW5 on 5.4.2011 concerning seized weapon of assault as the crime weapon. For forensic science examinations and report, investigating Officer dispatched 17 items to SFSL Rasulgarh, BBSR through court. Spot map/ site plan prepared by the I.O. is Ext. 20. Marriage register of Ghatagaon Tarini temple was seized on 23.6.2011 vide seizure list 12/2 which was later on given in custody of Kulamani Mahakuda vide zimanama Ext. 21. Investigation was wrapped up on 21.7.2011, on which date the appellant was charge sheeted.

6. Autopsy examination on both the cadavers were performed by Dr. Preety Nayak/ PW5, M.O. Danagadi C.H.C. Jajpur, on 14.3.2011 at 5 p.m. On the corpse of deceased Kanchan/D2 doctor found following ante mortem injuries:-

(i) of size 10 cm x 4 cm x 4 cm cut wound extending for(from) front of neck with laceration of muscles and profuse bleeding from vital neck vessels;

(ii) of size 5 cm. x 1 cm x 1 cm. cut wound on upper part of mid Chin.

(iii) 5 cm. x 1 cm. x 1 cm. cut wound on back of Rt. Pelvies

(iv) 5 cm. x 1 cm. x 1 cm. cut wound on Rt. Maxilla with laceration on and around muscles.

On the dead body of Dukhabandhu Mahanta/ D1 doctor PW5 detected following ante mortem injuries:-

(i) Incised cut wound of size 10 cm. x 5 cm. x 5 cm. on front of neck extending whole neck with injuries of surrounding nerves, vessels and laceration of surrounding muscles.

(ii) Rt. Thumb and index fingers were cut and were totally detached from the Rt. hand.

(iii) An incised cut wound of size 5 cm. x 1 cm x 1 cm. on the left parietal reason of mid scalp with laceration of scalp muscles.

Cause of death of both the deceased was haemorrhagic shock from homicidal attack by sharp cutting weapon causing multiple bleeding injuries, which were inflicted some 12 hours ago. The injuries were sufficient to cause death in ordinary course of nature and specifically injury no.1 independently suffered by both the deceased by it-self were sufficient to cause death in ordinary course of nature. Ext. 6 & 7 are the post mortem examination reports of Kanchan Mahanta/D2 and Dukhabandhu Mahanta/D1. Attour doctor had opined that injury no. 2 must have been sustained by D1 while warding off the blows. Significantly doctor had also stated unambiguously that injuries on the neck of both the deceased were *"so grievous and vital in nature which could not / would not have saved the person are* (had) *there been proper treatment given to the injured persons soon after the injuries are / were caused."*

7. Pertaining to the court proceedings, charge sheeting of the appellant resulted in registration of G.R. Case No. 178 of 2011 State versus Gania@ Ganeshwar Mahanta before committal court of J.M.F.C., Jajpur, who after observing due legal formalities contemplated u/s 207 of the Code, committed appellant's case to the Sessions court and sent the appellant for trial before it on 4.8.11, where it was registered as C.T.(Sessions) No. 232 of 2011, State versus Gania @ Ganeshwar Mahanta.

8. Sessions Judge/ trial Judge charged the appellant with offences u/s 302/201 I.P.C. on 26.7.2012, and since the appellant abjured both the charges and claimed to be tried that Sessions trial procedure was resorted to for prosecuting him to establish framed charges.

9. In the trial, prosecution examined in all twenty two witnesses and relied upon equal number of documentary exhibits with eighteen material Exhibits. Diptiranjan Behra/PW2, Ugrasen Mahanta@ Fagu/PW4, are the two eye witnesses of murder of D1, whereas Smt. Diptimayee Mahanta/PW1, DiptiranjanBehera/PW2,Smt.LaxmiMahanta/PW6,PremlataMahanta/PW7,Chintamani Mahanta/PW8, Saraswati Mahanta/PW9, and Smt. Bhama Mohanta/ PW14 (who during trial turned hostile), are the eye witnesses of murder of D2. Jayadev Mahanta/PW3 is the informant and witness of inquests over both

the cadavers and also witness of some recoveries. Dr. Preety Nayak/ PW5 is the autopsy doctor. Ananga Ch. Munda/PW10 and Somyaranjan Behura/ PW20 are the recovery witnesses of *Bhujali*, Where as Kartika Mahanta/ PW15, and Chaitanya Mahanta/ PW16 are the recovery witnesses of Cycle, potato , rice etc. Ujalamani Lenka/ PW 11 is the police constable who had carried both the corpses to the hospital and thereafter had deposited the cloths of both the deceased with the I.O. Duryodhan Mahanta/PW12, Jatia Nayak/ PW13, Amina Mahanta/ PW17, Biranchi Mahanta/ PW18, turned hostile and did not support the prosecution version, Budhadev Behra/ PW19 is the scribe of the FIR, and Bidya Narayan Bhoi/ PW22 Inspector-in-charge,P.S. Sukinda is the I.O.

10. Defence plea of the accused appellant is of denial and false implication because of property dispute but he had not examined any defence witness nor had tendered any documentary evidence.

11. Learned trial Judge/Sessions Judge, Jajpur, believed the prosecution story and held prosecution witnesses to be trustworthy, reliable and their depositions infallible and confidence inspiring, found the guilt of the appellant anointed to the hilt and hence convicted him for both the murders and sentenced him to death which judgment and order is now in question before us.

12. In above conspectus, when the appeal by the appellant and Reference came before us we found that the appellant has requested us to provide him with services of an advocate to contest his appeal. Before appointing an amicus curie for him, we thought it fit to know from the appellant as to whether he would like to be provided with the services of an advocate of his choice and therefore directed, vide our order dated 16.2.2015, to produce the appellant before us. Since appellant had no choice we appointed Mrs. Saswat Pattnaik as her counsel, as amicus curie and have heard her at a great length in support of appellant's appeal and against the death Reference. We have also heard Sri J. Katakia, learned Additional Government Advocate (AGA) in support of the Reference and against the appeal by the appellant. Besides, that we ourselves have attentively vetted through the entire trial court record and have scanned the evidences minutely.

13. Learned amicus curie launching scathing attack on the impugned judgment of conviction harangued that the prosecution has failed to establish immediate motive or causa causans for committing the crime by the appellant. Nothing has been deposed as to why the appellant will commit

murders following day of the marriage when many of the relatives of both the deceased had gathered at the residence of D2. Nothing has been stated for such a weird conduct of the appellant and hence it is difficult to believe that the appellant is the culprit. Only close relations of both the deceased have come forward to lend credence to the prosecution story and all of them are interested, partisan, related and inimical witnesses and therefore, in absence of independent corroboration, prosecution version should not be believed to be true description regarding the murders. Weapon of assault has been changed and the same has been withheld from being exhibited during trial, which creates a doubt about the use of that weapon which lapse makes a serious inroad into the authenticity of the prosecution version, especially when cloths of the appellant were not teemed with blood as per expert report Ext.22. Another motive attributed to the appellant evidenced through PW7, another sister of D2 and daughter of D1, is an embellishment and after thought and must be discarded. Otherwise also, after the marriage was over, there was no occasion for the appellant to commit double murders for the reason that he was not consulted in fixing up already solemnized marriage. No medical aid was made available to both the deceased indicating thereby that in all likelihood nobody had witnessed the incident. Weapon of assault being ordinary agricultural tool and found in every village house should not be taken to prove that the appellant had come prepared at the spot with murderous inclination and psyche to annihilate both the deceased. No family member had come forward to depose assault on D1 and both the witnesses qua murder of Dukhabandhu Mahanta/D1 are chance witnesses and their depositions do not inspire any confidence and whatever they have spelt out is too much of a coincidence to be attached with any credence. Investigation into the crime is perfunctory and incipient and cannot be trusted. Much of what was desired either was deliberately shunned or was investigated with a total remiss. It was further urged that according to Diptiranjan Behra/ PW2, the first incident of murder was preceded by " *exchanging hot words"* and hence in any view of the matter both the murders will fall only within the ambit of section 304 (I) I.P.C., as the possibility of D1 acting precipitously rankled by verbal duel, which had given rise to grave and sudden provocation to the appellant, cannot be ruled out completely and it is quite likely that the appellant, because of that provocation, had acted in haste losing self control and since the provocation lasted till D2 was assaulted, consequently conviction u/s 302 and sentence of life imprisonment both are unsustainable and should be set aside. Winding up her submissions, learned amicus curie incisively implored that the appellant's appeal be allowed and

he be acquitted of the charge and be set at liberty. Alternatively, it was submitted that in case the appeal is not allowed in toto, crime of the appellant be mollified and he be convicted only u/s 304 (I) I.P.C. and be suitably punished with normal sentence for that crime which is ten years RI with some fine.

14. As against the Reference dispatched by the learned trial court for confirmation of death sentence it was contested for the reason that on the own showing of the prosecution, the appellant had not acted in a gruesome and diabolical manner so as to shake one's conscience and since the crime, though double murders, does not fall in the category of rarest of rare case, imposition of capital punishment was uncalled for. That learned trial Judge was predetermined to award death sentence is clear from the judgment itself wherein he has failed to record any sustainable reason for awarding maximum sentence and hence the Reference be rejected.

15. Refuting appellant's contentions and arguing conversely, learned AGA submitted that the appellant has murdered two innocent persons-a widow and an aged person, when both of them were defenseless on a day when their families were rejoicing marriage of a maternal granddaughter and daughter. Without any provocation appellant chopped off neck of D1. Being close relative and the incident time being day time, identity of the appellant could not be questioned and it is because of this reason that defence has not challenged date, time, place of the incident and identity of the appellant. Consistent and corroborative medical report, eyewitnesses account and graphic description about both the murders coupled with established motive, all factors intertwined leaves no manner of doubt that the appellant is the sole perpetrator of the murders. Defence had failed to get elicited from any fact witness any damaging testimony which even remotely dents the prosecution version and creates suspicion in its veracity. Appellant's guilt has been convincingly established and since he had committed murders of two hapless persons without any immediate motive, therefore, his crime falls in the category of rarest of rare cases and he has been rightly sentenced to death. If allowed to remain alive and permitted to come out of jail after 14 years period, the lives of surviving daughters of D2 will be in danger. Appellant had criminal proclivity and to curb his activity and avarice to grab immovable property falling in the share of the daughters of D2, it is essential to allow the Reference and approve the death penalty, urged learned AGA. Concluding it was submitted that the appellant's appeal be dismissed and

Reference by the learned trial Judge/ Sessions Judge be accepted and confirmed.

16. We have pondered over rival contentions in the light of material evidences on the record. For a clear and comprehensive analysis, while examining various facets of prosecution evidences, simultaneously we propose to deal with cross submissions and we proceed to follow that course.

17. From vetting and revisiting of prosecution evidences, it unambiguously evinces that prosecution side as well as the appellant stood in close relationships with each other. Appellant is the son of elder brother of demised husband of D2 and hence was the nephew of D2 and cousin brother of PW9. Both the sides resided in the same village and hence were co–villagers. Thus present is not an incident involving unknown assailant and consequently it could not be a case of mistaken identity. It is because of this reason that in no manner defence has challenged relationships and identity of the appellant. The inescapable forgone conclusion is that the appellant was very well known to the prosecution witnesses. Further it is apparent that witnesses, if present, had sufficient opportunity and light to identify the assailant as no challenge has been thrown to the date, time and place of the two incidents which occurred for enough time to facilitate identification of the culprit. Natural corollary of such admitted facts are that the veracity of eye witnesses cannot be questioned because of lack of opportunity to identify the accused specially when the incident, in two parts, occurred for sufficiently long time. Consequently the only core issue remains to be decided is as to whether it was the appellant who had committed double murders or he has been arraigned as accused because of enmity.

18. Prosecution to pin point the appellant as the singular culprit of double murders has tendered three sets of witnesses to the entire episode besides relying upon expert, investigatory and documentary evidences. First set consists of Jayadev Mahanta/ informant/PW3 and Saraswati Mahanta/ PW9, who both, besides describing other facts are the witnesses of motive harboured by the appellant which prompted him to commit double murders. Second set of witnesses have testified about the murder of D1 and they include Diptiranjan Behra/ PW2 and Ugrasen Mahanta @ Fagu/ PW4, where as the third set consists of those witnesses who have divulged about the killing of D2 and they consists of Diptiranjan Behra/ PW2, Smt. Laxmi Mahanta/PW6, Premlata Mahanta/PW7, Chintamani Mahanta/PW8 and Saraswati Mahanta/PW9. Smt. Bhama Mohanta/ PW14 turned hostile and did

not support the prosecution story of she being an eye witness to the murder of D2, albeit in her 161 Cr.P.C. statement she had narrated witnessing her murder. Expert evidence consists of doctor/PW5, who has proved both the post mortem reports qua both the deceased and lastly various steps of investigation have been detailed by the I.O./PW22.

19. Side stepping repetition, when eye witness accounts are revisited concerning motive, it becomes apparent that both the witnesses PW3 & PW9, who could be the best witnesses concerning motive to commit murders, being son/brother and daughter of the deceased D2, have categorically stated, without any inherent contradiction in their depositions or otherwise statement, that there existed landed property dispute between the families of the D2 and the accused appellant since prior to the incident. Informant/PW3 had evidenced that *"Due to previous enmity, the accused murdered my father and sister"*. Subsequently in para 8 he deposed that "*There was landed dispute between my sister and the accused. The accused wanted to grab the landed property of my sister to which my father and sister protested for which the accused bore grudge against them and at last murdered them."* To the same effect is the statement of PW9, daughter of D2 when she evidenced that "*Previously the accused used to quarrel and harass my mother. First Dukhabandhu, my maternal grandfather went ahead. Thereafter my mother went. I followed my mother because prior to that day the accused had given threatening to her and apprehending any mishalf* (should be mishap) *I went behind my mother. Prior to the date of incident, the accused had threatened the villagers not to interfere in his work and on that day when I went to interfere in the assault of the accused to my mother, the accused also threatened me."* To fill up the lacuna left by the prosecution the defence, to its detriment, during cross examination got it elicited that the dispute was concerning landed property. In her cross examination PW9 has stated that "*The accused is my elder father's son. He is separate from my family. There was previous enmity between our family and the family of accused for land dispute."* Making things further difficult for him the accused appellant, very surprisingly, informant/PW3 was not at all questioned regarding his testimony concerning existence of land dispute between both the factions and his such an evidence goes un-rebutted and unquestioned. Corroborated with the depositions of PW9, a child witness who lost her mother and who was never suggested that she is a tutored witness and that she had not witnessed the incident or that she was not present at the spot, it will be unwise to reject and discard the prosecution version of existence of land dispute between the

widow and her father on one side and appellant and his family on the other with avaricious intent to grab widows immovable estate. This provided sufficiently strong motive for the appellant to commit murders as wealth is one of three recognized vices since time immemorial. Thus convincingly the motive attributed to the appellant to commit double murders seems to be genuine and real and has been clearly proved without admitting any other hypothesis. There is yet another aspect of the matter. It is too well settled trite law that motive is embedded in the mind of accused and it is difficult, if not impossible, to perceive it tangibly. Therefore, in case of eye witness account about the incident, motive relegates into background and it's importance dissipates into insignificance. On this score we can benefittingly refer to some of the views expressed by the Hon'ble Apex Court. In the case of **Habib v. State of U.P.WITH Manuwa v. State of U.P. :AIR 2013 SC 1764** it has been observed by the apex court as under:-

> "*.It is settled legal position that if there is direct trustworthy evidence of witnesses as to the commission of offence, motive part loses its significance. Therefore, if the genesis of the occurrence is proved, the ocular testimony of the witnesses could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. This legal position has been settled by this Court in its Judgment in Sheo Shankar Singh v. State of Jharkhand (2011) 3 SCC 654 : (AIR 2011 SC 1403) and Bipin Kumar Mondal v. State of West Bengal (2010) 12 SCC 91 : (AIR 2010 SC 3638).*"

In yet another decision **Lokesh Shivakumar v. State of Karnataka: AIR 2012 SC 956** it has been held by the apex court as under:-

> *"8.As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive loses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it. The submission, therefore, that the appellant had no motive for the commission of offence is not of any significance."*

20. At this juncture, when we advert to the criticism by learned amicus curie that no immediate causa causans has been disclosed by the prosecution and since the marriage was already solemnized there was no occasion for the appellant to indulge into double murder, we find the criticism trivial and

unconvincing. It seems that probably because in the relationship of marital tie both the deceased garnered support of yet another family and a male person to stand by them, that this must have wrecked havoc with the ill intent of the appellant, which is clear from the fact that he was opposed to the marriage as he was not consulted, that he thought it fit to do away with both the deceased as they were his real stumbling block in achieving his temptation. It is recollected that D2 was a widow and, besides the bride, she had an infant daughter to foster and therefore for her support, her son-in-law would have been of immense help. Father D1, who was protector of D2, was made the first victim and thereafter D2 was annihilated. Yet another snipping that the second motive attributed through PW7 is an embellishment, after thought and facetious, we are of the view that the submission does not go down well in view of our above analysis. In any view since there are eye witnesses account of convincing nature well corroborated with medical evidence, we cannot discard the entire prosecution version on the question only of motive not being established or immediate motive could not be divulged. Our critical examination of evidences and other surrounding circumstances impels us to opine that appellant had sufficient motive to commit double murders and therefore we here by repel amicus curie's castigation of prosecution case on this score.

21. Before adverting and delineating on the core issue regarding involvement of the appellant as the sole perpetrator of the crime we would like to register some other significant aspects which rarify appellant's difficulties and have consequential bearing on the outcome of this appeal and the Reference dispatched to us. At the outset, carding of evidences and summation of the record does not reveal that any serious challenge was made by the accused to the genuineness of the FIR and its contents nor any material evidence was placed or any worthwhile submissions harangued to whittle down or stifle its corroborative value and doubt its genuineness. It will be ludicrous to opine that the FIR/Ext 3, is the outcome of fabrication and concoction in absence of any denunciatory submissions. Neither Jaydev Mahanta/PW3/ informant nor Budhadev Behera/ PW19, scribe of the FIR/ Ext.3, or the investigating officer were challenged on the said score. According to the informant he received a telephonic call from Diptimayee Mahanta/ PW1, his maternal niece, at 11 a.m. and then he came to the murder scene and after inspecting two dead bodies that he got the FIR slated down through Budhadev Behra/ PW19 and thereafter he came to the police station by 11.30 a.m. and lodged his FIR which was registered as P.S. case no. 22 of

2011, u/s 302 I.P.C. This time slot has not been questioned at all by the defence. Inevitably, legitimate inference that can be drawn, therefore, is that prosecution had not wasted any time in preparation of the FIR and lodging of the same and it had no time for consultation and deliberation to create a false story. No conceivable reason has been urged before us to discard the FIR or the narrations contained therein. Since defence remained unsuccessful in demolishing the evidence of the informant on this score, the only inescapable conclusion is that no false case was foisted against the appellant arraigning him as the sole culprit. Accused has nothing to offer on this important aspect and resultantly the FIR version is actual description of an irrefutable real incident. This certainly is a very cardinal favourable circumstance for the prosecution and catastrophic incriminating evidence against the appellant. At this stage dealing with amicus curiae's submission that the weird conduct of the appellant remains unexplained we discard it for the reason that when a person labors under prehensile mental covetous agony, his cognitive faculties betray him to act eldritchly and his conduct is unimaginably unpredictable.

22. Next exacerbating circumstance negating defence plea of innocence, which gives a definite fillip to the genuineness of the prosecution story, emanates from the defence, which, by not questioning, not even on preponderance of probability, date, time and place of the incident, has brought a ring of truth around the charges framed against the appellant. Coupled with unchallenged FIR version, not questioning these significant aspects, the defence allowed moments to ponder that there remains not even the slightest doubt on the veracity of the prosecution allegations which the defence has failed to dislodge.

23. Defence further aggravated its difficulties by not challenging trustworthiness of the various documentary evidences of vital importance such as site plan, inquest memos, recovery and various seizure memos including seizure of weapon of assault. Although a feeble attempt was made to challenge recovery of weapon at the instance of the appellant but that remains inchoate without any adverse ramification on the trustworthiness of the prosecution version. Without concrete cross examination, an adverse suggestion which has been refuted is a facetious plea to discard evidence relating to recovery of weapon at the instance of the accused at his disclosure statement which is admissible u/s 27 of The Evidence Act.

24. Now, embarking upon the case material to determine the complicity of the appellant in the crime, a meticulous examination of evidences and

roving inquiry into this core aspect evinces that the appellant was named in the FIR as the sole perpetrator of the murders which was got registered at the police station without any delay soon after the incident. Complicity of the appellant was stated by the eye witnesses and it also surfaced immediately after the crime was committed, as on phone, informant was divulged appellant's name as the miscreant who had committed double murders, by his maternal niece/ PW1, who had no reason to falsely implicate the appellant and also had no time to cook up a story as by 11 a.m. she had already informed the informant. She being maternal grand -daughter of D1 and niece(*Bhanji/sister's daughter)* of D2 would be the last person to spare the real assailant and foist a false case against the accused appellant. No suggestion regarding any enmity with the appellant was given to her. She had witnessed assault only on her aunt(*mausi/ mother's sister)*D2. She has corroborated date, time and place of the incident as 14.3.2011 at 10.30 a.m. at Nati sahi, near *Mahua* tree at a distance of 300 feet from her house. She has further stated " *At the relevant time and place, I saw the accused Ganesh giving cut blows on Kanchan by means of Bhujali. The accused made Kanchan fall on the ground and gave blow on her back by means of Bhujali causing bleeding injury as a result of which Kanchan succumbed to the injury. I rushed to the spot hearing the screaming cry of Kanchan and saw the incident."* Cross examination of this witness is perfunctory and insidious having no deleterious effect on the truthfulness of her depositions. PW1 has stated that on hearing screaming of D2 she came out of her house and witnessed the incident from her courtyard. She could not muster courage to go near D2 because of being terrified. Other witness Indramani, who also saw the incident is also a resident of same vicinity. P.W.1 further clarified that no medical help was offered to D2 because, after infliction of murderous injuries,D2 had lost her life immediately. This witness has refuted defence suggestion that she was at her in-laws' house and not at the spot and that she had not seen the incident. In our opinion because of marriage ceremony presence of PW1 in the village is very natural and therefore defense criticism is naff and inconsequential. In absence of any reason for her to nail–in the appellant, she cannot be adjudged as perjurer and from her convincing deposition complicity of appellant in the crime is anointed beyond doubt without any damaging and suspicious circumstances. Criticism by the appellant accused that prosecution has examined only related and partisan witnesses and therefore its story should be discarded, we find the assertion gibberish. It is too well settled trite law that deposition of a truthful and convincing witness cannot be thrown overboard merely because he is related.

Time and again this aspect has been succinctly laid down by the apex court and for a ready reference we refer some of those decisions. In **Ranjit Singh and Ors. v. State of M. P.:AIR 2011 SC 255** it has been held by the apex court as under:-

> " *32.Undoubtedly, all the eye-witnesses including the injured witnesses are closely related to the deceased. Thus, in such a fact-situation, the law requires the court to examine their evidence with care and caution. Such close relatives and injured witnesses would definitely not shield the real culprits of the crime, and name somebody else because of enmity. The defence did not ask the injured witnesses as to how they received the injuries mentioned in the medical reports.(See: Dinesh Kumar v. State of Rajasthan, (2008) 8 SCC 270 : (AIR 2008 SC 3259); Arjun Mahto v. State of Bihar, (2008) 15 SCC 604 : (AIR 2008 SC 3270); and Akhtar and Ors. v. State of Uttaranchal, (2009) 13 SCC 722) : (AIR 2009 SCC (Supp) 1676).*"

In **Brahm Swaroop and Anr. v. State of U. P.:AIR 2011 SC 280** it has been observed as under:-

> *"21.Merely because the witnesses were closely related to the deceased persons, their testimonies cannot be discarded. Their relationship to one of the parties is not a factor that effects the credibility of a witness, moreso, a relation would not conceal the actual culprit and make allegations against an innocent person. A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of its false implication. However, in such cases, the court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence. (Vide: Dalip Singh and Ors. v. State of Punjab, AIR 1953 SC 364; Masalti v. State of U.P., AIR 1965 SC 202; Lehna v. State of Haryana, (2002) 3 SCC 76; and Rizan and Anr. v. State of Chhattisgarh through The Chief Secretary, Government of Chhattisgarh, Raipur, Chhattisgarh, (2003) 2 SCC 661) : (AIR 2003 SC 976).*"

25. Since we find all the fact witnesses creditworthy and their evidences not liable to be discarded and the same are unassailable, we find prosecution story to be truthful and convincing. Further we note that Diptiranjan Behera/ PW2 and Ugrasen Mahanta @ Fagu/ PW 4 both are independent witnesses

who have supported the prosecution version convincingly. Argument by learned amicus curiae therefore is discarded.

26. PW1 is corroborated in all material and significant aspects regarding annihilation of D2 by Diptiranjan Behra/PW2, Smt. Laxmi Mahanta/PW6, Premlata Mahanta/ PW7, Chintamani Mahanta/PW8 and Saraswati Mahanta/ PW9. For convenience sake, jointly dealing with their evidences, it is discernible that all of them have stated same conformable evidences regarding date, time and place of the incident as that of PW1 without any apparent discrepancy. All of them have coalesced to testify that it was the appellant who had assaulted D2 with *Bhujali* causing her instantaneous death. At this juncture, dealing with submission of learned amicus curiae that D2 was not given any medical aid and how the witnesses themselves opined that she had expired and hence their presence at the spot is doubtful, we have no hesitation to repel the same outright. The submission is puerile and does not require any detailed examination. Perceived by senses one can immediately come to know as to whether there is life in a person or not? Secondly, it does not matter at all for establishing appellant's crime as he has inflicted such injuries on D2 which, even with medical help, would not have saved her life as has been categorically opined by the doctor. Like PW1, rest of the witnesses, PWs 6 to 9, also had no reason to foist a false case against the appellant and no enmity has been suggested to them to arraign the appellant as the sole malefactor. Their evidences cannot be discarded merely because most of them are the relatives or known to D2. All the witnesses except PW2 were related to both the sides. Even during inquest examination on both the cadavers, informant, who is a witness of both the inquests, has stated that appellant had murdered his sister and father. Thus the complicity of the appellants came to light from the very inception of the incident and in absence of any challenge to all these confidence inspiring oral and documentary evidences, it will be puerile to hold otherwise. Convincingly established, therefore, is the fact that the incident of double murders did occur on 14.3.2011 at about 10.30 a.m. in village Natisahi near Sologadia tank and near a *Mahua* tree by the side of the village road with sharp edged weapon of which the appellant was sole real assailant.

27. Now, turning to the evidence of Diptiranjan Behura/PW 2, it surfaces that he is a witness to both the murders. After confirming the date, time and place of the incident regarding both the crimes, PW2 has deposed that his tractor was taking sand to village Raikia and he was following the tractor.

Arriving at the place where D1 was murdered, this witness saw the appellant from a distance of 20 mtrs , armed with a *Bhujali* of size 1 ½ ft. /2 ft. hurling hot words on an aged cyclist. Before that old man could utter a word, the accused (present appellant) dealt *Bjhuali* blows on the neck of the old man, which dissected his neck by half and the victim fell down on his cycle. While recollecting *Bhujali*, its handle came out and fell down on the ground. Thereafter the appellant left the place of the incident with blood stained *Bhujali*. Fifteen minutes thereafter while returning from the said road, PW2 also witnessed the assault on D2 by the appellant with the same blood stained *Bhujali*. Many male and female witnesses saw the assault and since the accused appellant was dissuading other villagers and hurling life threats, therefore, they could not muster enough courage to go nearby and rescue the lady. The victim D2 was crying for help, a girl aged about 10/12 years tried to give water and rescue the lady, but she was threatened and chased. The appellant thereafter, fled away from the spot towards Canal Bandh road with the *Bhujali*. The girl thereafter came to the lady and poured water in her mouth and at that time the lady was lying on the ground supinely. PW 2 further deposed that he had accompanied the informant to the Police Station to lodge the FIR. This witness(Diptiranjan Behura/PW2) is also a signatory on the inquest memo. Cross-examination of this witness, in fact, has given a fillip to the prosecution version instead of castigating it as he has evidenced that the second spot of murder was at a distance of 400 mtrs. from the first sport. Subash Mahanta, a contractor, had placed the order for him to carry the sand which was required for the construction of a school and Sukadev Nayak was the driver of the tractor at the time of the incident. He further stated that he knew the accused prior to the incident, who was cutting and selling woods from the forest. This witness further stated that the incident had occurred by the side of the main road. He had stayed at the spot 10 to15 minutes and further confirming the prosecution version, he has deposed that the family members of D1 were not present when he was assaulted.PW2 has denied the defence suggestion that D1 and the informant were working under him as laborers. PW1 also deposed that both the incident had occurred at an interval of fifteen minutes. He further deposed that the informant had arrived within 20 minutes of the second murder. Police interrogated him on the following day of the incident. An insignificant discrepancy was got elicited from this witness that in the inquest memo instead of *'Bhujali'* the word *'Tangia'* was mentioned. He had witnessed the murder of D2 from a distance of 20 to 25 mtrs. PW2 flatly denied the defence suggestion that he had not witnessed the

incident nor he was present at the spot and he has stated a mendacious version because D1 and the informant were working as laborers under him.

28. Turning to the evidence of Smt. Laxmi Mohanta/PW6 regarding murder of D2, she corroborated the earlier two witnesses in all material aspects of the matter. She further stated that D2, in relation by courtesy was her 'Mausi' (mother's sister). Hearing the screaming of D2 she came out of her house and had witnessed the appellant assaulting D2 with a *Bhujali*. She wanted to rescue D2, but because of the threat given by the appellant she could not venture for such a feat. Murdering D2 near a Mahua tree, by the side of an open field at a distance of 300 to 400 mtrs. from the house of D2, appellant had fled away from the incident spot. This witness failed to recollect number of blows given to D2 and by the time she had arrived near the victim, she was already dead. Nothing worthwhile besides the aforesaid facts has come out in her cross examination.

29. Turning to the evidence of Premlata Mohanta/PW 7, who had witnessed the incident from a distance of 100 mtrs. she has also corroborated the entire prosecution story as already mentioned. She is the daughter of D1 and sister of D2. Through her cross examination inter se relationship between the appellant and D2 and the motive for the crime was got proved. This witness has deposed that *"prior to incident, relationship between accused and Kanchan was not good. On the date of the marriage of the daughter of Kanchan, accused was abusing Kanchan alleging that why Kanchan went for marriage without consulting the accused."* She has categorically stated that accused was giving cutting blows on D2 on her face, throat and middle back. The defence has miserably failed to dislodge the evidence of this witness as well. Chintamni Mohanta/PW 8 has stated the same very facts, which has already been mentioned by his predecessor witnesses regarding murder of D2. He has also deposed that the accused was sputtering threats to kill the daughter and son-in-law of D2 as well. After departure of the accused some water was administered in the mouth of D2. This witness has proved the relationship between D2 as she was the elder sister of his wife. Nothing adverse could be elicited from this witness so as to create any doubt in the authenticity of the prosecution version and culpability of the appellant in the crime.

30. Like all other witnesses, Saraswarti Mohanta/PW9, who is the daughter of D2, has corroborated and authenticated the prosecution version and establish complicity of the appellant as the sole killer of her mother. She

was 13 years of age at the time when she testified in the court. In her examination-in-chief, she has confirmed date, time and place of the incident and has further evidenced that before murdering her mother, accused-appellant had killed her maternal grandfather D1 and from that place he had arrived at the second spot to annihilate her mother with blood stained *Bhujali*. Confirming motive she also lend credence to the prosecution story by divulging that prior to murder the appellant used to quarrel and harass her mother. She further deposed that firstly her maternal grandfather had gone and thereafter her mother D2 had proceeded and she followed her mother because of threats hurled by the appellant which also included dissuading villagers not to interfere in his matter. She was also threatened when she tried to sooth her mother during the incident. She has proved inter se relationships between the appellant and her as the appellant being son of her elder father, who had separated from her family because of previous land dispute animosity. She has supported earlier witnesses by stating that D2 was murder at a distance of 400 mtrs. from her house and prior to murdering D2 appellant had informed D2 that he had already killed her father and he will kill her as well because of fear psychosis that she may lodge an FIR against him and immediately thereafter appellant had inflicted 4 to 5 *Bhujali* blows on the chest, face, neck and back of the deceased. She has seen a motorcyclist(PW2) at the spot. The only omission which has been elicited from her cross examination is that she had not stated to the Investigating Officer that prior to the incident, accused had threatened to kill her mother. She has further proved the prosecution version by stating that she along with Sarita had gone to her mother to administer water. Her vivid and graphic description regarding motive, relationship and actual incident leaves no manner of doubt that, in fact, she had actually seen the incident and her narration contains a ring of truth. From her entire testimony no lacuna has surfaced to reject her testimony as a perjurer or as a got up witness.

31. Coming to the evidence regarding murder of D1, as already stated, Diptiranjan Behura/PW2 and Ugresan Mohanta/PW 4 have corroborated the entire prosecution version qua assault on D1 by the appellant by *Bhujali* on the date and time of the incident. PW4 has stated that at the relevant time he was carrying a bundle of dry leaves on a cycle to use as fire wood along with his two years old son sitting on the cycle frame. Hearing the screaming of D1 from a distance of 15/20 feet his attention was attracted towards the spot only to witness that from the sharp edge side of a 1' length iron blade of a Bhujali the appellant was giving cut blows on the neck and back of D1, who in an

endeavor to ward off the blows had also sustained injuries on his hand. Subsequently this witness had heard that the appellant had also committed murder of D2. On being cross examined PW4 has stated that D1 is the *"Samudi"* of his elder brother Chaitanya Mohanta/PW16. This witness has further stated that the accused was wearing a Lungi and half shirt at the time of the incident whereas the deceased D1 was wearing a shirt. Incident was informed by him to the ward member Khageswar Mohanta, who had reported the matter at the P.S. over phone. Defence in utter carelessness, got patched up the point gained by it by getting it elicited from this witness that at the time of the incident he did not know relationship between the deceased-Dinabandhu Mohanta(D1) and his elder brother as "Samudi" of each other. He categorically stated that he had not seen the incident of murder of D2 and that he, after a fortnight, was interrogated by the police.

32. Thus, from the evidence of these fact witnesses defence has not been able to make any in road into the correctness of the prosecution version and it miserably failed to demolish its truthful veracity and trustworthiness. Cross examination of all the witnesses is not only perfunctory and insidious but it had not surfaced any worthwhile evidence to reject trustworthiness of prosecution witnesses who all seems to be truthful and corroborative of each other. Since the defence remained unsuccessful in creating a doubt in the veracity of the prosecution case the obvious conclusion is that the prosecution has established complicity of the appellant as assailant of both the murders convincingly without any doubt.

33. From the evidence of Dr.Preety Nayak/PW5, the defence has not been able to stifle the prosecution version. This doctor had conducted both the autopsy examinations on 14.03.2011 at 5.00 P.M. and had noted the injuries sustained by both the deceased, as already mentioned above. Again defence brought it on record that "*particularly injuries on the neck of both the deceased persons were so grievous and vital in nature which could not/would not have saved the person are there been proper treatment given to the injured persons soon after the injures are/were caused.*" There could not have been a more careless cross examination by a defence advocate in a serious case of double murder like the present one. The evidence of the doctor unerringly establishes that the charge against the appellant will be squarely covered within the purview of section 302, IPC and in no way the same can be ameliorated to a lesser crime. Instead of nullifying and extricating the appellant from the ambit of murder, defence got it established.

34. No serious argument regarding the investigation has been urged before us by learned amicus curiae and rightly so. Our examination of the evidence of the I.O. Baidya Narayan Bhoi/PW 22 does not reveal any significant lapse although, we are of the opinion that with more rectitude it would have been much more confidence inspiring. Expert has mentioned the same words while describing blood on the attires of deceased as well as of the accused, therefore no capital can be made out of mole on the said aspect. Otherwise also since eyewitnesses are reliable and creditworthy, trivial lapse on the part of the I.O. is not going to damage the prosecution case. A witness is to be judged from the truthfulness of his depositions and not on the premium of trivialities and small insipient discrepancies and exaggeration. Prosecution case cannot be discarded or thrown overboard because of small omissions, contradictions and embellishments which do not affect the main substratum of the prosecution story.

35. At this stage we would like to advert to the defence submissions that since prosecution has not produced the *Bhujali*, the weapon of assault during the trial and that appellants attires were stained only with sprinkling of blood and that the two witnesses of murder of D1 are chance witnesses , the prosecution case is liable to be discarded. We find such moldy criticism to be of no avail for the reasons firstly that there was total a bsence of any reason for witnesses to spare the real assailant and foist a false case against the appellant, secondly that prosecution case in its totality is confidence inspiring and witnesses are truthful and reliable, and thirdly that recovery of *Bhujali* could not be disproved. The weapon contained human blood and no explanation on this score has been offered by the defence. Expert report, therefore, also lend credence to the prosecution case. Prosecution would have done well to get weapon exhibited but it's failure to produce it in court is of no consequence in the wake of confidence inspiring evidences of its witnesses. Further while launching assaults , appellant must have taken care not to get his attires completely soaked in blood and hence sprinkling of blood will not make any difference in the genuineness of the prosecution story. Investigation cannot be held to be inept and clumsy to demolish the reliability of the prosecution witnesses. All the aforesaid criticism, consequently are discarded.

36. Embarking upon the assertion that the appellant can be held to be guilty only u/s 304 (I) I.P.C. and not u/s 302 I.P.C. we find that the reason for the submission is only one line statement by PW2 in his examination-in-chief that "*At the first spot, I saw the accused being armed with a Bhujali of size 1*

½ ft/2ft exchanging hot words with an old cyclist. I was at a distance of 20 mtrs from that old man. Before that old man spoke any- thing to the accused, who is now in the dock, the accused dealt bhujali blows at the neck of that old man as a result of which the neck of that old man was half cut and he fell down on his cycle while the wooden handle of the bhujali came out from the body of bhujali and fell on the ground." On the strength that there was altercation between the accused and D1 that it is suggested that probably due to triadic altercation ensued between the accused and D 1 that the incident occurred when the accused acted excruciatingly and precipitously loosing self control. The submission, though in a flush, seemed to have much substance but on deeper examination is found to be inconsequential. No where it is got elicited that D1 entered into any kind of dialogue with the appellant. Conversely the evidence is that before D1 could speak he was assaulted on his neck by the appellant dissecting it into half. There does not seem to be any grave and sudden provocation given by D1. Appellant cannot be allowed to commit murder in the garb of such a provocation when there was none. Further, defence itself got it explained from the doctor that injury to the neck was imminently fatal and this brings the crime of the appellant well within the second clause of section 300 I.P.C. *"of intentionally causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused".* Another fact exacerbating the crime is that the appellant had sufficient time to calm down but after some fifteen minutes he again repeated the same crime without any contrition and hence what is proved against him is that he is a recidivist. There was no grave and sudden provocation by D2 and hence there does not exist any palliative reason to soften the rigors of the offence and obviate appellant's difficulties. Contention of learned amicus curiae therefore is repelled.

37. Thus on an overall analysis of all the pros and cons, we are of the opinion that the complicity of the appellant as the perpetrator of the crime has been too well anointed to absolve him of the crime committed by him and assoilzie his appeal favourably and, therefore, so far as conviction of the appellant is concerned, we have no doubt in our mind that the same is well merited and does not call for any interference by this Court.

38. Now coming to the sentence, the most serious aspect of the matter, as it is to be examined as to whether the death sentence awarded to the appellant should be confirmed and the Reference sent by the learned trial judge be allowed or it is to be concluded that the present is not a c ase falling in the

category of 'rarest of the rare' cases and, therefore, the appellant should be conferred benefit of such a categorization by commuting his death sentence into life imprisonment.

39. In the past awarding of death sentence has been the subject matter of various judicial pronouncements mainly by the Apex Court which succinctly and lucidly brought forth aggravating and mitigating circumstances required to be seriously considered before awarding capital punishment. It will be worthwhile and but be appropriate to take stock of some of those decisions before we take up appellant's submissions, as scrutiny of those will throw insight in the science of penology.

40. Delineating on the issue being discussed, in somewhat identical circumstances, it has been observed by a full bench of the apex court in **Rajendra Prasad versus State of U.P.: AIR 1979 SC 916**, as under:-

> *"109. Three deaths are regrettable, indeed, terrible. But it is no social solution to add one more life lost to the list. In this view, we are satisfied that the appellant has not received reasonable consideration on the question of the appropriate sentence. The criteria we have laid down are clear enough to point to the softening of the sentence to one of life imprisonment. A family feud, an altercation, a sudden passion, although attended with extraordinary cruelty, young and malleable age, reasonable prospect of reformation and absence of any conclusive circumstance that the assailant is a habitual murderer or given to chronic violence - these catena of circumstances bearing on the offender call for the lesser sentence."*

The aforesaid decision came up for reconsideration before a larger bench in **Bachan Singh versus State of Punjab: AIR 1980 SC 898,** and expressing the majority view, it has been observed by the apex court as under:-

> *"200. Drawing upon the penal statutes of the States in U. S. A. framed after Furman v. Georgia, in general, and clauses 2 (a), (b), (c), and (d) of the Indian penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances" :*

"Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion :

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed –

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

xx xx xx xx xx

204. Dr. Chitaley has suggested these mitigating factors :

"Mitigating Circumstances: - In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:-

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. It the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

41. The question of aggravating and mitigating circumstances and imposition of death penalty again attracted attention of the apex court in a subsequent decision in **Machhi Singh versus State of Punjab: AIR 1983 SC 957,** wherein stamping with approval the guidelines enumerated in Banchan Singh (supra), a further caveat was added in the following terms:-

> *"32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence in no case" doctrine are not far to seek. . In the first place, The very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the*

crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance :

I Manner of Commission of Murder

When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance.

(i) When the house of the victim is set aflame with the end in view to roast him alive in the house,

(ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II Motive for commission of murder

When the murder is committed for a motive which evinces total depravity and meanness. for instance when (a) a hired assassin commits murder for the sake of money or reward; (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust; (c) a murder is committed in the course for betrayal of the motherland.

III Anti-social or socially abhorrent nature of the crime.

(a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of 'bride burning' and what are known as 'dowry-deaths' or when murder is committed in order to remarry for the sake of

extracting dowry once again or to marry another woman on account of infatuation.

IV Magnitude of crime

When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V Personality of victim of murder

When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder. (b) a helpless woman or a person rendered helpless by old age or infirmity. (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust, (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

Imposition of death penalty was again considered by the apex court in a recent decision **Ram Naresh versus State of Chhatisgarh:AIR 2012 SC 1357,** wherein it has been laid down as under:-

"39.The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in the case of Bachan Singh (supra) and thereafter, in the case of Machhi Singh (supra). The aforesaid judgments, primarily dissect these principles into two different compartments - one being the 'aggravating circumstances' while the other being the 'mitigating circumstances'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful

reasoning by the Court as contemplated under Section 354(3), Cr. P.C.

Aggravating Circumstances:

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43, Cr. P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

40. While determining the questions relatable to sentencing policy, the Court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles:

(1) The Court has to apply the test to determine, if it was the 'rarest of rare' case for imposition of a death sentence.

(2) In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime."

Further in a much recent decision **State of U.P. Versus Om Prakash: (2015) 4 SCC 467** the apex court approved the high court's view of commuting death penalty into life sentence albeit the incident involved killing of four persons by gun fire as also by charring them to death. Thus numerology is no determinative criterion to spat death penalty.

In case of **Deepak Rai versus State of Bihar: (2013) 10 SCC 421,** it is held as follows:-

"47. We are mindful of the principles laid down by this Court in Bachan Singh v. State, (1980) 2 SCC 684 : (AIR 1980 SC 898) and affirmed in Macchi Singh v. State of Punjab, (1983) 3 SCC 470 : (AIR 1983 SC 957) to be observed on the sentencing policy in determining the rarest of the rare crimes. In Bachan Singh case (supra) this Court has held as follows:

"While considering the question of sentence to be imposed for the offence of murder u/s. 302 of the Penal Code, the court must have

regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

48. In Machhi Singh case (AIR 1983 SC 957) (supra), this Court has awarded death sentence to the accused who had methodically in a preplanned manner murdered seventeen persons of a village including men, women and children. Therein, this Court has besides outlining the five broad categories of rarest of rare cases held that in order to apply the guidelines of Bachan Singh case (AIR 1980 SC 898) (supra) the following questions ought to be answered:

"39. "(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

This Court has held that if the answer to the above is in affirmative, then death sentence is warranted. This Court has further observed that the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof are few of the many factors which normally weigh in the mind of the Court while awarding death sentence in a case terming it as the "rarest of the rare" cases. While applying the test of rarest of the rare case, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes which shake the collective conscience of the society.

49. This Court in Rajesh Kumar v. State, (2011) 13 SCC 706 has noticed the observations and principles evolved in Bachan

Singh case (AIR 1980 SC 898) (supra) resonating through the international sentiments on death penalty, as follows:

"83. The ratio in Bachan Singh (AIR 1980 SC 898) has received approval by the international legal community and has been very favourably referred to by David Pannick in Judicial Review of the Death Penalty: Duckworth (see pp. 104-05). Roger Hood and Carolyn Hoyle in their treatise on The Death Penalty, 4th Edn. (Oxford) have also very much appreciated the Bachan Singh ratio (see p. 285). The concept of "rarest of rare" which has been evolved in Bachan Singh by this Court is also the internationally accepted standard in cases of death penalty.

84. Reference in this connection may also be made to the right based approach in exercising discretion in death penalty as suggested by Edward Fitzgerald, the British Barrister. [Edward Fitzgerald: The Mitigating Exercise in Capital Cases in Death Penalty Conference (3-5 June), Barbados: Conference Papers and Recommendations.] It has been suggested therein that right approach towards exercising discretion in capital cases is to start from a strong presumption against the death penalty. It is argued that "the presence of any significant mitigating factor justifies exemption from the death penalty even in the most gruesome cases" and Fitzgerald argues:

"Such a restrictive approach can be summarised as follows: The normal sentence should be life imprisonment. The death sentence should only be imposed instead of the life sentence in the 'rarest of rare' cases where the crime or crimes are of exceptional heinousness and the individual has no significant mitigation and is considered beyond reformation."

(Quoted in The Death Penalty, Roger Hood and Hoyle, 4th Edn., Oxford, p. 285.)

85. Opposing mandatory death sentence, the United Nations in its interim report to the General Assembly in 2000 advanced the following opinion:

"The proper application of human rights law-especially of its provision that 'no one shall be arbitrarily deprived of his life' and that 'no one shall be subjected to ... cruel, inhuman or degrading ... punishment'- requires weighing factors that will not be taken into account in the process of determining whether a defendant is guilty

of committing a 'most serious crime'. As a result, these factors can only be taken into account in the context of individualised sentencing by the judiciary in death penalty cases .... The conclusion, in theory as well as in practice, was that respect for human rights can be reliably ensured in death penalty cases only if the judiciary engages in case-specific, individualised sentencing that accounts for all of the relevant factors.... It is clear, therefore, that in death penalty cases, individualised sentencing by the judiciary is required to prevent cruel, inhuman or degrading punishment and the arbitrary deprivation of life."

(The Death Penalty, Roger Hood and Hoyle, 4th Edn., Oxford, p. 281.)

50. In Ramnaresh v. State of Chhattisgarh, (2012) 4 SCC 257 : (AIR 2012 SC 1357) : (2012 AIR SCW 1917), this Court has reflected upon the aforesaid decisions and culled out the principles as follows:

"76. The aforesaid judgments, primarily dissect these principles into two different compartments-one being the "aggravating circumstances" while the other being the "mitigating circumstances". The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) Cr.P.C.

Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed

by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43, Cr.P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though the prosecution has brought home the guilt of the accused.

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

(1) The court has to apply the test to determine, if it was the "rarest of rare" case for imposition of a death sentence.

(2) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime."

42. There are many more decisions on the subject but, for the sake brevity, we desist from giving a graphic description of each one of it. However, we refer some of them as **Mohd. Mannan versus State of Bihar: (2011) 5 SCC 317; Sandesh verssu State of Maharashtra: (2013) 2 SCC 479, Sangeet versus State of Haryana: (2013) 2 SCC 452.**

43. Now examining the appeal at hand within the enunciated principles as above it is discernible that the appellant had acted under intense influence of rapacity for property in hot haste all of a sudden at the spur of the moment without any evidence as to any preplanning. The incident occurred without pre-meditation and pre planning. Appellant has no criminal background nor it is shown that he has such criminal proclivity as it has not been evidenced that he is involved in any other crime. He had not harmed to the daughter/PW9 when she had appeared during course of the incident. The incident was preceded by verbal utterance by the appellant and therefore it seems that initially he had no intention commit murder which developed immediately at the spur of the moment. Even though grievous injuries to both the deceased were caused but there is absence of convincing evidence that appellant acted cruelly and in a diabolical manner. The precursor of the incident was the hostility between both the families. Besides adjectives “extreme culpability”, “unprecedented crime scenario” “monstrous conduct” no other reason has been assigned by the learned trial court for slapping extreme penalty. In our society murders for avarice or greed for property with sharp weapons is not

something which is uncommon and has many exemplers. Further only by counting numbers of the cadavers death penalty should not be awarded as in our view that is not a safe criterion to determine 'rarest of rare case' and probably is not a special reason contemplated u/s 354(3) Cr.P.C. The degree of gruesomeness depicted by the appellant is not of that intense degree which can jolt the conscience and revolt cognitive faculties. We have not been able to gather as to what was uncommon in the incident except that the date of execution was surreal. Are prolicides, fratricides, patricides, filicides uxoricides uncommon in society? "Magnitude of the crime considered in the light of feudatory relationship" and "assault on innocent, helpless persons", albeit are gravely culpable and scurrilous act but not of the degree to imbibe it within the fold of "rarest of rare" cases. Moreover possibility of appellant's reformation and penance in jail penitentiary and grief of contrition cannot be ruled out. No criminal activity as an under trial by the appellant or any un-damnumable conduct was brought before us to gad appellant's life. It cannot be concluded that collective conscience of the society was shaken and that imprisonment of life sentence will not be just, proper and commensurate with appellant's guilt and will be wholly insufficient. Cholerically appellant acted precipitously. During trial, prosecution has not elicited aggravating circumstances. Present was appellant's first crime, though grave. He was in forties at the time of the incident. Learned trial court although heard the appellant on the question of sentence, but while dealing with that aspect has not recorded sufficient reasons to award death sentence. Double murders of close relatives by itself will not bring the crime within the ambit of "rarest of rare" case. Both the reasons that "*defence plea that the appellant is innocent is not a mitigating circumstance at all"* and "*that this case is 'rarest of the rare' one indicating his extreme culpability in the unprecedented crime scenario*" are not compelling reasons to take away appellant's life. No doubt it is day light double murder incident where the appellant had committed murders of an old man and a lady on the following day on which the daughter of the lady D2 was got married. But while executing the crime, he has acted not in a diabolical and grotesque manner so as to bring his case within the category of rarest of the rare cases. To bring an incident within the ambit of the said category, the execution of the crime should be such, which must shake the conscience and the only conclusion from a prudent angle to emerge should be that but for death penalty, no other sentence will suffice to assuage the wounds of the victim. Unless such an opinion is arrived at death penalty should not be awarded. Appellant's family had separated from the family of the deceased and it seems that the family pressure also acted as a stimuli for

the appellant to commit such a heinous crime. Further, appellant can't be considered as a hazardous person to the society. Property dispute since the days of Mohabharat had resulted in assault and counter assault. Desire to accumulate property is not unknown in the society and many a times, it robs the person of his humanism and saner thoughts, as has happened in the present case. It is the ghastliness of the crime and the manner of its diabolical execution which is the determinative factor to award death penalty to a convict and not to spare life. In our view, therefore, this is not a case where death penalty should be awarded to the appellant. At the same time we are of the view that the appellant should not be allowed to come out of prison on 14 years Rule because we are also conscious of the fact that there are daughters of D2, who had already lost their father earlier and who are still very young and their lives will be in jeopardy if on the 14 years Rule, the appellant is allowed to come out of jail. As has already been held by us, the learned trial judge has not given sufficient reason to award death penalty and therefore we hereby commute death sentence of the appellant to one of life imprisonment, but he should not be allowed to come out of jail prior to his completing 25 years of continuous incarceration within the jail boundary without parole and without benefit of set off.

44. Since by this judgment we are directing the appellant not to be released from jail prior to completion of 25 years of continuous incarceration inside jail premises without parole and benefit of set off, we consider it not necessary to pass a separate sentence u/s 201 I.P.C.

45. Thus, in view of our foregoing analysis, conviction of the appellant on both the charges u/s 302/201 I.P.C. are hereby confirmed and his appeal challenging his conviction stands dismissed but on the quantum of sentence it is allowed in part and his death sentence for the murder charge is commuted to life imprisonment with the rider that he shall not be released from jail prior to his completing 25 years of continuous incarceration in jail without parole and without benefit of set off.

46. Jail Criminal Appeal No. 13 of 2015, preferred by the appellant is partly allowed as above and DSREF NO. 1 of 2015 sent by the learned trial Judge is hereby rejected.

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

Appeal allowed in part.
Death Reference rejected.

2015 (II) ILR - CUT- 663

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

MATA NO. 61 OF 2007

KISHORE KUMAR SAHOO …….. Appellant

.Vrs.

BAIJANTIMALA SAHOO ……... Respondent

HINDU MARRIAGE ACT, 1955 – S.13

Divorce – Exparte decree against wife – Husband married to another lady and blessed with two children – Parties living separately for 18 years – Long separation between the parties and marriage of the appellant to another lady has created unbridgeable distance between them – Nobody is interested for re-union – A marriage which is dead for all purposes can not be revived by the court's verdict if parties are not willing – This court is convinced that the marriage between the parities has irretrievably broken down which is beyond repair – Held, it is a fit case where a decree of divorce must be granted.

(Paras 11, 12)

Case Laws Rreffered to :-

1. AIR 2006 SC 1675 : Naveen kohli -V - Neelu Kohli
2.AIR 2013 SC 2176 : K.Srinivas Rao -V- D.A.Deepa
3.(2007) 4 SCC 511 : Samar Ghosh -V- Jaya Ghosh
4. AIR 2011 SC 2748 : Vinny Parmvir Parmar -V- Parmvir Parmar
5. AIR 2013 SC 415 : U.Sree -V- U.Srinivas

For Appellants - M/s. Asim Amitav Das
For Respondents - M/s. S.K.Mishra, J.Pradhan,D.K.Pradhan & P.P.Mohapatra

---

Date of hearing :13. 01.2015
Date of Judgment :16. 01. 2015

JUDGMENT

S.K. SAHOO, J.

"A happy marriage doesn't mean you have a perfect spouse or a perfect marriage. It simply means you've chosen to look beyond the imperfections in both."

-Fawn Weaver

This appeal has been filed by the appellant-husband against the judgment and order dated 28.9.2007 passed by the learned Judge, Family Court, Cuttack in Civil Proceeding No. 852 of 2006 in dismissing the divorce petition filed by him.

2. The appellant filed a Divorce Proceeding against respondent-wife on the ground of desertion and cruelty. It is the case of the appellant that some days after the marriage, the respondent started quarrelling with him and persuaded him to live separately from the joint family. To satisfy the respondent and to keep the family peace, the appellant shifted to the quarters in Sector-1 at Rourkela and stayed there with the respondent. The respondent insisted the appellant to bear the expenses of her parental house, the study expenses of her brother and also the treatment expenses of her mother. Though the appellant satisfied the demand of the respondent to some extent but when all the demands could not be fulfilled, the respondent picked up quarrel with the appellant. She was not performing the household works and staying at her parental house for most of the time and keeping away herself from the society of the appellant. The appellant tolerated the disturbance created by the respondent. Both of them were blessed with a female child in April, 1991 but the respondent did not change her attitude and she was keeping the child away from the appellant and was very cruel towards the friends and relatives of the appellant. The respondent also refused to keep sexual relationship with the appellant. It is further case of the appellant that on 6.3.1994, the respondent went away to her parental house taking some valuable gold ornaments, articles and cash along with the infant daughter during the absence of the appellant. The appellant attempted a lot to bring back the respondent to his company but failed.

The appellant filed a divorce proceeding under Section 13 of Hindu Marriage Act, which was registered as O.S. No. 2 of 1995 and the same was dismissed being not maintainable on 14.3.1995. He filed another divorce petition bearing O.S. No.13 of 1996, which was withdrawn on 22.4.1996 with a permission to file fresh suit. In the meantime the respondent left Rourkela and went to her native village at Puri. The appellant then filed another divorce petition vide C.P. No. 182 of 1996.

As the respondent did not contest in that proceeding, she was set ex parte and the marriage between the parties was dissolved on 3.9.1996. The respondent filed Misc. Case No. 138 of 1998 under Order 9 Rule 13 CPC to set aside the ex parte order, which was allowed and the case was posted for

hearing. The respondent filed a writ application before this Court vide OJC No. 11635 of 1995 to quash the entire proceeding pending before the Family Court but this Court directed to expedite the disposal of the divorce petition. Thereafter, the divorce petition was dismissed for default on 6.11.2002. There was a direction to the appellant to pay maintenance to respondent and their daughter and in that connection, Execution Case No.15 of 1997 was filed by the respondent. The respondent filed a criminal case against the appellant which corresponds to G.R. Case No. 1461 of 1997 in the Court of learned SDJM, Rourkela.

3. The respondent filed her written statement denying the averments made by the appellant in the divorce petition and contended that they shifted to Sector -1 house at Rourkela as there was only one bed room in the house of the appellant at Uditnagar and there were five members in the family for which it was not convenient for all of them to stay together. She further stated that there was good relationship between her and the appellant and the girl child was born on 10th April, 1991. It is the further case of the respondent that she discovered some love letters addressed to the appellant in her house and also found that the appellant had extra marital relationship with one Sunita Satpathy, who was a girl of immediate neighbourhood of the quarters of the appellant. When the respondent confronted to the appellant about such illicit relationship, she was subjected to ill treatment and cruelty. The appellant and his paramour got a child out of their illicit relationship and ultimately the appellant withdrew himself from the society of the respondent. It is the further case of the respondent that she was assaulted by the appellant and driven out of his house for which she and her daughter came back to the in-laws house at Uditnagar and took shelter there. The elders and relations of the families of the appellant made an attempt to patch up the dispute and differences between the parties, but the appellant did not obey them and expressed his intention for second marriage. It is the further case of the respondent that while she was staying at her in-laws house at Uditnagar, she received a notice in the divorce case vide O.S. No. 2 of 1995, which was dismissed by the learned Judge, Family Court, Rourkela. She further stated that she filed a case for restitution of conjugal rights vide O.S. No. 100 of 1995 and the judgment was delivered on 7.12.1996, but the appellant didn't obey the said order. It is the case of the respondent that the appellant was living with her beloved Sunita Satpathy since 2000 under one roof and they have also got one male child.

4. The divorce petition which was initially filed before the learned Judge, Family Court, Rourkela was transferred to the learned Judge, Family Court, Cuttack for disposal as per the judgement of this Court in TRP (C)No. 45 of 2005 vide order dated 14.11.2006.

5. It is not disputed by the parties that earlier three other divorce proceedings were instituted by the appellant against the respondent. The first one is O.S. No. 2 of 1995, which was dismissed as not maintainable on 14.3.1995, the second one is O.S. No. 13 of 1996, which was withdrawn by the appellant on 22.4.1996 and the third one is C.P. No. 182 of 1996, which was allowed ex parte on 3.9.1996 and the ex parte order was set aside on 22.2.1999 and thereafter the proceeding was dismissed for default on 6.11.2002.

6. From the side of the appellant, three witnesses were examined. P.W. 1 is the appellant himself, P.W. 2 is one Rabindra Kumar Swain and P.W. 3 is one Jagabandhu Behera. The appellant filed certain documents which were marked as exhibits. Ext. 1 is the certified copy of the order sheet in O.S. No. 2 of 1995, Ext.2 is the Xerox copy of the order in the OJC No. 11365 of 1999, Ext. 3 is the Xerox copy of the F.I.R. in Rourkela Mahila P.S. Case No. 10 of 1997 dated 16.9.1997, Ext. 4 is the notice of the SAIL, Rourkela Steel Plant to the petitioner to appear before the Mahila P.S., Rourkela and Ext. 5 is the copy of the judgement in C.P. No. 182 of 1996.

The respondent examined herself as D.W. 1, but no document has been exhibited from the side of the respondent.

7. The learned Judge, Family Court, Cuttack discussing the materials available on records held that the appellant was very loyal to the second wife and children and rigid to the respondent and their daughter. It was further held that after being aware that the appellant was staying with Sunita and her children, the respondent was mixing with the appellant and having physical relation with him and the appellant was exploiting her sentiment, love and affections. While deciding the question as to whether the husband has any fresh cause of action after 6.11.2002, which is the date of dismissal order of C.P. No. 182 of 1996, the learned Court further held there is no fresh cause of action to substantiate the grounds of cruelty and desertion and accordingly, the divorce petition was dismissed.

8. During course of hearing, learned counsel for the parties after taking necessary instruction submitted that there is no chance of reunion between

both the parties in as much as after obtaining the ex parte decree of divorce on 3.9.1996, the appellant has got married to Sunita Satpathy on 9.11.1998 and out of the second marriage, he has got two children namely, Debabrata Sahoo who was born on 25.11.1999 and Sibabrata Sahoo who was born on 23.2.2004. According to the respondent, she was staying separately from the appellant since 1996 and she was having a daughter, namely, Nirupama Sahoo.

9. The appellant filed Misc. Case No. 126 of 2014 before this Court for stay of operation of the judgment and order dated 7.5.2014 of the learned Judge, Family Court, Rourkela passed in Civil Proceeding No. 143 of 2008, which was filed by the respondent and her daughter namely, Nirupama Sahoo against the appellant under Section 25 of Hindu Adoptions and Maintenance Act, 1956 and the learned Judge, Family Court, Cuttack has directed the appellant to pay Rs. 7,000/- per month to the respondent and Rs.3,000/- per month to her daughter Nirupama Sahoo towards their maintenance from the date of application.

10. Learned counsel for the appellant submitted that since the parties are living separately since long and the appellant-husband has already got married for the second time and blessed with two children and in such circumstances, the respondent-wife is not inclined to live in the company of the appellant and the marriage has been irretrievably broken down between the parties, it would not be proper to compel one party to stay with the other and therefore, he submitted that the marriage between the appellant and the respondent should be dissolved by way of a decree of divorce and permanent alimony should be fixed.

Learned counsel for the respondent, on the other hand, while not opposing the prayer for grant of decree of divorce, submitted that the appellant is working in Rourkela Steel Plant and his income per month is around Rs. 70,000/- and therefore, the permanent alimony should be fixed at Rs. 25 lakhs so that the respondent can live a decent life and she can also maintain her daughter.

11. In case of **Naveen Kohli Vs. Neelu Kohli reported in AIR 2006 SC 1675**, the Hon'ble Supreme Court held as follows:-

> "68. The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles,

> trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case and as noted above, always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hyper- sensitive approach would be counter-productive to the institution of marriage. The Courts do not have to deal with ideal husbands and ideal wives. It has to deal with particular man and woman before it. The ideal couple or a mere ideal one will probably have no occasion to go to Matrimonial Court".

It is not disputed by the learned counsel for the appellant-husband as well as the respondent-wife that the appellant and respondent are staying separately since 1996. It is also not disputed that the appellant has already got married to one Sunita Satpathy and they are blessed with two sons namely Debabrata Sahoo and Shibabrata Sahoo. The separation for such a long period as well as the marriage of the appellant to another lady has created in unbridgeable distance between the two. We are satisfied that the marriage between the appellant-husband and the respondent-wife has irretrievably broken down and it is beyond repair on account of bitterness between the parties and they are not willing to stay together.

The Hon'ble Supreme Court in the case of **K.Srinivas Rao Vs. D.A. Deepa, reported in AIR 2013 SC 2176** has held as follows:-

> "26.....Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1995. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up, there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree".

12. We are of the view that the appellant-husband has caused mental cruelty to the respondent-wife and the situation has become such that the

respondent also cannot be asked to put up with such conduct of the appellant and live with him.

In case of **Samar Ghosh -Vs.- Jaya Ghosh reported in (2007) 4 SCC 511**, Hon'ble Supreme Court held as follows:-

> "101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing

injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty".

Having dispassionately considered the materials before us and the fact that the appellant-husband and the respondent-wife had been living separately for 18 years as of now and they are not interested to live with each other, it would be in the interest of both the parties to sever the matrimonial ties since the marriage has broken down irretrievably. Court grants a decree of divorce only in those situations in which the Court is convinced beyond doubt that there is absolutely no chance of the marriage surviving and it is broken down beyond repair. Since both the parties are not willing to stay with each other, even if we uphold the impugned judgment and order of the Judge, Family Court, Cuttack and refuse the decree of divorce to the appellant, there are hardly any chances for both of them staying together to lead a happy conjugal life and therefore, it is a fit case where a decree of divorce must be granted.

13. Now the question is what would be the proper quantum of permanent alimony.

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

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

courts have to be kept in mind while determining maintenance or permanent alimony."

In case of **U. Sree Vs. U. Srinivas reported in AIR 2013 SC 415**, it is held as follows:-

"33.....Be it stated, while granting permanent alimony, no arithmetic formula can be adopted as there cannot be mathematical exactitude. It shall depend upon the status of the parties, their respective social needs, the financial capacity of the husband and other obligations.....

34.....Be that as it may, it is the duty of the Court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The Court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man-made misfortune".

We have considered the respective submissions on the quantum of permanent alimony. It appears that the appellant-husband is serving in Rourkela Steel Plant and his gross earning per month as per the salary certificate filed by the respondent-wife is Rs.68,133/-(Rupees Sixty eight thousand one hundred thirty three) and after deduction under different headings, his net pay is Rs. 39,367/-. This was the position in October 2014. Taking into account in $1/4^{th}$ of the net pay of the appellant-husband as the entitlement of the respondent-wife towards her maintenance, it comes to Rs.10,000/- per month and thus annually it comes to Rs.1,20,000/-. The respondent-wife is now aged about 47 years.

Taking into the consideration the quantum of monthly earnings of the appellant-husband and the need of their respective families, we are of the view that it would be just and expedient to fix the quantum of permanent alimony under Section 25 of the Hindu Marriage Act, 1955 payable to the respondent-wife at Rs 20 lakhs.

Accordingly, the appeal is allowed and the impugned judgment and order is set aside and the marriage between the parties namely appellant-husband Kishore Kumar Sahoo and respondent-wife Smt. Baijantimala Sahoo is dissolved by a decree of divorce with a further direction under Section 25 of the Hindu Marriage Act, 1955 to the appellant to pay Rs. 20

lakhs to the respondent towards permanent alimony. The said amount of Rs. 20 lakhs (rupees twenty lakhs only) shall be deposited by the appellant-husband by way of bank draft before the trial court within a period of six months and the same shall be handed over to the respondent-wife by the trial Court on proper identification failing which the wife shall be at liberty to realize the same from the husband with due process of law. The parties shall bear their respective costs.

14. Before parting we would quote,

> ”Divorce isn't just the person, it's everything that goes with it - your kids, the adjustment, everything”.
>
> **-Peter Andre**

The appeal is allowed in the aforestated terms.

Appeal allowed.

2015 (II) ILR - CUT- 673

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

W.P.(C). NO.19875 OF 2013

UNITED SPIRITS LTD. ……..Petitioner.

.Vrs.

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

BIHAR AND ODISHA EXCISE ACT, 1915 – Ss. 22,23

Ownership of a premise can not be the determining factor for grant of license or for the purpose of levy of bottling fee – Impugned demand made vide letter Dt.17. 08 . 2013 is quashed – Direction issued that the amount deposited by the petitioner company may be refunded forthwith or the same may be adjusted against any excise dues of the petitioner. (Para 11)

For petitioner : Mr. Biswa MohanPattanaik. Sr. Adv
M/s. S.R.S. Samanta
For Opp. Parties : Additional Government Advocate.

Date of hearing : 04.08.2015
Date of Judgment: 17.08.2015

JUDGMENT

I. MAHANTY, J.

The petitioner, namely, United Spirits Limited have sought to challenge the demand of Rs.54,92,906/- raised by the Officer-in-Charge (Excise), M/s. United Spirits Limited, Ekamkana, Nimapara, Puri under Annexure-5 towards the differential bottling fee for the period from 11.04.2013 to 16.08.2013.

2. Mr. B.M. Pattanaik, learned Senior Advocate appearing for the petitioner submits that the petitioner-company had entered into a registered lease deed with one Heritage Distilleries Pvt. Ltd. (Annexure-2) dated 25.05.2013. In terms of the said lease deed, the petitioner-company were the lessor of the premises of the said Heritage Distilleries for a period of five years extendable thereafter on mutual term and, accordingly, made an application to the excise authorities for grant of license for producing IMFL at the said premises. It is stated on behalf of the petitioner that the necessary excise license No.01/2013-14 dated 11.04.2013 was granted in favour of the petitioner-company (Annexure-3) and was described as "license for compounding or blending of foreign liquor" and in the column of "locality where operations are to be carried out", it is stated as follows:

"In the lease-out premises of Heritage Distillery Ekamakona, Nimapada, District-Puri."

Apart from the aforesaid license, which was issued in Form-F.L.-13, the petitioner also has obtained a license (issued in Form F.L.-14) bearing No.04/2009-10 from the excise authorities which was termed as "License for bottling of portable foreign liquor" wherein the detailed of the licensee (petitioner) was mentioned and once again the location was described as leased out premises of Heritage Distillery Ekamakona, Nimapada, District-Puri. In the said license, it was noted that "license is hereby granted for the period from 11.04.2013 to 31.03.2014 holding license No.01/2013-14 for the

wholesale vend of foreign liquor for bottling of such liquor for sale at Orissa".

Clause-II of the said license contained as follows:

"The licensee shall pay bottling fee @ Rs.7/- per lpl of IMFL in respect of own brands and Rs.10.50/- in respect of other than own brand bottled in the unit as per Excise Policy for the year 2013-14. xxx "

3. It is stated that after the petitioner-company obtaining lease of the premises and the aforesaid two licenses in Form Nos. F.L.-13 & F.L.-14 respectively for compounding and blending of foreign liquor and for bottling of potable foreign liquor, he has also obtained a further license in Form-F.L.-1 towards license for foreign liquor warehouse for sale to the trade i.e. to other licensed dealers. Therefore, after obtaining necessary three licenses, the petitioner-company thereafter applied for and was granted approval of foreign liquor labels under Rule-41-A of the Board's Excise Rules, 1965 for three of its brands, namely, Derby Special PREMIUM WHISKY (Modified), Mc Dowell's No.1 Celebration MATURED XXX RUM (Modified) and Mc Dowell's No.1 PLATINUM SUPERIOR WHISKY (Modified).

4. The essential contention of the petitioner in this writ application is that the petitioner-company having the necessary licenses as noted hereinabove to bottling and blending of foreign liquor as well as to store for purpose of sale in Orissa produced the brands for which the approvals were granted to the petitioner under Rule 41-A of the Board's Excise Rules, 1965 and in terms of Clause-II of the license of bottling of potable foreign liquor (F.L.-14) made the necessary deposit of bottling fee "@Rs.7/- per lpl of IMFL" since the bottling of potable foreign liquor was brands owned by the petitioner-company itself as narrated hereinabove.

5. In the aforesaid circumstances as noted hereinabove, the demand came to be made on the petitioner-company by the excise authorities under Annexure-5 dated 17.08.2013, which is the subject matter of challenge in the present writ application.

6. A counter affidavit came to be filed on behalf of the State of Odisha through the Superintendent of Excise and the essence of the contention of the State was narrated in paragraph-7 of the said counter affidavit, which is quoted hereunder:

"7. That in rely to the averments made in paragraphs 6 & 7 of the writ application, it is humbly submitted that the petitioner was allowed earlier for bottling of IMFL in the plant of M/s Heritage Distilleries (P) Ltd., Ekamkona, Nimpara, Puri during the year 2011-12 and 2012-13 on the up basis and the unit M/s Heritage Distilleries Ltd. paid the bottling fee meant for other brand (i.e. Rs.9/- for the year 2011-12 and Rs.10/- for the year 2012-13). During this year M/s United Spirits Ltd. instead of tie up basis has been allowed for production of IMFL in the premises of M/s Heritage Distilleries (P) Ltd. on the basis of lease agreement by transferring license in their name for a period of five years with effect from 01.04.2013. But the matter remains the same that the Unit is continuing their production as has been done in the year 2011-12 and 2012-13 as aforesaid.

As per Section 23 of Bihar and Odisha Excise Act, 1915 and Rule 35 of Board's Excise Rules, 1965, the Unit M/s United Spirits Ltd. has not purchased the establishment/factory from Heritage Distilleries (P) Ltd. for which M/s United Spirits Ltd. cannot be treated as owner of the factory at Ekamkona, Nimapara. Hence, the unit M/s United Spirits Ltd. is liable to pay bottling fee meant for other brand @ Rs.10.50 per LPL as per clause-4(2) of the Excise Duty, Fee Structure and Guide Lines for the year 2013-14."

7. In the light of the dispute before this Court in the present writ application, the only question that arise for consideration in the present case is as to whether the petitioner would be liable to pay bottling fee @7/- per lpl of IMFL since it claims that the petitioner-company is bottling its own brands or Rs.10.50/- per lpl on the ground that earlier the petitioner had an agreement with Heritage Distilleries under which the said Heritage Distillery had earlier been bottling the products for the petitioner-company.

8. The aforesaid issue has to be seen in the factual backdrop of the case. It is not disputed that the petitioner-company had entered into an agreement with M/s. Heritage Distilleries Pvt. Ltd. in the earlier years i.e. 2011-12 and 2012-13 and it is also not disputed that during that period since Heritage Distillery were blending and bottling the IMFL products for the petitioner-company, the higher rate of bottling fee chargeable at the relevant time was being charged and collected by the excise authorities from M/s. Heritage Distilleries Pvt. Ltd.

However, upon the petitioner entering into a lease agreement with M/s. Heritage Distilleries Pvt. Ltd, the petitioner took over possession of the land, building and equipment of the said Heritage Distilleries on terms and conditions noted in the lease deed appended as Annexure-2 to the writ application. The petitioner-company thereafter made the necessary application for the various licenses as enumerated hereinabove. The State Excise Authorities had granted license to M/s. United Spirits Ltd. in Form-F.L.-13 for compounding and blending of foreign liquor and license for bottling of potable foreign liquor in Form No.F.L.-14 as well as license in Form No.F.L.-1 for storage of foreign liquor warehouse for sale in the State. In all these licensees, it is most important to note herein that the excise authorities were aware that the petitioner-company had entered into a lease deed with Heritage Distilleries and that is why the same is specifically indicated in the license as follows:

"Locality where operations are to be carried out" :- "In the lease-out premises of Heritage Distillery Ekamakona, Nimapada, District Puri".

In other words, it is clear therefrom that in the aforesaid licenses granted to the petitioner, the excise authorities were clearly informed of the lease agreement between the petitioner and Heritage Distilleries and based on such knowledge; necessary licenses were granted to the petitioner-company.

9. The explanation provided in Annexure-5 as to why the higher rate of bottling fee for other brands i.e. @ Rs.10.50/- per lpl ought to be charged, is apparently on the ground that the petitioner-company does not own the premises on which the business of the petitioner-company is being carried out. We find there to be no lawful justification for any such distinction being drawn for the purpose of levying and claiming a higher bottling fee. We do not find any where from the Bihar and Orissa Excise Act and/or Rules made thereunder that a person has to be the owner of the premises in order to be granted a license. Prior to grant of license, the excise authorities were provided with the copy of the lease deed and based on such knowledge and inspection carried out thereafter, the necessary licenses were issued in favour of the petitioner-company. We are also of the considered view that ownership of a premise cannot be the determining factor for the purpose of levy of bottling fee. The term bottling fee as it clearly indicates that the fee is to be charged for permitting compounding and bottling of foreign liquor whosoever may be licensed by the excise authorities to carry out the license

activities is compound under law to comply with the license conditions. It is most imperative to take note herein that undisputedly rather the brands manufactured by the petitioner-company are the brands which have been duly approved by the Board of Revenue, Odisha, Cuttack under cover of its approval letter dated 17.04.2013 under Annexure-4, which is extracted hereinbelow:

"BOARD OF REVENUE: ODISHA: CUTTACK
APPROVAL OF FOREIGN LIQUOR LABELS
UNDER RULE 41-A OF BOARD'S EXCISE RULES, 1965.
LA-13/2011-ORDER NO. /NIZ. DATED

Whereas M/s. United Spirits Ltd., Unit:-Nimapara, At/PO-Ekamkana-752114, Via- Nimapara, Dist-Puri, Odisha have applied for modified registration of their Foreign Liquor Labels for the year 2013-14 and have deposited the required fee of Rs.20,90,000/- (Rupees Twenty Lakh Ninety thousand) only vide HDFC Bank Ltd. B.D. No.027244 Dated 10/04/2013.

AND THEREFORE

In exercise of power vested under rule 41-A of the Board's Excise Rules, 1965, the Excise Commissioner, Odisha hereby do approve the following Foreign Liquor Labels for the year 2013-14 and authorizing the company to sale the Foreign Liquor under the following approved labels in their modified version subject to validity of license.

Sl. No.	Brand of the foreign Liquor	Proof Strength	size	
1	2	3	CIVIL	DEFENCE
1	Derby Special PREMIUM WHISKY (Modified)	75^0	750/375/180/90 ML	750 ML
2	Mc Dowell's NO.1 Celebration MATURED XXX RUM (Modified)	75^0	750/375/180/90 ML	750 ML
3	Mc Dowell's NO.1 PLATINUM SUPERIOR WHISKY (Modified)	75^0	1000/750/375/180/90ML	750 ML

In using the above labels, the firm should ensure that the patent and trademark laws and Packaged Commodities Rules are not infringed.

Sd/-
Excise Commissioner, Odisha."

10. In the light of the limited scope of dispute as noted hereinabove, it would be relevant also to take note of the Rule-41-A of the Board's Excise Rules, 1965, which is quoted hereunder:

"**41-A** (1) No foreign liquor which has been manufactured within Orissa in the manner prescribed in Part III above or foreign liquor which has been manufactured outside the State in India by licensed manufactures and allowed to be imported into the State, shall be stored in any warehouse or sale-to-trade premises or any retail or any other licensee's premises for the purpose of sale unless and until the brand name under which and the label with which it is to be sold has been approved by the Excise Commissioner, Orissa and a permit by the Excise Commissioner, Orissa and a permit has been granted by him authorizing sale under such brand name and with such label.

(2) The manufacture shall, after the bottles are filled, corked and capsuled, affix on each bottle a Label approved by the Excise Commissioner for the purpose of affixing such label. The labels shall contain such particulars as may be prescribed by the Board from time to time.

3.(a) The manufacturers licences to manufacture foreign liquor within the State shall apply for approval of brands and labels and for issue of permit to use such brand name and label directly to the Excise Commissioner, Orissa. The manufacturers licenced to manufacturer foreign liquor outside Orissa shall apply to Excise Commissioner, Orissa for approval of the brands and labels and for issue of permit through their respective Excise Authority of the State.

(b) Applications for approval for a new brand name of foreign liquor mentioned at Sub-rule(1) and the labels corresponding to it, shall be made to the Excise Commissioner, Orissa, at least two months prior to its sale or offer for sale; but the application for renewal of approval of existing brand and label shall be made to the Excise Commissioner, Orissa, within the last working day of the months of February each year.

(c) The Manufacturer licenced to manufacture Foreign Liquor within the State and outside the State of Orissa besides 750 ml., 375 ml., 180 ml. and 90 ml. may also manufacture I.M.F.L. and bottle in quantities of 60 ml. and 1000 ml. size for sale only in I.M.F.L. OFF shops. They shall have to apply for approval of the registration of the brands and labels for sale to trade inside the State of Orissa.

4. All applications for approval of brands and labels and renewals of such brands and labels and for issue of permit shall be accompanied by such fees as may be notified by the Board from time to time.

5. (a) The Excise Commissioner, Orissa before approval of Brands and labels and issue of permit, shall make such enquiries as deemed necessary and may also required samples of the liquor to be chemically examined before such approval to ensure that the liquor meets required standard;

(b) The correct and up to date record of all Brands and labels which are approved or whose approval is renewed from time to time shall be maintained by the Excise Commissioner, Orissa.

(c) The list of Brands which are approved by the Excise Commissioner, Orissa up to 28th of February every year shall be published by him within 31st March following and offered for sale at such price as may be fixed by the Excise Commissioner.

6. The Excise Commissioner, Orissa may refuse approval of brand and label if he is not satisfied.

(a) in the case of foreign liquor bottled in India, that the bottler whose name is stated in the application holds a valid licence from the Government or any State or Union Territory in India to distil, compound, blend or bottle spirits or brew beer, and

(b) in the case of foreign liquor brought into India from any foreign country and bottled in India, that the brand name under which or the label with which it is proposed to be sold in distinguishable from other brand names or labels which have already been approved or whose approval has already been applied for:

Provided that while refusing to approve a particular or brand the Excise Commissioner, Orissa will state reasons to be recorded in writing and such refusal shall be made after giving the affected party a reasonable opportunity of being heard.

7. The permit which has been once issued shall remain valid until 31st of March next.

8. A permit already issued may be withdrawn at any time by the Excise Commissioner for reasons to be recorded in writing and after giving the affected party reasonable opportunity of being heard.

11. In the light of the circumstances that exists in the present case, it is clear therefrom that the petitioner i.e. United Spirits Ltd. having been granted the necessary licenses as narrated hereinabove and the Board of Revenue having approved the brands which could be produced from the petitioner's licensed premises have to be accepted as the petitioner's own brands and, consequently, the bottling fee of Rs.7/- per lpl of IMFL as applicable to own brands which admittedly had been deposited by the petitioner-company is payable. Taking any converse view than the one we have arrived at would effectively result in stating that even if a person obtained a necessary excise license to carry out excise activities and produces his own brands, yet shall have to pay a higher bottling fee on account of the fact that the premises in which the licensed operation take place do not belong to him and are being operated by him through a lease deed. We are afraid, we cannot accept such submission. The Excise Act does not contemplate the ownership of the premises where the licensed activities could be conducted. Under the Excise Act several licenses are contemplated such as licenses for IMFL ON shops (Bars) or IMFL OFF shops and in none of such cases, the ownership of the premises is ever a pre-requisite for grant of license. Persons who hire such location either on rent or on lease are being granted necessary licenses for carrying on the licensed activities. In the present case, the excise authorities having granted necessary licenses to the petitioner-company and its brands having been approved by the Board of Revenue under Rule-41-A of the Board's Excise Rules, 1965, no other view other than the conclusion arrived at by us can be taken. The Excise Authorities may only charge such bottling fee on the petitioner as applicable to its own brands. We make it clear that if the petitioner manufactures brands of other companies, the higher bottling fee for other brands shall obviously charged. Consequently, the writ application is allowed and the letter dated 17.08.2013 under Annexure-5 is quashed with a further direction that the amount deposited by the petitioner-company may either be refunded to it forthwith and/or adjusted against any excise dues of the petitioner-company.

Writ petition allowed.

2015 (II) ILR - CUT- 682

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

W.P.(C) NO. 10741 OF 2015 (WITH BATCH)

STATE PRIVATE INDUSTRIAL TRAINING CENTER ASSOCIATIONS, ORISSA ……..Petitioner

.Vrs.

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

EDUCATION – All India Trade Test – Notification fixing 54 Nos. of Government and 80 Nos. of private institutions as Trade Testing Centers – Notification challenged being discriminatory between the students who studied at Government ITI and Private ITIs – No student to appear at the theory paper in the institute where they undertake their education – Direction issued to the SCTE&VT to ensure fair testing process and strict compliance of the stipulation issued by DGE&T in the conduct of examinations – Copy of the order and copy of the DGE&T's direction be sent to the secretaries School & Mass Education, Secondary Education and Higher Education to be made applicable for all other examinations conducted under various other bodies in the state – Direction issued to the Director Technical Education to take civil and criminal action against fake, fraudulent or unaffiliated ITIs.

For Petitioner : M/s. D.Routray
For Opp. Parties : Mr. B.K.Dash

Date of order 10.07 .2015

ORDER

I.MAHANTY.J.

This batch of writ application has come to be filed seeking to challenge the Notification dated 29.5.2015 under Annexure-6, by which order The State Council for Technical Education and Vocational Training Odisha on the basis of recommendation of the Centre Selection Committee and guidelines prescribed by DGE&T, Government of India, New Delhi had fixed 54 nos. of Government and 80 nos. of Private Institutions as Trade Testing centres to conduct the All India Trade Test in July/August, 2015 and January/February, 2016 under the semester pattern vide letter dated 29.5.2015.

Learned counsel for the petitioner submits that this exercise had already been carried out earlier by the learned counsel for the State under Annexure-4 dated 29.12.2014 whereby the Industrial Training Institutions have been identified as Testing centres for conducting examinations to be held in semester pattern during February and August, 2015 (except 2nd Semister in February, 2015). It is asserted that all the said institutions mentioned under Annexure-4 satisfied the requirement according to the eligibility criteria fixed by the DGE&T. The petitioners' assertion is that the Trade Testing Centre which had been identified under Annexure-4 most of them have now not been declared as Trade Testing Centres under Annexure-6. Hence the present challenge.

Mr. R.K.Mohapatra, learned Government Advocate places reliance on the DGE&T's Circular under Annexure-A/3 to the affidavit filed by opposite parties 3 & 4 dated 19th December, 2014 which is the direction issued by the Ministry of Labour and Employment, Directorate General of Employment & Training stipulating the manner in which the examination centres are to be determined for both theory and practical examinations at various recognized ITIs.

Learned counsel for the petitioners asserts that the said directives of the DGE&T, in so far as the direction contained in paragraph-2(a) of the said Notification concerned to the following extent:

> "xx xx in order to resolve the issue while deciding the examination center the State Directorate will <u>first exhaust the possibilities of making the Government ITIs/Govt. aided Testing centres and then they can make Private ITI's as a Testing centre</u> with a intimation to DGE&T and subjected to the following condition:-

a. Pvt. ITIs should have all the infrastructural facilities.
b. <u>No private ITIs will be made as self testing centre</u>.
c. Private ITI must be NCVT Affiliated & having minimum of 8 units.
d. The students of two ITIs made as a testing center should not be mutually interchanged.
e. The students of any ITIs should not be allowed in same trade testing center consecutively for two years.
f. The private ITIs should not have more than 500 students and within the vicinity of 25 km of ITI where the trainees are undergoing training.

g. All trade testing centers should have one govt. official must be appointed as examination superintendent (not below the rank of instructor)."

Learned counsel for the petitioners essentially challenge the Clause-b as noted hereinabove. Due to such stipulation, the Govt. ITIs were excluded from the said bar and consequently, there was discrimination between the students who studied at Govt. ITIs and Private ITIs.

We are of the considered view that the said assertion is valid and no distinction ought to have been made by DGE&T between Govt. ITIs and Private ITIs but we strongly support and approve the other conditions imposed by the DGE&T in order to achieve fairness/transparency in the examination process.

We are however informed by the learned counsel for the SCTE&VT (OP-3) as well as the learned counsel for the petitioner that due to inadequacy of time, the SCTE&VT has directed practical examination for this year (2015) alone to be conducted at the institute where the students have studied. Therefore, for the present year the only dispute relating to location of the Test centre for the theory papers.

Since we are of the prima facie in agreement with the petitioner's contention regarding the discrimination, we inherent in Clause-(b) above direct the Director of Technical Education to submit a revised list of Test centers (petitioners-institutes) and we had specifically directed that no student should appear at the theory paper in the institute where they are undertaking their education (i.e. there should be "No distinction between students of Govt. ITIs or Private ITIs" in the matters of examination). In respect to the discussion made in Court, an affidavit has been filed today by Mr.Bishnu Prasad Sahoo, the Director of Technical Education and Training, Odisha, listing the Trade Testing Centres which will be tagged in the AITT July/August, 2015. The Director has ensured that fairness/discrepancies is maintained and all ITI students appear at the theory papers in other institutions and not in the institution where they were studied.

Mr. Bose, learned Assistant Solicitor General brings to our notice that pursuant to the earlier direction issued by the SCTE & VT under Annexure-6, the question papers as well as the admit cards have already been issued for the theory papers which is scheduled to start from 30th July, 2015. In view of our approval of the Trade Testing Centres, as appended to the affidavit filed

in Court today, we direct the Director to communicate this list to the D.G.E & T, New Delhi forthwith with the request to recall the admit cards as well as the question papers which may have already been dispatched and to once again issue fresh admit card and questions papers for the purpose of relocated Trading Testing Centres at the earliest. The D.G.E. & T has also pointed out certain difficulties for locating all Testing Centres in particular districts in paragraph-5 which is quoted hereinbelow:

> "5. That it is humbly submitted that all the examinees of Govt. I.T.Is. shall appear the above Examination in Private I.T.Is. Trade Testing Centre except Govt. I.T.I., Khariar Road, Nuapada, Govt. I.T.I., Phulbani, Govt. I.T.I., Umarkot and Govt. I.T.I., Sonepur, who will appear the said Examination in Govt. Polytechnics in their respective districts as there is no availability of any other alternative arrangement such as Private I.T.Is.
>
> As there is no Govt. or Private I.T.Is. of Polytechnics in the district of Malkangiri there is an exceptional that the students of Malkangiri I.T.I. shall appear the above examination in I.T.I., Malkangiri."

We find for the reasons above as noted in the affidavit, due to the difficulties faced, we approve the Trade Test Centres as narrated in paragraph-5 above.

We also record our appreciation of the assistance provided by the learned counsel for the petitioner, learned counsel for the State as well as learned Assistant Solicitor General in this regard. Since the attempt by this Court is to try and achieve the fair testing process, so that, the students obtain such diplomas will enable them to seek employment in appropriate place. The sanctity attached to the examinations are of prime importance. Therefore, we also direct the SCTE&VT to ensure strict compliance of the stipulation issued by the DGE&T in the conduct /supervision of the examinations.

We further direct that the copy of this order be sent to the Secretaries, School & Mass Education, Secondary Education and Higher Education and also copy of the D.G.E. & T's direction to consider similar stipulations to be made applicable for all other examinations conducted under various other bodies in the State.

For the future years, it must be ensured that the Trade Testing Centres (for both theory and practical) should follow the DGE&T's direction as modified by this order are strictly complied with.

Since practical examinations for this year have already been scheduled to be held, we refrain from interfering with the same keeping the interest of the students in mind.

We also make it further clear that in future as explained by the Director in the affidavit in paragraph-5, it shall remain open for SCTE&VT to consider difficulties and take such steps as may be practical.

It is also been brought to our notice in course of hearing that various institutions which are unaffiliated and unapproved I.T.Is are flourishing, consequently thereby putting in jeopardy to the lives of numbers of poor students of the State. Consequently, we feel it appropriate to direct the SCTE&VT to publish both in the print as well as the visual media, list of institutions which are duly approved and put out warning to both the parents as well as the students that, the students should only seek admission to the approved/affiliated I.T.Is. Further the Director of Technical Education shall immediate take steps both civil and criminal actions against those fake, fraudulent or unaffiliated ITI in order to ensure that such sprouting of unlawful ITIs are brought to an immediate stop.

We further direct the Director, Technical Education shall take all necessary step to depute an officer to go to Delhi to the office of the DGE&T to ensure necessary compliances of the directions made herein and to ensure that examinations as per scheduled fixed must be adhered.

With the aforesaid observations and directions, the writ petitions are disposed of.

Urgent certified copy of this order be granted on proper application. Free copies of this order may be handed over to the learned counsel for the State as well as the learned Assistant Solicitor General for necessary communication and compliance.

Writ petitions disposed of.

2015 (II) ILR - CUT- 687

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

W.P.(C) NO. 23473 OF 2013

M/S. JAI BALAJI JYOTI STEELS LTD. ……...Petitioner

.Vrs.

DY. COMMISSIONER OF SALES TAX, ROURKELA-II CIRCLE, PANPOSH & ORS. ……...Opp. Parties

(A) ODISHA VAT ACT, 2004 – S.43

Escaped turnover – Fraud case – Whether the Assessing Officer is justified in insisting the petitioner-dealer for production of books of account before supplying the certified copy of the seized documents and reason for reopening the assessment ? Held, yes.

Issuance of copies and supply of reasons are wholly unconnected with production of regular books of account as there is ample scope for manipulation – Action of the petitioner-dealer in not producing the books of account pursuant to the statutory notice and his plea that the same would be produced after receipt of copies of the seized documents is contrary to law and malafide.

(Paras 15, 16)

(B) ODISHA VAT ACT, 2004 – S.43

Proceeding initiated U/s. 43 of the Act – Assessee is entitled to be heard at two stages i.e, (i) in course of inspection of the business premises till submission of the report by the inspecting officer, (ii) after commencement of the re-assessment proceeding by issuance of notice for assessment of tax on escaped turnover till order under section 43 of the Act is passed.

In this case petitioner-dealer failed to explain ten sets of documents found by the inspecting team – He has also failed to produce the books of account even though sufficient opportunities were afforded to him – Held, it can not be said that the Assessing Officer without assigning any reason has passed the impugned order of assessment in violation of Rule 50(4) of the OVAT Rules, 2005.

(Paras 19, 30, 31)

Case Laws Referred to :-

1. 1997 105 STC 112 : Kanak Cement Pvt. Ltd. vs. Sales Tax Officer,

(Orissa)

2. (2003) 259 ITR 19 (SC) : G.K.N. Driveshafts (India) Ltd. vs. Income Tax Officer.

For Petitioner : Mr. J.Sahoo, Sr. Adv. & Alok Mohapatra
For Opp. Parties : Mr. R.P.Kar, Standing Counsel

Date of judgment: 10.02.2015

JUDGMENT

B.N. MAHAPATRA, J.

The present writ petition has been filed challenging legality/validity of the order of assessment dated 17.07.2013 passed under Section 43 of the Orissa Value Added Tax Act, 2004 (for short, OVAT Act') by opposite party No.1-Deputy Commissioner, Sales Tax, Rourkela Circle-1, Panposh for the tax period 01.04.2008 to 20.05.2011 on the ground that the said order of assessment is illegal, arbitrary, without jurisdiction and has been passed in gross violation of principles of natural justice. The further prayer of the petitioner is to direct the opposite party No.1 to release the seized documents/statements to the petitioner within a stipulated period of time.

2. Petitioner's case in a nutshell is that the petitioner at the relevant time was a registered dealer under the provisions of the OVAT Act. For the tax period 01.04.2006 to 30.03.2011, the petitioner had been assessed under Section 42 of the OVAT Act vide assessment order dated 30.03.2011. The petitioner has not been assessed under the OVAT Act under Sections 39, 40, 42 and 44 for the period 01.04.2011 to 25.05.2011. Opposite Party No.2, STO, Investigation Unit, Rourkela Circle-2, Panposh visited the place of business of the petitioner- Company on 20.05.2011. On the date of inspection, without carrying on weighment of the physical stock, Investigating Officer alleged suppression of sale/purchase turnover. Opposite party No.2 without actual verification of the books of account and physical stock at the time of visit wanted production of accounts at his office for which notice in Form VAT 401 was issued to the petitioner fixing the date to 27.05.2011. In course of inspection, opposite party No.2 seized note books, files, documents vide seizure list dated 20.05.2011. Opposite party No.2 submitted the ex-parte report alleging suppression of purchase/sale turnover against the petitioner suggesting assessment of escaped turnover and tax for the aforesaid tax period. Thereafter, proceeding under Section 43 of the

OVAT Act for the tax period 01.04.2008 to 20.05.2011 was initiated by issuing notice dated 28.03.2012 in Form VAT 307 fixing the date for production of regular books of account and documents to 10.05.2012. On the date fixed, i.e., 10.05.2012, the petitioner appeared through Advocate and filed an application for supply of copies of documents seized by opposite party No.2 on 20.05.2011. The petitioner has also applied to the Assessing Officer for grant of copy of the order sheet and copy of the statement of the Assistant General Manager (Commercial), Sri S.Ladia recorded during inspection and to supply the reasons of reopening the assessment. Opposite party No.1-Deputy Commissioner of Sales Tax, Rourkela-II Circle, Panposh without granting copies of the seized documents and statements merely adjourned the proceeding from time to time and ultimately on 17.07.2013 the impugned order of assessment was passed raising tax and penalty to the tune of Rs.28,43,57,055.00. Hence, the present writ petition.

3. Mr.J.Sahoo, learned Senior Advocate appearing for the petitioner vehemently argued that the Assessing Officer has committed grave error of law in insisting the petitioner to produce the regular books of account and documents, before granting copies of seized documents to the petitioner. The Assessing Officer has legal obligation to release the note books/documents, which were seized from the petitioner and proposed to be utilized in the assessment/reassessment proceeding to the detriment of the assessee. Placing reliance on the orders of this Court in the case of M/s Amar Jyoti Granite (India) Private Ltd. Vs. Sales Tax Officer passed vide order dated 18.01.2007 in W.P.(C) No.15658 of 2006 and M/s. Sarada Store vs. Sales Tax Officer [OJC No.9381 of 1995] disposed of on 11.01.1996, it was submitted that the opposite party No.1 should have granted release of seized documents after keeping authenticated copy of the same being signed by the assessee. No reasonable opportunity of hearing was afforded to the petitioner to produce the books of account. Placing reliance on the judgment of this Court in the case of *Konark Tyres & Trade Vs. State of Orissa & others, (1996) 100 STC 74 (Orissa) and Geeta Industries Ltd. Vs. Commissioner of Sales Tax, (1996) 100 STC 48 (Orissa)*, it was submitted that the Assessing Officer ought to have communicated the reasons for initiating reassessment proceeding. It was further argued that the learned Assessing Officer has reproduced various figures submitted by opposite party No.2 and without any deliberation and application of judicial mind, as required under Rule 50(4) of OVAT Rules, the Assessing Officer endorsed the allegation raised in the report. Opposite party No.1 has simply noted the seized documents and number of written

pages consisting dispatch/sale of sponge iron, iron ore fines, coal fines and accepted the report.

4. The petitioner in the present case cooperated with the Inspecting Officer. The action of opposite party No.1 in retaining seized documents for more than six months is in violation of provisions of Section 73(7) of the OVAT Act. The impugned assessment order has been passed in violation of principles of natural justice as no reason has been assigned for raising such demand. Such action of the Assessing Officer is contrary to the law laid down by the Hon'ble Supreme Court in *CCT Vs. Shukla and Brothers*, (2010) 4 SCC 785. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Steel Authority of India Limited Vs. S.T.O., Rourkela (2008) 16 VST 181 (SC) and Raj Kishore Jha Vs. State of Bihar (2003) 11 SCC 519*, Mr.Sahoo submitted that reason is the heart beat of every conclusion and without it the same becomes lifeless. Mr.Sahoo further submitted that as in the meantime, opposite party No.1-Assessing Officer disposed of the assessment proceeding by an ex- parte order, no prejudice will be caused to the interest of the opposite parties to return the seized documents to the petitioner and after granting an opportunity of hearing to the petitioner and examining the regular books of account to redo the assessment. While concluding his argument, Mr. Sahoo submitted that if this Court is not inclined to grant the relief claimed in the writ petition on merit, the petitioner may be given liberty to avail the alternative statutory remedy by way of filing appeal.

5. Mr.R.P.Kar, learned Standing Counsel for the Commercial Taxes Department submits that there is no infirmity and/or illegality in the impugned assessment order passed under Section 43 of OVAT Act. The petitioner had been assessed under Section 39 of OVAT Act for the period 01.04.2011 to 25.05.2011 before initiating proceeding under Section 43 of OVAT Act. Placing reliance on the judgment of this Court in the case of *Lakhiram Jain and Sons vs. Sales Tax Officer, Rayagada Circle, Rayagada and another, (2009) 21 VST 280 (Orissa*), Mr. Kar submitted that in the facts and circumstances of the case, the petitioner is obliged to produce the books of account first and then may ask for copies of the seized documents to give its reply against the allegations raised on the basis of seized documents and physical stock found on the date of inspection. This is necessary as during the course of inspection and thereafter the petitioner-dealer failed to produce the books of account before the Inspecting Officer. The apprehension of the

Department is that the transaction noted in the seized documents were not recorded in the regular books of account maintained by the petitioner and issuance of certified copies of those documents would give scope to the petitioner to manipulate its books of account in line with seized documents. It was further submitted that reasonable and ample opportunities have been afforded to the petitioner to explain the documents seized in course of inspection and thereafter by the Inspecting Officer as well as by opposite party No.1-Assessing Officer. But the petitioner did not avail the same by producing the books of account on some plea or other which is not legally sustainable. The petitioner having not approached this Court with clean hands it is not entitled to any discretionary relief. The averments made in the writ petition are misleading.

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

(i) Whether in the facts and circumstances of the case, the Assessing Officer is justified in insisting production of books of account before supplying the certified copy of seized document and reason for reopening the assessment?

(ii) Whether reasonable opportunity of hearing has been afforded to the petitioner and thereby the principle of natural justice has been duly complied with before passing the impugned order of assessment?

(iii) Whether opposite party No.1-Assessing Officer is justified in passing the impugned order ex parte?

(iv) Whether the Assessing Officer has passed the impugned assessment order assigning basis/reasoning for determination of the escaped turnover and tax due thereon and thereby the principle of natural justice has been duly complied with?

(v) Whether the Assessing Officer is justified in accepting and relying on the allegations raised in the report in absence of any explanation furnished by the dealer to rebut the same despite availing several opportunities?

(vi) Whether in the facts and in the circumstances of the case, it would be appropriate/legally permissible to set aside the ex parte assessment order and direct the Assessing Officer to return the seized document of the petitioner and after granting an opportunity of hearing to the

petitioner and examining the regular books of account with reference to the seized documents to redo the assessment and by that no prejudice will be caused to the interest of the State?

(vii) Whether the prayer of the petitioner to grant it liberty to prefer appeal in case it fails to succeed in the present writ petition can be accepted?

7. Question No.(i) is as to whether the Assessing Officer is justified in insisting production of books of account before supplying certified copies of the seized documents and reason for reopening the assessment.

Undisputed facts are that the dealer-petitioner carries on business in manufacturing and sale of sponge iron & M.S. Ingot. For the purpose of manufacturing of sponge iron the dealer, inter alia, uses iron ore, coal and dolomite as raw materials. For manufacturing of M.S. Ingot, the dealer uses sponge iron, pig iron M.S. Scrap, Ferro waste, scrap, slag, C.I. mould C.P.C. and silicon manganese as raw materials. The dealer effects sales inside the State, in course of Inter-state trade and commerce as well as in course of export.

On 20.05.2011, opposite party No.2-Sales Tax Officer, Investigation Unit, Rourkela-II, Panposh visited the place of business of the petitioner-company and in course of inspection, the Inspecting Officer seized the books of accounts consisting of note books, files and other documents vide Annexure-B/1 attached to the petitioner's additional affidavit dated 12.01.2015 as he has reason to believe that the transactions noted therein apparently revealed evasion of tax revenue. The books of account consisting of note books, files and other documents seized vide Annexure-B/1 on the date of inspection shall hereinafter be referred to as "seized documents". During inspection books of account statutorily required to be maintained were not produced before the Inspecting Officer. Subsequently, on receiving a fraud case report from the Deputy Commissioner of Commercial Taxes, Enforcement Range, Sambalpur (hereinafter referred to as "Inspecting Officer"), a proceeding under Section 43 of the OVAT Act was initiated by issuing notice dated 28.03.2012 for assessment of tax on escaped turnover in Form VAT 307 for the above tax period.

In the said notice dated 28.03.2012, the petitioner was informed that the whole/part of sale and purchase for the aforesaid tax period has escaped assessment for which the dealer was required to appear before the opposite party No.1-Deputy Commissioner of Sales Tax, Rourkela Circle, Panposh,

Sundargarh on 10.05.2012 with the books of account relating to his business maintained as per OVAT Act and Rules framed there-under. By the said notice, the dealer-petitioner was further informed that in the event of its failure to comply with the terms of that notice, the opposite party No.1 shall proceed to assess the petitioner under Section 43 of the OVAT Act to the best of his judgment. The petitioner-dealer was also directed to show cause as to why in addition to the amount of tax that may be assessed on it, a penalty equal to twice the amount of tax assessed shall not be imposed on it under sub-Section (2) of Section 43 of the OVAT Act.

8. On receiving the aforesaid notice dated 28.03.2012, the petitioner made an application on 10.05.2012 before opposite party No.1-Assessing Authority stating therein that, **"**production of Books of Account could not be possible unless we receive certified copy of the documents seized by the Investigation Unit, Rourkela from our factory at Teinsar dated 20.05.2011. Therefore, we request your goodself to kindly allow us time to produce books of account after we receive certified copy of the documents as applied for.**"**

At this juncture, it may also be relevant to refer Annexure-4 series attached to the writ petition which contain copies of the applications filed by the petitioner-dealer before the Assessing Officer on various dates. Copy of the application dated 16.07.2013 contains similar reason for not producing books of account. In that application, it is mentioned that **"**we have not yet received the certified copy of the documents as applied for on 10.05.2012. Unless and until certified copy of the above documents is received we are unable to clarify the allegations made by the Investigation Unit, Rourkela in the said report.**"** Letter dated 18.10.2012 reveals that the dealer asked for the reason of reopening the assessment. Further, vide letter dated 27.08.2012, the petitioner intimated opposite party No.1-Assessing Officer that **"**we request your goodself to kindly intimate us the reason for reopening the case for the period from 01.04.2008 to 20.05.2011 and after which we shall be able to produce books of account as called for.**"** Again vide letter dated 30.09.2012, the petitioner intimated opposite party No.1-Assessing Authority that **"**unless and until the report is confronted, the reasons for reopening the case is intimated as well as certified copy as applied for is issued, we will be not in a position to produce the documents for verification**"**.

9. Now the question arises whether the dealer-petitioner is justified to impose any pre-condition(s) to produce the books of account, i.e., only after receipt of the certified copy of the seized documents and reason for reopening the assessment etc., the petitioner would produce the books of account.

10. As it appears, the Assessing Officer insisted upon production of the books of account time and again without issuing certified copy of the seized documents and intimating the reason for reopening the assessment.

Let us also examine whether the Assessing Officer is justified in insisting upon production of regular books of account before supplying the copy of the seized documents and the reasons for reopening the assessment.

11. At this juncture, it would be appropriate to refer to the judgment of this Court in the case of ***Lakhiram Jain and Sons*** (supra), wherein, the question that fell for consideration before this Court was whether the Assessing Officer is justified in insisting upon production of the books of account for verification before issuing certified copies of the seized documents.

This Court in the said case, taking note of several judgments of this Court and Hon'ble Supreme Court including judgment in the case of ***Kanak Cement Pvt. Ltd. vs. Sales Tax Officer, [1997[105 STC 112 (Orissa)*** and ***G.K.N. Driveshafts (India) Ltd. vs. Income Tax Officer, (2003) 259 ITR 19 (SC),*** held as follows:

> "...Needless to say that an assessing authority is entitled to collect the materials behind the back of the assessee. It is not necessary that all the materials so collected by the assessing authority need be confronted to the assessee. Only those materials which the assessing authority wants to utilize against the assessee in assessment is bound to be disclosed to the assessee. In appropriate cases, the assessee can also demand for cross-examination of any person who stated something adverse to him which the assessing authority wants to utilize against the assessee."

Thereafter, this Court held at which stage the seized documents are to be supplied to an assessee. The relevant portion of the said judgment is reproduced below:-

> "Therefore, it cannot be said that the assessing officer has committed any error in insisting upon production of books of account before issuing the certified copy of the seized materials. Production of books of account prior to issuance of certified copy of the seized materials is necessary to rule out the possibility of preparation of accounts in line with the seized documents. This has become further necessary in this case as at no stage books of account were produced earlier at the time

> of inspection or before the assessing officer. However, we make it clear that where in the course of inspection the inspecting officer seizes incriminating materials as well as regular books of account from the business premises of a dealer, the assessing officer or the inspecting officer shall supply copies of the seized regular books of account and incriminating material (s) to the dealer if he asks for the same before asking the dealer for furnishing his explanation in connection with any proceeding under the OVAT Act."
>
> (*underlined for emphasis*)

12. In the instant case, undisputedly, the petitioner did not produce its regular books of account at the time of inspection in its premises on 20.05.2011. It may be relevant to mention here that Section 61(2) of the OVAT Act requires the dealer to keep all its books of account in its place of business. Thereafter, the Inspecting Officer also allowed sufficient time to the petitioner for production of the books of account for the purpose of examination of the same with reference to the seized documents and for this purpose fixed the date to 18.06.2011 and 15.07.2011 on which dates the dealer-petitioner did not produce the same.

The petitioner also did not produce the regular books of account before the Assessing Officer, though several opportunities were provided to the petitioner. On the other hand, it imposed a precondition that only after receiving copy of the seized documents and reason of reopening it will produce the books of account. Such a plea has no legal support.

13. So far as supply of reason for reopening of assessment is concerned, it may be noted here that vide notice dated 28.03.2012 in Form VAT-307 issued under Sub-rule (1) of Rule 50 for initiating reassessment proceeding, the petitioner was intimated that it appeared to the Assessing Officer that its whole/a part of turnover of sales/purchases for the tax period 01.04.2008 to 20.05.2011 has (i) escaped assessment, (ii) has been under assessed. Needless to say that the petitioner is entitled to be intimated the detailed reason as to why it appeared to the Assessing Office that its turnover of sales/purchases for the aforesaid tax period has escaped assessment and/or has been under assessed. Such detailed reason is nothing but the contents of the seized documents which were seized in course of inspection. In the preceding paragraphs a detailed discussion has been made as to why the contents of the seized documents cannot be supplied before production of the regular books of account. The same reason is applicable as to why before production of the

regular books of account the detailed reason for initiating reassessment proceeding cannot be supplied to the dealer-petitioner.

14. At this juncture, it may be appropriate to reproduce here the relevant portion of the judgment of the Hon'ble Supreme Court in the case of ***G.K.N. Driveshafts (India) Ltd. (supra),*** wherein, it is held as under:

> "....when a notice under section 148 of the Income-tax Act, 1961, is issued, the proper course of action for the noticee is to file a return and, if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish the reasons within a reasonable time".
>
> (*underlined for emphasis*)

15. It needs to be noted that production of the books of account is not dependent on the receipt of copies of seized documents and/or knowing of reasons for reopening the assessment. The regular books of account are required to be maintained statutorily and to be in custody of the petitioner. The Assessing Officer had issued notice for production of the regular books of account in the custody of the petitioner. Issuance of copies and supply of reasons are wholly unconnected with production of the regular books of account. As noted (supra), there is ample scope for manipulation. It was open to the petitioner to contend that all transactions noted in seized documents are entered in the regular the books of account.

16. In view of the above, the Assessing Officer is justified in insisting upon the production of the books of account before supplying certified copy of the seized documents and reason for reopening the assessment and the action of petitioner-dealer in not producing the books of account pursuant to the statutory notice and subsequent intimation on the plea that the same would be produced after receipt of copies of the seized documents is contrary to law and mala fide.

17. The order of this Court dated 11.01.1996 passed in W.P.(C) No.9381 of 1995 and the order of this Court dated 18.01.2007 passed in W.P.(C) No.15658 of 2006 are of no assistance to the petitioner, since, in those cases the Department has seized the regular books of account of the dealers and in the first case the petitioners had made a prayer to release those regular books of account for the purpose of producing before the Sales Tax Officer in reassessment proceeding under Section 12(8) and in second case for tax audit, this Court directed release of those books of account after keeping

authenticated copy of the same. In the instant case, the regular books of account have not been seized by the Department and the same are lying with the petitioner.

18. Questions No.(ii) and (iii) being interlinked, they are dealt with together.

The questions are whether reasonable opportunity of hearing has been afforded to the petitioner and thereby principle of natural justice has been complied with before utilizing the incriminating materials seized from its business premises against the petitioner and Assessing Officer is justified in passing the impugned order *ex parte*.

19. When a proceeding under Section 43 of the OVAT Act is initiated on the basis of a report submitted by any agency, the assessee is entitled to be heard at two stages, i.e., (i) in course of inspection of the business premises till submission of the report by the inspecting officer, (ii) after commencement of the re-assessment proceeding by issuance of notice for assessment of tax on escaped turnover till order under Section 43 of the OVAT Act is passed.

20. In the instant case, undisputedly in course of inspection of the business premises of the petitioner on 20.05.2011, the inspecting team found ten sets of written documents indicating materials received and dispatched and stock etc. Since the Asst. General Manager (Commercial) of the Company, on the date of visit did not produce the regular books of account and failed to explain the contents of the said documents, the Inspecting Officer seized those documents, in exercise of power under Section 73(6) of the OVAT Act and the dealer was issued with a notice in Form VAT 401 requiring it to produce the books of account. It may be relevant to mention here that Section 61(2) of the OVAT Act provides that every registered dealer shall keep, at his place of business as recorded in the certificate of registration, all accounts, registers and documents maintained in the course of business: *provided that* if any such dealer has established branch offices of the business at different places of the State other than the principal place of his business, the relevant accounts, registers and documents in respect of each such branch shall be kept by him at the concerned branch. On the date of inspection, statement was recorded on S.A. from Sanjay Kumar Ladia, the Asst. General Manager (Commercial) of the Company and he undertook to produce books of account/documents as indicated in Form VAT 401 on 27.05.2011. On

27.05.2011, no books of account/documents was produced as required under Form VAT 401 and undertaken by the dealer. However, two petitions were moved on 24.05.2011 and 16.06.2011 seeking time for production of books of account. On these two time petitions, the date was adjourned to 18.06.2011 and 15.07.2011 respectively for production of books of account. But on those two dates, the dealer did not produce his books of account.

21. It may be appropriate to reproduce here the relevant portion of the assessment order:

> "In pursuance to the information gathered from a reliable source; as regards to the clandestine business activity and irregular maintenance of the books of account by the above named dealer. The Enforcement Team, headed by the by the Sales Tax Officer along with three Asst. Sales Tax Officers of the Investigation Unit, Rourkela has been visited the place of business on dt. 20.05.2011 at about 1.15 P.M. as per U/s 73(4) of the O.V.A.T. Act, 2004. At the time of visit, to the manufacturing unit, Sri Sanjay Kumar Ladia, Asst. General Manager Commercial of the Company was present in the factory premises and extend all required co-operation to conduct enquiry into the details business activities of the firm, to examine the detail stock of finished product, raw materials and to verify the complete books of account for the tax period from 01.04.2008 to 20.05.2011. Exhaustive stock of Ms Ingot available in the factory premises are recorded in a separate sheet of paper as dictated, counted and reported by the factory supervision who has signed on it and later on validated by the Asst. General Manager Commercial of the company. In course of inquiry 10 sets of written documents, indicating the materials received and dispatched were found in the business premises. In the event of not explained the written contents of the said documents by the Asst. General Manager Commercial of the company on the date of visit, these were seized as per U/s. 73(6) of the OVAT Act and detail copy of it was handed over to him for future reference for production of books of account and for verification of the seized documents. The person contacted failed to produce the complete books of account on the date of visit. Hence, he was asked to submit the same as per notice in Form VAT 401 issued on that date. A statement in that regard was recorded on S.A. from Sri Sanjay Kumar Ladia, the Asst. General Manager Commercial Company and he was

undertaken to furnish relevant documents as sought in the notice in Form VAT 401 issued on the date of visit, fixing the date on 27.05.2011 at 09 A.M. in the office, Investigation Unit, Rourkela.

In response to the notice, the authorized signatory of the Company filed time petition on 24.05.2011 and 16.06.2011 to adjourn the date for production of books of account as per the date and time intimated on the notice. So, accordingly, the date was adjourned to 18.06.2011 and 15.07.2011 respectively. But in spite of giving adequate opportunity of being heard, the dealer company did not turn up to produce books of account for verification. Thus, in the absence of adequate co-operation received from the seized documents in the file. The report is completed to be prepared on ex-parte in the above circumstances."

(*underlined for emphasis*)

22. In the above circumstances, the Inspecting Officer submitted his report after analyzing the seized documents and treating the transaction of sale and purchase recorded therein as suppressed transactions.

23. Before the Assessing Officer, hearing commences on issuance of the notice for assessment of tax on escaped turnover in Form VAT 307 under sub-rule (1) of Rule 50. Notice for assessment of tax on escaped turnover in Form VAT 307 was issued to the petitioner on 28.03.2012 through process server fixing the date to 10.05.2012. Pursuant to the said letter, the petitioner filed a time petition and the case was adjourned and posted to 06.06.2012. Since the petitioner did not turn up on the date fixed, one more intimation was issued to the petitioner. On 18.07.2012, the petitioner again moved a time petition. Thereafter, two more intimations were issued to the petitioner. On those dates, the dealer did not produce the books of account. However, in response to notice dated 11.10.2012, the petitioner filed a petition to intimate him the reasons of reopening the case. On 27.06.2013, another intimation was issued to the dealer fixing the date to 16.07.2013. On that date, the dealer failed to appear before the Assessing Officer to produce the books of account. Thereafter, the impugned ex parte assessment order was passed.

Thus, it may be seen that though several opportunities were given by the Assessing Officer for hearing, the petitioner-dealer did not produce the books of account on some plea or other, which is not legally sustainable and/or contrary to law.

24. In the above facts situation, we are of the considered view that reasonable opportunity of hearing has been afforded to the petitioner and thereby principle of natural justice has been duly complied with before passing the impugned assessment order and the Assessing Officer is fully justified in passing the said order ex parte.

25. Question Nos.(iv) and (v) being interlinked, they are dealt with together.

The questions are whether any basis/reason has been assigned for determination of the escaped turnover and levy of tax thereon in the impugned assessment order and the Assessing Officer is justified in accepting the allegations raised in the report.

26. Law is well-settled that the Assessing Officer has to assign reasons in support of its determination of escaped turnover and the tax sought to be levied thereon. But where the Assessing Officer concurs with the conclusions, which are based on materials as expressed by the Inspecting Officer and he has no additional material to record its findings, in its order, the said order cannot be vitiated merely because it concurs with reasons assigned by the Inspecting Officer to determine the escaped turnover and levying tax thereon.

27. It may be relevant to refer here the judgment of the Hon'ble Supreme Court in the case of ***CIT Vs. K.Y.Pilliah and Sons***, 63 ITR 411, wherein it is held that the Income Tax Appellate Tribunal is the final fact finding authority and normally it should record its conclusion on every disputed question raised before it, setting out its reasons in support of its conclusion. But, in failing to record reasons, when the Appellate Tribunal fully agrees with the view expressed by the Appellate Assistant Commissioner and has no other ground to record in support of its conclusion, it does not act illegally or irregularly, merely because it does not repeat the grounds of the Appellate Assistant Commissioner on which the decision was given against the assessee or the Department.

The above decision of the Hon'ble Supreme Court implies that the Tribunal is not required to repeat the reasons, when it agrees with the reasoning given by the learned CIT(A) in the impugned order.

28. The reasons assigned by the Assessing Officer in the assessment order for accepting the allegations raised in the report is reproduced below:

> "In view of the above allegation, it was considered necessary to reopen the case for assessment U/s. 43 of the O.V.A.T. Act, 2004. Accordingly, a notice for assessment of tax on escaped turnover in Form VAT 307 (sub-rule (1) of Rule 50) of the O.V.A.T. Act) was issued to the dealer on dated 28.03.2012 through process server fixing the date to 10.05.2012. The dealer has responded the notice and filed time petition. The case is consider and posted to 06.06.2012. On dt. 06.07.2012 the dealer has not responded, hence issued one more intimation to the dealer. But the dealer has filed time petition on dt. 18.07.2012. Again two more intimation issued to the dealer, at last the dealer Ld. Advocate Mr. D.K. Agarwal appeared and filed petition for reason of reopening the case, the case is partly heard. On dt. 27.06.2013 issued intimation to the dealer fixing date to 16.07.2013. The dealer has failed to appear before the under signed and not produced the books of accounts for verification. It is clear that, the intention of the dealer is not to cooperate for completion of assessment proceedings. Hence looking no other way, the assessment is completed to the best of judgment. Considering the allegation contained in the tax evasion report submitted by D.C.C.T., Enforcement, Sambalpur as true and correct, the re-assessment order is decided on ex parte basing on the information and materials available in the record on merit."
>
> (*underlined for emphasis*)

29. There is no quarrel over the legal proposition that there should be some reasoning recorded for declining or granting relief. The Hon'ble Supreme Court in the case of ***Shukla and Brothers*** (supra) held that requirement of recording of reasoning necessarily does not mean a very detailed or lengthy order.

In the instant case, the Assessing Officer has given the basis/reasons in support of determination of the escaped turnover and tax due thereon.

30. As stated above, in course of inspection on 20.05.2011, the petitioner failed to explain 10 sets of documents found by the inspecting team in its place of business. After the inspection, though opportunities were afforded to the petitioner to produce the books of account for verification, the dealer did not produce the books of account. Further, the petitioner-dealer also failed to produce the books of account before the

Assessing Officer though several opportunities were afforded to it. In the assessment order, the Assessing Officer has reproduced various allegations/ conclusions of the Investigating Officer against the petitioner and calculation of the amount of tax alleged to have been evaded by the petitioner during the tax period. Perusal of the assessment order reveals that the amount of tax alleged to have been evaded is based on the transaction of sales and purchases noted in the seized documents and physical stock found on the date of inspection.

31. In view of the above, it cannot be said that the Assessing Officer without assigning any reason has passed the impugned order of assessment in violation of Rule 50(4) of the OVAT Rules and principles of natural justice has not been duly complied with and the Assessing Officer has committed any wrong in accepting the allegations raised in the report of the Investigation Officer.

32. Question No.(vi) is Whether in the facts and in the circumstances of the case, it would be appropriate/legally permissible to set aside the ex parte assessment order and direct the Assessing Officer to return the seized documents of the petitioner and after granting an opportunity of hearing to the petitioner and examining the regular books of account with reference to the seized documents to redo the assessment and by that no prejudice will be caused to the interest of the State.

33. Admittedly, in the present case, an ex parte assessment order has been passed due to non-production of the books of account by the petitioner-dealer before the Assessing Officer for the purpose of examination of the same with reference to the seized documents. As stated above, the petitioner also did not produce its books of account before the Inspecting Officer.

34. It may be relevant to mention here that the statute provides under which circumstances an ex parte order can be passed by the Assessing Officer. If such a power is not vested with the Assessing Officer then unscrupulous/ dishonest businessmen who have indulged in clandestine business to evade tax shall escape from payment of legitimate tax due to the State, simply by not producing the books of account /documents for verification with reference to the incriminating materials collected and refraining themselves from participating in the assessment proceeding on some plea or other.

35. Needless to say that all ex parte orders need not be set aside by higher court/authority for giving further opportunity of hearing to the party against whom ex parte order has been passed. Whether an ex parte order is to be set aside for giving further opportunity of hearing or not, it always depend on facts and circumstances of each case. There are certain cases where if ex parte orders are set aside to give an opportunity of hearing to the aggrieved parties that may amount to granting a boon to such parties, as they would be able to achieve their unholy purpose and in that case the very purpose of passing ex parte order is frustrated.

For example, in the instant case, the petitioner-dealer did not only fail to produce the regular books of account during inspection of its business premises nor before the Assessing Officer and instead offered to produce the same only after receiving copies of the seized documents and reason of reopening. The obvious reason for putting forward such a pre-condition is that the petitioner wanted to know the contents of seized documents before production of regular books of account so that he could be able to manipulate/prepare its regular books of account, in line with contents of the seized document. Despite a number of opportunities being allowed to produce the regular books of account, the dealer-petitioner did not produce the same and thereby the Assessing Officer was compelled to pass the assessment order ex parte disclosing the contents of the seized documents in the assessment order. If the said ex parte order is set aside and the dealer would be given an opportunity to produce its regular books of account before the Assessing Officer, the dealer could easily incorporate in its regular books of account the entries recorded in seized documents and thereafter produce the manipulated/ prepared books of account. In that event, the very purpose of conducting surprise visit to the place of business of a dealer to find out as to whether all the business transactions are recorded in regular books of account and tax due thereon has been paid shall be frustrated and a dealer who was indulged in clandestine business will be benefited due to setting aside of an ex parte order to give him a further opportunity, to produce his regular books of account for the purpose of examining those with reference to seized documents.

36. Further, though the contents of the seized documents have been disclosed in the impugned assessment order (Annexure-3), no averment has been made in the writ petition explaining the contents of the seized documents. No averment has also been made as to how the transactions

noted in the seized documents have been accounted for in the regular books of account and whether tax due on those transactions has been paid. In course of hearing also, no material has been brought before us to show as to how the transaction noted in the seized documents are recorded in the regular books of account and that why the determination of escaped turnover and calculation of tax thereon on the basis of seized documents are in any manner wrong/incorrect. Similarly also the physical stock of 71.400 MT of MS ingot found in the business premises of the dealer-petitioner on the date of inspection by the Inspecting Party has not been explained at any point of time with reference to regular books of account.

37. For the reasons stated above, we are of the considered view that serious prejudice shall be caused to the interest of the State, if after disclosure of the entries made in the seized documents in the ex parte assessment order, the said order will be set aside and an opportunity would thereafter be given to the petitioner-dealer to produce its regular books of account for the purpose of examination of the said accounts with reference to the seized documents.

38. Question No.(vii) is whether the prayer of the petitioner to give it liberty to prefer appeal in case it fails to succeed in the present writ petition on merit can be granted to the petitioner.

39. The above prayer of the petitioner is misconceived and cannot be granted. Needless to say that if the High Court is called upon to decide the legality of an order of assessment on its own merit, it would be a futile exercise to relegate the petitioner-dealer to approach the statutory appellate authority after the High Court deciding the case on merit. Therefore, the plea of the petitioner that this Court can after adjudicating the merits of the issues involved grant liberty to the petitioner to avail statutory remedy is fallacious and such a prayer of the petitioner cannot be allowed. It may be relevant to note that when the above prayer was advanced by Mr. Sahoo, Senior Advocate in course of his argument, he was specifically asked as to whether he wants to withdraw the writ petition and approach the appellate authority, he categorically denied the same and persisted with the above prayer.

40. For the reasons stated above, the writ petition is dismissed.

Writ petition dismissed.

2015 (II) ILR - CUT- 705

I. MAHANTY, J & B.RATH, J.

W.P.(C) NO. 82 OF 2015

NIRUPAMA BARIK ……..Petitioner

.Vrs.

STATE OF ODISHA & ORS. …….Opp.Parties

BIHAR AND ODISHA EXCISE ACT, 1915 – S.26 (1)

I.M.F.L. OFF Shop – Direction for closure of the shop – No notice to the licencee – Action challenged – Collector vide order Dt. 27.10. 2014 directed for closure of the shop U/s 26 (1) of the Act for preservation of Public peace – Provision clearly postulates a notice in writing to the licencee for temporary closure of such shop and if a closure is required for a continuous period of more than three days approval of Excise Commissioner shall be taken – Compliance of natural justice is a compulsion – Held, impugned order not being sustainable in law is set aside. (Para 7)

For petitioner - M/s. U.C.Patnaik, S.D.Mishra,S.Patnaik & M.R.Sahoo.
For Opp. Parties - Mr. M.S.Sahoo, Addl.Govt.Advocate.

Date of Hearing : 25.06.2015
Date of Judgment: 07.07. 2015

JUDGMENT

B. RATH, J.

This writ petition has been filed seeking quashing of Annexure-4 and thereby directing the opposite parties to allow the petitioner to operate the Posala IMFL OFF Shop at its existing location for the year 2014-15 for the extended licence period i.e. 01.08.2014 to 31.03.2015.

2. The short recital involved in the case is that the petitioner is an existing holder of exclusive privilege for IMFL OFF Shop located at Hata Delanga being duly granted by the competent authority for the purpose of retail vending. The IMFL OFF Shop was settled in favour of the petitioner through lottery process in the year 2005 and the petitioner is continuing with the said shop for last over a decade being renewed from time to time. The

last licence was renewed/extended in favour of the petitioner for 8 (eight) months i.e. from 1.08.2014 to 31.03.2015. It is the submission of the petitioner that when the petitioner was expecting renewal of the licence, the petitioner was directed to find out an alternate unobjectionable site and submit proposal for shifting of the Hata Delanga IMFL OFF Shop consequence upon which the petitioner submitted her proposal for shifting of the shop at Hata Delanga to an unobjectionable site.By letter dated 11.9.2014 the petitioner was communicated that her proposal for shifting of IMFL OFF Shop from Hata Delanga has been accepted and she has been permitted to shift the IMFL OFF Shop from the existing site to a new site. The petitioner further claimed that while the matter stood thus, pursuant to direction contained in Annexure-2, the Collector, Puri by its order dated 30.9.2014 has been pleased to allow the petitioner for shifting of Hata Delanga IMFL OFF Shop from its existing site to an unobjectionable site over Plot No.501, Khata No.255, Mouza-Posala, G.P.-Jenapur for the remaining period of the year 2014-15 till next settlement through 'e-auction' and the stock of the E.P. holder lying in the existing site be transferred to the proposed site. The petitioner further submitted that while the position stood thus, the Collector & District Magistrate, Puri issued another order on 27.10.2014 in purported exercise of power under Section 26(1) of the Bihar & Orissa Excise Act, 1915 thereby directing the petitioner to temporarily close the IMFL OFF Shop at Posala for preservation of public peace. The further case of the petitioner is that before issuing the licence for the year 2014-15 objections were invited from different sources and the Jenapur Grama Panchayat at the relevant time by communication dated 25.7.2014 submitted its no objection on the shifting of the IMFL OFF Shop. The petitioner contended that the shifting of IMFL OFF Shop to Posala was strictly in terms of the provisions contained under the Act and after obtaining no objection from the concerned area prior to issuance of temporary closure order dated 27.10.2014. Petitioner contends that since the impugned action was affecting petitioner's right under licence, she ought to have been given a chance to object its closure and it is under this circumstance, the petitioner claims that the direction under Annexure-4 is not only suffering for non-compliance of natural justice but also contrary to the provisions of the Bihar & Orissa Excise Act, 1915 besides being contrary to the demand in place and consequently sought for quashment of Annexure-4 and further directing the petitioner to continue in the shop room for the remaining period under the licence.

3. Perusal of the record reveals that this matter was taken up on 17.4.2015 and this Court in a Division Bench by order dated 17.4.2015 while issuing notice considering the Misc. Case No.5245 of 2015 passed the following order:

> "Heard.
>
> As an interim measure, it is directed that the operation of the demand notice dated 04.03.2015 under Annexure-7 shall remain in abeyance till the next date but, the pendency of the writ petition shall not stand on the way of consideration for shifting of the petitioner's shop at an early date."

4. Pursuant to the notice, on its appearance, the opposite party nos. 2 to 4 filed a counter affidavit in sum and substance submitting as follows:

"The petitioner having entered into an agreement with State voluntarily, containing particular conditions in the agreement cannot wriggle out of the terms of agreement. The impugned action for temporary closure of Posala IMFL OFF Shop was rather an administrative compulsion to evade any untoward incident resulting outburst of public resentment against the functioning of the said shop and the administration had no other option than to close the shop for preservation of public peace. In substantiating their above stand, the opposite party nos.2 to 4 further submitted that while the shop was functioning at Hata Delanga, public resentment against the shop arose. Consequently the matter ended with an administrative direction accepting the proposal of the licencee to shift the OFF shop to Posala under Jenapur Grama Panchayat and the shifting was allowed accordingly. But soon after shifting the shop room took place, the administration received public compulsion under the signature of the Sarpanch of Jenapur Grama Panchayat submitted to the Collector Puri-opposite party no.3 and this complaint compelled the district administration to resort to the temporary closure of the shop for preservation of public peace. The opposite party nos.2 to 4 have also annexed the copy of the public complaint taking into consideration. It is under this premises, the opposite party nos. 2 to 4 justified their action in proper and prayed for not entertaining the writ petition."

5. From the pleadings and the submissions of the petitioner, it appears that there is no dispute regarding installation of the IMFL OFF Shop belonging to the petitioner providing licence to the petitioner for having

IMFL OFF Shop at Hata Delanga and the fact that upon consideration of some objection, not only the district administration arrived at a decision for shifting of the Hata Delanga IMFL OFF shop to Plot No.501, Khata No.255, Mouza-Posala, G.P.-Jenapur, P.S.-Delanga, there is also no denial by the respective parties to the fact that it is as a result of the above development. By direction under Annexure-3, the Hata Delanga IMFL OFF shop was shifted to Plot No.501, Khata No.255, Mouza-Posala, G.P.-Jenapur in the district of Puri for the remaining period of the year 2014-15. The shifting order under Annexure-3 further makes it clear that the IMFL OFF Shop has not been shifted to the above place permanently but the shifting was for the remaining period of the year 2014-15 or till next settlement through 'e-auction' whichever is earlier subject to further conditions noted therein. But looking to the grievance of the petitioner, the only question remains to be considered, whether the order under Annexure-4 is valid or not? The submission of the petitioner in this regard is that once the shifting of the shop room as appearing under Annexures-2 and 3 had taken place upon consideration of the objection and counter to the objections by the respective parties, before passing the order under Annexure-4 dated 27.10.2014, opportunity ought to have been given to the licencee. From perusal of the records it appears that the final shifting order of the IMFL OFF Shop was passed on 30.9.2014. The submission of the State i.e. opposite party nos. 2 to 4 is that in view of the complaint under Annexure-6 to the writ petition they had no other option than to resort to the temporary closure of the IMFL OFF Shop at Posala. The opposite party nos. 2 to 4 further claimed that the objection in Annexure-6 was pursuant to a resolution dated 25.7.2014 of the Panchayat, copy of which is also filed by the State, opposite party nos. 2 to 4 as Annexure-A/2. Perusal of the documents vide Annexure-A/2 as well as Annexure-6 makes it clear that the complaint to the Collector vide Annexure-6, no where indicates regarding the resolution adopted by the Jenapur Grama Panchayat. The complaint vide Annexure-6 also clearly reflects that the complaint reached the Office of the Collector Puri on 31.10.2014 without even annexing a copy of the resolution stated hereinabove. From the above, it clearly appears that not only the complaint contained with file did not disclose the resolution of the Grama Panchayat but it also reached the Collector's Office on 31.10.2014 along with a copy of the same to the Superintendent of the Excise, Puri. Thus, there was no occasion for the Superintendent of Excise, Puri to pass the impugned order dated 27.10.2014 before the complain reached its office. Further, it is not known as to when this complaint reached the Office of the Superintendent, Excise, Puri. That

apart from the perusal of the complaint under Annexure-6 also appears at Annexure-B/2, no where discloses any allegation against the licencee or functioning of the IMFL OFF Shop at Posala. The complaint on the other hand gives a case of illegal sale of spurious liquor by unauthorized persons in the area as a result of which there is some inconvenience in the locality. The representationists even further requested the district administration that the situation became worse after the temporary closure of the authorized shop and the Secretary thereafter again requested the district administration to open the petitioner's shop in order to prevent the sale of liquor. Further perusal of the Panchayat resolution as appearing at Annexure-5 as well as Annexure-A/2, it clearly indicates that the Panchayat had no objection if a shop is opened at Posala chhaka. Both the above make it clear that there has been total misreading of the resolution under Annexure-5 again appearing at Annexure-A/2 and the complaint under Annexure-6 again appearing at Annexure-B/2 by the district administration as well as the Superintendent of Excise. The order under Annexure-4 is not only passed in non-consideration of the resolution of the Grama Panchayat as well as the complaint under Annexure-5 and Annexure-6. Further, it is also observed that before passing the order for temporary closure of the Posala IMFL OFF Shop, the petitioner has not been afforded with reasonable opportunity. Under the circumstances, the order under Annexure-4 cannot be sustained in the eye of law.

6. From the impugned order, it also appears that the Collector, Puri has passed the temporary closure order in exercise of power under Section 26(1) of the Bihar & Orissa Excise Act, 1915. Section 26 (1) of the Bihar & Orissa Excise Act, 1915 reads as follows:

> "**26.Powers to close shops temporarily-**(1) The District Magistrate or a Sub-divisional Magistrate, may, by notice in writing to the licensee, require that any shop in which any (intoxicant) is sold shall be closed at such times or for such period as he may think necessary for the preservation of the public peace:"
>
> xxx xxx xxx

7. From the above, this Court finds that there is a serious legal flaw in the action of the Collector. Since Section 26 (1) clearly postulates a notice in writing to the licencee under the circumstances of any intoxicating it sold before temporary closure of such shop and further if a closure is required for a continuation period of more than 3 (three) days, the approval of Excise Commissioner shall be taken. Compliance of natural justice is a compulsion.

The impugned order has been passed not only in improper consideration of the protest available at Annexure-6 but also being contrary to the provisions contained in Section 26 (1) of the Bihar & Orissa Excise Act and same cannot be sustained in the eye of law. This Court sets aside the order under Annexure-4.

8. In the result, the writ petition succeeds to the extent indicated hereinabove. However, there shall be no order as to cost.

Writ petition allowed.

2015 (II) ILR - CUT- 710

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

W.P.(CRL) NO. 665 OF 2013
MC. NOS. 75 & 131 OF 2014

SWAPNA SATPATHY @UPADHAYA ……..Petitioner

.Vrs.

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

(A) CONSTITUTION OF INDIA, 1950 – ART-226 r/w Section 151 C.P.C.

Writ of habeas corpus seeking custody of child – Petitioner-wife obtained final order by suppressing material facts which amounts to exercise of fraud upon the Court – Held, in this case the Court has got inherent power to recall its own order. (Para 24)

(B) CONSTITUTION OF INDIA, 1950 – ART-226 r/w Section 151 C.P.C.

Writ of habeas corpus – Petitioner-wife filed affidavit suppressing material particulars without serving copy on the opposite party-husband – Opp.Party deprived of filing counter to such affidavit and unable to place his case – Held, final order passed in the writ petition being violative of the principles of natural justice is liable to be recalled. (Para 25)

Case Laws Referred to :-

1. AIR 1988 SC 1531 : A.R. Antulay v. Union of India.
2. (1996) 5 SCC 550 : Indian Bank v. Satyam Fibres (India) Pvt. Ltd.
3. 2001(5) SCC 247 : Syed Saleemuddin v. Dr. Rukhsana and others.
4. (1994) 1 SCC 1S.P. : Chengalvaraya Naidu(Dead) by LRs. V. Jagannath (Dead) by LRs.,
5. (1996) 5 SCC 550 : Indian Bank v. Satyam Fibres (India) Pvt. Ltd
6. AIR 2015 SC 1248 : Krishna Hare Gaur v. Vinod Kumar Tyagi and Ors.

For Petitioner : M/s. P.K.Ray & N.Dash
For Opp. Parties : Addl. Govt. Adv. M/s. D.Panda
M/s. D.P.Dhal, C.R.Panda & R.Panda

Date of hearing : 23.7.2015
Date of judgment : 17.8.2015

JUDGMENT

DR. D.P.CHOUDHURY, J.

The aforesaid Misc. Cases were heard together as they arise out of the W.P.(Crl.) No. 665 of 2013 disposed of by this Court vide order dated 22.1.2014.

FACTS :

2. The writ petitioner-wife-Swapna Satpathy @ Upadha is the opposite party and the writ-opposite party-husband-Sanjay Kumar Satpathy is the petitioner in Misc. Case No. 75 of 2014 and the wife is petitioner and husband is the opposite party in Misc. Case No. 131 of 2014.

3. The factual backdrop of the case of the husband-Sanjay is that wife-Swapna has married writ-opposite party-Sanjay Kumar Satpathy. Out of their wed-lock, a son was born. The couple left the rented house of the father of husband-Sanjay at plot no. 94, Madhusudan Nagar, Unit-IV, Bhubaneswar and resided separately at Plot No.154, Soubhagya Nagar, Bhubaneswar in July, 2012. On 23/24.9.2012, it is alleged that wife-Swapna left the husband leaving behind the minor child after quarreling with him.

On 3.11.2012 wife-Swapna filed Bhubaneswar Mahila P.S. Case No. 451 of 2012 under sections 498-A/294/323/506/34 IPC and section 4 of the Dowry Prohibition Act (hereinafter called 'DP Act') against the husband-Sanjay and his relatives. F.I.R. was registered and investigation proceeded. It is the further case of husband-Sanjay that Civil Petition No. 453 of 2012 was filed by the wife-Swapna under section 26 of Hindu Marriage Act, 1955 in the court of learned Judge, Family Court, Bhubaneswar and also one I.A. No. 122 of 2012 was filed in that court seeking interim custody of the minor child. In that case, summon was issued but reasons best known to the wife-Swapna, husband-Sanjay was set ex parte in Civil Petition No. 453 of 2012 and I.A. No. 122 of 2012 was disposed of vide order dated 24.11.2012 passed by learned Judge, Family Court, Bhubaneswar therein purportedly directing interim custody of the child to be given to the mother (wife-Swapna).

4. Challenging the said order, the husband-Sanjay filed W.P.(C) No 2276 of 2012 before this Court on 27.2.2012. In the meantime on 12.2.2012 the wife-Swapna filed another F.I.R. under sections 506/509 IPC vide Kharavelanagar P.S. Case No. 297 of 2012 against husband-Sanjay.On 13.12.2012 in the earlier Mahila P.S. Case, husband-Sanjay was arrested. On 15.12.2012 another criminal case was filed by the wife-Swapna against husband-Sanjay in Pipili P.S. registered as Pipili P.S. Case No. 491 of 2012. On 25.12.2012 husband-Sanjay was released on bail by the order of the learned Sessions Judge, Bhubanewar. It is the further case of the petitioner that on 7.2.2013 the husband-Sanjaya got stay of operation of the order of the learned Judge, Family Court, Bhubaneswar giving interim custody of the minor child. In spite of that, on 13.2.2013 ex pate decree was passed in C.P. No. 453 of 2012 by the learned Judge, Family Court, Bhubaneswar as the husband-Sanjay has already been set ex parte on 23.11.2012. Against such ex parte final order passed by the learned Judge, Family Court, Bhubaneswar, husband-Sanjay preferred MATA no. 11 of 2013 in this Court. On the other hand, wife-Swapna filed Execution Petition No. 5 of 2013 before the learned Judge, Family Court, Bhubaneswar for execution of the ex parte decree. On 22.3.2013, MATA No. 11 of 2013 was allowed by this Court on contest. The order passed in C.P. No. 453 of 2012 was set aside and the execution proceeding, E.P. No. 5 of 2013 was dropped.

5. It is a peculiar story which did not stop there. It is further averred that on 26.3.2013 after disposal of MATA No. 11 of 2013, wife-Swapna filed petition under section 13(1)(i)(a) of the Hindu Marriage Act before the

learned Judge, Family Court, Bhubaneswar being CP. No. 150 of 2013 seeking judicial separation. In the same proceeding also filed I.A. No. 54 of 2013 on 15.4.2013 seeking custody of the child on the ground that she being the mother, is the best person to protect the interest of the child. It is alleged by the husband-Sanjay that suppressing material facts, wife-Swapna produced order of the learned Judge, Family Court, Bhubaneswar with the assistance of police, forcibly took away the minor child from the house of the husband-Sanjay. The mother of husband-Sanjay accompanied the child to the Kharavela Nagar P.S. On production of this Court's order in MATA No. 11 of 2013 which was suppressed by wife-Swapna, Police left the child to the custody of husband-Sanjay. In spite of filing the C.P. No. 150 of 2013 before the learned Judge, Family Court, Bhubaneswar, on 13.5.2013 W.P.(Crl) No. 665 of 2013 was filed by her seeking habeas corpus to produce the child in the custody of wife-Swapna. It is alleged inter alia, by the husband-Sanjay vide M.C. No. 75 of 2014 that the final order in the writ petition was passed without giving proper opportunity to him of being heard about the status and salary of the wife-Swapna who can not protect the best interest of the child. That order was purportedly passed on 22.1.2014 by this Court. So he being the petitioner, has approached this Court to recall the judgment dated 22.1.2014 passed in W.P.(Crl) No. 665 of 2013. On the otherhand, the wife-Swapna filed M.C. No. 131 of 2014 praying to implement the order dated 22.1.2014 passed in W.P.(Crl) No. 665 of 2013. The husband-Sanjay contested the Misc. Case No. 131 of 2014 on the ground that such order being not passed on contest, should not be implemented and requires fresh adjudication.

6. The case of the wife-Swapna is that she is the legally married wife of the husband-Sanjay and they are blessed with a male child being born to them on 30.11.2011. After birth of the child, there was disturbance between the husband and wife due to unwanted demands by the husband-Sanjay. Therefore, she was forced to leave his house on 23.10.2012 night. After some days, she went with her family members to the house of husband-Sanjay to bring her child back but husband-Sanjay and his family members assaulted and drove her away. She lodged F.I.R. at the Bhubaneswar Mahila P.S. vide P.S. Case No. 451 of 2012. Thereafter she also moved the learned Judge, family Court, Bhubaneswar for the custody of the child. After getting the order from the learned Judge, Family Court, Bhubaneswar, through the help of police officials of Kharavela Nagar P.S. got the custody of the child. It is further alleged, inter alia, by the wife-Swapna that on 8.5.2013 the

police officials of Kharavela Nagar P.S. asked the wife-Swapna to appear before the P.S. with the child because of the order of this Court and in presence of the police officials of Kharavela Nagar P.S. and Government Advocate, the child was forcibly delivered to the custody of husband-Sanjay from the custody of wife-Swapna. It is averred in the writ petition that the child being in need of the mother's care and she can protect the absolute interest of the child, should be left to her custody. So she filed writ of habeas corpus before this Court to get the custody of the child. It is the further case of the wife-Swapna that on 22.1.2014 this Court passed order directing the husband-Sanjay to deliver the custody of the child within a fortnight to his mother-Swapna but father-Sanjay got the visiting right to visit his son once in every month for a period of two hours at the house where Swapna is residing. Since the order of this Court is not complied with by husband-Sanjay, wife-Swapna filed Misc. Case No. 131 of 2014 to implement `the order of this Court and at the same time, raised objection to the petition in Misc. Case No. 75 of 2014 filed by husband-Sanjay.

SUBMISSIONS

7. Learned counsel for the husband-Sanjay submitted that the order dated 22.1.2014 passed by this Court in W.P.(Crl) No. 665 of 2013 is not an order on merit inasmuch as no sufficient opportunity was afforded to the petitioner in this case to ventilate his grievance before this Court. He further submitted that without any rhyme or reason, wife-Swapna left her matrimonial home leaving behind the male child in the custody of husband-Sanjay and filed false case against the husband-Sanjay before the Kharavelanagar P.S. He further submitted that the child was forcibly removed by the police at the instance of wife but after intervention on time, by virtue of the order dated 22.3.2013 passed in MATA No. 11 of 2013, the paternal grandmother of the child got custody of the child and the child was never in the custody of wife-Swapna. He further submitted that wife-Swapna filed C.P. No. 150 of 2013 before the learned Judge, Family Court, Bhubaneswar on 26.3.2013 purportedly under section 13(1)(i)(a) of the Hindu Marriage Act for decree of judicial separation and she also filed I.A. No. 541 of 2013 for the custody of the child, but she could not get the custody of the child. On the otherhand, she filed the impugned writ petition before this Court claiming custody of the child. According to him, she has suppressed the material fact about the filing of the petition for the custody of the child before the appropriate court and tried to snatch away the order

dated 22.1.2014 of this Court in W.P.(Crl) No. 665 of 2013. He further submitted that on 24.7.2013 hearing was concluded, the parties filed their respective notes of submission and the judgment was reserved. But on 26.9.2013, before passing final order, this Court asked the wife-Swapna petitioner in W.P.(Crl) No. 665 of 2013 to file an affidavit mentioning therein the present status of her family with regard to the educational qualification of the members of the family as well as their financial status by 30.9.2013 after serving copy thereof on the learned counsel for the husband-opposite parties. The opposite parties were directed to file reply to the said affidavit by 3.10.2013, if they want. Again the matter was fixed to 3.10.2013 for hearing in the chamber of Hon'ble senior member of the Bench. By 3.10.2013 affidavit was filed but lawyers went on strike. He further submitted that no copy of the affidavit was served on them and the husband-Sanjay did not get opportunity to file counter-affidvait. Finally the judgment was passed on 22.1.2014 directing husband-Sanjay to deliver the child to the custody of the wife-Swapna and allowed the visiting rights of husband-Sanjay. He further stated that since opportunity was not availed by the husband-Sanjay to file counter to the affidavit of wife-Swapna with regard to the educational qualification of the members of the family as well as their financial status, the judgment being passed only relying on the affidavit filed by wife-Swapna, there is absolute violation of natural justice by the Court requiring to recall the same as the said order dated 22.1.2014 tantamounts to ex parte order, even though it was passed showing purportedly on contest.

8. Mr. Panda, learned counsel for the husband-Sanjay submitted that in the decision in **A.R. Antulay v. Union of India, AIR 1988 SC 1531** Their Lordships observed at paragraphs 37, 38 & 39 in the following manner :

"37. The second question that arises here is if such a wrong direction has been given by this Court can such a direction inter partes be challenged subsequently. This is really a value perspective judgment.

> 38. In Kiran Singh v. Chaman Paswan, (1955) 1 SCR 117 at p. 121 : (AIR 1954 SC 340 at p 342), Venkatarama Ayyar, J. observed that the fundamental principle is well established that a decree passed by a court without jurisdiction is a nullity, and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the

very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.

39. This question has been well put if we may say so, in the decision of this Court in M.L. Sethi v. R.P. Kapur, (1973) 1 SCr 697: (AIR 1972 SC 2379) where Mathew, J. observed that the jurisdiction was verbal coat of many colours and referred to the decision in Anisminic Ltd. v. Foreign Compensation Commission, (1969) 2 AC 147 where the majority of the House of Lords dealt with the assimilation of the concepts of 'lack' and 'excess' of jurisdiction or, in other words, the extent to which we have moved away from the traditional concept of jurisdiction. The effect of the dicta was to reduce the difference between jurisdictional error and error of law within jurisdiction almost to a vanishing point. What is a wrong decision on a question of limitation, he posed referring to an article of Professor H.W.R. Wade, "Constitutional and Administrative Aspects of the Anismanic case" and concluded: "it is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or decree embodying the decision a nullity liable to collateral attack and there is no yardstick to determine the magnitude of the error other than the opinion of the Court.(Emphasis supplied)"

9. He submitted that the fundamental principle has been established that a decree passed by a court without jurisdiction, is a nullity and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings.

10. He also relied upon the decision in **Indian Bank v. Satyam Fibres (India) Pvt. Ltd., (1996) 5 SCC 550** and submits that the plea of fraud could not be ignored by the commissioning in the said case which needs to be reminded that the authorities, be that constitutional, statutory or administrative, possessed the power to recall their judgments or orders if they are obtained by fraud as the fraud and justice can never dwell together. It is, therefore, submitted by Mr. Panda, learned counsel for the husband-Sanjay that the order dated 22.1.2014 being obtained by the petitioner suppressing fact of filing of the case before the learned Judge, Family Court,

Bhubaneswar vide C.P. No. 150 of 2013 and by not giving chance to the husband-Sanjay to place counter to the affidavit of the wife-Swapna with regard to the educational qualification of the members of the family as well as their financial status, for the best interest of the child, which amounts to playing fraud on the court, the said order dated 22.1.2014 has to be recalled by the Court. He submitted to allow the Misc. Case No. 75 of 2014 by recalling the order dated 22.1.2014 passed by this Court in the aforesaid writ and at the same time to dismiss the writ petition being devoid of merit as the writ petitioner-wife has not come in clean hand seeking equity from the Court.

11. Mr. Panda, learned counsel for the husband-Sanjay further submits that the law with regard to the custody of the child has been well dealt in the decision reported in **Syed Saleemuddin v. Dr. Rukhsana and others, 2001(5) SCC 247.** He drew our attention to paragraph-11 of the judgment where it has been discussed that an application seeking a writ of habeas corpus for custody of minor children the principal consideration for the court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that the present custody should be changed and the children should be left in the care and custody of somebody else. According to him, the petition for habeas corpus is not maintainable in view of the fact that already the learned Judge, Family Court is in seisin of the matter before filing of the writ petition of habeas corpus and the child is in custody of the father by the order dated 22.3.2013 passed by this Court in MATA No. 11 of 2014. So he submitted that the writ petition is otherwise not maintainable.

12. Per contra, learned counsel for the wife-Swapna submitted that the Misc. Case to recall the judgment passed in W.P.(Crl.) 665 of 2013 is not maintainable. He contended that under Article 132 of the Constitution of India, an appeal can lie to the Hon'ble Supreme Court in judgment/decree or final order within the territory of India whether civil, criminal or other proceeding. Since the High Court has already passed the final order in the aforesaid writ petition for habeas corpus, the petition to recall the order is not maintainable and the appeal lies to the Hon'ble Supreme Court. He also drew our attention to Article 137 of the Constitution of India by contending that only Hon'ble Supreme Court has got power to review any judgment pronounced or order made by it and the order passed by this Court under Article 226, cannot be recalled or reviewed. He further submitted that the

factual aspect as narrated by the learned counsel for the husband-Sanjay are not all correct.

13. Mr. Ray, learned senior advocate for the wife-Swapna drew our attention to the decision in **W.P.(Crl) No. 345 of 2010 (Jumaila v. Abdul Gafoor and others) decided on 13.4.2012** where Their Lordships of Kerala High Court have held about the principles regarding custody of the child. Relying upon such decision, he submitted that being the mother and natural guardian of the child, the rights of the petitioner are inviable and sacrosanct and the conduct of the husband-Sanjay and others has deprived the wife-Swapna of her motherhood. The mandate of the Constitution envisages special protection for women and children which compel to hold all efforts must be made to set at knot the attempts of persons like husband-Sanjay and their family members to deprive helpless Swapna of her child by adopting dubious method as happened in the present case. So he submitted that the order passed in the writ petition should be implemented as it has reached its finality. He also stated that the writ petition is maintainable even if the Family Court is in seisin of the matter.

POINTS FOR DISCUSSION :

14. After going through the contention of both the parties, we find following points emerge for consideration :

(1) whether there is fraud exercised upon the court to recall the order dated 22.1.2014 passed by this Court in W.P.(Crl) No. 665 of 2013;

(2) whether there is violation of natural justice available to the husband-Sanjay;

(3) whether the writ petition is maintainable in the event of recalling the order dated 22.1.2014 passed by this Court in W.P.(Crl) No. 665 of 2013; and

(4) whether the child can be given into custody of mother-Swapna or father-Sanjay.

DISCUSSION

Point no.1

15. W.P.(Crl) No. 665 of 2013 was instituted by the wife-Swapna on 13.5.2013 with the prayer to direct the State Government, Deputy

Commissioner of Police, Bhubaneswar & Inspector-in-Charge, Kharavela Nagar Police Station (opposite parties 1 to 3) to recover the son of the petitioner from the wrongful confinement of O.Ps.4 to 8 including the husband-Sanjay to give the child to the custody of the wife-petitioner-Swapna with ancillary relief. It is revealed from the averments of the original writ petition that admittedly the child was in the custody of the mother as on 8.5.2013 pursuant to the order dated 13.2.2013 passed by the learned Family Court, Bhubaneswar in C.P. No. 453 of 2012. It is the further case of the petitioner, as revealed from the averments in the writ petition that on 8.5.2013 the child was removed from the custody of the wife-petitioner-Swapna (who is also the petitioner in M.C. No. 131 of 2014) by the husband-Sanjay with the police help of the Kharavela Nagar Police Station on an understanding that the Court has set aside the order of the learned Family Court, Bhubaneswar. There is nothing found from the petition under which order the child was removed by the police from her custody and delivered to the custody of the husband-Sanjay. On the other hand, it is revealed from the counter-affidavit of the husband-Sanjay that the order of the Family Court, Bhubaneswar was reversed by this Court vide order dated 22.3.2013 passed in MATA No. 11 of 2013. Petitioner-wife has not submitted such fact to this Court.

16. Moreover, it is revealed from the writ petition that having no other way, she filed the writ petition in question to take custody of the child. It is revealed from the counter-affidavit of opposite party-husband that after dismissal of MATA No 11 of 2013 she sought judicial separation, vide C.P. No. 150 of 2013 and also vide I.A. No. 54 of 2013 filed therein, seeking custody of the child. The writ petition or any other petition or affidavit filed by her do not reveal about such fact. So the petitioner suppressing the material facts about filing of the case in the Family Court, has thereafter filed the writ petition for habeas corpus seeking the custody of the child. So the suppression of material facts by the wife-petitioner as alleged by the husband-Sanjay cannot be denied.

17. The order-sheet in W.P.(Crl.) No. 665 of the 2013 need to be gone into to find out whether there is further act of the petitioner in the said writ petition to have suppressed the material fact or not. On 15.5.2013 for the first time the matter was taken up and the order was passed to serve the copies of the petition on the learned State Counsel and O.P. No.5-mother of husband-Sanjay (O.P. No.4) was directed to produce the child before this Court on 17.6.2013. As the record was received by the Section on 20.6.2013,

the case could not be listed on 17.6.2013. However, the mater was placed before this Court on 21.6.2013 and this Court passed order directing both the parties for a conciliation between them and the case was fixed for hearing to 17.7.2013 in the chamber of Hon'ble Mr. Justice M.M. Das. The matter was put up on 17.7.2013 in the chamber of Hon'ble Mr. Justice M.M. Das and husband-Sanjay filed affidavit before this Court. However, the order-sheet dated 24.7.2013 shows that the respective parties filed their written statements, they were also heard and the judgment was reserved. On the next date, i.e. on 26.9.2013, before passing of the judgment, the Court felt that there should be an affidavit filed by the wife-Swapna mentioning therein the present status of her family members with regard to their educational qualification as well as their financial status. It was also directed therein that copy of the same be served on the opposite party and the opposite party, if wants, should file reply to the said affidavit by 3.10.2013. Subsequent orders passed by this Court before 22.1.2014, may be reproduced below for better appreciation :

> "3.10.2013 Since the Lawyers have abstained from Court work, none appears for the parties.
>
> The affidavit filed by the petitioner, pursuant to the order dated 26.9.2013 be kept on record.
>
> Put up this matter on 22.10.2013 in the chamber at 1.40 p.m.
>
> 22.10.2013 Since the Lawyers have abstained from Court work, the petitioner appears in person.
>
> Pursuant to the order dated 26.9.2013 an affidavit has already been filed by the petitioner.
>
> Since the case was reserved earlier for judgment, the matter is reserved for judgment."

18. The aforesaid orders do not reveal that the copy of the affidavit pursuant to the order dated 26.9.2013, has been served by the wife-Swapna upon the husband-Sanjay and there is nothing found that any counter-affidavit by the husband-Sanjay has been filed refuting the submissions made by the wife-Swapna in her affidavit dated 26.9.2013. Though she filed affidavit on 27.9.2013 in Court, pursuant to the order dated 26.9.2013, copy of the same has not been served on the husband-Sanjay and no receipt of service of copy is also filed in record. On the other hand on 22.1.2014,

judgment was passed in the writ petition directing the husband-Sanjay to handover the custody of the child to the petitioner-wife-Swapna within a fortnight, giving husband-Sanjay visiting right to visit the child. It further appears from the order-sheet that the copy of the same was communicated to the learned Family Court, Bhubaneswar as per the endorsement of office dated 4.4.2014.

19. On 21.4.2014 the aforesaid Misc. Case filed by the respective parties were listed before the Bench of Hon'ble the Chief Justice and thereafter it went on listing on the dates after dates. From the aforesaid continuation of order-sheet, it is clear that the writ petitioner-Swapna has not served copy of the affidavit containing vital facts upon the writ opposite parties 4 to 8 including the husband and in spite of the order of this Court, suppressing the material facts, which amounts to influencing the Court, obtained the order dated 22.1.2014 because the Court was under impression that the order dated 26.9.2013 has been complied with. So the conduct of the wife-Swapna suppressing the matter of serving copy of the affidavit and depriving the husband-Sanjay to file counter-affidavit to the affidavit filed by wife-Swapna, amounts to exercise fraud upon the Court to obtain the order in her favour.

20. In **S.P. Chengalvaraya Naidu(Dead) by LRs. V. Jagannath (Dead) by LRs., (1994) 1 SCC 1** Their Lordships have observed, a litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

21. With due respect to the said decision, in the instant case, it is reiterated that the petitioner-wife-Swapna has withheld copy of the affidavit dated 27.9.2013, defying the order of this Court, suppressing the filing of C.P. No. 150 of 2013, she is found to have played fraud on the Court.

22. In **Indian Bank v. Satyam Fibres (India) Pvt. Ltd., (1996) 5 SCC 550** Their Lordships observed at paragraph-20 in the following manner :

> "By filing letter No. 2775 of 26.8.1991 along with the review petition and contending that the other letter, namely, letter No. 2776 of the even date, was never written or issued by the respondent, the appellant, in fact, raised the plea before the Commission that its

judgment dated 16.11.1993, which was based on letter No. 2776, was obtained by the respondent by practicing fraud not only on the appellant but on the commission too as letter No. 2776 dated 26.8.1991 was forged by the respondent for the purpose of this case. This plea could not have been legally ignored by the Commission which needs to be reminded that the authorities, be they constitutional, statutory or administrative, (and particularly those who have to decide a lis) possess the power to recall their judgments or orders if they are obtained by fraud as fraud and justice never dwell together (*Fraus et jus nunquam cohabitant*). It has been repeatedly said that fraud and deceit defend or excuse no man (*Fraus et dolus nemini patrocinari debent*)."

23. With due respect it is found that in that case the plea of fraud exercised on the appellant and on the Commission was taken. Therefore, the Hon'ble Apex Court held that the plea is legally tenable and the Court, be constitutional, statutory or administrative, has got the inherent right to recall their judgments or orders if they are obtained by fraud as fraud and justice never dwell together. Apart from this, in **Krishna Hare Gaur v. Vinod Kumar Tyagi and others, AIR 2015 SC 1248** at paragraph-15 Their Lordships observed that suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est.

24. We are, therefore, of the view that since the final order in the W.P.(Crl.) No. 665 of 2013 has been obtained by playing fraud on the court as per the discussion made above, in view of aforesaid authorities, this Court has got inherent power to recall its own order obtained by fraud. The contention of Mr. Ray, learned senior advocate for the petitioner-wife that the order passed under Article 226, cannot be recalled, having reached its finality, has to be considered. Article 137 relates to the order of the Hon'ble Apex Court where they have got power to recall or review the same. There is no provision in the constitution to recall the order passed in the writ jurisdiction under Article 226. But it must be remembered that writ is a suit. Since the decree passed in the suit by playing fraud on the court as discussed above, can be recalled as decree is said to be non est, the order under Article 226 being order in suit, obtained by fraud, is also liable to be recalled. Hence there is no force on the contention of Mr. Ray, learned senior advocate for the petitioner-wife-Swapna. On the otherhand, we are of the

view that the order dated 22.1.2014 passed in W.P.(Crl.) No. 665 of 2013 need to be recalled because fraud has been committed by petitioner-wife-Swapna on the Court. Point no.1 is answered accordingly.

POINT NO. 2

25. So far as point no.2 is concerned, it is not necessary to repeat the facts of the case. But as discussed above, we found that the husband-Sanjay was deprived of filing counter-affidavit to the affidavit filed by the petitioner-wife-Swapna with regard to the present status of her family members and their financial status so far as the maintenance of child is concerned. On going through the impugned order passed by this Court in the aforesaid writ application, it is found that the Court has given more stress on the capacity and competency of the petitioner-wife-Swapna and her family members to maintain the child. In the judgment dated 22.1.2014 passed in W.P.(Crl.) No. 665 of 2013 at paragraph-11, their Lordships have well discussed the factum of the status and capacity of earning of the petitioner-wife-Swapna and her family members and considering the same, the custody of the child was ordered to be given to the mother of opposite party no.4-husband-Sanjay. Had there been counter-affidavit filed by the opposite party no.4-husband-Sanjay, the discussion on this aspect must have been otherwise. On the otherhand opposite party no.4-husband-Sanjay and other opposite parties could not get opportunity to place their case. So the consideration of the writ petition filed by petitioner-wife-Swapna appear to have been made ex parte. When opposite party no.4 including his family members are not given reasonable opportunity of being heard by filing counter or reopening the case to hear the opposite parties, it will amount to violation of natural justice as audi alteram partem which is the core value of the Constitution for a federal country like ours, remain far from satisfaction. Either way, natural justice which is a very vital issue in this case, has been violated. When there is violation of natural justice, the order dated 22.1.2014 passed by this Court in W.P.(Crl.) No. 665 of 2013 is liable to be recalled. Point no.2 is answered accordingly.

26. In view of the aforesaid analysis, we recall the order 22.1.2014 passed by this Court in W.P.(Crl.) No. 665 of 2013.

POINT NOS. 3 & 4

27. In view of the submissions of the learned counsel for the respective parties, on the merit of the writ petition, point nos. 3 & 4 have been

formulated. Since they are inter-connected, we desire to address them together.

28. Mr. Ray, learned senior advocate for the wife-Swapna submitted that even if the remedy for custody of the child is available to the petitioner-wife by filing C.P. No. 150 of 2013 and interim application therein, the prayer of the petitioner-wife through the writ petition for habeas corpus is maintainable. On the other hand, learned counsel for the husband-Sanjay submitted that the petition for habeas corpus is not maintaible as the relief has not been sought in the appropriate forum. There is nothing to stand on the way of the Court exercising its jurisdiction in this writ for habeas corpus. It is well settled that a writ of habeas corpus is maintainable even if there is statutory remedy available to the petitioner. He further stated that in the decision in **Gaurab Nagpal v. Sumedha Nagpal, AIR 2009 SC 557** their Lordships observed in paragraph-22 in the following manner :

In Habeas Corpus, Vol.I, page 581, Bailey states;

The reputation of the father may be as stainless as cystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."

29. Referring to the aforesaid passage, learned counsel for the petitioner submitted that as a rule in the selection of guardian of a minor, best interest of the child is paramount consideration to which the rights of the parents must sometimes yield. Learned counsel for the husband-Sanjay submitted that since the statutory provisions already have been invoked by the petitioner-wife-Swapna, at the same time, this writ petition for habeas corpus praying for the custody of the child is not maintainable. At the same time he argued by relying upon the decision in **Syed Saleemuddin** (supra).

Our attention to paragraph-11 of the judgment was drawn where it has been discussed that in an application seeking a writ of habeas corpus for custody of minor children, the principal consideration for the court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that the present custody should be changed and the children should be left in the care and custody of somebody else. Referring to the above para, he submitted that there is no two opinion that the court on habeas corpus and the Family Court as well should always protect the best interest of the child and left to the custody of such guardian. On going through the above decision, we are of the view that no doubt the best interest of the child is the paramount consideration for all the courts while deciding the custody of the child.

30. In the instant case, C.P. No. 150 of 2013 and I.A. No. 54 of 2013 were filed for judicial separation and seeking custody of the child by wife-Swapna on 26.3.2013 and 15.4.2013 respectively before the learned Judge, Family Court, Bhubaneswar. Thereafter W.P.(Crl.) No. 665 of 2013 was filed seeking custody of the child by wife-Swapna on 13.5.2013. Pendency of such proceeding was not mentioned and it has been only certified that the matter out of which the writ petition arises, was never before this Hon'ble Court as per instruction supplied by the petitioner in the writ petition. Writ petition has been filed without declaring or disclosing the earlier filing of the proceedings before the Family Court, Bhubaneswar whereas, in fact, petitioner had already exercised her rights by filing C.P. No. 150 of 2013 and I.A. No. 54 of 2013 before the Family Court, Bhubaneswar. This suppression has resulted in the petitioner seeking similar remedy before two different courts. In **Gaurab Nagpal** (supra), there are no two parallel proceeding filed before different courts whereas in the present case, the proceeding is pending before two courts. In view of such different facts and circumstances, the decision in **Gaurab Nagpal** (supra), is not applicable to the present case.

31. Be that as it may, C.P. No. 150 of 2013 and W.P.(Crl.) No. 665 of 2013 are pending for the custody of the child and the child is with the custody of the husband-Sanjay and wife-Swapna is seeking for the custody of the child. Multiplicity of the proceeding is not at all favourable for awarding even justice. Since the goal of litigation has got in common to award justice, the parallel proceeding with common object is to be discouraged. Secondly, it has to be borne in mind that in civil proceeding, evidence can be led by the respective parties to the issues raised. Witnesses

can also be examined and cross-examined. Relevancy or irrelevancy of the documents are to be considered. Now in the case in hand, to avoid multiplicity of the proceeding or plurality of litigations and to allow parties to lead evidence, keeping in view the best interest and welfare of the child, C.P. No. 150 of 2013 which is already pending prior to filing of writ of habeas corpus, in our view, should be allowed to decide the common issue in question, i.e., custody of the child. Reliance is placed on a decision in **Sumedha Nagpal v. State of Delhi and others, (2000) 9 SCC 745** where Their Lordships have observed at paragraphs 2 & 3 in the following manner :

> "2. Both parties do recognize that the question of custody of the child will have to be ultimately decided in proceedings arising under Section 25 of the Guardians & Wards Act read with section 6 of the Act and while deciding such a question, welfare of the minor child is of primary consideration. Allegations and counter-allegations have been made in this case by the petitioner and Respondent 2 against each other narrating circumstances as to how the estrangement took place and how each one of them is entitled to the custody of the child. Since these are disputed facts, unless the pleadings raised by the parties are examined with reference to evidence by an appropriate forum, a proper decision in the matter cannot be taken and such a course is impossible in a summary proceeding such as writ petition under Article 32 of the Constitution.
>
> 3. Without expressing any view on the pleadings raised in this case and making it clear that it is neither appropriate nor feasible in the present case to investigate the correctness of the same and decide one way or the other, we propose to relegate the parties to work out their respective rights in an appropriate forum like the Family Court or the District Court in a proceeding arising under Section 25 of the Guardians & Wards Act read with Section 6 of the Act or for matrimonial relief.

32. With due respect to the above authorities, as the Family Court where the matrimonial proceeding is already pending,we refrain ourselves to allow relief in this writ application.In our view, the proceeding pending before the Family Court is preferred to exercise the issue in question in this writ application. Point nos. 3 & 4 are answered accordingly.

CONCLUSION

33. We are, therefore, of the considered view that the best interest and welfare of the child must be adjudicated by the learned Judge, Family Court, Bhubaneswar in C.P. No. 150 of 2013 and I.A. No. 54 of 2013 arising out of the said civil proceeding on its own merit within a period of six weeks from today. Both the parties are directed to appear before the learned Judge, Family Court, Bubaneswar on 24.8.2015 and learned Family Court, Bhubaneswar will take up the matter on a day to day basis and dispose of the matter within the time as stated above, according to law after affording reasonable opportunity to both the parties of leading evidence and being heard. Misc. Cases and the Writ Petition are disposed of accordingly.

Writ petition & Misc. Cases disposed of.

2015 (II) ILR - CUT- 727

S. PANDA, J.

CRLMC NO. 968 OF 2012

DR. BHAGABATI CHARAN DAS & ORS. ……..Petitioners

.Vrs.

REPUBLIC OF INDIA ……Opp. Party

(A) CRIMINAL PROCEDURE CODE, 1973 – S.482

Quashing of order taking cognizance – Offence under sections 120(B), 420, 468, 471, 177 I.P.C – Institutions found to have employed teachers with fake and forged documents and submitted declaration form of such teachers – Prosecution has not arrayed seven junior doctors as accused persons who have supplied documents relating to their employment – Whether C.B.I has power to investigate under MCI regulations ? – In MMDR Act and Chartered Accountants Act there

is inbuilt provision for prosecution which is absent in MCI Regulations – Held, the impugned proceeding against the petitioners is liable to be quashed. (Para 9)

(B) PENAL CODE, 1860 – S.420

Cheating – Offence can not be said to have been made out unless the following ingredients are satisfied :-

(i) that the accused deceived some person;
(ii) that such inducement was intentional;
(iii) that the person so induced did or omitted to do something;
(iv) that such act or omission caused, or was likely to cause damage or harm to that person in body, mind, reputation or property.

In this case, Opp. Party has not alleged any act of inducement on the part of the petitioners – No allegation that the petitioners have an intention to cheat the Opp. Party – Moreover the documents produced by the seven doctors are self declaratory and they were not impleaded as accused persons – Held, in the absence of the seven doctors the proceeding against the petitioners is vitiated.

(Para 8)

Case Laws Referred to :-

1. 2014(3) MLJ(Crl) 646 : State -V- M.K.Rajagopalan
2. (2014) 9 SCC 772 : State (NCT of Delhi) -V- Sanjay
3. (2011) 1 SCC 534 : Institute of C. A. of India -V- Vimal Ku. Surana & Anr.
4. 2013(11) SCALE 183 : Rohilkhand Med. College & Hosp.,Bareilly -V- M.C.I. & Anr.

For Petitioners : M/s. A.K. Parija, S.P.Sarangi, P.K.Dash, J.S.Mishra, P.P.Mohanty

For Opp. Party : M/s. S.K.Padhi, Sr. Counsel for C.B.I.

Date of Judgment : 16.09.2015

JUDGMENT

S.PANDA, J.

Petitioners in this 482 Cr.P.C. application assailed the order dated 3.2.2012 passed by learned Special C.J.M.,(C.B.I.), Bhubaneswar taking cognizance of offence under Sections 120(B), 420, 468, 471,177 of the I.P.C.

in SPE No. 5 of 2010 and issuing process as well as the F.I.R. bearing No. RC0152010S0019 dated 11.11.2010 and charge sheet No. 1 of 2012 dated 30.1.2012.

2. Learned counsel for the petitioners submits that the allegation as found in the F.I.R. as well as in the charge sheet on which the C.B.I. seeks to prosecute the petitioners that the petitioners are deliberately concealed from the MCI Inspector about the status of seven junior residents/tutors during the second renewal inspection in order to obtain Nil Deficiency Report. The management had arranged number of faculties on ad hoc basis showing them as regular faculties with appointment orders, joining reports and declaration forms and made them to appear before the MCI Inspector on false representation to obtain the Nil Deficiency Report. It was alleged that during investigation it is found that seven doctors are regular employees of Government of Orissa. The copies of requisite documents towards resident proof i.e. copies of Driving Licence and Resident/Nativity Certificate in respect of faculties to fulfill the requirements of MCI was arranged and those are forged documents which are never issued by the concerned authorities. So far as auditorium and deficiency in bed occupancy there is no evidence has been found to substantive those allegations. Learned counsel for the petitioners further submits that in view of the aforesaid allegations made by the C.B.I. on the basis of establishment of Medical College Regulations, 1999 (Amended up to September, 2011), Clause 8(3) of the said Regulation deals with the grant of permission for establishment of a new Medical College. For better appreciation Clause 8(3)(1) is extracted hereunder:-

"8(3)(1) The permission to establish a Medical College and admit students may be granted initially for a period of one year and may be renewed on yearly basis subject to verification of the achievements of annual targets. It shall be the responsibility of the person to apply to the Medical Council of India for purpose of renewal six months prior to the expiry of the initial permission. This process of renewal of permission will continue till such time the establishment of the medical College and expansion of the hospital facilities are completed and a formal recognition of the Medical College is granted. Further admissions shall not be made at any stage unless the requirements of the Council are fulfilled.

The Central Government may at any stage convey the deficiencies to the applicant and provide him an opportunity and time to rectify the deficiencies.

Provided that in respect of

(a) Colleges in the stage up to 2nd renewal (i.e. Admission of third batch):-

If it is observed during any regular inspection of the Institute that the deficiency of teaching faculty and/or residents is more than 30% and/or bed occupancy is <60% such an Institute will not be considered for renewal of permission in that academic year.

(b) Colleges which are found to have employed teachers with faked/forged documents:-

If it is observed that any Institute is found to have employed a teacher with faked/forged documents and have submitted the declaration form of such a teacher, such an Institute will not be considered for renewal of permission/recognition for award of MBBS Degree/processing the applications for postgraduate courses for two academic years i.e. that academic year and the next academic year also."

3. The prosecution has not arrayed the seven junior doctors as accused persons who have supplied the documents relating to their employment i.e. Driving Licence, Resident/Nativity Certificate. Hence in absence of any materials available on record the petitioners have supplied the documents (referred to above) relating to seven junior doctors in a deceptive manner and produced before the MCI, the proceeding against them liable to be quashed. In support of his contention he has cited the decision of the ***Madras High Court*** reported in ***2014(3) MLJ(Crl)646, State V. M.K.Rajagopalan*** in Crl. RC Nos. 943 and 985 of 2013 decided on 6.8.2014 wherein the Court has held that:-

> " The shortfall in faculties and submissions of fake/forged documents would only disentitle the Institution from getting renewal of permission. Also, the errant medical Doctors would be dealt with accordingly by the Medical Council, whereby the names of defaulters can be removed from the State Medical Register, thus debarring them from engaging themselves in the profession. Also, the Medical Council of India Act provides for withdrawal of recognition granted to such College as per Section 19 of the Act. Nowhere it is stated either in Medical Council of India Act or the regulations that such violation would result in penal consequences. The contravention of

> Rules and Regulations may be an offence against the statute, but is not a crime. It is pertinent to point that no complaint is preferred by Medical Council of India. Therefore, there is considerable force in the submission made by the learned counsel for the petitioners that there is no room or jurisdiction in any external agency to investigate into the affairs of any medical Institution coming with the purview of the Medical Council of India.
>
> Apart from that, the learned Special Public Prosecutor for CBI could not point out, from the materials placed along with the charge sheet or from anywhere on the record from which it can be gathered, that prima-facie offences are made out against the accused persons. The Trial Court examined the materials placed on record on threadbare after referring to the statements recorded from various witnesses and decided to discharge the accused persons which in my view is justified. "

4. Mr.S.K.Padhi, learned Senior Counsel for the C.B.I. submits that the aforesaid decision inapparent to the present case and it was not correctly decided as per the principles settled by the Apex Court in the case of ***State (NCT of Delhi) V. Sanjay*** reported in ***(2014) 9 SCC 772*** under the Mines and Minerals Development and Regulation Act as well as in the case of ***Institute of Chartered Accountants of India V. Vimal Kumar Surana and Another*** reported in ***(2011) 1 SCC 534***. It was held in the aforesaid decision that the police is empowered and duty bound under Section 149 to 152 and 154 Cr.P.C. to lodge an F.I.R. under IPC and Cr.P.C. investigate it and file charge sheet irrespective of the procedures under MMDR Act (even if police suo motu registers the FIR as in one of the present cases and even if complaint is not filed by person authorized under MMDR Act).

In the case of Institute of ***Chartered Accountants (supra)*** it was held that where a person is alleged to have committed offences under Sections 24, 24-A and 26 of the Chartered Accountants Act, 1949 in personation as CA etc. is also under IPC but in absence of complaint under Section 28 before Magistrate's Court no cognizance of offences punishable under Sections 24, 24-A and 26 could be taken. Prosecution under IPC can still be commenced against him and it cannot be disallowed on the ground that 1949 Act is a special statute vis-à-vis IPC. Therefore in the present case even though the MCI has not made any complaint CBI can proceed with the prosecution.

5. The learned counsel for the petitioners in reply to the aforesaid submission submits that the decisions relied on by the counsel for the CBI are distinguishable as both the acts the MMDR Act and Chartered Accountants Act there is a provision for prosecution in the said parents act. Therefore the consequences of those penal provisions prosecution can proceed under the general provision i.e. IPC. or under the same statute where inbuilt provision was available.

6. Learned counsel for the C.B.I. also placed reliance in the case of ***Rohilkhand Medical College and Hospital, Bareilly V. Medical Council of India and another*** reported in ***2013(11) SCALE 183*** wherein it was held that permission of the Central Government was pre-requisite for establishment or increasing the number of seats in a medical college. However mere fact that the C.B.I. has registered a case against few officers of the Ministry of Health and Family Welfare, New Delhi and also against the Chairman of the College is not a ground to revoke the permission already granted for the additional intake of students for the academic year 2013-14 with malafide intention and violation of natural justice. In that case the C.B.I. in its charge sheet points out serious infirmities in the report submitted by the Central team which conducted the inspection of the college but the said was distinguishable as in the present case the MCI has not taken any action as provided under the Regulations 8(1)(3)(d) of Regulations 2013. Court has expressed its concern regarding any entrance test conducted by private educational institutions must be one enjoined to ensure the fulfillment of twin object of transparency and merits and no capitation fee be charged and there should not be profiteering. C.B.I. had to charge sheet none other than the then Union Minister of Health and Family Welfare, itself which depict how the educational system in this country is deteriorating.

7. Considering the above fact and circumstances and as both the acts the MMDR Act and Chartered Accountants Act there is a provision for prosecution in the said parents act, rightly the Court has not inclined to interfere with the same in the decisions ***State (NCT of Delhi)*** and ***Institute of Chartered Accountants of India(supra).*** In the case at hand no action taken by the M.C.I. and there is no materials on record which reveals that the petitioners are knowing fully well about the facts reflected in the documents supplied by the seven junior teachers (the doctors) have deceptively used the documents before the M.C.I. during its inspection. Those documents rather produced by those seven doctors who are suppose to give their self

declaration which the petitioners have bonafidely believed to be true and accepted those documents and produced before the M.C.I. In absence of those persons who have supplied the documents hence the ingredients of Section 420 I.P.C. has not fulfilled and no criminal charges attributes towards the petitioners.

8. Law is well settled that offence of cheating cannot be said to have been made out unless the following ingredients are satisfied.

(i) that the accused deceived some person;
(ii) that such inducement was intentional;
(iii) that the person so induced did or omitted to do something;
(iv) that such act or omission caused, or was likely to cause damage or harm to that person is body, mind, reputation or property.

In the present case no act of inducement on the part of the petitioners have alleged by opposite party. No allegation has been made that the petitioners have an intention to cheat the opposite party from the very inception rather the seven junior tutors/doctors have produced those documents which are self declaratory and they were not impleaded as accused persons in the charge sheet. Hence in their absence initiation of proceeding against the petitioners is vitiated.

9. The MCI neither alleged nor recorded any finding that fake documents are produced before it. There is no inbuilt provision in the M.C.I. regulation for punishment accordingly the proceeding initiated against the petitioners are liable to be quashed. This Court sets aside the impugned order and quashes the proceeding in SPE No. 5 of 2010 pending before the learned Special C.J.M. (C.B.I), Bhubaneswar in exercise the jurisdiction under Section 482 of the Cr.P.C.

Application allowed.

2015 (II) ILR - CUT- 734

B. K. NAYAK, J.

RFA NO. 8 OF 2012 & M.C. NO. 25 OF 2015

GIRIJA SHANKAR SATPATHY .....Appellant

.Vrs.

USHARANI MISHRA .....Respondent

HINDU MARRIAGE ACT, 1955 – S.25

Permanent alimony – Trial Court while dissolving the marriage directed to pay Rs. 5,00,000/- towards permanent alimony and Rs. 2,00,000/- towards dowry articles – Hence this appeal – Parties separated soon after the marriage – There was no prayer for permanent alimony either in the plaint or by way of independent application – Wife has been serving under CESU as a Clerk with gross salary of Rs. 19,335/- P.M. and she has remarried after the decree of divorce – In the other hand husband draws a gross salary of Rs. 22,000/-P.M and living with his old ailing parents – There is also no pleading / evidence with regard to giving of any dowry or the articles given have been illegally retained by the husband or his family members – Held, the respondent wife is not entitled to any maintenance from the appellant – Impugned order of the trial court directing payment of the amount towards permanent alimony and dowry articles is set aside.

(Paras 8, 9)

For Appellant : M/s. Devi Prasad Dash & Associates.
For Respondent : M/s. R. Bahal & Associates.

Date of hearing : 01.05.2015
Date of judgment: 01.05.2015

JUDGMENT

B.K.NAYAK, J.

Judgment dated 30th November, 2011 passed by the Civil Judge(Senior Division), Phulbani in C.S. No.13 of 2010, insofar as it relates to grant of permanent alimony of Rs.5,00,000/-(rupees five lakh) and a further direction for payment of Rs.2,00,000/-(rupees two lakh) towards ornaments, dowry articles and other household things etc. to the plaintiff-respondent, is challenged in this appeal.

2. Undisputedly marriage between the parties was solemnized on 08.07.2007 according to the Hindu caste and custom. It is stated in the plaint that as per the demand of the appellant and his family members a cash of Rs.2,00,000/-(rupees two lakh) was paid by the father of the respondent apart from 10 bharis of gold ornaments, 20 bharis of silver ornaments, one Godrej Almirah, Colour T.V., Dressing Table, Sofa set, Regrigerator, cot and silk sari and other household articles worth of Rs.4,00,000/-(rupees four lakh). Admittedly the parties separated soon after the marriage though there is a dispute with regard to date of separation. On separation, the respondent came and resided in her father's house. The respondent filed the suit for dissolution of marriage on ground of cruelty and for return of the dowry articles and the cash given by her father at the time of marriage. There was no prayer for permanent alimony either in the plaint or by way of independent application.

3. During trial the parties led evidence, on consideration of which the Trial court by the impugned judgment dissolved the marriage between the parties and directed for payment of Rs.5,00,000/-(rupees five lakh) as permanent alimony and a further amount of Rs.2,00,000/-(rupees two lakh) towards dowry articles, ornaments and other household articles by the appellant to the respondent.

4. During the pendency of this appeal Misc. Case No.25 of 2015 has been filed by the appellant under Order-41, Rule-27 of the C.P.C. for acceptance of additional evidence to the effect that the respondent has been serving under the CESU as a Clerk with gross salary of Rs.19,335/- and that in the meantime, after the decree of divorce, she has remarried on 4th June, 2014. Annexure-1/1 series are the informations(4 sheets) supplied by the CESU to the appellant under RTI with regard to service particulars of the respondent. Annexure-1/2 series is the invitation card with regard to the remarriage of the respondent. No objection to the petition is filed. Rather the learned counsel for the respondent has admitted the correctness of the documents vide Annexure-1/1 series and 1/2 series. Therefoer, the petition for additional evidence is allowed and the Annexure-1/1 series (4 sheets) are marked as Exts. B,C,D & A-1/2 is marked as Ext.-F, for the defendant-appellant.

5. Without challenging the decree of divorce, learned counsel for the appellant only assails the order of the Trial Court for payment of Rs.5,00,000/-(rupees five lakhs) as permanent alimony and Rs.2,00,000/-(rupees two lakh) towards dowry and other articles. It is submitted by the

learned counsel for the appellant that there was no prayer for alimony by the respondent and further that there is no acceptable evidence with regard to giving of any dowry by the father of the respondent. It is further submitted that the respondent in her own statement admitted that she was working as Probationary Officer in the ICICI Bank and earned gross salary of Rs.18,000/- and now working under the CESU and that the appellant was a Clerk in the post Officer having old ailing parents to look after and therefore, the respondent was not entitled to any alimony at all. He also submits that in view of the un-controverted additional evidence that respondent has now been working as a Clerk under CESU and drawing gross salary of Rs.19,000/- and that in the meantime, after the decree of divorce, she has re-married, she is not entitled to any maintenance and a further sum of Rs.2,00,000/-(rupees two lakh) towards dowry and ornaments. The Trial Court has not at all considered the evidence with regard to the income and liability of the parties.

6. Learned counsel for the respondent on the other hand submits that there is sufficient evidence, particularly that of P.W.3, the paternal uncle of the respondent, about giving a dowry and cash of Rs.2,00,000/-. With regard to the direction about payment of permanent alimony it is submitted that even if no prayer was made the court below was in its jurisdiction to grant such alimony and that keeping in view the present day cost of living and the status and position of the parties, grant of Rs.5,00,000/-(rupees five lakh) as permanent alimony is not exorbitant.

7. Section-25 of the Hindu Marriage Act makes provision for grant of permanent alimony and maintenance which is as follows:-

> **"25. Permanent alimony and maintenance**.—(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances or either party at any time after it has made an order under sub-section(1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just]"

It is seen that as per subsection-(1) of section 25 maintenance can be granted by either party to the other keeping in view the income of the parties concerned and their liabilities their conduct and other circumstances. Subsection-(2) speaks about variation, modification or rescinding of order of maintenance by the Court on being satisfied about change of circumstances by the parties. Subsection-(3), apart from other things, also provides for rescinding of the order of maintenance on the remarriage of the party in whose favour maintenance order has been passed.

8. With regard to the question of alimony, it is seen that the respondent being examined as P.W.1 stated that she was working as P.O. in the ICICI Bank on the date of her evidence. On cross examination, she has stated that her gross income was more than eighteen thousand per month. It also transpires from the documents Exts.-B,C,D & E that she is working under CESU having a gross monthly income of Rs.19,335/-(rupees nineteen thousand three hundred thirty five). Uncontroverted evidence of the appellant-defendant with regard to his salary is that he draws a gross monthly salary of Rs.22,000/-. It also transpires from his evidence that he has old ailing parents who are dependent on him. Keeping in view the aforesaid position, I am of the view that the respondent is not entitled to any maintenance from the appellant. Accordingly, the direction of the court below granting a lump sum maintenance of Rs.5,00,000/-(rupees five lakh) in favour of the respondent is set aside.

9. It is stated in the plaint that as demanded by the defendant and his family members a cash of Rs.2,00,000/-(rupees two lakh) was paid to them by the father of the respondent. There is no pleading as to when and where and to whom such payment was made. It is also stated that in addition to the

above Rs.2,00,000/-(rupees two lakhs), gold ornaments of 10 bharis, silver ornaments of 20 bharis, godrej Almirah, colour T.V., Refrigerator, cot etc. were given. With regard to T.V., Refrigerator, etc. no brand name or description or value has been furnished. In the written statement and evidence of the respondent demand and receipt of Rs.2,00,000/-(rupees two lakh) and other articles have been denied.

P.W.2 is the father of the respondent who had allegedly given the cash and the other dowry articles. Except stating in Para-2 of his evidence that he gave sufficient dowry, he has not whispered a word about payment to the appellant by him of Rs.2,00,000/-(rupees two lakh). On the contrary, in his cross examination he has stated that though giving of dowry is illegal, he had given all those articles as required by his daughter, the respondent. This statement makes it amply clear that nothing was given to the appellant and that whatever was given it was given for the respondent. There is neither any pleading nor proof that the articles or ornaments given to the respondent by her father have been illegally retained by the appellant or his family members. P.W.3 who is the brother of P.W.2 states that a cash of Rs.2,00,000/-(rupees two lakh), 10 bharis of gold ornaments, and other articles were given by way of dowry, but in his cross examination he admitted lack of his personal knowledge about from which shop articles were purchased. On the failure of P.W.2, who had allegedly given the cash and other articles, to say about such payment and giving, the evidence of P.W.3 is of no value at all. In the aforesaid circumstance, the direction of the Trial Court for payment of Rs.2,00,000/-(rupees two lakh) to the respondent by the appellant towards dowry articles is erroneous and unsustainable.

Accordingly the appeal is allowed and the judgment and decree of the Trial Court in so far as it relates to direction for payment of permanent alimony of Rs.5,00,000/-(fupees five lakh) and an additional amount of Rs.2,00,000/-(rupees two lakh) by the appellant, is set aside.

Appeal allowed.

2015 (II) ILR - CUT-739

B. K. NAYAK, J.

O.J.C. NO. 8689 OF 1994

MAHESWAR BARIK (SINCE DEAD) AFTER HIM JATRI BARIK & ORS. .....Petitioners.

.Vrs.

MAHESWAR NAIK & ORS. .....Opp. Parties

ODISHA LAND REFORMS ACT, 1960 – S. 23

Concurrent Order of the Tahasildar and Sub Collector directing for restoration of the suit land in favour of O.P.1 by evicting the petitioner – Action challenged – Case land situated in the district of Keonjhar – Evidence of the petitioner, possession note in the Hal ROR, Yadast of the year 1965 and the report of the R.I. clearly proved that the petitioner was in possession of the case land since 1940 by virtue of oral sale, for a consideration of Rs. 95/- – Section 7-D of Odisha Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulations, 1956 (Regulation-II, 1956) was amended in the year 1975 with retrospective effect from 2.10.1973 (which was made applicable to Keonjhar district in 1979) prescribing limitation of 30 years instead of 12 years – So petitioner being in possession over the case land for more than 12 years prior to 1973 and perfected his title by way of adverse possession, such vested right can not be divested unless there is express provision in the statute indicating in that way – The case land could not have been directed to be restored in favour of O.P.1 by evicting the petitioner – Held, the impugned orders are quashed. (Para 11)

Case Laws Referred to :-

1. 32-(1990) OJD-173: (Civil) Raghunath Mahanta v. Kairi Munda and Ors.
2. 1989(II) OLR-221 : Burulu Ramalu V. Mukunda Raipatra
3. 1994(II) OLR-322 : Atul Chandra Adhikari and another v. Stat of Orissa and others

For Petitioners : M/s. Manoj Mishra, U.C.Patnaik, P.K.Das & B.Mishra

For Opp. Parties : Addl. Govt. Adv. M/s. S.C.Sahoo, A.N.Sahoo, B.B.Mohanty, B.K.Rath, N.K.Sahoo & C.S.Nayak

Date of hearing : 24.07.2014
Date of judgment: 24.07.2014

JUDGMENT

B.K.NAYAK, J.

Orders passed by the original and appellate authorities, viz. the Tahasildar, Ghatagaon and Sub-Collector, Keonjhar respectively vide Annexures-5 and 10, directing for restoration of the disputed land in favour of opposite party no.1, Maheswar Naik have been assailed in this writ application.

2. Opposite party no.1 filed application purportedly under section 23 of the OLR Act for eviction of Maheswar Barik,- writ petitioner(since dead) from the case land and restoration of the same in his favour, on the ground that he is a Scheduled Tribe person and the land has been recorded in his name, and, that the writ petitioner, a non-Scheduled Tribe person has been in unauthorised possession of the land. The application was registered as Case No.1 of 1993 in the court of Tahasildar, Ghatagaon, District- Keonjhar since District- Keonjhar is a Scheduled Area and the Orissa Scheduled Areas Transfer of Moveable Properties (by Scheduled Tribes) Regulation 1956 (in short "Regulation-2 of 1956) came into force in the Sub-Division of Keonjhar w.e.f. 12.6.1979, the proceeding was treated to be one under Regulation-3 of the Regulation-2 of 1956. The writ petitioner appeared before the Tahasildar, and contended that the father and uncle of opposite party no.1 were the original owners and they sold the case land in favour of the petitioner orally for a consideration of Rs.95/- about 53 years back i.e. in 1940 and since then, the petitioner has been continuing in possession and has constructed a house there, where he is staying.

3. It transpires that during the Hal settlement operation the land in question has been recorded in the name of the father of opposite party No.1 and his co-sharers with note of possession in favour of the petitioner. Opposite party no.1 himself has admitted before the Tahasildar, that the petitioner is in possession of the case land since 10 to 12 years.

4. The Tahasildar, by the impugned order allowed restoration in favour of opposite party no.1 merely holding that the petitioner has not taken any step for getting said land recorded in his name either in Civil Court or in the

Court of Board of Revenue, Orissa, after final publication of the Hal ROR on 28.8.1982, and, therefore, his possession must be held to be forcible.

5. The petitioner challenged the order of the Tahasildar before the Sub-Collector, Keonjhar in Regulation Appeal Case No.1/93. The said appeal was dismissed by order dated 11.11.1994.

6. Learned counsel for the petitioner submits that findings of the appellate authority that the petitioner has not adduced any evidence either documentary or oral regarding his possession since 1940 in the lower court is not correct because the Yadast of the year, 1965 produced before the appellate authority and also the report of the R.I. coupled with petitioner's oral evidence prove the possession of the petitioner since 1940, and, therefore, the impugned appellate as well as the original orders are unsustainable. None appears on behalf of opposite party no.1 when the matter is called.

7. It transpires from the order of the appellate authority- Sub-Collector, that Yadast of the year, 1965 in respect of the case land was produced before him for the first time though the same was not produced before the Tahasildar. In the Yadast, which has been filed before this court and marked as Annexure-7, it is clearly written by the Amin on 2.5.1965 that the land in question was sold orally by the father and uncles of present opposite party no.1 in favour of the present petitioner for a consideration of Rs.95/- in the year, 1940. The Yadast also reveals that the petitioner was continuing in possession. The Yadast is a document prepared by the Amin during initial stage of Settlement in the year,1965, when the present dispute between the parties was not in-contemplation. Therefore, the entries made in the Yadast by the Amin on which the father and uncle of the opposite party no.1 have signed is very much relevant which has been overlooked by the appellate authority. It also transpires that the R.I. has submitted a report on 23.4.1993 to the Tahasildar after making enquiry, wherein it is stated that the petitioner has constructed house on the disputed land and is in possession of the same and his possession is more than 30 years.

8. Neither the Tahasildar nor the Sub-Collector has referred to the report of the R.I. which goes to show that the petitioner is continuing in possession for more than 30 years.

9. In the case of **Raghunath Mahanta v. Kairi Munda and others**: **32-(1990) OJD-173(Civil),** this court has held that section-7-D of Regulation-II of 1956 was amended by Regulation-I of 1975 prescribing limitation of 30 years for recovery of property transferred by aboriginal and that the Regulation having come into force in Keonjhar on 12.6.1979, the transferee already in possession for more than 12 years prior to 12.6.1979 cannot be evicted and the land cannot be recovered from him.

10. A Division Bench of this Court in the case of **Burulu Ramalu V. Mukunda Raipatra, 1989(II) OLR-221** held as follows:

> "**6**. The position has to be accepted as well settled that the vested right of a person cannot be divested unless there is express provision in the statute indicating in that way. But, in the present case the legislature while making the amendment in 1975 substituting the period of 12 years by 30 years gave it only limited retrospective effect from 2nd October,1973. Therefore, if a person had perfected his title by adverse possession over the property for the requisite period i.e. 12 years, he had a vested right over the said property and such right is not intended to be affected by the amendment in Sec.7-D of the Regulation. If any decision is necessary in support of the view, we may refer to the case of (Indramani Jena and others v. Dandasi Paik and others) reported in 50(1980) CLT 368".

Another Division Bench decision of this Court on similar line is reported in **1994(II) OLR-322-: Atul Chandra Adhikari and another v. Stat of Orissa and others**.

11. The oral evidence of the petitioner and the nature of possession note in the Hal Record of Rights in respect of the case land in favour of the petitioner and the Yadast of 1965 and the report of the R.I. clearly proved that the petitioner is in possession of the land since 1940, by virtue of oral sale, for a consideration of Rs.95/-. Even though Regulation-II, 1956 was made applicable to Keonjhar in 1979 and that the regulation itself was amended in 1975 by prescribing limitation of 30 years under section 7-D w.e.f. 1973, the petitioner being in possession for more than 12 years prior to 1973, the land could not have been directed to be restored in favour of opposite party no.1 by evicting the petitioner.

Both the impugned orders are, therefore, unsustainable and I quash the same. The writ petition is accordingly allowed. No costs.

Writ petition allowed.

2015 (II) ILR - CUT- 743

S. K. MISHRA, J.

ABLAPL NO. 9240 OF 2015

CHITRA ATHWANI .....Petitioner

.Vrs.

STATE OF ODISHA .....Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.438

Anticipatory bail – Offence under sections 412, 419, 188, 120-B I.P.C – One P.K.Iyer accused in a Bank fraud case was staying in Hotel Trident in order to evade police arrest – According to the present petitioner as there was every possibility of her marriage with P.K.Iyer she in good faith booked the room in his name – Non application of offence U/s. 412 I.P.C against the present petitioner – No allegation that the present petitioner did represent herself as P.K.Iyer nor P.K.Iyer has impersonated to be the petitioner – No report by the I.O that the petitioner has previously undergone imprisonment in respect of a congnizable offence or there is chance of her fleeing from justice or possibility of committing similar or other offence – She has also not misutilised the interim protection granted by this Court earlier, rather she is co-operating with the investigation – Held, application for anticipatory bail is allowed. (Para 9)

Case Laws Referred to :-

1. (2011) 1 SCC 694 : Siddharam Satlingappa Mhetre -V- State of Maharashtra & Ors.
2. (1980) 2 SCC 565 : Gurbaksh Singh Sibbia -V- State of Punjab
3. AIR 2014 SC 2756 : Arnesh Kumar -V- State of Bihar

For Petitioner : M/s. Partha Mukherji
For Opp. Party : Addl. Govt. Advocate :

Date of order 11.09.2015

ORDER

S.K.MISHRA, J.

This is an application under Section 438 Cr.P.C, filed by the petitioner apprehending arrest for the alleged commission of offence under Sections 412, 419, 188, 120-B of the Indian Penal Code (for short 'the IPC')

in C.T. Case No.2508 of 2015 of the court of learned SDJM, Bhubaneswar, arising out of Nayapalli P.S. Case No.196 of 2015.

The FIR has been lodged initially against the Management of Hotel Trident and one P.K. Iyer. It is alleged that the said P.K. Iyer is involved in a criminal case for commission of offence under Sections 120-B, 420, 468 and 471 of the IPC in Bangalore CBI Case Nos.RC03/13, RC02/14 and RC03/14. It is alleged in the FIR, which has been drawn up on his own information of the IIC, Nayapalli Police Station, that a suspected person involved in heinous crime is staying at Hotel Trident in another's name in order to evade police arrest. He entered this fact in the station diary and proceeded to said Hotel for verification of the information and necessary action along with other police personnel. During verification of Hotel Register in presence of staff, witnesses and Hotel employees, he found that Room No.220 is booked in the name of the present petitioner but one P.K. Iyer, who is the accused in the aforementioned CBI case was residing alone since 17.03.2015. Being asked he confessed in the presence of the witnesses that he is wanted in a Bank fraud case of the CBI, Bangalore and the officers of the CBI were chasing him. In order to evade police arrest, he is waiting for anticipatory bail.

The CBI officers of Bhubaneswar Police were also intimated, who confirmed the identity of said P.K. Iyer, son of late T.V. Parsuram, Vice-Chairman of M/s Deccan Chronicle Holding Ltd., The CBI officers arrested the said P.K. Iyer. It is further revealed from the FIR that though several times executive order has been circulated through notice board to intimate the occupancy statement of the occupant to the local police, the Trident Hotel authority defied the order and assisted the said accused and allowed to stay months together in the Hotel Room No.220, which was booked in the name of a lady violating the sections of law. As a result of which, the Trident Hotel authority not only harboured a criminal but also disobeyed the police order by assisting him in impersonation and conspired with him in order to carry out his ulterior motive or to evade police arrest. The IIC, Nayapalli Police Station came to the conclusion on verification that P.K. Iyer was concealing his presence in the name of a lady in order to evade police arrest with the assistance of Hotel Management, who have given shelter and abetting for commission of his mission. Hence, FIR has been registered as noted above.

At the first instance, it is noted that the offence under Section 412 IPC provides for punishment of dishonestly receiving stolen property knowing

that it was obtained by dacoity. So, in this case, the said provision is not applicable. The Investigating Officer mistakenly arrayed this offence as there is no allegation that anybody actually received stolen property, which was obtained by dacoity. Even in the original case, which was filed by the CBI, Bhubaneswar, no offence under Section 395 IPC has been registered. Instead, the learned counsel for the petitioner submits that offence under Section 212 IPC is clearly made out, which provides for punishment for harbouring an offender. But, this Court takes note of the fact that the offence under Section 212 IPC is cognizable but bailable in nature and is triable by any Magistrate. The offence under Section 188 IPC provides for punishment for disobedience of order lawfully promulgated by public servant. If such disobedience causes obstruction, annoyance or injury to person lawfully employed, then it is punishable with imprisonment for one month or fine of Rs.200/- or both. If the offence under Section 188 IPC is committed by such disobedience, which causes danger to human life or health or safety the sentence prescribed is six months imprisonment or fine of Rs.1,000/- or both. The offence under Section 188 IPC is also cognizable but bailable in nature and triable by any Magistrate.

The Section 120-B IPC though constitute a separate offence, the punishment as to the same depends upon the offence for which the conspiracy is entered into by the offenders and accordingly, the punishment prescribed is the same as abetment of offence, which is same as for offence abetted. When criminal conspiracy committed an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, then it shall be cognizable or not depends upon the offence, which is offence for which the conspiracy was hatched. In other words, if the offence for which conspiracy has been hatched is cognizable, then the offence under Section 120-B of the IPC will be cognizable otherwise or not. Similarly, if the offence for which the conspiracy is hatched is bailable, then the Section 120-B IPC shall be bailable. In other words, if the conspiracy is for committing an offence, which is non-bailable, then 120-B IPC shall be non-bailable. All other conspiracies provide for imprisonment of 6 months or fine or both, it is non-cognizable, bailable and triable by Magistrate First Class.

So, in this case from the facts narrated in the report given by the IIC, Nayapalli Police station, no offence under Section 412 IPC is made out. There is also no allegation that the present petitioner did represent herself as P.K. Iyer nor there is allegation that P.K. Iyer has impersonated to be the

petitioner. The allegation is that petitioner booked a room in her name at Hotel Trident for which offence under Section 419 IPC can be made applicable along with Section 120-B of the IPC. Thus, the offence under Section 419 of the IPC is bailable and the offence under Section 120-B IPC is also bailable. Similarly, the offence under Section 212 IPC for harbouring offender and 188 IPC for disobedience lawful order issued by the authorities are bailable in nature. However, the case has been registered under Section 412 IPC. The Court comes to the conclusion that the apprehension in the mind of the petitioner that she shall be arrested by the police appears to be real. Hence, anticipatory bail is maintainable.

Coming to the question whether to grant anticipatory bail to the petitioner or not, this Court takes note of the oft quoted case of ***Siddharam Satlingappa Mhetre vs. State of Maharashtra and others,*** (2011) 1 SCC 694, where the Hon'ble Supreme Court after taking into consideration 49 earlier reported cases including the case of ***Gurbaksh Singh Sibbia vs. State of Punjab,*** (1980) 2 SCC 565 laid down the following factors and parameters that should be taken into consideration while dealing with the anticipatory bail.

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code,

1860 the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

In the aforesaid case, the Hon'ble Supreme Court further held that personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case. The Hon'ble Supreme Court at para 113 and 115 held that arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of the case. The Court must carefully examine the entire available record and particularly the allegation which has been attributed to the accused and the allegation is corroborated by other material and circumstance on record. The factors that have been enumerated earlier, as per the order of the Supreme Court are by no means exhaustive but they are only illustrative.

No doubt, the nature of accusation appears to be grave as far as the offences committed by P.K. Iyer is concerned and this case has drawn a lot of media coverage but the nature of accusation against the present petitioner is that she only reserved a room in her name where main accused P.K. Iyer stayed. She has given explanation to the I.O. that as there was every possibility of solemnizing her marriage with P.K. Iyer, she in good faith booked a room in his name. So, at best offence under Sections 419, 212 read with Section 120-B IPC is made out against her, which are bailable in nature.

The I.O. also did not report that the petitioner has previously undergone imprisonment on conviction by a court in respect of cognizable offence or that other criminal case is against her. It is also not stated by the I.O. in his report that there is chance of her fleeing from justice or possibility of the petitioner committing similar offence or other offences. The case in which the main accused P.K. Iyer has been arrested, affects a large number of people as public money has been misappropriated by him. The present case, as far as the present petitioner is concerned does not have a large magnitude affecting large number of people.

The petitioner happens to be a lady and even under the 1st proviso to Sub-section (1) of Section 437 Cr.P.C the Magistrate has been given the powers to enlarge her on bail keeping in view the fact that the accused is a lady. So, striking a balance between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused, this Court is of the opinion that anticipatory bail should be granted to her.

In the meantime, while this Court granted interim protection it had also directed the petitioner to appear before the I.O. to co-operate with the investigation. Accordingly, she was contacted by the I.O. but as her health was not good, she expressed her inability to appear before the officers of Nayapalli police station. Then, the officers of the said police station proceeded to Delhi and examined her. Her examination has been done and it is apparent from the said examination that she has admitted that she has booked a room for the accused P.K. Iyer. So, this Court is of the opinion that even if anticipatory bail is granted to her, there shall not be any unnecessary hindrance to the proper and effective investigation of the case. Since the alleged offences have been committed at Bhubaneswar and the Hotel register etc have been seized by the police officer in charge of the investigation and it is also admitted fact that room was booked in the name of the petitioner, which can be well proved from the documents available in the Hotel, this Court considers that there is no apprehension of the petitioner tampering with the prosecution evidence or there is any chance of apprehension of threat to the informant, who happens to be a police officer.

In the case of ***Arnesh Kumar v. State of Bihar,*** AIR 2014 SC 2756, the Hon'ble Supreme Court also took into consideration the length of punishment prescribed for a offence and the scope and ambit of Section 41 of the Cr.P.C., 1973 and held that in cases where the offence is punishable with

imprisonment up to 7 years, then the arrest should be made only if the condition fulfils in Section 41, Sub-section (1), clause(b), Sub-clause(ii). Keeping in view the aforesaid discussion of facts and the ratio decided in Mhetre's case (supra) and Arnesh Kumar's case (supra), this Court is of the opinion that anticipatory bail should be granted to the petitioner.

In the result, the application for anticipatory bail is allowed. In the event of her arrest in the aforesaid case, she shall be released on bail on such terms and conditions as deemed just and proper by the arresting officer. However, it is further directed that the petitioner shall co-operate with the investigating agency and shall not in any way try to tamper with the prosecution case. The ABLAPL is disposed of accordingly.

Application allowed.

2015 (II) ILR - CUT- 749

C.R.DASH, J.

J.C.R.L.A. NO. 35 OF 2009

MEGHANADA MALLICK …….. Appellant

.Vrs.

STATE OF ORISSA ……...Respondent

CRIMINAL TRIAL – Appreciation of evidence – Weather non examination of Jasobanti is fatal to the prosecution case ? – It is not the requirement of law that all the witnesses present at the spot should be examined – Prosecution is free to examine as many witnesses as required to unfold the narrative of events – If Jasobanti has not been examined and the defence feels that her examination would have thrown light towards innocence of the appellant, the defence could have taken steps to examine her as a defence witness – Admittedly no steps taken to examine Jasobanti as a defence witness – Held, non-examination of Jasobanti by the prosecution could not affect the prosecution case in any manner.

CRIMINAL TRIAL – Appreciation of evidence – Evidence is clear that the appellant gave a single blow on the head of the deceased by a

piece of wood and left the place immediately – He could have given more assault but did not chose to do that – Preceding the assault there had been quarrel between the parties and the occurrence happened suddenly – Held, it would be proper to reduce the sentence to five years instated of seven years. (Para 13)

For Appellant : Smt. Mandakini Panda
For Respondent : M/s. D.K.Mishra, Addl Govt. Advocate

Date of Hearing : 28.08. 2015
Date of Judgment : 28.08.2015

JUDGMENT

C.R. DASH, J.

This appeal is directed against the judgment and order of sentence dated 24.01.2009 recorded by the learned Additional Sessions Judge (F.T.), Sambalpur in S.T. Case No.24/34 of 2008, convicting the appellant for the offence under Section 304, Part-II, I.P.C. and sentencing him to suffer R.I. for seven years with the benefit of set off under Section 428, Cr.P.C.

2. Binod Duan (P.W.2) is the informant. Daughter of the appellant, as found from the evidence of the witnesses, namely Anjana Duan had eloped with Binod Duan (P.W.2) and they were staying as man and wife prior to the occurrence. Deceased Bisakha Duan is the mother of the informant Binod Duan (P.W.2). The occurrence happened on 25.07.2007 at about 8.30 P.M. in front of the house of the appellant at village Kudapada under Sasan P.S. in the district of Sambalpur. Some days prior to the occurrence, Anjana Duan, daughter of the appellant returned from her matrimony and came to stay in his father's (appellant's) house. Some times prior to the occurrence Binod Duan (P.W.2) came to the house of the appellant to bring back Anjana Duan to his house. The appellant refused to leave Anjana and abused the informant (P.W.2) in filthy words. The informant (P.W.2) came to his house and narrated the incident before his mother Bisakha Duan (deceased). Bisakha Duan then came to the house of the appellant situated in the same village and asked the appellant to leave Anjana Duan to her house. The appellant all of a sudden assaulted the deceased on her head with a piece of wood. The incident was witnessed by Dillip Mirdha (P.W.7) and Sunil Mirdha (P.W.8). Immediately after the occurrence, other villagers including P.W.2 came to the spot. They rushed Bisakha Duan (deceased) to the place of Dr. Gopal Chandra Behera (P.W.6), a Homoeopathic doctor of the locality. From there

she was brought back to her house and again on the next day she was shifted to the District Headquarters Hospital, Sambalpur, where she was treated by Dr. Kalyani Patra (P.W.4). After two days, she was shifted to V.S.S. Medical College & Hospital, Burla, where she succumbed to the injuries while undergoing treatment.

On registration of the case against the appellant at Sasan P.S. on the basis of the written report dated 28.07.2007, investigation was taken up by the I.O. (P.W.10) and subsequently by P.W.11, who submitted charge-sheet on completion of investigation, implicating the appellant in offence under Sections 341/294/506/302, I.P.C.

3. Prosecution examined 11 witnesses to bring home the charges against the appellant. Besides the witnesses introduced in the preceding paragraph, P.W.1 Satyaram Duan is the husband of the deceased and a post-occurrence witness, P.W.3 Bihari Duan is a witness to the inquest, P.W.9 Manoj Kumar Malla is the witness to the seizure of the wearing apparel of the accused and the deceased, P.W.5 is the Medical Officer, who conducted post-mortem examination.

4. Defence plea is one of complete denial and false implication.

5. Two witnesses have been examined on behalf of the defence, and it has been specifically pleaded by the appellant in his statement under Section 313, Cr.P.C. that in the occurrence night at about 8.00 P.M. Binod Duan (P.W.2), Sunil Mirdha (P.W.8) and Dillip Mirdha (P.W.7) came near his house (appellant's house) in a drunken state and started abusing him in obscene language. It is further pleaded that on protest by his wife, they assaulted her and at that time he came out from his house. The mother of Binod Duan (P.W.2) came there by running and a piece of wood kept on his thatched roof fell on her head and she sustained injury.

6. Learned trial court, on the basis of eye-witness account of P.Ws.7 and 8 and other corroborative evidence, held the appellant guilty of offence punishable under Section 304, Part-II, I.P.C.

7. Learned counsel for the appellant submits that both P.Ws.7 and 8 are interested witnesses and they being partisans and friends of the informant Binod Duan (P.W.2), they should not have been believed by the trial court to record the finding of guilt against the appellant. Taking a clue from the cross-examination of P.W.7 it is further submitted that, house of one Jasobanti is situated near the house of the appellant and P.W.7 has testified

that Jasobanti was also present near him at the time of occurrence, but the prosecution having not examined said Jasobanti, the prosecution version should not have been believed by the learned trial court. Further, Anjana Duan, for whom the entire occurrence happened, having not been examined by the prosecution, such non-examination of Anjana Duan casts serious doubt on the veracity of the prosecution case.

Learned Additional Govt. Advocate on the other hand supports the impugned judgment.

8. Evidence of P.W.7 shows that at the time of occurrence he along with Sunil Mirdha (P.W.8) was there in the club house. They heard the sound of quarrel near the house of the appellant and rushed to the spot to see the occurrence. Both P.Ws.7 and 8 are asserted to have seen the occurrence of assault by the appellant. They have specifically stated that by a wood the appellant assaulted on the head of the deceased. From the evidence of P.Ws.7 and 8 it is clear that the appellant gave a single blow and left the spot. Though P.Ws.7 and 8 have been cross-examined at length, nothing has been brought on record to discredit their evidence on the ground of interestedness. There is nothing on record to show their enmity or animosity towards the appellant to either falsely implicate him or their proximity with the informant to either benefit him by falsely implicating the appellant. Both these witnesses, i.e. P.Ws.7 and 8 stood unscathed through the thorough cross-examination of the defence and there is nothing to disbelieve them.

9. In paragraph-4 of the cross-examination, P.W.7 has testified that there was failure of electricity and it was a dark night. But subsequently in paragraph-5 of his evidence he has clarified that the place of occurrence was lighted by electric bulb fitted at a nearby house and after the assault by the appellant to the deceased, there was failure of electricity and there was darkness. In view of such specific evidence, no doubt can be cast regarding possibility of identification or seeing the occurrence by the witnesses when it was dark.

10. So far as non-examination of Jasobanti is concerned, it is not the requirement of law that all the witnesses, those were present at the spot, should be examined. The prosecution is free to examine as many witnesses as required to unfold the narrative of events. If Jasobanti has not been examined and the defence feels that her examination would have thrown light towards innocence of the appellant, the defence could have taken step to

examine her as a defence witness. But, admittedly no step has been taken to examine Jasobanti as a defence witness. In view of such fact, non-examination of Jasobanti by the prosecution could not affect the prosecution case in any manner.

11. So far as the criticism regarding non-examination of Anjana Duan is concerned, there is nothing on record to show that Anjana Duan is either an occurrence witness or a post-occurrence witness. No doubt, the occurrence happened as a result of quarrel to bring back Anjana Duan from the house of her father. But her non-examination does not in any way affect the prosecution case.

12. Taking all the aforesaid aspects into consideration, I do not find any merit in the contentions raised by the learned counsel for the appellant. Accordingly, the conviction of the appellant under Section 304, Part-II, I.P.C. is confirmed.

13. So far as the sentence is concerned, it is found from record that the appellant gave a single blow by a piece of wood on the head of the deceased and left the place immediately. He could have given more assault, but he chose not to assault the deceased any more. Preceding the assault, there had been quarrel between the parties and the occurrence happened suddenly. Taking into consideration all these aspects, I think it proper to reduce the sentence to 5 (five) years rigorous imprisonment instead of seven years rigorous imprisonment. With the aforesaid modification in sentence, the Jail Criminal Appeal is allowed in part. Appellant Meghanada Mallick be released from custody forthwith, if he has already suffered the sentence imposed on him and if his detention is not required in any other case.

Appeal allowed in part.

2015 (II) ILR - CUT- 754

DR. A. K. RATH , J.

W.P.(C) NO. 5664 OF 2004

MIRZA GOLAM JELANI BAIG ……Petitioner

.*Vrs.*

SRI PRABIR KUMAR SAMAL & ORS. ……...Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O- 1, R-10 (2)

Weather a person who was not a party to the suit, purchased certain property after the preliminary decree was passed in a suit for partition, can be impleaded as party in the final decree proceeding ? Held, yes – Events happening subsequent to passing of the preliminary decree can also be taken in to consideration and decided at the stage of final decree proceeding.

In this case the petitioner having direct interest in the subject matter of litigation is a proper party to the lis – The impugned order rejecting his prayer for impleadment as a party is quashed – Direction issued to the learned court below to implead the petitioner as a party in the final decree proceeding. (Paras 9,10)

For Petitioner : Mr. P.K.Rath
For Opp. Party : None

Date of Hearing : 21.08.2015
Date of Judgment: 26.08.2015

JUDGMENT

DR. A.K. RATH, J.

Aggrieved by and dissatisfied with the order dated 23.3.2001 passed by the learned Civil Judge (Sr. Divn.), Bhadrak in Original Suit No.36/1970-I vide Annexure-1, the instant application has been filed under Article 227 of the Constitution. By the said order, learned trial court rejected the application filed by the petitioner under Order 1 Rule 10, C.P.C. for impleadment of party.

2. Bereft of unnecessary details the short facts of the case are that Rabinarayan Samal, the father of opposite party nos.1 and 2, laid Original

Suit No.36/1970-I in the court of learned Civil Judge (Sr. Divn.), Bhadrak for partition. The preliminary decree was passed in the suit on 6.9.1975 declaring

the shares of the plaintiffs and the defendants. Since the parties could not partition the property amicably, final decree proceeding was initiated. In the said proceeding, the present petitioner filed an application under Order 1 Rule 10, C.P.C. to implead him as a party. It is stated that on 29.12.1975, Rabinarayan Samal, plaintiff, executed a registered sale deed of an area of Ac.0.08 dec. out of Ac.0.10 dec. appertaining to Khata No.372, Plot No.3592 of mouza-Barala Pokhari, District-Bhadrak in his favour and delivered possession. After his death, he is in possession of the same and residing in the house constructed over it. By order dated 23.3.2001, learned trial court rejected the petition holding, inter alia, that it is open to the petitioner to agitate the claim in a separate suit.

3. Heard Mr. P.K. Rath, learned counsel for the petitioner. None appears for the opposite party nos.1 and 2 in spite of valid service of notice.

4. The seminal question that hinges for consideration before this Court is as to whether a person who was not a party to the suit, purchased certain property after the preliminary decree was passed in a suit for partition, can be impleaded as a party in the final decree proceeding ?

5. Order 1, Rule 10(2) of the C.P.C. postulates that:-

> "xxx xxx xxx
>
> (2) *Court may strike out or add parties* – The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

6. Sub-rule (2) of Rule 10 of Order 1 provides that the Court may either upon or without an application of either party, add any party whose presence before the Court may be necessary in order to enable the Court effectually

and completely to adjudicate upon and settle all the questions involved in the suit. The object of the rule is to bring on record all the persons who are parties to the dispute relating to the subject-matter so that the dispute can be determined in their presence to avoid multiplicity of proceedings.

7. In *Razia Begum v. Sahebzadi Anwar Begum and others,* AIR 1958 SC 886, the apex Court held that it is firmly established as a result of judicial decisions that in order that a person may be added as a party to a suit, he should have a direct interest in the subject-matter of the litigation whether it raises questions relating to moveable or immoveable property.

8. In *Vidur Impex and Traders Private Limited and others v. Tosh Apartments Private Limited and others,* (2012) 8 SCC 384, the Supreme Court had the opportunity to consider all the earlier judgments. The fact of the case was that a suit for specific performance of agreement was filed. The appellants and Bhagwati Developers though total strangers to the agreement, came into picture only when all the respondents entered into a clandestine transaction with the appellants for sale of the property and executed an agreement of sale which was followed by sale deed. Taking note of all the earlier decisions, the Court laid down the broad principles governing the disposal of application for impleadment. Para 41 of the report is quoted hereunder:-

> "**41.** Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:
>
> **41.1.** The court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the court is necessary for effective and complete adjudication of the issues involved in the suit.
>
> **41.2.** A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the court.
>
> **41.3.** A proper party is a person whose presence would enable the court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

> **41.4.** If a person is not found to be a proper or necessary party, the court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.
>
> **41.5.** In a suit for specific performance, the court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.
>
> **41.6.** However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the court or the application is unduly delayed then the court will be fully justified in declining the prayer for impleadment."

9. On the anvil of the decisions cited supra, the case of the petitioner may be examined. The preliminary decree in the suit was passed on 6.9.1975. In the preliminary decree, the shares of all the co-sharers had been carved out. Thereafter the original plaintiff had alienated a portion of the suit schedule property in favour of the father of the petitioner. The vendor had no right to sell any particular portion of the joint family property. He had the right to sell his share only. The petitioner has no right to any particular property. His right is confined to the share allotted to his vendor. As held by this Court in *Debendra Jena and others v. Umakanta Jena and others,* AIR 1988 Orissa 11, the events happening subsequent to the passing of the preliminary decree can also be taken into consideration and decided at the stage of final decree proceeding. The petitioner has direct interest in the subject matter of litigation. He is a proper party to lis.

10. In the wake of the aforesaid, the order 23.3.2001 passed by the learned Civil Judge (Sr. Divn.), Bhadrak in Original Suit No.36/1970-I is hereby quashed. Learned trial court is directed to implead the petitioner as a party in the final decree proceeding and proceed with the same. It is made clear that this Court has not examined the validity of the registered sale deed said to have been executed by the father of the plaintiffs to the father of the petitioner. It is open to the court below to decide the same in the event such issue is raised. Accordingly, the petition is allowed.

Writ petition allowed.

2015 (II) ILR - CUT- 758

DR. A. K. RATH, J.

W.P.(C) NO. 2540 OF 2008

SRI HANUMAN JEW MAHABIR TEMPLE ……..Petitioner

.Vrs.

THE BALASORE MUNICIPALITY & ANR. ……..Opp. Parties

(A) ODISHA MUNICIPAL ACT, 1950 – S. 349

Whether learned trial court is justified in returning the plaint to the plaintiff for non compliance of the provision U/s. 349 of the Act ? Held, No.

In this case since the plaintiff has filed the suit for declaration of right, title and interest, confirmation of possession and permanent injuction against the Municipality, service of notice U/s. 349 (1) of the Act is not a pre condition to maintain the suit – Held, the impugned order passed by the trial court directing return of plaint for non-compliance of the provision of section 349 of the Act is quashed – Direction issued to the trial Court to proceed with the suit.

(B) CIVIL PROCEDURE CODE, 1908 – S. 80

Whether Municipality is a state U/s. 80 C.P.C ? Held, though "Municipality" is a 'State' within the meaning of article 12 of the constitution of India, it is not a state for the purpose of section 80 C.P.C. (Para 6)

(C) ODISHA MUNICIPAL ACT, 1950 – S. 349

When service of notice U/s. 349 (1) of the Act is a pre-condition to maintain a suit ? Held, where plaintiff filed the suit relating to wrongful acts committed by any Municipal Councillor, the Chairman, Executive Officer, any officer or Servant in respect of any act done or purporting to be done in execution or intended execution of the Act or any rule, regulation, bye-law or order made under it – The act must be "colori offici".

(Para 10)

For Petitioner : Mr. Soumya Mishra, for Mr. S.P.Mishra, Sr. Adv.
For Opp. Parties : Mr. S.B. Jena

Date of hearing : 17.08.2015
Date of judgment : 26.08.2015

JUDGMENT

DR. A.K.RATH, J

By this petition under Article 227 of the Constitution of India, the petitioner assails the order dated 8.2.2008 passed by the learned Civil Judge (Senior Division), Balasore in C.S. No.141 of 2008, whereby and whereunder the learned trial court has returned the plaint for non-compliance of the provision of Section 349 of the Orissa Municipal Act (hereinafter referred to as "the Act").

2. The petitioner as plaintiff filed a suit for declaration of right, title and interest, confirmation of possession over Schedule-A land and for permanent injunction restraining the defendants from changing the nature and character of the suit, in the court of learned Civil Judge (Senior Division), Balasore, which was registered as C.S. No.141 of 2008. By order dated 8.2.2008, the learned trial court returned the plaint to the plaintiff for non-compliance of the provision of Section 349 of the Act and to present the same after the statutory period was over. Learned trial court held that the Municipality is the wing of the Government and is under the control of the Collector, Balasore. Thus the prior notice to them under Section 80 CPC was required to be issued.

3. Heard Mr. Soumya Mishra, learned counsel for the petitioner on behalf of Mr. S.P. Mishra, learned Sr. Advocate and Mr. S.B. Jena, learned counsel for the opposite parties.

4. The seminal point that hinges for consideration of this Court is as to whether learned trial court is justified in returning the plaint to the plaintiff for non-compliance of the provision of Section 349 of the Act?

5. Section 80 CPC, which is relevant, is quoted hereunder:

> "**80. Notice.-** (1) Save as otherwise provided in sub-section (2), no suit shall be instituted against the Government including the Government of the State of Jammu and Kashmir or against a public officer in respect of any act purporting to be done by such public

officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of—

(a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;

(b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;

(bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf;

(c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district;

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) A suit to obtain an urgent or immediate relief against the Government including the Government of the State of Jammu and Kashmir or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit:

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1).

(3) No suit instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be dismissed merely by reason of any error of defect in the notice referred to in Sub-section (1), if in such notice—

(a) the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and such notice had been delivered or left at the office of the appropriate authority specified in sub-section (1), and

(b) the cause of action and the relief claimed by the plaintiff had been substantially indicated."

6. On a conspectus of Section 80 CPC, it is evident that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of the State or the Central Government. True it is, the 'Municipality' is a 'State' within the meaning and ambit of Article 12 of the Constitution of India, but then for the purpose of Section 80 CPC it is not a State. Thus no notice under Section 80 CPC is required to be issued to the Balasore Municipality before institution of suit.

7. The next question falls for consideration is as to whether prior notice is required to be issued under Section 349 of the Act to the Balasore Municipality before institution of the instant suit for declaration of right, title and interest, confirmation of possession and permanent injunction?

8. To appreciate the rival contentions, it is necessary to refer to Section 349 of the Orissa Municipal Act, which reads as follows:

"349. Notice of action against municipal council (1) No suit or other legal proceedings shall be brought against any municipal councillor, the Chairman, Executive Officer, any councillor, officer or servant, in respect of any act done or purporting to be done in execution or intended execution of this Act or any rule regulation bye-law or order made under it or in respect of any alleged neglect or default in the execution of this Act or any such rule, regulation, bye- law or order, until the expiration of two months next after notice in writing, stating the cause of action, the nature of the relief sought, the amount of compensation claimed, and name and place of residence of the intended plaintiff and place of residence of the intended plaintiff has been left at the office of the municipal council, and if the proceeding is intended to be brought against any such Chairman, Executive Officer, councillor, officer, servant or person, also delivered to him,

or left at his place of residence, And unless such notice be proved, the Court shall find for the defendant.

(2) Every such proceeding shall, unless it is a proceeding for the recovery of immovable property or for a declaration of title thereto, be commenced within six months after the date on which the cause of action arises or in case a continuing injury or damage, during such continuance or within six months after the ceasing thereof.

(3) If any municipal council or person to who notice is given under Sub-section (1) shall be fore the proceeding is commenced, tender amends to the plaintiff and if the plaintiff does not in any such proceeding recover more than the amount to tendered, he shall not recover any costs incurred by him after such tender. The plaintiff shall also pay all costs incurred by the defendant after such tender.

(4) No suit or other legal proceeding shall be brought against the Chairman, the Executive Officer or any councillor, officer or servant of a municipal council or any person acting under the direction of a municipal council, or such Chairman, the Executive Officer, councillor, officer, or servant in respect of any act done, in execution or intended execution of this Act or any rule, regulation, bye-law or order made under it or in respect of any alleged neglect or default on his part in the execution of this Act or any such rule, regulation, bye-law or order, if such act was done, or if such neglect or default was made in good faith; but any such proceeding shall, so far as it maintainable in a Court, be brought against the municipal council except in the case of suits brought under Section 375".

9. The subject-matter of dispute is no more res integra. In Puri Municipality, Puri, represented through its Executive Officer v. Sradhamani Devi, 80 (1995) CLT 544, A. Pasayat, J (as he then was), on an interpretation of Section 349 of the Act, held as follows;

> **"6.** A bare reading of Section 349(1) of the Act makes it clear that requirement of a notice of a contemplated suit was applicable only in those cases where plaintiff claimed damages or compensation or in respect of acts done in execution or intended execution of the provisions of the Act, Rules, Regulations, Bye-laws or Order made under it. The question whether notice is necessary would depend not on whether the cause of action arose in tort or contract or any other

branch of law but on whether the act complained of was done or purported to have been done directly under the Act or Rules or Regulations or Bye-laws or order. Section 349 is not applicable in a suit for possession of land as it is not an action for anything done or purporting to have been done in pursuance of the Act. Where the claim of the Municipality is based on a private right, the plaintiff who may be injured by the exercise of that right can sue without previous notice just as he might sue any other individual. It was held in B. Baliarsingh and another v. Bamdev Misra and others, 1971 (1) C.W.R. 415 that relief of declaration of title and recovery of possession being based on the cause of action of alleged trespass by the Municipality on his private rights, service of a notice under Section 349(1) of the Act is not a pre-condition for maintainability of the suit. Requirement of notice of a contemplated suit was applicable only in those cases where plaintiff claim related to wrongful acts committed by any Municipal councillor, the Chairman, Executive Officer, any councillor, officer or servant in respect of any act done or purporting to be done in execution or intended execution of the Act or any rule, regulation, bye-law or order made under it. The acts must be in the exercise or honestly supposed exercise of their statutory powers, that is, to acts done by the Commissioners, "colori offici". Section 349(1) of the Act makes it imperative on the part of the plaintiff to serve a notice before institution of the suit in respect of acts done in execution or intended execution of the provisions of the Act, Rules, Regulations, bye-laws etc. The impugned acts involved in the case at hand are not of such nature as to attract application of section 349(1), as they cannot be brought under the umbrella of acts or purported acts contemplated under the provision. In Manohar Ganesh v. Pakor Municipality, I.L.R 16 Madras 296 it was held that notice was required in case of actions for possession of land brought against a municipality. It was observed by Fareli, C.J. that a suit for possession of land is not an "action for anything done or purporting to be done in pursuance of the Act." Ranade, J. made this point clear when he observed that "where the claim of the Municipality is based on a private right, the plaintiff who may be injured by the exercise of that right can sue without giving previous notice just as he might sue any other individual."

10. Thus the conclusion is irresistible that in a suit for declaration of right, title and interest, confirmation of possession and permanent injunction against the Municipality, service of notice under Section 349 (1) of the Act is not a pre-condition to maintain the suit. Section 349 of the Act is not applicable in a suit of this nature as it is not an action for anything done or purporting to have been done in pursuance of the Act. Requirement of notice of a contemplated suit was applicable only in those cases where plaintiff claim related to wrongful acts committed by any Municipal councillor, the Chairman, Executive Officer, any councillor, officer or servant in respect of any act done or purporting to be done in execution or intended execution of the Act or any rule, regulation, bye-law or order made under it. The act must be "colori offici".

11. In the wake of the aforesaid the order dated 8.2.2008 passed by the learned Civil Judge (Senior Division), Balasore in C.S. No.141 of 2008 is quashed. Learned trial court shall proceed to hear the suit. The petition is disposed of.

Writ petition disposed of.

2015 (II) ILR - CUT- 764

DR. A. K. RATH, J.

TRP (C) NO. 92 OF 2013

ALAKA @ ALAKANANDA MOHAPATRA & ANR. .....Petitioners

.Vrs.

SMT. BISHNUPRIYA MOHAPATRA & ORS .....Opp. Parties

CIVIL PROCEDURE CODE,1908 – S. 24

Transfer of suit – Parties are common and issues are almost identical – Court has to consider the balance of convenience having regard to all the circumstances of the two suits.

In this case petitioner No.1 is a deaf and dumb woman and it will be difficult on her part to attend the court at Balasore – In the other hand O.P Nos. 1 & 2 may not face any difficulty to attend the court at Bhadrak – Held, suit pending in the court of Balasore be transferred to the court at Bhadrak for analogous hearing. (Paras 7,8)

For Petitioner : Mr. Gautam Mishra
For Opp. Parties : Mr. Amit Prasad Bose

Date of hearing : 06.08.2015
Date of judgment:12.08. 2015

JUDGMENT

DR. A.K.RATH, J

This is an application under Section 24 of the Civil Procedure Code for transfer of Civil Suit No.359 of 2009-I instituted in the court of learned Civil Judge (Senior Division), Balasore to the court of learned Civil Judge (Senior Division), Bhadrak and to try the same analogously with Civil Suit No.48 of 2005.

2. The petitioner no.1 and opposite party no.1 claim to be the wives of late Madhabananda Mohapatra. The petitioner no.1 and her son laid a suit in the court of learned Civil Judge (Senior Division), Bhadrak for declaration that the plaintiffs and the defendant no.3 are only the legal heirs and successors of deceased Madhabananda Mohapatra and the defendant nos.1 and 2 (opposite parties 1 and 2) are not the legal heirs and successors of late Madhabananda Mohapatra, which is registered as Civil Suit No.48 of 2005. Opposite parties 1 and 2 as plaintiffs instituted another Civil Suit No.359 of 2009-I in the court of learned Civil Judge (Senior Division), Balasore for declaration that they are entitled to receive the matured LIC amount of the deceased being the nominee; with further prayer to restrain defendant nos.1 and 2 (petitioners) from creating any obstruction for disbursement of the schedule amount. In both the suits, parties are common and issues are almost identical. The main issue in both the suits is whether plaintiffs in Civil Suit No.48 of 2005 or the plaintiffs in Civil Suit No.359 of 2009-I are the legal heirs and successors of late Madhabananda Mohapatra.

3. Heard Mr. Gautam Mishra, learned counsel for the petitioners and Mr. Amit Prasad Bose, learned counsel for the opposite parties 1 and 2.

4. Mr. Mishra, learned counsel for the petitioners, submitted that in both the suits, parties are common and issues are almost identical. Further, petitioner no.1 who is the plaintiff no.1 in Civil Suit No.48 of 2005 is a deaf and dumb woman. It will be very difficult on her part to attend the court at Balasore. He further submitted that most of the witnesses are staying closure to Bhadrak. In view of the same, Civil Suit No.359 of 2009-I pending before the learned Civil Judge (Senior Division), Balasore may be transferred to the court of learned Civil Judge (Senior Division), Bhadrak.

5. Per contra Mr. Bose, learned counsel for the opposite parties 1 and 2, submitted that it will be inconvenient on the part of the opposite party no.1 to attend the court at Bhadrak. He further submitted that both the suits should be transferred to a middle place so that both the suits can be heard analogously.

6. Both the petitioner no.1 and opposite party no.1 claim to be the wives of late Madhabananda Mohapatra in both the suits. Parties are common and issues are almost identical. When such a situation arises, the court has to consider the balance of convenience, having regard to all the circumstances of the two suits. Thus in the interest of justice the aforesaid two suits be tried analogously at one place in order to avoid conflict of decisions.

7. Admittedly petitioner no.1 is a deaf and dumb woman. It will be difficult on her part to attend the Court at Balasore. The distance between two places is near about 68 K.M. The opposite parties 1 and 2 may not face any difficulty to attend the court at Bhadrak.

8. In view of the analysis made in the above paragraphs, this Court is of the opinion that ends of justice will be better served if Civil Suit No.359 of 2009-I pending in the court of learned Civil Judge (Senior Division), Balasore is transferred to the court of learned Civil Judge (Senior Division), Bhadrak. Learned Civil Judge (Senior Division), Balasore is directed to transmit the entire record of Civil Suit No.359 of 2009-I to the court of learned Civil Judge (Senior Division), Bhadrak, who after receipt of the records from the court of learned Civil Judge (Senior Division), Balasore shall try both the suits analogously and conclude the hearing within a period of six months thereafter. The transfer petition is allowed.

Petition allowed.

2015 (II) ILR - CUT-767

DR. A. K. RATH, J.

WP (C) NO. 9902 OF 2008

RAJAT KUMAR MOHANTY & ORS. ……...Petitioners

.Vrs.

SARAT CHANDRA PANDA & ANR. ……...Opp. Parties

CIVIL PROCEDURE CODE,1908 – O-6, R-17

Amendment of Plaint – Whether the learned trial court is justified in rejecting the application for amendment as it was filed after 7 years of institution of the suit ? Merely because an application for amendment is filed belatedly, the same cannot be refused if it is necessary for deciding the real controversy between the parties – The Court has wide powers and unfettered discretion to allow amendment of pleadings in such manner and on such terms as it appears to the Court just and proper – Held the impugned order rejecting amendment is quashed – The matter is remitted back to the learned trial court to consider the application afresh. (Paras 7,9,10,14)

For Petitioner : Mr. Prashanta Kumar Mohanty
For Opp. Parties : Mr. Soumya Mishra for Mr. S.P.Mishra Sr. Adv.

Date of hearing : 18.08.2015
Date of judgment : 26.08.2015

JUDGMENT

DR. A.K.RATH, J

By this petition under Article 227 of the Constitution of India, challenge is made to the order dated 27.6.2008 passed by the learned Civil Judge (Junior Division), Baripada in T.S. No.196 of 2001, vide Annexure-7, whereby and whereunder the application for amendment of the plaint was rejected.

2. The petitioners as plaintiffs filed the suit for declaration of right, title and interest; for eviction of the defendants from the suit land through process

of court and for delivery of possession of the land in the court of the learned Civil Judge (Junior Division), Baripada, which is registered as T.S. No.196 of 2001. The foundation of the claim of the plaintiffs is that the suit land was an ancestral joint family properties and the same was divided under registered partition deed bearing no.211 between the co-owners. The rightful owner had transferred the land in favour of the plaintiffs and one Rabindra Mohanty under a registered gift deed. The gift has been acted upon and the plaintiffs are in possession of the property as absolute owners thereof. They have constructed a residential house over a portion of the suit land. Further plank of claim of the plaintiffs is that they could not produce the gift deed before the settlement proceeding since they were residing at separate places, as a result of which a portion of the land conveyed under the gift deed was recorded in the name of Narayan Prasad Mohanty and the Government of Orissa. The defendants having no semblance of right, title and interest had encroached upon an area measuring Ac.0.03 dec. and managed to get the said land recorded in their favour in a mutation proceeding.

3. Pursuant to issuance of summons, the defendants entered appearance and filed written statement denying the assertions made in the plaint. The case of the defendants is that the disputed land measuring Ac.0.03 dec. had not been gifted in favour of the plaintiffs. They are in possession of the suit land peacefully, openly and continuously for more than the statutory period and, as such, they have perfected title by way of adverse possession.

4. While the matter stood thus, the plaintiffs filed an application for amendment of the plaint on 2.8.2007 to substitute paragraph-3 of the plaint by correctly describing the documents and the executants of the said documents and to add a sub-paragraph after paragraph-4 stating that recordings made in favour of Narayan Prasad Mohanty was without any basis since the land is covered under the gift deed.

5. By a laconic order dated 27.6.2008, vide Annexure-7, learned trial court rejected the application for amendment. The operative portion of the said order is quoted hereunder;

> "…...Perused the petition, case record and the objection petition and seen that the amendment petition is filed after 7 years on filing of the suit and if the proposed amendment will be allowed the nature and character of the suit will be changed. Heard. The prayer for amendment is rejected."

6. Heard Mr. Prashanta Kumar Mohanty, learned counsel for the petitioners and Mr. Soumya Mishra on behalf of Mr. S.P. Mishra, learned Senior Advocate for the opposite parties.

7. The seminal point that hinges for consideration of this Court is as to whether learned trial court is justified in rejecting the application for amendment since the same was filed after 7 years of institution of the suit. An ancillary point that crops up is as to whether the learned trial court is justified in rejecting the application for amendment without assigning any reason ?

8. In Revajeetu Builders and Developers v. Narayanaswamy and sons and others, (2009) 10 SCC 84, on a survey of earlier decisions, the apex Court succinctly stated that the factors to be taken into consideration while dealing with the application for amendment. The apex Court in paragraph-63 of the report held as follows:

> "**63.** On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.
>
> (1) whether the amendment sought is imperative for proper and effective adjudication of the case?
>
> (2) whether the application for amendment is bona fide or mala fide?
>
> (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
> 4)refusing amendment would in fact lead to injustice or lead to multiple litigation;
>
> 5)whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
>
> 6)as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.
>
> These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

9. In Surender Kumar Sharma v. Makhan Singh, 2009 AIR SCW 6131, the apex Court held that even if the prayer for amendment was a belated one, then also the question that needs to be decided is to see whether by allowing

the amendment, the real controversy between the parties may be resolved. Under Order 6 Rule 17 of the CPC, wide powers and unfettered discretion have been conferred on the Court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the Court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. The Court must bear in favour of doing full and complete justice in the case where the party against whom the amendment is to be allowed, can be compensated by cost or otherwise.

10. Thus merely an application for amendment is filed belatedly, the same cannot be refused if it is necessary for deciding the real controversy between the parties. The court must bear in mind the principles as laid down in Revajeetu Builders and Developers (supra). The court has wide powers and unfettered discretion to allow amendment of pleadings in such manner and on such terms as it appears to the court just and proper.

11. The next question arises as to whether the impugned order stands the scrutiny of law since the same is a laconic one.

12. In MMRDA Officers Association Kedarnath Rao Ghorpade v. Mumbai Metropolitan Regional Development Authority and another, (2005) 2 SCC 235, the apex Court in paragraph-5 of report held as follows:

> "Even in respect of administrative orders Lord Denning, M. P. in Breen Vrs. Amalgamated Engg. Union reported in (1971) 1 All ER 1148 observed : (All ER p. 1154h). "The giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. v. Crabtree reported in 1974 ICR 120 (NIRC) it was observed:
>
> "Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at."
>
> Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx," it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to

reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking-out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance. (Chairman and Managing Director, United Commercial Bank Vrs. P.C. Kakkar, reported in (2003) 4 SCC 364."

13. The apex Court in Kranti Associates Private Limited and another v. Masood Ahmed Khan and others, (2010) 9 SCC 496 has summarized the principles, which are quoted hereunder:

"47. Summarizing the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial

decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m.) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor.)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain EHRR, at 562 para 29 and Anya v.University of Oxford, wherein the Court referred to Article 6 of the European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

(o). In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law,

requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

14. Resultantly the impugned order dated 27.6.2008 passed by the learned Civil Judge (Junior Division), Baripada in T.S. No.196 of 2001 is quashed. The matter is remitted back to the learned trial court to consider the application for amendment afresh. The petition is allowed.

Writ petition allowed.

2015 (II) ILR - CUT-773

DR. B.R.SARANGI, J

W.P.(C) NOs. 14428 OF 2013 (WITH BATCH)

PRASANNA KUMAR ACHARYA …....Petitioner

.*Vrs.*

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

SERVICE LAW – Transfer – Petitioners are continuing as Sales Assistant under Orissa State Civil Supplies Corporation Ltd. on "Adhoc" and "until further orders" basis for more than 10 years in a particular station – Whether Corporation can transfer the petitioners when their services not regularized ? Held, yes – The impugned order of transfer being within the complete domain of the employer, this court is not inclined to interfere with the same.

(Paras 18,19,20)

Case Laws Referred to :-

1. 2005 (II) OLR 643 : Subash Chandra Routray v. Managing Director, Orissa State Civil Supplies Corporation Ltd. & ors.
2. AIR 1986 SC 1686 : E.S.I. Corporation v. South India Flour Mills (P) Ltd
3. AIR 1989 SC 2045 : All India Bank Officers' Confederation v. Union of India
4. (2008) 11 SCC 10 AIR 2008 SC 2463 : India UPSC v. Dr. Jamuna Kurup
5. AIR 1991 SC 532 1992 (6) SLR (SC) : Shilpi Bose v. State of Bihar.

6. 1989 (2) SLR 684 (SC) : Shilpi Bose case (supra) and Gujurat Electricity. Board v. Atmaram Sungomal Poshani.
7. AIR 1993 SC 2444 : Union of India and others v. S.L. Abas.
8. AIR 1993 SC 2486 : State of Punjab and others v. Joginder Singh Dhatt .
9. AIR 2004 SC 2165 : State of U.P. and others v. Gobardhan Lal.
10. 2014 (II) OLR 844 : Niranjan Dash v. State of Orissa and others.

For Petitioner : M/s. G.K.Mishra, A.K.Saa
M/s. G.K.Behera, D.R.Mishra
M/s. R.G.Singh, A.Mohanty, R.K.Nayak, A.Mohapatra
M/s. Rajjet Roy, R.K.Sahoo, S.K.Singh, R.Das Nayak
For Opp. Parties : M/s. B.K.Sharma, A.U.Senapati
M/s. A.K.Moahnty, A.K.Sharma, M.K.Dash, P.K.Dash, S.Mishra & A.K.Mishra.

Date of hearing : 15.04.2015
Date of judgment: 05.05.2015

JUDGMENT

DR. B.R.SARANGI, J.

In these batch of petitions, the petitioners have challenged the office orders dated 26.06.2013 and 29.11.2014 issued by the Orissa State Civil Supplies Corporation Ltd transferring them from one place to other and directing them to join in respective transfer places by relieving them w.e.f. 26.06.2013 with immediate effect.

2. The short fact of the case in hand is that in order to procure and distribute essential commodities, the Orissa State Civil Supplies Corporation Ltd. has been established to regulate the Public Distribution System of the State. All the petitioners are continuing as Sales Assistant-cum-Godown Assistant under the Orissa State Civil Supplies Corporation Ltd. on "Ad hoc and until further orders basis" and are continuing for more than 10 years in a particular station. They have been transferred vide impugned order in Annexure-1. Challenging the said order of transfer, the petitioners have approached this Court by filing the present applications.

3. Mr. G.K. Mishra and Mr. G.K. Behera, learned counsel appearing for the petitioners strenuously urged that the petitioners being the "ad hoc and until further order basis" employees of the Corporation, unless their service

is regularized, they cannot be transferred by the authority. It is stated that transfer being a concept of continuity in service, without regularization in service, the impugned order of transfer cannot be sustained in the eye of law. Therefore, they seek for interference of this Court.

4. Mr. A.K. Mishra and Mr. B.K. Sharma, learned counsel appearing for the Corporation state that the petitioners being the employees of the Corporation may it be "ad hoc or until further orders" they have been continuing in a particular place for more than 10 years. On the basis of the decision of the Board of Directors, the impugned orders of transfer have been issued and as such transfer being an incidence of service, it will no way prejudice the petitioners and they have to comply the same in letter and spirit. Relying upon the judgment of this Court in ***Subash Chandra Routray v. Managing Director, Orissa State Civil Supplies Corporation Ltd. and others,*** 2005 (II) OLR 643, it is urged that the petitioners will be allowed to continue in services and their services shall not be dispensed with and further the corporation shall regularize them as and when regular vacancies are available. They may be deputed to any other project or assignment under the management/control of the corporation. Therefore, it is urged that since the petitioners are still continuing in service and they being the employees of the corporation, they can be transferred by the impugned order.

5. On the basis of the facts pleaded above, it is to be considered as to whether:

i) The corporation can transfer the petitioners, those who are working "ad hoc" and "until further orders basis" being an 'employee' of the corporation;

ii) If not, what relief ?

6. On the basis of the materials available on record, it is admitted by the petitioners that they are continuing as employees of the corporation holding the post of Sales Assistant-cum-Godown Assistant either 'ad hoc' or 'until further orders basis' and they are all waiting for regularization of their services subject to availability of vacancy. It is urged that 'ad hoc' or 'until further order basis' category persons unless their services is regularized, they cannot be transferred by the authority. Therefore, the impugned order of transfer has to be quashed by this Court.

7. The moot question is whether 'ad hoc' or 'until further order basis' employees are the employees of the corporation or not.

In ***E.S.I. Corporation v. South India Flour Mills (P) Ltd***, AIR 1986 SC 1686, the apex Court held that 'casual employees' are employees within the meaning of the term "employee" as defined in Section 2 (9) of the Act and, accordingly, come within the purview of the Act.

In ***All India Bank Officers' Confederation v. Union of India***, AIR 1989 SC 2045, the apex Court held that the word 'employees" includes 'workmen' and 'non-workmen'.

In ***UPSC v. Dr. Jamuna Kurup***, (2008) 11 SCC 10 : AIR 2008 SC 2463, the apex Court held that the term "employee" is not defined in the Delhi Municipal Corporation Act, 1957, nor is it defined in the advertisement of UPSC. The ordinary meaning of "employee" is any person employed on 'salary' or 'wage' by an employer. When there is a contract of employment, the person employed is the 'employee' and the person employing is the 'employer'. In the absence of any restrictive definition, the word "employee" would include both permanent or temporary, regular or short term, contractual or ad hoc.

08. In view of the law laid down by the apex Court, the petitioners are the 'employee' of the Orissa State Civil Supplies Corporation Ltd. Learned counsels appearing for the petitioners also fairly admit that the petitioners are the "employees" of the Corporation, may it be 'ad hoc' or 'until further orders basis.' Therefore, the petitioners being the 'employee' of the corporation, being the 'employer', there exits a 'master and servant' relationship between them.

09. The opposite party-corporation in its Board of Directors meeting decided to transfer the 'ad hoc' and 'until further order basis' employees like Sales Assistant-cum-Godown Assisant-Kantawalla, who are posted in different MFP shops, RRC-cum-DAC and have completed more than 10 years of service in their respective places for smooth administration of the corporation and its offices at the district level. All the 'daily wage employees' have been upgraded to the status of 'ad hoc' from 1.4.2012 and they have been allowed time scale of pay and 'ad hoc' employees have been upgraded to the status of 'until further orders basis' from 1.4.2012 and are entitled to get financial benefits under the Orissa Revised Scale of Pay Rules, 2008. Due to such up-gradation of the status, the petitioners cannot claim to remain in a particular place at their sweet will. The corporation being the employer has absolute right to transfer or depute the petitioners to any place

under its administrative control. The status of 'until further orders' has been given to the 'ad hoc' employees taking the cut off date as 5.1.1999. Since the first appointment of the petitioners have been made after the cut off date, they are all continuing as ad hoc employee since 'ad hoc' employee is coming under the meaning of 'employee', they are also subject to transfer by its 'employer', namely, the opposite party-corporation.

10. As it appears from the pleadings, there is no allegation of mala fide or statutory infraction in transferring the petitioners from one place to other. Only contention they have raised is that unless the services of the petitioners are regularized, they cannot be transferred from one place to other. Since there exits master and servants relationship between the petitioners and the opposite party-corporation, the employer has every prerogative to transfer its employees.

11. In the aforesaid factual backdrop of the case in hand it is to be considered as to whether this Court can exercise power under Article 226 of the Constitution of India to interfere with the impugned order of transfer of the petitioners.

12. In every service there exists a relationship of master and servant. Transfer, retirement, promotion, etc. are incidence of service. Usually the master has full power to transfer his servant whenever he wants because transfer is ordered looking at the character and quality of work the servant does. Thus, if the master is of the opinion that a particular servant is required at a particular place for a particular duty, the master has the right to transfer its servant from one place to another. This power of the master is however not absolute and should not be exercised capriciously. At the same time, the master should avoid to transfer a servant simply to accommodate any other favoured servant. Furthermore an order of transfer of a servant should be passed in public interest or in the interest of the institution itself where the servant serves. Exigencies of service also sometimes persuade the master to transfer a servant from one place to another.

13. The Hon'ble Supreme Court in ***Shilpi Bose v. State of Bihar***, AIR 1991 SC 532 : 1992 (6) SLR (SC) has observed as under:-

> "xxxxxx the Courts should not interfere with a transfer order which are made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A Government servant holding a

> transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the 6 other. Transfer orders issued by the competent authority do not violate any of the legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order, instead affected party should approach the higher authorities in the department."

From the above it is evident that the executive instructions even if not followed, the Court should not interfere with the order of transfer.

14. Effective utilization of service of an employee is in the very core of administrative exigency. It is an accepted position of law that even while a service is transferable, an employee in public employment cannot be transferred on mere ipse dixit of the superior authority having power to make an order of transfer. The administrative exigency and/or public interest must be fulfilled before passing the order of transfer against an employee. Transfer is a very important incidence of service and often the order of transfer though may appear to be innocuous, causes serious hardship to the concerned employee. It should be noted in this connection how best the services of an employee can be utilized must be left to the wisdom of the employer and for that purpose, to the appropriate authorities in a public service. Whether the service of an employee can be better utilized in some other place is not a justifiable issue in a court of law. It will be sufficient to sustain an order of transfer if it can be shown that the service is transferable and by the impugned order of transfer, no condition of service or the norm laid down for such transfer has been violated and that a proper consideration of administrative exigency and/or public interest has been made by the concerned authority and on being satisfied of such administrative exigency and/or public interest, the order of transfer has been made.

15. Referring to ***Shilpi Bose*** case (supra) and ***Gujurat Electricity Board v. Atmaram Sungomal Poshani,*** 1989 (2) SLR 684 (SC), it is held that a judicial review of an administrative action is of course permissible, but orders of transfer are interfered when:-

a. the transfer is mala fide or arbitrary or perverse;

b. when it adversely alters the service conditions in terms of rank, pay and emoluments;

c. when guidelines laid down by the department are infringed and lastly;

d. when it is frequently done; and

e. if there is a statutory infraction.

Therefore, whenever a public servant is transferred, he must comply with the order but if there be any genuine difficulty in the proceeding of transfer, it is open to him to make representation to the competent authority for modification or cancellation of the transfer order.

16. The said view has been reiterated in ***Union of India and others v. S.L. Abas,*** AIR 1993 SC 2444***, State of Punjab and others v. Joginder Singh Dhatt,*** AIR 1993 SC 2486, ***State of U.P. and others v. Gobardhan Lal,*** AIR 2004 SC 2165***.***

17. The same view has also been reiterated by this Court in ***Niranjan Dash v. State of Orissa and others***, 2014 (II) OLR 844, ***Sudhir Kumar Praharaj v. State Bank of India and others*** (W.P.(C) No. 19816 of 2014, disposed of on 24.02.2015) and ***Narendra Kumar Jena v. Orissa Forest Development Corporation & another*** (W.P. (C) No. 8398 of 2014 and batch of cases, disposed of on 26.09.2014).

18. In view of the law laid down by the Apex Court this Court should not interfere with the order of transfer which is within the complete domain of employer. The Apex Court has time and again expressed its disapproval of courts below interfering with the order of transfer of public servants from one place to another. It is entirely for the employer to decide when, where and at what points of time an employee is to be transferred from the place where he is continuing and ordinarily Courts have no jurisdiction to interfere with the impugned order of transfer.

19. In ***Subash Chanda Routray*** (supra), this Court has already held that the petitioners be allowed to continue as Kantawalla in the management/corporation and their services shall not be dispensed with and further the corporation shall regularize them as and when regular vacancies are available. They may be deputed to any other project or assignment under the management/control of the corporation. In view of the above mentioned decision whether it is a deputation or transfer, it will not cause any prejudice to the petitioners, rather this Court has held that the services of the petitioners can be deputed to any project or assignment in the

management/control of the corporation. In that view of the matter, the petitioners can also be transferred from one place to other for smooth management of the organization as per the requirement of the management. It is their prerogative to post any employee as per their requirement to which this Court has no jurisdiction to interfere with the same, unless the petitioners make out a case within the parameters discussed above.

20. In that view of the matter, this Court is of the considered view that the order of transfer being within the complete domain of the employer, this Court is not inclined to interfere with the same. Accordingly, the writ applications stand dismissed. However, there is no order to costs.

Writ petition dismissed.

2015 (II) ILR - CUT- 780

DR. B. R. SARANGI, J.

W.P.(C) NO. 8918 OF 2015

RASHMITA BARIK ……..Petitioner

.Vrs.

KENDRIYA VIDYALAYA SANGATHAN, REGIONAL OFFICE, BBSR. & ANR. ……..Opp. Parties

EDUCATION – Admission – Whether twin girl children of the petitioner can be regarded as single girl children for admission in class I of Kendriya Vidyalaya No. 3 – Held, yes – The concept of single girl children includes twin girl children as per sub clause VIII of clause 1 of Part-B of special provisions of the guidelines for admission in Kendriya Vidyalaya – Direction issued to the authorities to admit the other girl child of the petitioner. (Para 9, 10)

For Petitioner : M/s. Jaydev Sengupta, G.Sinha, D.K.Panda

For Opp. Parties : Mr. S.K.Pattnaik, Sr. Adv.
P.K.Pattnaik, S.P.Das, S.Das

Date of hearing : 05.08.2015
Date of judgment: 18.08.2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who is the mother of twin girl child has filed this application challenging the action taken by the opposite parties in admitting one girl child ignoring the other though both are treated as single girl child as per clause-viii of norms of the admission prescribed by the Kendriya Vidyalaya.

1 The short fact of the case in hand is that the petitioner being the mother of a twin girl child, namely A. Gloria and A. Razia pursuant to the notice issued by the opposite party no.2 for admission in to Class-I during the academic session 2015-16 applied for registration of her twin daughters in two separate forms along with all the documents as required in the notice. After receipt of the registration forms, opposite party no.2 prepared a list of forms received which are complete in all respect and published the provisional select list for the academic session 2015-16. Under RTE Quota as many as 30 candidates were selected which included one of the twins of the petitioner, namely, A. Gloria but the other one was not selected even her name did not figure in the waiting list prepared for admission to Class-I. Hence, this application.

3. Mr. D.K. Panda, learned counsel for the petitioner submitted that clause-viii of the special provisions contained in Part-B of the guidelines for admission in Kendriya Vidyalayas specifically provides that single girl children in class-I and from class-VI onwards subject to a maximum of two per section in Class-I and two per class in class VI and onwards which includes twin girl children also would be admitted over and above the class strength except where stated otherwise in the provision meaning thereby, the twin girl children will be taken into consideration as single girl children. It is stated that since one child of the petitioner, namely, A. Gloria has already taken admission, the other one namely A. Razia should have been given admission being treated as single girl children in the institution. It is further stated that though representation was filed, the same has not yet been considered. Therefore, the petitioner has approached this Court by filing the present writ petition seeking for a direction to the opposite parties to allow her other girl child within the meaning of single girl child to prosecute her study in class-I in Kendriya Vidyalaya as per clause-viii of special provision under Part-B of the guidelines for admission in Kendriya Vidyalaya.

4. Mr. S.K. Pattnaik, learned Sr. Counsel for the opposite parties states that the Kendriya Vidyalaya Sangathan established Kendriya Vidyalayas in different States and Union Territories with a primary view to provide uniform education facility to the children of Central Govt. employees who are transferable throughout the country. The employees of autonomous bodies and public sector undertakings fully financed by the Central Govt. or where Govt. has more than 50% share are also entitled to admit their children into the Central Schools so established. Where children of Central Govt. and public sector undertaking are not available, if seats remain vacant, the children of State Govt. employees and public sector undertakings of State Govt. may be given admission as per priority of admission under the guidelines of Kendriya Vidyalaya under part-A of general guidelines. It is admitted that the petitioner gave birth to twin girls namely, A. Gloria and A. Razia and made application to admit them into class-I of Kedriya Vidyalaya No.3, Bhubaneswar and the names of two girls appear in sl.nos. 96 and 97. A. Gloria has been selected against 30 seats reserved for RTE quota as serial no. 29 of provisional selection list under Annexure-4 and the other child namely A. Razia was not selected. It is stated that special provision has been made by the K.V.S. for giving admission to children belonging to special category as provided in Clause-1 of Part-B of the admission guidelines. Under sub-clause (viii) of Clause-I, single girl children in Class-I and from Class-VI onwards are entitled to be admitted subject to a maximum of two per class over and above the class strength and it includes twin girl children also. Clause-vii and viii of Education Code of Kendriya Vidyalayas provide that after admitting the candidate up to the full intake capacity as per norms, if there are single female children left among the unsuccessful applicants, up to two single female children may be admitted over and above the sanctioned intake in each section of class-I. For selection on this basis, inter se priority among such single female children shall be as per the categorization in Part-3(A) of the Admission Guidelines. In view of that since three sections in Class-I in K.V.No.3 are available, six single girl children could have been admitted in that quota. All those six seats were exhausted by single girl children belonging to priority category-I as has been indicated in Annexure-8 and when one of the single girl child did not take admission, one student belonging to priority category-II was selected for admission. The second girl child of the petitioner, A. Razia belonged to priority category-V for which her turn could not come for admission as against girl child quota of six in class-I of the K.V. No.3. Therefore, second girl child of the petitioner could not be admitted in class-I of Kendriya Vidyalaya No.3.

5. On the basis of the facts pleaded above, it is to be considered whether the twin child of the petitioner can be taken into account as single child and if one child has already taken admission, the second one can be given admission as single child as per clause-viii of the guidelines of admission under part-B of special provision of the Kendriya Vidyalaya.

6. For admission into the Kendriya Vidyalaya Sangathan guidelines were framed, which have been annexed as Annexure-A to the counter affidavit filed by the opposite parties. In Part-A of general guidelines under clause 3-(A), priorities in admission has been prescribed. Therefore, while admitting the students the following priorities shall be followed in granting admission, which reads as follows:-

"3-A. KENDRIYA VIDYALAYAS UNDER CIVIL/DEFENCE SECTOR.

1. Children of transferable and non-transferable Central government employees and children of ex-servicemen. This will also include children of Foreign National officials, who come on deputation or transfer to India on invitation by Govt. of India.

2. Children of transferable and non-transferable employees of Autonomous Bodies /Public Sector Undertaking/Institute of Higher Learning of the Government of India.

3. Children of transferable and non-transferable State Government employees.

4. Children of transferable and non-transferable employees of Autonomous Bodies / Public Sector Undertakings / Institute of Higher Learning of the State Governments.

5. Children from any other category including the children of Foreign Nationals who are located in India due to their work or for any personal reasons. The children of Foreign Nationals would be considered only in case there are no Children of Indian Nationals waitlisted for admission.

Note : Preference in Admission towards will be based on the number of transfers of the parents in the last 7 years."

7. Under Part-B, special provisions have been made for admission in Kendriya Vidyalayas. Sub-clause-viii of Clause- 1 for Admission in Kendriya Vidyalaya reads as follows:

> "viii. Single girl children in class I and from class VI onwards subject to a maximum of two per section in class I and two per class in class VI and onwards. It includes twin girl children also.

8. Admittedly the petitioner has blessed with twin girl children and out of them one has been selected by following due procedure of selection, whose name finds place in Sl.No. 29 of the select list as mentioned in Annexure-4 to the writ petition and she has been admitted to class-I of Kendriya Vidyalaya No.3, namely, A. Gloria. So far as second girl child, namely, A. Razia is concerned, she was not admitted into the school even though clause-viii of special provisions under Part-B of the Kendriya Vidyalaya for admission guidelines is applicable to her. Perusal of provisions contained in sub-clause viii of clause-1 of Part-B of special provisions, clearly indicates that single girl children in class I and from class VI onwards subject to a maximum of two per section in class I and two per class in class VI and onwards which includes twin girl children also can be admitted over and above the class strength. If the first one, namely, A. Gloria has been granted admission pursuant to her position in the merit list, A. Razia, the second girl child of the petitioner could not or should not have been ignored on the ground that as per priorities in admission under Part-A of the general guidelines under clause-3(A) has to be followed scrupulously.

9. The petitioner has not disputed the provisions contained in Part-A of the general guidelines as per clause-3(A) of the guidelines for admission into Kendriya Vidyalaya but at the same time if the twin girl children are considered as single girl children and out of them one has been admitted into class-I, the second one could not have been ignored as per sub clause viii of clause-1 of Part-B of special provisions. Nowhere in Part-B of special provisions contained that only one child amongst the twin girl children will take admission and other will not, rather it is just reverse one. If the twin girl children can be considered as single girl children and one has taken admission, the other could not have been ignored by the authority. The purpose of indicating the special provision is to facilitate the twin girl children to prosecute their study in one school considering as single girl child. Therefore, once one of the twin girl children has been admitted into class-I, namely, A. Gloria then in that case taking into account the single girl

children concept, the second girl child, namely, A. Razia should not have been ignored and the authority should have admitted A. Razia under single girl children concept which includes twin girl children as per sub clause viii of clause-1 of Part-B of special provisions of the guidelines for admission in Kendriya Vidyalaya.

10. In view of the aforesaid facts and circumstances, this Court is of the considered view that the opposite parties should admit A. Razia, the other girl child of the petitioner within the meaning of single girl children within a period of fifteen days from the date of communication of this judgment and I direct accordingly. The writ petition is allowed.

Writ petition allowed.

2015 (II) ILR - CUT- 785

DR. B. R. SARANGI, J.

W.P.(C) NO. 8942 OF 2015

AJITESH SINGH .....Petitioner

.Vrs.

KENDRIYA VIDYALAYA SANGATHAN & ORS. .....Opp. Parties

EDUCATION – Admission in class I in Kendriya Vidyalaya-2 Madhupatna, Cuttack – Petitioner applied for admission as his father was working as Addl. Central Government Standing Counsel – Whether petitioner's father is to be considered as a Central Government employee under sub-clause (A)(1) of clause (3) of the guide lines for admission of the petitioner in to Kendriya Vidyalayas ? Held, though petitioner's father is discharging public duty as a public officer, there being no master servant relationship exists between the petitioner's father and the Central Government the petitioner is not entitled to get benefit of admission as per the above guidelines.

(Para 14)

Case Laws Referred to :-

1. AIR 1991 SC 537 : Kumari Shrilekha Vidyarthi etc.etc. -V- State of U.P. & Ors.
2. 1969 2 SCR 422 : Mahadeo -V- Shantibhai & Ors.
3. 2014 (2) S.L.J.(SC) 301 : U.T.Chandigarh & Ors. -V- Gurucharan Singh & Anr.
4. AIR 2006 SC 1480 : M/s. Maharastra State Seeds Corpn. Ltd. -V- Haridas & Ors.
5. AIR 2010 SC 3783 : M.S. Patil -V- Gulbarga University & Ors.

For Petitioner : M/s. U.C.Mohanty, S.Pattanayak, R.R.Satpathy
For Opp. Parties: Mr. H.K.Tripathy

Date of hearing :14.07.2015
Date of judgment:18.08.2015

JUDGMENT

DR. B.R.SARANGI, J.

Against the refusal of the opposite parties to admit the petitioner in Class-I in Kendriya Vidyalaya-2, Madhupatna, Cuttack during the academic session 2015-16, the petitioner has approached this Court through this Writ petition.

2. The short facts of the case, in hand, are that pursuant to notification issued by the Kendriya Vidyalaya Sangathan under the Ministry of HRD, Department of Education, New Delhi dated 16.01.2015 schedule for admission into Class-I in Kendriya Vidyalaya for the academic session 2015-16 has been intimated to the Principal, KVS/all the Regional Offices with request to circulate the same amongst the KVS under their jurisdiction. After such notification, the petitioner applied for his admission into Class-I in Kendriya Vidyalaya-2, Madhupatna, Cuttack. On consideration of his application, the Selection Committee of Kendriya Vidyalaya prepared a list of selected candidates in which the petitioner's name found place at Sl. No. 8 of the waiting list in Annexure-2. Subsequently, the provisional selection list was prepared wherein his name was found place at Sl. No. 7. Consequently, the petitioner's father was called upon by the School authority on 02.05.2015 to remain present on 05.05.2015 between 9 AM and 11 AM along with all original documents accompanied by the child and his mother. On the date fixed, the petitioner's father appeared before the school authority along with

required documents, but opposite party No. 4 informed that his son cannot be admitted into his school. The petitioner's father being an Addl. Central Govt. Standing Counsel appointed by Central Govt. for Central Administrative Tribunal, Cuttack Bench, Cuttack, the petitioner could not have been denied such admission. Hence, this Writ petition.

3. Mr. U. C. Mohanty, learned counsel appearing for the petitioner states that the petitioner's father being a practicing advocate and at present working as an Addl. Central Govt. Standing Counsel for Central Administrative Tribunal, Cuttack Bench, Cuttack is placed in the priority category-1 as per the admission guidelines of the opposite parties. Even though the petitioner was selected but subsequently, the said selection was rejected on the ground that the petitioner could not produce the document that the father of the petitioner is a regular Central Government employee under Ministry of Law and Justice Department, Government of India as per the service certificate filed along with the application form. Therefore, his case cannot be considered under the priority category-1 for admission into the Kendriya Vidyalaya-2, Cuttack. He submitted that the petitioner's father was discharging the public duty being a Public Officer as defined under Section 2(17)(h) of the Civil Procedure Code, 1908. He was holding an office of profit and as such as per the provisions contained under Section 24 of Cr.P.C., 1973, the petitioner's father being a Public Prosecutor, having a special status and getting statutory appointment, he can be considered under category-1 of the guidelines issued by the Central Government Authority and without considering the same, denial of admission of the petitioner on the plea that the petitioner's father is not a regular Central Govt. Employee, cannot be sustained in the eye of law. To substantiate his contention he has relied upon the judgment of the apex Court in **Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. and others,** AIR 1991 SC 537, in **Mahadeo v. Shantibhai and others,** 1969 2 SCR 422.

4. Per contra, Mr. H. K. Tripathy, learned counsel appearing for the opposite party nos. 1 to 4 raised a preliminary objection that the writ petition is to be dismissed on the ground of suppression of material facts and non-disclosure of fact is more serious and further by adhering deliberate to falsehood by filing a false affidavit. As such any party not approaching the Court in clean hand is not entitled to get any relief. If the petitioner's name was included in the select list by mistake construing his father as a Central Govt. Employee, that mistake can be rectified by the authority. Therefore,

no illegality or irregularity has been committed by the authority in rejecting the claim of the petitioner to get admission into the Class-I of Kendriya Vidyalaya-2, Madhupatna, Cuttack.

5. The facts pleaded above reveals that the petitioner's father applied for admission of the petitioner into Class-I, Kendriya Vidyalaya-2, Madhupatna, Cuttack by furnishing documents. Considering the same the petitioner's name has been included in the waiting selected list in Annexure-2 at serial no.8 and subsequently in the provisional select list in Annexure-3 at serial no. 7. On 02.05.2015 the petitioner's father was intimated to produce the relevant documents for consideration for admission of the petitioner into Class-I of Kendriya Vidyalaya-2, Madhupatna, Cuttack. On 05.05.2015, when the documents were produced, the petitioner's father who was appointed as an Addl. Central Govt. Standing Counsel by the Central Govt. for Central Administrative Tribunal, Cuttack Bench, Cuttack, was called upon to produce the salary certificate. He could not produce the same. Consequently, the authority denied the admission to the petitioner as his father does not come under the priority category-1 on the guidelines issued by the Kendriya Vidyalayas Sangathan.

6. Kendriya Vidyalaya Sangathan has framed a guideline for admission into Kendriya Vidyalayas which has been annexed as Annexure-F series to the counter affidavit filed by the opposite parties. Part-A of the General Guidelines under Clause-3, deals with priorities in admission which read as follows:-

"PRIORITIS IN ADMISSION

The following priorities shall be followed in granting admissions:-

(A) KENDRIYA VIDAYALAYA UNDER CIVIL/DEFENCE SECTOR:

1. Children of transferable and non-transferable Central government employees and children of ex-servicemen. This will also include children of Foreign National officials, who come on deputation or transfer to India on invitation by Govt. of India.
2. Children of transferable and non-transferable employees of autonomous Bodies / Public sector Undertaking/institute of Higher Learning of the Government of India.
3. Children of transferable and non-transferable State Government employees.

4. Children of transferable and non-transferable employees of Autonomous Bodies/ Public Sector Undertakings/Institute of Higher Learning of the State Governments.

5. Children Nationals who are located in the India due to their work or for any personal reasons. The children of Foreign Nationals would be considered only in case there are no children of Indian Nationals waitlisted for admission.

Admission into Kendriya Vidyalayas is governed by the guidelines framed by the Kendriya Vidyalayas in its letter and spirit. Pursuant to notification issued, the petitioner's father applied for admission of his son-the petitioner into Class-I of Kendriya Vidyalaya-2, Madhupatna, Cuttack. The said application was registered as Regd. No. 469 for the session of 2015-16 and annexed as Annexure-A series to the counter-affidavit filed by opposite parties. Under the heading "SERVICE CERTIFICATE" The Senior Panel Counsel, Central Administrative Tribunal, Cuttack Bench, Cuttack certified that the petitioner's father is working as a regular employee in the Office/Ministry of Law and Justice. He is a regular employee and the certificate given by Senior Panel Counsel, Central Administrative Tribunal, Cuttack Bench, Cuttack is quoted below.

> Certified that Shri Chandra Madhan Singh is working as regular employee in the Office/Ministry of Law and Justice. He/She is a regular employee of Central Govt. and his/her services are non-transferable/transferable anywhere in India."

On the basis of such certificate the petitioner's case was considered for admission into Class-I for Kendriya Vidyalaya-2, Cuttack and his name was empanelled at serial no.8 in Annexure-2 and subsequently, at serial no. 7 in Annexure-3. On 05.05.2015 when the petitioner's father was called upon to produce the service certificate, he could not be able to produce the same, as he is not a salaried employee of the Central Government, rather he produced his engagement order issued by Ministry of Law and Justice Department indicating that he is working as Addl. Central Govt. Standing Counsel for the Central Administrative Tribunal, Cuttack Bench, Cuttack. Due to non production of salary certificate, admission has been refused.

7. The moot question that arises for consideration is whether the Addl. Central Government Standing Counsel appointed by Central Government is

to be considered as a Central Government employee under Sub-Clause (A)(1) of Clause-(3) of the General Guidelines Part-A.

8. Admittedly, the petitioner's father was appointed as Addl. Central Government Standing Counsel by the Central Government for Central Administrative Tribunal, Cuttack Bench, Cuttack. Though he has not been receiving regular salary, he has been paid remuneration by way of fees for his performance/legal duties in the Court of law. Being a Central Government Counsel he defends the Government action in the Court of law and as such, he is discharging the public duty.

9. Section 2(17)(h) of Civil Procedure Code, 1908 states "**Public Officer"** means a person falling under any of the following descriptions namely:

xx xx xx

> (h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty;

10. Section 24 of the Criminal Procedure Code, 1973 deals with Public Prosecutors. Under the code the Public Prosecutor has a special status and it is a statutory appointment and he receives a special recognition for the said purpose. The Law Officers of the High Court (Recruitment, Remuneration and Duties) Rules' 1974 also provides as under:-

> "The G.A. A.G.A., S.C. Addl. S.C. shall be subject to Rule-171 of the Odisha Service Code in the matter of leave."

11. It urged by Mr. U.C. Mishra, learned counsel for the petitioner that though essentially the Addl. Central Government Standing Counsel can not be treated as employee of the Central Government but the nature of duty he is discharging be termed as public duty and as such, he is an Public Officer having special statutory engagement to discharge as Public Prosecutor within the meaning of Sec. 24 of the Cr.P.C.

12. In **Kumari Shrilekha Vidyarthi** (supra) the Apex Court held that Public Prosecutors hold public office and since the Government Counsel are paid remuneration out of public exchequer, there exists a clear public element attached to the office or post. It was further held that under the Code of Criminal Procedure, 1973 the Public Prosecutor has a special status and it is statutory appointment. Since he receives a special recognition the

apex Court held that the office of the Public Prosecutor is a Public Office and he performs a public duty.

13. In **Mahadeo v. Shantibhai and others (supra)**, the Apex Court considered the character of engagement of a Government Counsel, where it was held that the lawyer engaged by the Railway Administration during continuance of engagement hold an "OFFICE OF PROFIT". It is urged that since the engagement of Railway Counsel is similar to that of the Government Counsel in Central Administrative Tribunal and the petitioner's father having hold the office of profit, determination of the petitioner under category priority (A) (1) is justified. But such determination having been done on misinterpretation of the priority category, the mistake committed by the authority has been rectified. So far as the allegation made that the petitioner's father suppressed the material facts and non-disclosure of the fact is more serious, cannot sustain in the eye of law. On perusal of the application form it appears Clause-5 deals with details of mother and father. Sub-Clause-(ix) of Cluse-5 deals with category of the parents, against which it has been mentioned as Addl. Central Govt. Standing Counsel(copy attached) and the petitioner's father has furnished his engagement order issued by Central Government as an Additional Central Government Standing Counsel. From that it cannot be construed that the petitioner's father has suppressed any fact before the authority. At best it can be said that the selection committee while considering the case of the petitioner has misconstrued as if the petitioner's father is an employee of the Central Government and enlisted the name of the petitioner in waiting list in Annexure-2 and subsequently in Annexure-3. The allegation with regard to deliberate falsehood of filing false certificate must be rectified effectively, is not applicable in the present context. With regard to the contention that the mistake can be rectified by the authority, it may be said that if the authority has erroneously included the petitioner's name in the merit list prepared by them, the same can be rectified in view of judgment referred by the Apex Court **U.T. Chandigarh & others v. Gurucharan Singh & Another,** 2014 (2) S.L.J. (S.C.) 301. **M/s. Maharastra State Seeds Corporation Ltd. –vrs. Haridas & others**, AIR 2006 SC 1480 and **M.S. Patil V. Gulbarga University & others,** AIR 2010 SC 3783.

14. Priorities in admission Clause-(A)(1) stated bout the children of transferable and non-transferable Central Government employees and children of ex-servicemen. The question now comes for consideration is as to whether the Addl. Central Govt. Standing Counsel can be construed to be an

employee under the Central Government so as to get the benefit of sub-Clause(A)(1) of Clause-3 of the guidelines. Certainly no master-servant relationship exists between the petitioner's father and the Central Government, rather being the petitioner's father has been appointed as a lawyer by the Ministry of Law and Justice Department to defend the Central Government in CAT. May it be, he is discharging the public duty as a public officer. More so, during the continuance of engagement he holds an office of profit, that ipso facto cannot be said that he is a Central Government Employee as there exists no master-servant relationship between the petitioner's father and the Central Government and as such he will not come within the parameters of sub-Clause-(A)(1) of Clasue-3 of the Priorities in admission as per guidelines for admission into Kendriya Vidyalayas. Therefore, the petitioner is not entitled to get the benefit of admission as per Part-A of General Guidelines.

15. It appears that while entertaining this application, this Court passed an interim order on 07.05.2015 in misc. case No. 8724 of 2015 that as an interim, one seat in Standard-I in Kendriya Vidyalaya No.2, Cuttack be kept reserved till final adjudication of the case. Mr. H.K. Tripathy, learned counsel for opposite party nos. 1 to 4 states that in compliance to the order passed by this Court, one seat has been kept reserved in Standard-I, therefore, this Court is of the considered view that since the seat is lying vacant, if there is no other impediment, the opposite party may do well to accommodate the petitioner to prosecute his studies in the Standard-1 as special case.

16. With the above observation and direction, the writ petition stands disposed of.

Writ petition disposed of.

2015 (II) ILR - CUT-793

DR. B. R. SARANGI, J.

W.P.(C) NO. 11906 OF 2009

HARIHAR HOTA & ANR. ……..Petitioners

.Vrs.

C.E.O. (M.D), NESCO & ORS. ……..Opp. Parties

ELECTROCUTION DEATH – Deceased came in contact with live 33 KV line – Compensation claimed in writ petition – Writ Court has no jurisdiction to record evidence to prove negligence – In this case although several request made by the local people to maintain such high tension line no precaution had been taken by the authorities, So, primafacie there is negligence on the part of the opposite parties – Held, this Court grants an ad-interim compensation of Rs. 1,00,000/- to the petitioners with liberty to move the civil Court for further compensation. (Para 12)

Case Laws Relied on :-

1. AIR 1999 SC 3421 : Chairman GRIDCO & Ors. -V- Smt. Sukamani Das

Case Laws Referred to :-

1. AIR 2000 SC 3629 : W.B. State Electricity Board & Ors. -V- Sachin Banerjee.
2. AIR 2005 SC 3971 : S.D.O. Grid Corpn. -V- Trimudu Oram.

For Petitioner : Mr. S.C.Routyray

For Opp. Parties : M/s. D.N.Mohapatra, Smt. J.Mohanty, P.K.Mohanty, P.K.Nayak & S.N.Dash)
M/s. S.Barik & T.Pradhan
M/s. A.K.Mishra, S.K.Ojha, N.R.Pandit & A.K.Sahoo

Date of hearing : 24.07.2015
Date of Judgment :25.08. 2015

JUDGMENT

DR. B.R.SARANGI, J.

The petitioners being the parents of Rama Chandra Hota, who died due to electrocution having come in contact with live electric wire of 33 KV,

have filed this application seeking for a direction to opposite parties to pay compensation of Rs.10,00,000/- with interest @ 12% per annum from the date of accident till the date of payment and litigation cost.

2. The short fact of the case, in hand, is that the petitioners' son, Rama Chadnra Hota, who was aged about 28 years and had also acquired +2 qualification, while engaged himself in a colour painting work on 29.10.2007 of the residential house of Nirupama Swain, opposite party no.9 of ward no.5, Vyasanagar Municipality, Jajpur Road, came in contact with live wire of 33KV line which was hanging at 2 feet height over the roof of the said residential house, as a result of which he sustained severe burn injuries and fell down and lost his sense at the spot. He was carried to Danagadi C.H.C., where after getting some preliminary treatment, he was shifted to SCB Medical College and Hospital, Cuttack where ultimately, he died on 05.11.2007 due to 95% burn injuries. In the post-mortem examination, the doctor opined that the death of Ramchandra was due to electrocution. Accordingly, Mangalabag Police Station registered a P.S.U.D. Case no. 1098 of 2007 on 05.11.2007, consequent upon which U.D.G.R. Case No. 1416 of 2007 was registered before the S.D.J.M., Cuttack. The FIR, Final Form, Inquest Report, Dead Body Challan, Post-mortem examination report, which are annexed as Annexure-2 series indicate that the deceased died due to electrocution followed by burn injuries. Therefore, the petitioners have claimed for compensation of Rs. 10,00,000/- with interest for the premature death of their son due to electrocution.

3. Mr. S.C. Routray, learned counsel for the petitioner strenuously urged that the death of the deceased occurred due to electrocution by coming in contact with live 33kV line which was drawn in a dangerous position over the house of opposite party no.9. Therefore there is a negligence on the part of the electricity authority in drawing 33KV line over the house of opposite party no.9, in a dangerous position. The deceased having come in contact with said electricity line while colouring the house of the opposite party no.9, sustained burn injuries and thereafter succumbed to the same and therefore consequentially the petitioners are entitled to get the compensation as claimed in this petition.

4. Three separate counter affidavits have been filed, one by opposite party no.1 and 6, one by opposite party nos. 2 to 5 and 7 to 8 and the other by opposite party no.9, namely Smt. Nirupama Swain.

5. Mr. A.K. Misha, learned counsel for opposite party nos. 2 to 5 and 7 to 8 stated that the petitioners' son died due to electrocution by coming in contact with the 33 kv line electric wire due to negligence, fault and omission of opposite party no.1 in maintaining the height and safety of live high voltage line which was passing over the roof of opposite party no.9. It Is categorically stated that the opposite party nos. 1 to 8 are no way connected with any incident as after formation of GRIDCO by virtue of the Orissa Electricity Reforms Act, 1955, the GRIDCO owned and operated the distribution undertaking till 25.11.1998. Thereafter, the distribution undertaking of north-eastern part of Odisha was transferred to NESCO with effect from 26.11.1998. Thereafter GRIDCO has no role to play nor liable to pay compensation as claimed. Whereas NESCO authority, opposite party nos. 2 to 5 and 7 to 8 has stated that the writ petition is not maintainable in view of Rule 82 of the Indian Electricity Rules, 1956 as the case of the petitioners involves disputed questions of fact. The petitioners having approached this Court earlier in W.P.(C) No. 4444 of 2009, which was dismissed on 30.03.2009 vide Annexure-10, for self-same relief, the present writ petition is not maintainable. It is stated that the same amounts to suppression of facts. It is further urged that the police on enquiry has reported in the final report that there is no foul play. The 33 KV line has been connected since long i.e. prior to 1962 and the house of opposite party no.9 was constructed much later than the 33 KV line constructed and therefore, no compensation can be payable to the petitioners. That apart, the permission for construction of house under 33 KV line as required under Rule-82 of the Indian Electricity Rules, 1956 has not been obtained and therefore, the benefit cannot be admissible to the petitioners. It is stated that the death of the deceased has no connection with the present case. As per the Annexure-8, one proposal has been submitted in connection with shifting of 33 KV line but the same has not been done as it has been erected long before and more so, the contention raised by the petitioners that the deceased was earning Rs.9,000/- per month from out of colouring work, has been disputed. In view of such position, the opposite parties strenuously refuted the claim of the petitioners to pay the compensation due to premature death of their son due to electrocution. In order to substantiate their case, reliance is placed on the judgments of the apex Court in **Chairman Grid Corporation of Orissa Ltd. (GRIDCO) and others v. Smt. Sukamani Das,** AIR 1999 SC 3421; **W.B. State Electricity Board and others v. Sachin Banerjee,** AIR 2000 SC 3629 and **S.D.O. Grid Corporation v. Trimudu Oram.** AIR 2005 SC 3971.

6. Opposite party no.9 has categorically stated that due to callous attitude of the authority, the accident has occurred, leading to the premature death of the deceased due to electrocution.

7. On the basis of the facts pleaded above, it is admitted fact that the deceased having come in contact with 33 KV line, suffered 95% burn injuries, carried to Danagadi C.H.C. thereafter he was shifted to S.C.B. Medical College and Hospital, Cuttack where he succumbed to injuries and the medical report as well as inquest report indicates that the petitioners' son died due to injuries on electrocution. Therefore, there is no dispute that the son of the petitioners sustained injury due to electrocution which caused him death.

8. Question now arises as to whether any negligence has been caused by the authority so as to entitle the petitioners to get the compensation as claimed in the petition. As it appears, the petitioners have not produced any materials save and except certain documents on which they rely indicating that there is a protest raised by the local people for shifting of the high tension line over the dense populated locality of Vyasanagar area, but the same has not been acceded to by the authority. Unless negligence on the part of the authority is proved, the petitioners cannot be entitled to get compensation as claimed.

9. In exercise of power under Article 226 of the Constitution of India this Court has no jurisdiction to record any evidence to reach at a conclusion that there is negligence on the part of the opposite parties, but the inevitable conclusion is that the injury sustained by the deceased was due to electrocution as he came in contact with 33 KV line while painting. Therefore, the petitioners having lost the sole earning member of the family, may be entitled to get compensation as claimed by following a due procedure in accordance with law. The contention of the opposite parties is that they have maintained high tension line in proper manner. Therefore, the claim made by the petitioners is not admissible. That question can only be adjudicated by adducing evidence whether there is negligence on the part of the authority in maintaining high tension line in the locality. In **Chairman Grid Corporation of Orissa Ltd.** (supra) the writ petition was filed by the wife of the deceased claiming compensation for the death of her husband due to electrocution on the ground that he came in contact with an electric wire which was lying across the road after getting snapped from the overhead electric line, because of negligence of GRIDCO and its officers in not

properly maintaining the lline. This Court awarded a compensation of Rs.1 lakh merely relying upon the fact that live wire of the electric line belonging the GRIDCO had snapped and the deceased came into contact with it and had died, that ipso facto does not entitle the petitioners to get the compensation unless it is proved by adducing proper evidence regarding negligence on the part of the authority. The apex Court has held that where disputed the questions of fact are involved, petition under Article 226 of the Constitution of India is not a proper remedy. The High Court has not and could not have held that disputes in the cases were raised for the sake of raising them and that there was no substance therein. The High Court should have directed the writ petitioners to approach the Civil Court.

10. Similarly in **W.B. State Electricity Board** (Supra), the apex Court held that two victims were electrocuted because of an illegal hooking for purpose of theft of electricity, thereby electric Board cannot be held guilty of negligence. Therefore, the direction to pay Rs.50,000/- as ex-gratia payment was maintained but the observation that the two victims had died because of negligence on the part of the Board, has been deleted by the apex Court.

11. In **S.D.O. Grid Corporation of Orissa Ltd. and others (supra),** the apex Court rejected the claim on the ground that the writ application was filed for compensation on account of death due to electrocution after a lapse of 10 years of the occurrence. No reasons have been given for such inordinate delay. Entertaining the writ petition by the high Court is not proper and as such awarding compensation in such case by exercising the jurisdiction under Article 226 of the Constitution of India is improper.

12. In this case the death has occurred due to electrocution, injury sustained by electrocution has been admitted and the petitioner was carried to Danagadi C.H.C. and then S.C.B. Medical College and Hospital, Cuttack where he succumbed to the injuries and all the reports indicate that the death has occurred due to injuries on electrocution as the deceased came in contact with 33 KV line, which was placed in a dangerous position. In spite of several request made by the local people, no precautions had been taken by the authority. Therefore, prima facie it appears that the authorities have neglected in their duty in maintaining such high tension line but in the present proceeding, this Court is refrained from adjudicating the question of negligence committed by the authority in view of the ratio decided in **Chairman Grid Corporation of Orissa Ltd.** (Supra). Therefore, it is left

open to the petitioners to move the appropriate Civil Court to establish whether there is negligence on the part of the opposite parties or not. Unless the same is adjudicated by the appropriate forum, by following due procedure of law and negligence of the authority is established, it is difficult to award the compensation as claimed in the writ application. In any case, since death has occurred due to electrocution there is allegation of non-maintenance of high tension line, ends of justice will be served by granting an ad-interim compensation of Rs.1,00,000/- to the petitioners leaving it open to them to establish negligence on the part of the authority in a competent Civil Forum by adducing evidence. The said ad-interim compensation of Rs.1,00,000/- (One Lakh) shall be paid within a period of three months from the date of communication of this judgment.

13. With the above observation and direction, the writ petition stands disposed of.

Writ petition disposed of.

2015 (II) ILR - CUT-798

D. DASH, J.

R.S.A. NO. 111 OF 2005

JAMUNA DAS & ORS. ……..Appellants

.Vrs.

MOCHIRAM BEHERA & ANR. ……..Respondents

CIVIL PROCEDURE CODE, 1908 – O.41, R-17(1)

Whether the lower appellate court, in the absence of the appellants or their counsel was justified to dispose of the appeal on merit without following the provision of Rule 17 (1) of Order 41 CPC ? Held, No.

The learned Court below has power to simply dismiss the appeal but cannot dismiss it on merit in view of the explanation

attached to the above Rule – Held, the impugned judgment and decree passed by the lower appellate court is set aside and the matter is remitted back to that court for fresh disposal in accordance with law.

(Paras 4, 5)

For Appellants : M/s. R.N.Mohanty, K.P.Mohanty, D.C.Mohanty & C.R.Sahoo

For Respondents : M/s. A.K.Choudhury, K.K.Das & C.R.Behera

Date of hearing : 20.08.2015
Date of judgment : 21.08.2015

JUDGMENT

D. DASH, J.

This appeal has been filed against the judgment and decree passed by the learned Civil Judge (Sr. Division), Chatrapur in R.F.A. No.16 of 2003. By the said judgment and decree, the appeal filed by the present appellants, who were the unsuccessful plaintiffs in the Title Suit No.56 of 2001, has been dismissed on merit.

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

Whether the lower appellate court in the absence of the appellants and/or the counsel representing them in the appeal was justified in disposing the appeal on merit without following the provision of Rule -17(1) of Order -41 of the Code of Civil Procedure?

3. Learned counsel for the appellants submit that on the date of hearing of this appeal as would be seen from the judgment of the lower appellate court, the appellants were absent and so also the learned counsel appearing on their behalf in the said appeal. However, the lower appellate court having only heard the learned counsel for the defendant-respondents has gone to dispose of the appeal on merit by affirming the findings of the trial court and confirming the judgment and decree called in question. This, according to him, is not having the legal sanction being wholly contrary to the procedures as prescribed in Order-41 of the Code of Civil Procedure. Therefore, he urges that the judgment and decree passed by the lower appellate court on this ground are liable to be set aside and the matter need be remitted to the lower appellate court for fresh disposal of the appeal in accordance with law after hearing the parties.

Learned counsel for the respondents submits that the appeal having been disposed of on merit after hearing upon perusal of the judgment, the lower appellate court has committed no such error of law.

Perusal of the Para-3 and 4 of the judgment of the lower appellate court reveals the same state of affair as has been submitted by the learned counsel for the appellants on the date of hearing of this appeal that on that day when appeal was called for hearing none, none was present on behalf of the appellants. So as provided under Rule 17(1) of Order-41 of the Code, the appeal was to meet the fate of simple dismissal in that regard. The explanation is very clear on the point which says that nothing in the sub-rule shall be construed as empowering the court to dismiss the appeal on merits.

In view of the above, the course adopted by the lower appellate court is held to be not the one which is legally approved. Thus, it is held that the lower appellate court has committed gross illegality in going to dispose of the appeal on merits in the eventuality as already stated in the forgoing paragraphs.

5. Resultantly, the appeal stands allowed and in the facts and circumstances without cost. The judgment and decree passed by the lower appellate court are hereby set aside and the matter is remitted to the lower appellate court for fresh disposal in accordance with law after hearing the parties. In order to save time, the parties are directed to enter appearance in the lower appellate court on 07.09.2015 to receive further instruction and take necessary steps as directed. Viewing the age of the litigation, the lower appellate court is directed to make all endeavour to dispose of the appeal within a period of four months to be computed from 07.09.2015.

Appeal allowed.

2015 (II) ILR - CUT-801

D. DASH, J.

GOVERNMENT APPEAL NO. 75 OF 1996

STATE OF ORISSA ……..Appellant

.Vrs.

BAPUJI NAIK @ BAPUNI @ FATU ……Respondent

CRIMINAL PROCEDURE CODE, 1973 – S.378 (1)(b)

Order of acquittal – Offence U/ss 376, 511 I.P.C. – Trial Court without any justifiable reason has discarded the evidence of the victim (P.W. 1) having truth without any basic infirmity to doubt the same – Appreciation of evidence done by the trial court is perverse – Compelling reasons to differ with the finding of the trial court in order to prevent miscarriage of justice – Held, order of acquittal is set aside and the appellant is convicted for the above offence – Since the appellant is continued with the presumption of innocence for about two decades and scar on the victim and her family must have settled down in the meantime and considering the rural background of the parties this Court feels it just and proper to impose sentence of R.I. for a period of one year. (Paras 8, 9)

Case Laws Referred to :-

1. (2014) 57 OCR 1044 : Basappa Vrs. State of Karnataka.
2. (2009) 10 SCC 639 : Gamini Bala Koteswara Rao and others Vrs. State of Andhra Pradesh;
3. (2008) 1 SCC 258 : K. Prakashan Vrs. P.K. Survenderan T.
4. (2006) 1 SCC 401) : T. Subramaniam Vrs. State of Tamil Nadu
5. (2002) 10 SCC 461) : Bhima Singh Vrs. State of Haryana
6. AIR 1983 S.C. 753 : Bharwada Bhoginbhai Hirjibhai v. State of Gujarat

For Appellant : Mr. A.K.Mishra, Standing Counsel
For Respondent : M/s. D.P.Dhal, K.Rath, S.K.Tripathy, S.S.Ghosh, B.S.Dasparida

---

Date of hearing : 03.12. 2014
Date of judgment: 09 .01.2015

JUDGMENT

The State in this appeal has called in question the order of acquittal passed by the learned Sessions Judge, Kandhamal-Boudh-Phulbani in S.T. No. 28 of 1995 acquitting the respondent of the charge under section 376/511, I.P.C. read with section 3(2)(v) of S.C. and S.T. (P.A) Act, 1989.

2. The case of the prosecution in short is that the respondent attempted to commit rape upon the victim (P.W.1) near "Ladamaha" field of village Tiangis (Mandasaru). The age of the victim girl is stated to be 12 years then. It is further stated that on 18.11.1994 around 3 P.M. the victim was grazing cattle over the land locally called "LADAMAHA". At that time, in that lonely place, the respondent with an intention to rape the victim came, embressed and squeezed her breast whereafter he made her lie on the ground. Then he tore her inner garments. It is further stated that by application of force the respondent when was about to penetrate his penis into the vagina of the victim in order to commit forcible sexual intercourse, the victim being frightened started urinating with fecal matters coming out of her annus. At this point of time, one Upajini saw and shouted. So, the respondent left her. The victim then went to her house and reported the incident to her mother. Lastly a meeting was convened on 19.11.1994. Thereafter the written F.I.R. was lodged at the police station. Police having investigated the case submitted charge-sheet. This is how the respondent came to be tried.

3. The trial court on examination and evaluation of evidence has come to the conclusion that the prosecution has failed to establish its case beyond reasonable doubt. The evidence of P.W.1 (victim) has been discarded on the above score that victim P.W. 1 has not supported the F.I.R. version to the effect that P.W. 2 noticed the respondent to be lying over her and then he raised alarm, which led the respondent to lift P.W. 1. Next it has heavily weighed in the mind of the trial court to disbelieve the version of the P.W. 1 that after she urinated and eased in the place of occurrence without cleaning herself, she went to her house and met her mother. It has further been stated that version of P.W. 2 and 3 are contrary with the evidence of P.W. 1. Broadly on these grounds; the trial court has discarded the case of the prosecution.

It may be stated here that informant in the case is the victim herself and she is aged about 12 years. She has come to the dock as P.W. 1. P.W. 2 is a relation of P.W. 1 who having seen the respondent by the side of P.W. 1 and also having seen P.W. 1 crying shouted. Mother of P.W. 1 has been examined as P.W. 3. P.W. 4 is a witness of that meeting. The doctors

examining P.W.1 are P.W. 8 and 9. The investigating officer is P.W. 10. The respondent has examined himself in defence.

4. Learned counsel for the State submits that the appreciation of evidence in the case by the trial court is wholly perverse and there remains no reason to discard the truthful version of P.W. 1. According to him, there is no need for seeking corroboration from any independent sources as the evidence of P.W. 1 is wholly trust-worth, when there remains no remove reason to falsely implicate the respondent in a case of this nature. He further submits that the trial court has unnecessarily given weightage to the evidence of P.W. 1 and 3. It is his submission that here on the basis of evidence of P.W. 1, the trial court ought to have been recorded conviction for offence under section 376/511 of I.P.C.

5. Learned counsel for the respondent on the other hand supports the finding rendered by the trial court as regards the failure of the prosecution to establish its case against the respondent. According to him, the evidence of P.W. 1 is not reliable and it's a case where only due to arrival of P.W. 2, the colour to the incident has been given otherwise.

6. On such rival submission, this Court is now called upon to examine the evidence of the prosecution witnesses to judge the sustainability of the order of acquittal passed on the finding that the evidence is not sufficient to prove that there was an attempt by the respondent to commit rape upon P.W. 1.

But before going for reappraisal of the evidence in the light of the contentions as advanced, it is felt apposite to take note of the settled position of law with regard to the scope and power of this Court for interference with the order of acquittal.

It has been held in case of ***Basappa Vrs. State of Karnataka***; (2014) 57 OCR 1044 that the High Court in an appeal under section 378 Cr.P.C. is entitled to reappraise the evidence and put the conclusions drawn by the trial court to test but the same is permissible only if the judgment of the trial court is perverse. Relying the case of ***Gamini Bala Koteswara Rao and others – Vrs. State of Andhra Pradesh***; (2009) 10 SCC 639, it has been held that the word "perverse" in terms as understood in law has been defined to mean 'against weight of evidence'. In '***K. Prakashan Vrs. P.K. Survenderan***; (2008) 1 SCC 258, it has also been held that the Appellate Court should not reverse the acquittal merely because another view is possible on evidence. It has been clarified that if two views are reasonably possible on the very same

evidence, it cannot be said that prosecution has proved the case beyond reasonable doubt (Ref.:- ***T. Subramaniam Vrs. State of Tamil Nadu***; (2006) 1 SCC 401). Further, the interference by appellate Court against an order of acquittal is held to be justified only if the view taken by the trial court is one which no reasonable person would in the given circumstances, take (Ref.:- ***Bhima Singh Vrs. State of Haryana;*** (2002) 10 SCC 461).

7. The law is fairly well settled that in such cases, the solitary testimony of the victim can be accepted to fasten the guilt upon the accused in case, the same is found to be free from any infirmity and its held to be trust-worth.

It has been held in case of ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat***, reported in AIR 1983 S.C. 753, their Lordships in the Hon'ble Apex Court have been pleased to hold that in the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should be evidence of a girl or the woman who complains of rape or sexual molestation be viewed with the said of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society "…….. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society and its profile".

8. Keeping the aforesaid in mind, let's first examine the evidence of victim-P.W. 1. The witness aged about 12 years has been examined in court with the help of an interpreter as she knows only 'Kui' language. Of course the evidence of doctor P.w.8 is that the age of P.W.1 was more than 15 years but less than 17 years and that according to him has been so opined by giving due margin on both sides. Mother of victim P.W.3 is not stating about the age of the victim. She was grazing cattle near a field, when the respondent came to her after attending call of nature and then immediately squeezed her breasts, made her lie on the ground, removed her chadi by tearing it and then sat over her thighs. She has further stated that in view of sudden happening, she urinated out of fear and also fecal matters came out of her annus and therefore, the respondent left the place. She stated that on her way back home, she met her mother, told her the incident and then mother reported it to father. Now if we look at the F.I.R. Ext. 1, it is found that the narration is quite exaggerated that the respondent forcibly attempted to push his penis and

penetrate into her vagina when she urinated out of fear. This has been scribed by P.W.7 who has gone to deny. Although she has not stated about the arrival of P.W. 2 who raised shout, during her examination in court, the same finds mention in the F.I.R. P.W. 2 having been examined has stated, to have seen both respondent and P.W. 1 in standing position with P.W. 1 crying and then being asked, P.W. 1 stated that the respondent when was about to commit sexual intercourse she urinated and fecal matters came out of her annus for which the respondent left her. The victim when was found to be crying the question of her even going near the respondent out of fear own will in facing such a situation is totally over ruled So simply because P.W. 1 has not stated about the arrival of P.W. 2, her evidence when is found to have not been shaken in any manner as regards the role of the respondent, the trial court ought not to have doubted the version of P.W. 1 to the extent of respondent's role. Rather it is found that P.W. 2's evidence provide ample corroboration to the evidence of P.W. 1 that she immediately told about the incident to her. Mother-P.W. 3 has also stated what P.W. 1 told her. In the meeting held in the village as has been stated by P.W. 1 and others including the co-villagers, P.W. 5 that P.W. 1 had narrated in detail about the incident there. P.W. 2 having stated before the court contrary to the F.I.R. version that she had not seen P.W. 1 and respondent in compromising position has been taken as circumstances to a adversely view the prosecution case and the version of P.W.1. It is not understood as to how that would have adverse impact upon the testimony of P.W. 1, when it is stated by the respondent that the case has been foisted against him to spoil his career and as because he belongs to a different religion, no such evidence is forthcoming. It is extremely hard even to accept for a moment that for the purpose life of a girl of such tender age would be put at stake and she would come out to speak falsehood in implicating the respondent in a crime of this nature alleging sexual assault upon her inviting social stigma, causing severe harm for her future life and at the cost of her dignity.

The defence version as such does not corrode the credibility of the version of P.W. 1, the victim. It is thus found that the trial court without any such justifiable reason has discarded the version of P.W. 1 which is having the ring of truth without any such basic infirmity or exposing any such feature to doubt the same. Thus, the submission of the learned counsel for the State that the appreciation of evidence as done by the trial court is perverse and it's a fit case for interference with the order of acquittal merits acceptance. So, there remains compelling reason to differ with the finding of

the trial court in order to prevent miscarriage of justice. Consequently, the order of acquittal is held unsustainable.

For the aforesaid discussion and reasons, accepting the version of P.W.1 the respondent is held guilty for commission of the offence under section 376 read with section 511 of IPC.

8. In the result, the appeal stands allowed, the order of acquittal is set aside and appellant is convicted for offence under section 376 read with section 511 of IPC.

Next coming to the question of award of appropriate sentence, taking into consideration the age of the respondent and his suffering with family, and he having continued with the presumption of innocence for nearly two decades, when also the scar on the victim with her family must have settled down. Further, viewing their rural background as well as the strata of the society which they enjoy, this court feels it just and proper to impose sentence of rigorous imprisonment for a period of three years. The respondent is accordingly directed to surrender in the trial court to serve out the sentence. The trial court is also directed to take necessary step forthwith as per law to see that the respondent is taken to custody to serve the sentence. It is needless to mention that the period already undergone in custody in this case by the respondent shall be set off.

Appeal allowed.

2015 (II) ILR - CUT-806

B.RATH, J

MISC. CASE NO. 25 OF 2014
Arising out of Election Petition No.05 of 2014

RABINARAYAN NANDA ……..Petitioner

.Vrs.

TARAPRASAD BAHINIPATI & ORS. ……Opp.Parties

REPRESENTATION OF THE PEOPLE ACT, 1951 – S.87 r/w O-6, R-17 C.P.C.

Election Petition – Amendment – Introduction of new material facts which are beyond the martial facts already contained therein and is opposed to the sprit of Section 87 of the Act. – No amendment beyond the period of limitation as prescribed in Section 81 of the Act – Held, application for amendment of election petition is dismissed with cost of Rs 5000/-. (Para 7)

For Petitioner : M/s B. Mishra, P. Njaaradwak, G.K. Mohanty, S.Lal and A.Mohapatra.

For Opp. Parties : M/s P.Acharya, S. Rath, B.K. Jena, J.P. Parida and S.Upadhyaya (R.-1)
M/s B.P. Tripathy, R. Acharya, T. Barik, N. Barik, S. Hidayatullah and D.N. Pattanaik (R-2)
M/s D. Kumar and D.Varadwaj (R.-9)
M/s R.N. Mishra, R.K.Mahanta, J.N. Parida and D.K. Mohanty (R-8)

Date of Hearing : 12.11.2014
Date of judgment: 17.11.2014

JUDGMENT

BISWANATH RATH, J.

This is an application under Order 6 Rule-17 of the Civil Procedure Code, 1908 read with Section 87 of the Representation of the People Act, 1951.

By filing this Misc. Case, the Election Petitioner has sought for amendment of the Election Petition by bringing in the following to the main petition:-

> " 5F. Let it be declared that the Respondent No.1 has not subscribed "OATH" as mandatorily required under Article 173 of the Constitution of India and as such is not eligible to contest the election, for the reasons stated under paragraph 6F, and the votes recorded in favour of the Respondent No.1 be declared as invalid, void and throw-away votes and let it be further declared that the election petitioner has secured majority of valid votes and be declared

duly elected as a member of Odisha Legislative Assembly from 143-Jeypore Assembly Constituency.

5G. Let it be declared that the "Form-A" and "Form-B", i.e., party ticket filed by the Respondent No.1 along with his nomination is incomplete, invalid and non est in the eyes of law and in absence of valid party ticket, as the Respondent No.1 has not been nominated by ten prospers, his nomination is liable for rejection, for the reasons stated in paragraph 6G, and for such the votes recorded in favour of the Respondent No.1 be declared as invalid, void and throw-away votes and let it be further declared that the election petitioner has secured majority of valid votes and duly elected as a member of Odisha Legislative Assembly from 143-Jeypore Assembly Constituency.

2. After paragraph 6E, add the following as paragraph 6F and paragraph 6G respectively:-

6F. That the "OATH" subscribed by the Respondent No.1 being incomplete for non-disclosure/non-mention of the time of taking Oath so also the name and number of the Assembly Constituency from which the Respondent No.1 intends to contest, amounts to non-subscribing of oath under Article 173 of the Constitution of India, ultimately leading to rejection of nomination of Respondent No.1 as the defect is a substantial defect.

6G. That the party ticket granted in "Form-A" and Form-B" being incomplete for non-disclosure of the name and number of the constituency below the Returning Officer, to whom the "Form-A" and "Form-B" are to be delivered as well as in the heading of the subject, and since in "Form-B" column 3, 4, 6 and 7 are left blank, the "Form-A" and "Form-B" filed by the Respondent No.1 are not properly constituted "Form-A and Form-B", in the eyes of law. In absence of a properly constituted "Form-A" and "Form-B", it was incumbent for the respondent no.1 to be nominated by Ten proposers in Part-II of the nomination Form-2B, since the same has not been done, the nomination of Respondent No.1 is liable to be rejected.

3. After prayer C, add the following as prayer C-1and prayer C-2 respectively:-

C-1. Let it be declared that the Respondent No.1 has not subscribed 'OATH' as mandatorily required under Article 173 of the Constitution of India and as such not eligible to contest the election.

C-2. Let it be declared that the Respondent No.1 has not filed valid party ticket i.e. "Form-A" and "Form-B" and in absence of valid party ticket, the Respondent No.1 having not been nominated by ten proposers, his nomination is liable to be rejected.

4. In the Verification after paragraph-6, add the following as paragraph-7:-

7. That the statements made in paragraphs 5F, 5G, 6F and 6G are true to my knowledge on verification of the "Oath" form as well as verification of the party ticket granted in favour of Respondent No.1 in 'Form-A' and 'Form-B', which I came to know on seeing the copy of the 'Oath Form' as well as copy of 'Form-A' and 'Form-B' and I believe the same to be true.

5. In the affidavit, add the following as paragraph 6A:-

6A. That the statements made in paragraphs 5F, 5G, 6F and 6G are true to my knowledge on verification of the 'Oath' form as well as verification of the party ticket granted in favour of Respondent No.1 in 'Form-A' and 'Form-B', which I came to know on seeing the copy of the 'Oath Form' as well as copy of 'Form-A and 'Form-B' and I believe the same to be true."

In filing the amendment application, The Election Petitioner has taken the grounds that the omissions in the Election Petition are all by over sight and inadvertence. Further the proposed amendments sought for are essentially required for just determination of real question in controversy. The amendments sought for as described in the schedule are very formal in nature and if allowed will not change nature and character of the Election Petition nor shall work out any prejudice to the respondent no.1 or to any other respondents. In course of argument, the Election Petitioner making reference to some paragraph in the Election Petition tried to establish that the proposed amendments are only explaining the facts already there in the Election Petition. By bringing reference to Sub-section (5) of Section 86 and Section 87 of the Representation of the People Act, 1951 submitted that the High Court has ample power to consider the application for amendment.

Learned senior counsel for the Election Petitioner further submits that in view of provision contained in Section 87 of the Representation of the People Act, 1951 the provisions contained in Code of Civil Procedure, 1908 are very much applicable. The learned senior counsel for the Election petitioner also in order to justify his submission, relied on the decisions AIR 1957 S.C. 444 **Harish Chandra v. Triloki Singh**, AIR 1965 S.C. 1243 **Amin Lal v. Hunna Mal**, AIR 1991 SC 1557 **F.A. Sapa v. Singora**, (1994) 2 SCC 579, **Sethi Roop Lal v. Malti Thapar and others and**, but given stress only on decision **Sethi Roop Lal v. Malti Thapar and others,** (1994) 2 SCC 579. Strongly relying on the decision reported in (1994) 2 SCC 579, the election petitioner contended that in view of the decision of the Hon'ble Apex Court (supra) application for amendment is valid and claim for allowing his application for amendment ought to be allowed.

2. Per contra, respondent no.1, the returned candidate-the only contestant by filing a counter to the petition for amendment objected in entertaining the petition for amendment on the following grounds:-

(a) No amendment of Election Petition at this stage is permissible vis-à-vis Order 6 Rule-17 of the Civil Procedure Code in as much as it is the settled law that the procedure provided for trial of Civil suits under C.P.C. is not wholly applicable to trial of the Election petition. The provision contained in the Representation of the People Act, 1951 over reach the provision of C.P.C. particularly in the matter of amendment to Election petitions and the procedures of the C.P.C. are only guideline value in the Election cases.

(b) In referring to provisions contained in Section 81 of Representation of the People Act, 1951, the respondent no.1 contended that limitation prescribed under Section 81 of Representation of the People Act, 1951 ceases after 45 days from the date of election of the return candidate. No amendment of the Election Petition can be entertained beyond 45 days.

(c) In referring to Section 83 of Representation of the People Act, 1951 respondent, i. e, the returned candidate contended that Section 83 of the act provides for contents of the Election Petition by saying that an Election Petition must contain a concise statement of material facts on which election petitioner relies.

It is on these premises, the returned candidate submitted that any statement of material facts beyond the statement of material facts borne in the Election Petition is impermissible beyond the 45 days prescription.

(d) The return candidate claimed that the provision at Order 6 Rule-17 of C.P.C. does not at all apply to the election petition.

(e) The returned candidate further submits that by filing the present amendment application, the Election Petitioner has made an attempt to introduce new material facts going away from the material facts already contained in the Election Petition and as such the amendment is impermissible. He further submitted that the provisions contained in Section 87 of the Representation of the People Act, 1951 so far as applicability of the procedures under the Code of Civil Procedure to the trial on suits in an Election Petition cannot be understood the application of Code of Civil Procedure to the Election proceedings as a whole.

3. The returned candidate to substantiate his submissions, apart from relying on the provisions of Section 81(1), Section 83(1)(a), Section 86(5), Section 86(7) and Section 87(1) of the Representation of the People Act, 1951 and certain provisions under Chapter-35 of the Orissa High Court Rules also relied on the decisions referred to in (2005) 5 SCC-46, **Harmohinder Singh Pradhan vrs. Ranjit Singh Talwandi and Others**, AIR 2005 Punjab and Haryana 251, **Surinder Pal vrs. Gurpeet Singh Kangar and Others**, AIR 1987 SC 1577, **Dhartipakar Madan Lal Agarwal vrs. Shri Rajiv Gandhi**, (2005) 4 SCC 480, **Kailash vrs. Nakhu and Others** and AIR 1987 Gauhati 11, **Soneswar Borah vrs. Nagen Neog and Others**.

It is on the basis of the aforesaid submissions, the returned candidate, that is respondent no.1 opposes entertaining the application under Order 6 Rule 17 CPC at the instance of the Election Petitioner. Though there are other respondents in the Election Petition but they have neither filed any objection to the amendment application nor submitted any argument during course of hearing of the petition for amendment.

4. At this stage, it is necessary to refer to some of the provisions of the Representation of the People Act, 1951 as well as a provision from the Representation of the People Act relevant for the purpose, which runs as follows:-

"**81. Presentation of petitions**.—(*1*) An election petition calling in question any election may be presented on one or more of the grounds specified in [3][sub-section (*1*)] of section 100 and section 101 to the [4][High Court] by any candidate at such election or any elector [5][within forty-five days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates].

xx xx xx

"**83. Contents of petition**.—(*1*) An election petition—

(*a*) shall contain a concise statement of the material facts on which the petitioner relies"

86- Trial of Election Petitions

xx xx xx

"86 (*5*) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(*7*) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial.

"87. **Procedure before the High Court.**—(*1*) Subject to the provisions of this Act and of any rules made thereunder , every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits:

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or

> witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings."

It is also a relevant to quote Section 81 (3) of the Old Representation of the People Act, which runs as follows:-

> "83(3) The Tribunal may upon terms as to interest and otherwise as it may direct at any time allow the particulars included in the said list to be amended or order said further and better particulars in regard to any matter referred to therein to be furnished as may in its opinion it necessary for purpose of ensuring a fair and factual trial of the petition."

Under this provision since the disposal of the Election petition could not be materialized within a reasonable time the law makers consciously taken out the aforesaid Provisions from the Representation of the People Act.

After taking out the provisions as contained vide Sub-section (3) of Section 83 of the Representation of the People Act, the only provision accepting amendment remained vide Sub-section(5) of Section 86 of the Representation of the People Act, 1951, which is again confined to amendment of Election Petition on the allegation of corrupt practice. From bare reading of the Election Petition as well as amendment application, it is amply clear that the proposed amendments are all introduction of new material facts and having no relevance to the material facts already existed therein. Under the specific provisions as contained in Section 83(1) read with Section 81 of the Representation of the People Act, 1951, the Election Petition containing concise statement of the material facts on which the petitioner relies ought to be filed within 45 days but not earlier than the date of Election of the return candidate ought to have been filed. The provisions referred to hereinabove makes it clear that period of limitation in filing concise statement of material facts is maximum 45 days and not beyond that. Further reading of the Sub-section(5) of Section 86, the law makers have very consciously made the law giving relaxation of the amendment of the election petition confining to cases in relation to corrupt practices only. This provision has absolutely no application to other Election Petitions and the rest provisions undoubtedly debars filing of an amendment beyond 45 days bringing in further material facts.

5. The decision cited by the Election Petitioner vide AIR 1965 SC 1243 and 1991 (3) SCC 375 do not fit to the facts in the present case and hence have no application to the present case. So far as decision cited by the Election Petitioner relates to (1994) 2 SCC 579 is concerned, it is relevant to travel through paragraphs-9, 10 and 11 of the said decision, which runs as follow:-

> "**9.** Coming now to the other impugned order, we find that the learned Judge has rejected the prayer for amendment of the petition principally on the ground that by the proposed amendment the appellant was seeking to introduce 'material fact' as distinguished from 'material particulars' of a corrupt practice which was impermissible. In so doing the learned Judge drew sustenance from the following observations made by this Court in the case of *F.A. Sapa* v. *Singora*:
>
> "(*i*) Our election law is statutory in character as distinguished from common law and it must be strictly complied with.
>
> (*ii*) There is a clear and vital distinction between 'material facts' referred to in Section 83(1)(*a*) and 'particulars' in relation to corrupt practice referred to in Section 83(1)(*b*) of the Act.
>
> (*iii*) Section 86(5) of the Act empowers the High Court to allow particulars of any corrupt practice which has already been alleged in the petitions to be amended or amplified provided the amendment does not seek to introduce a corrupt practice which is not previously pleaded.
>
> (*iv*) By implication amendment cannot be permitted so as to introduce 'material facts'."
>
> **10.** The fasciculus of sections appearing in Chapter III of Part VI of the Act lays down the procedure for trial of election petitions. Sub-section (1) of Section 87 thereof provides that subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure ('Code' for short). That necessarily means that Order VI Rule 17 of the Code which relates to amendment of pleadings will afortiori apply to election petitions subject, however, to the

provisions of the Act and of any rules made thereunder. Under Order VI Rule 17 of the Code the Court has the power to allow parties to the proceedings to alter or amend their pleadings in such manner and on such terms as may be just and it provides that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. But exercise of such general powers stands curtailed by Section 86(5) of the Act, when amendment is sought for in respect of any election petition based on corrupt practice. Since Section 87 of the Act — and, for that matter, Order VI Rule 17 of the Code — is subject to the provisions of the Act, which necessarily includes Section 86(5), the general power of amendment under the former must yield to the restrictions imposed by the latter.

11. Indubitably, therefore, if the amendment sought for in the instant case related to corrupt practice we might have to consider the same in conformity with Section 86(5) of the Act as interpreted by this Court in the case of *F.A. Sapa*[1] and accept the findings of the learned Judge as recorded in the impugned order; but then, the learned Judge failed to notice that the amendments, the appellant intends to bring in his election petition, do not relate to any corrupt practice and, therefore, it has to be considered in the light of Section 87, and de hors Section 86(5) of the Act. For the foregoing reasons the impugned order dated May 28, 1993 cannot also be sustained."

In considering the case involved in the above decision, the Hon'ble Apex Court has categorically held that exercise of general powers as in Order VI Rule-17 of the Code stands curtailed by Section 86 of the Act except an exception for amendment in Election cases in the premises of corrupt practices. It is on the above premises while interfering in the High Court Judgment involved therein the Hon'ble apex Court set aside the impugned order dated 28th May, 1993 and directed the same to be reconsidered by the High Court in the light of Section 87 and dehors Section 86(5). This decision rather directly supports the contention of the Respondent No.1.

6. The question of amendment in an Election Petition has visited the Hon'ble Apex Court as well as other High Courts on the subject as follows:-

(A)AIR 1987 Gauhati 11. In deciding a case of applicability of Code of Civil Procedure to the Election Petition, the Single Bench of Gauhati High Court held as follows:-

> "2-A short question which arises for consideration is whether a Judge is required to sign the deposition of the witness in an election case. S.87(1) of the 'Act' runs:
>
> "Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of1908) to the trial of suits."
>
> **(Emphasis added)**
>
> The provisions in S.87(1) of the 'Act' shows that the whole of the Civil Procedure Code is not fully applicable. The S.87(1) provides that the proceeding should be tried "as nearly as may be" in accordance with the procedure applicable under the Code of Civil Procedure. The reasons for using the expression "as nearly as may be" appears to be that u/s.86 (7) of the 'Act', endeavour is to be made to conclude the trial of an election petition within 6 (six) months from the date on which the election petition is presented and if the technicalities of the Code is followed the trial may not be concluded expeditiously. The technicalities of the code should not make the progress of the trial of an election petition difficult. However, it must be consistent with the interest of justice. As such, the expression "as nearly as may be" shows only an approximation. In the other words, an election Court shall be guided by the spirit of the Code, but shall not be bound by the letter of the Code."Act',

This decision has made it clear that provisions in C.P.C. are not made application to election petitions as a whole.

(B) AIR 1987 SC 1577:-

"Considering a case for striking out certain parts of the petition not disclosing any cause of action under Order 6 Rule-16 CPC in Para 31 and Order 6 Rule 17 in the said decision, the Hon'ble Apex Court held as follows:-

> "31. The above scanning of the election petition would show that the appellant failed to plead complete details of corrupt practice which could constitute a cause of action as contemplated by S.100 of the

Act and he further failed to give the material facts and other details of the alleged corrupt practices. The allegations relating to corrupt practice, even if assumed to be true as stated in the various paras of the election petition do not constitute any corrupt practice. The petition was drafted in a highly vague and general manner. Various paras of the petition presented disjointed averments and it is difficult to make out as to what actually the petitioner intended to plead. At the conclusion of hearing of the appeal before us appellant made applications for amending the election petition, to remove the defects pointed out by the High Court and to render the allegations of corrupt practice in accordance with the provisions of S.33 read with S.123 of the Act. Having given our anxious consideration to the amendment applications we are of the opinion that these applications cannot be allowed at this stage. It must be borne in mind that the election petition was presented to the Registrar of the High Court at Lucknow Bench on the last day of the limitation prescribed for filing the election petition. The appellant could not raise any ground of challenge after the expiry of limitation. Order VI, Rule-17 no doubt permits amendment of an election petition but the same is subject to the provisions of the Act. Section 87 prescribes a period of 45 days from the date of the election for presenting election petition calling in question, the election of a returned candidate. After the expiry of that period no election petition is maintainable and the High Court or this Court has no jurisdiction to extend the period of limitation. An order of amendment permitting a new ground to be raised beyond the time specified in S.81 would amount to contravention of those provisions and beyond the ambit of S.87 of the Act. It necessarily follows that a new ground cannot be raised or inserted in an election petition by way of amendment after the expiry of the period of limitation. The amendments claimed by the appellant are not in the nature of supplying particulars instead those seek to raise new ground of challenge. Various paras of the election petition which are sought to be amended do not disclose any cause of action, therefore, it is not permissible to allow their amendment after expiry of the period of limitation. Amendment applications are accordingly rejected.

Order 6 Rule-17.Amendment of pleadings-"The Court may at any stage of the proceedings allow either part to alter or amend his pleadings in such manner and on such terms as may be just, and all

such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties;

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. "

In the above case the Hon'ble Apex Court has made it clear that no amendment in the Election Petition beyond the period of limitation as prescribed in Section 81 of the Act. In deciding the case as reported in 1987 AIR S.C.1577 the Hon'ble Apex Court has categorically held that the appellant could not raise any ground to challenge the election petition after expiry of limitation and the same is subject to the provisions of the Act Section 87 prescribes a period of 45 days from the date of election in presenting Election Petition. The Hon'ble Apex Court also held an order of Amendment permitting a new ground to be raised beyond the time specified in Section 81 would account to contravention of those provisions and beyond ambit of Section 87 of the Act.

(C) (2005) 4 Supreme Court Cases 480:

"7-Two points of significance deserve to be noted and highlighted. On all the subjects, suggested by the titles given to the different chapters, provisions are already available in CPC which is a pre-existing law. An election petition is a civil trial and if Parliament had so wished, all the aspects of trial included in Part VI could have been left to be taken care of by the pre-existing law, that is, CPC. However, Parliament has chosen to enact separate and independent provisions applicable to the trial of election petitions and placed them in the body of the Act."

"9-Sub-section (6) of Section 86 of the Act requires trial of an election petition to be continued from day to day until its conclusion, so far as is practicable consistently with the interests of justice in respect of the trial, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded. Sub-Section (7) requires every election petition to be tried as expeditiously as possible with an endeavour to conclude the trial within six months from the date of presentation of the election petition. Thus, the procedure provided for the trial of civil suits by

CPC is not applicable in its entirety to the trial of election petitions. The applicability of the procedure is circumscribed by two riders; firstly, CPC procedure is applicable "as nearly as may be"; and secondly, CPC procedure would give way to any provisions of the Act and or any rules made thereunder".

"46(ii)-On the language of Section 87(1) of the Act, it is clear that the applicability of the procedure provided for the trial of suits to the trial of election petitions is not attracted with all its rigidity and technicality. The rules of procedure contained in CPC apply to the trial of election petitions under the Act which flexibility and only as guidelines".

By this judgment, the Hon'ble Apex Court has also held that CPC apply to the trial of election case under the Act will flexibility and only as guidelines. This decision supports the case of the respondent no.1 fully.

(*D) AIR 1970 Supreme Court 108, Ratan Lal Shah v. Firm Lalman Das Chhadamma Lal and another*:

"2-Against the decree, Ratan Lal alone appealed to the High Court of Allahabad. Mohan Singh was impleaded as the second respondent in the appeal. The notice of appeal sent to Mohan Singh was returned unserved and an application made by counsel for the appellant to serve Mohan Singh "in the ordinary course as well as by registered post" was not disposed of by the Court. On July 9, 1963 Ratan Lal applied that it was "detected that there had been no service of the notice of appeal upon Mohan Singh and it was essential for the ends of justice that notice of appeal may be served upon Mohan Singh". The Court by order dated July 10, 1963, rejected the application and proceeded to hear the appeal. The Court was of the view that since there was a joint decree against Ratan Lal and Mohan Singh in a suit founded on a joint cause of action and the decree against Mohan Singh had become final, Ratan Lal could not claim to be heard on his appeal. The High Court observed:

"If we hear him (Ratan Lal) the result may be that on the success of his appeal there will be two conflicting decisions between the "same parties in the same suit based on the same cause of action. Furthermore, the appellant has not taken steps to serve the second

respondent (Mohan Singh) and the appeal must be dismissed for want of prosecution. On both these grounds we dismiss this appeal".

Against the order passed by the High Court, this appeal has been preferred with special leave".

In concluding the issue, the Hon'ble Apex Court has categorically held that High Court was right in rejecting the application for amendment.

Decisions cited by respondent no.1 as reported in AIR 1987 Orissa 204, AIR 2005 Punjab and Haryana 251 since stood on different footing have no application to the present case.

7. Perusal of the petition for amendment clearly established introduction of new material facts which are beyond the material facts already contained therein and is opposed to the spirit of Section 87 of the Act. Attempt for introduction of prayer being dependent on the introduction of new material facts cannot be permissible in view of restriction indicated hereinabove. Besides, the attempt for introduction of new material facts as well as the new prayer being made beyond the limitation of forty five days also opposed to Section 81 of the Act. Hon'ble apex Court in its reported pronouncements, as indicated supra, has very categorically held that amendment beyond material facts and beyond the period of limitation is wholly impermissible. Hence, I do not find any merit to allow the Misc. Case for amendment of the election petition and the same is dismissed as such with cost of Rs.5,000/- (Rupees five thousand) only.

Election petition dismissed.

2015 (II) ILR - CUT-821

S.N. PRASAD, J.

W.P.(C) NO. 22762 OF 2010

JOGENDRA BEHERA ……...Petitioner

.Vrs.

CHAIRMAN, GRID CO. LTD. & ORS. ……..Opp. Parties

ODISHA CIVIL SERVICES (PENSION) RULES, 1992 – RULE 18 (3)

Claim for full pension – Since petitioner has not completed 33 years continuous service he prayed to count his service for 3 years 1 month and 21 days under the work charged establishment for availing full pension – Rule 18 (3) of the 1992 Rules require that unless an employee worked "five years or more" under work charged establishment he can not get such benefit – Petitioner has cited a judgment of this court passed in OJC No. 11896 of 2001 claiming relaxation in the period which was passed basing on Rule 47 of the 1992 Rules without taking into account Rule 18(3) of the 1992 Rules – Such judgment is distinguishable for non-consideration of Rule 18(3) of the said Rules – Held, petitioner cannot get benefit out of the above judgment – He also can not be granted benefit of service rendered under the work charged establishment.

For Petitioner : M/s. J.M.Pattnaik, C.Panigrahi, D.K.Mallick

For Opp. Parties : M/s. B.K.Pattnaik, S.Parida, Bibudhendra Dash, P.K.Mohanty & Sambit Das.

Date of order : 23.04.2015

ORDER

S.N. PRASAD, J.

The petitioner has challenged the order dated 26.5.2009 passed by the Senior General Manager(HR),Central Electricity Supply Utility of Orissa by which period of service rendered by him under work-charged establishment has not been calculated for consideration to be entitled to get full pension.

Brief facts of the case that the petitioner was initially engaged on 1.6.1966 under the work-charged establishment and remained in the said

establishment to 21.7.1969 and thereafter he was taken to regular establishment with effect from 22.7.1969 and started discharging his duties and thereafter he was superannuated from service with effect from 30.4.1999.

As per the Orissa Civil Services(Pension) Rules, 1992 a retired employee will get full pension after completion of 33 years of continuous service under the permanent establishment but since there is short fall of 3 years, 1 month and 21 days, hence the petitioner has not been found qualified for getting full pension.

Accordingly, he approached before this Court by way of preferring writ petition being O.J.C.No.16292 of 2001 which was disposed of on 5.1.2009 giving liberty to the petitioner to file representation before the Chief Executive Officer, CESU for taking a decision in accordance with law and accordingly a decision has been taken vide order communicated as contained in letter dated 26.5.2009(Annexure-13) whereby and whereunder claim of the petitioner for making him entitled for getting full pension has been rejected on the ground that the petitioner has only completed 29 years 9 months and 9 days service.

Case of the petitioner that the period of service rendered by him under work-charged establishment from 1.6.1966 to 21.7.1969 ought to have been calculated for the purpose of entitling him for full pension, but that has not been given on the pretext that Rule 18(3) of the Orissa Civil Services(Pension) Rules,1992 which provides that the period of service rendered under the work-charged establishment will be calculated only if he discharged his duty under the work-charged establishment for a period of five years or more, then the said period will be calculated. In this case, the petitioner has rendered service for 3 years, 1 month and 21 days in the work-charged establishment and as such in view of Rule 18(3) of the of the Orissa Civil Services(Pension) Rules,1992 the period of service rendered under the work-charged establishment has not been calculated.

According to the petitioner that in view of the provisions as contained under Rule 47 of the of the Orissa Civil Services(Pension) Rules,1992 provision has been given for calculating service rendered in other establishment and regular establishment and the authorities have not passed the order taking into consideration the provisions of Rule 47 of the of the Orissa Civil Services(Pension) Rules,1992 rather the order has been passed on the basis of the Rule 18(3) of the of the Orissa Civil Services(Pension)

Rules,1992 and as such the impugned order cannot be said to be justified order.

The petitioner has placed reliance upon the order passed by this Court in O.J.C. No.11896 of 2001(**Dharanidhar Barik –vs-The Chairman, GRID Corporation Ltd. and others)** wherein direction has been given to the authorities to calculate the period of service on the basis of Rule 47 of the of the Orissa Civil Services(Pension) Rules,1992 and it has been submitted by learned counsel for the petitioner that this case is to be looked into in the light of the Rule 47 of the of the Orissa Civil Services(Pension) Rules,1992 and decision in O.J.C.No.11896 of 2001 in which similar to the case of the petitioner.

On the other hand, learned counsel for the opposite parties has submitted that the order dated 26.5.2009 has been passed on the basis of the provisions as contained in Rule 18 of the of the Orissa Civil Services (Pension) Rules,1992 which specifically bars to calculate the period of work-charged establishment if service period of an employee is less than five years since it has been provided in the Rule "for **a period of five years or more".** Since the petitioner is not coming under the parameter of Rule 18 of the of the Orissa Civil Services(Pension) Rules,1992, hence the authorities after taking into consideration of this aspect, has passed order and as such there is no infirmity in the impugned order.

Heard learned counsel for the parties and perused the documents available on record.

Admitted fact is that the petitioner was engaged under the work-charged establishment on 1.6.1966 and remained in the said establishment till 21.71969. Thereafter the petitioner was taken to regular establishment with effect from 22.7.1969 and superannuated from service with effect from 30.4.1999.

So far as the contention of the learned counsel for the petitioner that the impugned order dated 26.5.2009 has been passed without considering the provisions as contained in the of the Orissa Civil Services(Pension) Rules,1992. For adjudicating this issue it is important to see the provisions as contained in Rule 18 of the of the Orissa Civil Services(Pension) Rules,1992 which is being quoted below:

"Conditions subject to which service qualifies:-

(1) Service does not qualify for pension unless it is rendered in a pensionable establishment post.

(2) The entire continuous temporary or officiating service under Government without interruption in the same post or any other post, shall count for the purpose of pension in respect of all categories of Government servants except in the following cases, namely:

(i) Period of service in an non-pensionable establishment;

(ii) Period of service in the work-charged establishment;

(iii) Period of service paid from contingencies;

(iv) Where the employee concerned resigns and is not again appointed to service under Government or is removed/dismissed from public service;

(v) A probationer who is discharged from service for failure to pass the prescribed test or examination;

(vi) Re-employed pensioner Government servants engaged on contract and Government servants not in whole time employment of Government;

(vii) Service paid from Local Fund or Trust Fund;

(viii) Service in an office paid by fees whether levied by law or under authority of the Government or by Commission; and

(ix) Service paid out of the grant in accordance with Law or Custom.

(3) Notwithstanding anything contained in Clauses (i) and (ii) of Sub-rule(2) a person who is initially appointed by the Government in a work-charged establishment for a period of five years or more and is subsequently appointed to the same or another post in a temporary or substantive capacity in a pensionable establishment without interruption of duty, the period of service so rendered in work-charged establishment shall qualify for pension under this rule.

(4) Notwithstanding anything contained in Sub-rule(1) Government may, by general or special order; prescribe any class of service or post which were previously born under work-charged establishment or paid from contingencies to be pensionable.

(5) Notwithstanding anything contained in Sub-rules (1) and (2) in case of a Government servant belonging to Government of India or other State Government on his permanent transfer to the State Government the continuous service rendered by him under pensionable establishment of Government of India or any other State Government, as the case may be, shall count as qualifying service for pension.

(6) Notwithstanding anything contained in Clauses (i) and (iii) of Sub-rule (2), a person who is initially appointed in a job contract establishment and is subsequently brought over to the post created under regular/pensionable establishment, so much of his job contract service period shall be added to the period of his qualifying service in regular establishment and would render him eligible for pension."

From perusal of the provisions as contained in Rule 18(2) the entire continuous service in the work-charged establishment shall not be counted for the purpose of pension.

From perusal of Rule 18(3) of the of the Orissa Civil Services (Pension) Rules,1992 exception has been given that if an employee will discharge his duty in the work-charged establishment for a period of five years or more and subsequently appointed to the same or another post in a temporary or substantive capacity in a pensionable establishment without interruption of duty, the period of service so rendered in work-charged establishment shall quality for pension under this rule.

From perusal of the provisions it is apparent that if an employee has discharged duty under the work-charged establishment for a period of five years or more, the said period shall be counted for the purpose of calculating pension otherwise the said period shall not be counted which give embargo as has been provided under the provisions as contained in Rule 18(3) as quoted above.

In this case, the petitioner has discharged his duty under the work-charged establishment for a period of 3 years, 1 moth and 21 days and as such the petitioner cannot be given any benefit as provided under Rule 18(3) which provides for ignoring the period of service rendered in the work-charged establishment if the period of service is not 5 years or more.

Since the petitioner has discharged his duty in the work-charged establishment for a period of 3 years, 1 month and 21 days, hence the

petitioner cannot be said to be entitled to be given benefit period of service rendered in the work-charged establishment.

So far as the reliance placed by learned counsel for the petitioner in O.J.C. No.111896 of 2001 wherein same issue has been dealt with and order has been passed directing the authorities to calculate pension of the writ petition on the ground that the petitioner in the said writ petition has performed his duty in the work-charged establishment for 4 years, 11 months and 21 days, according to the petitioner his case is covered by the judgment.

From perusal of the order rendered in OJC No.11896 of 2001 it is apparent that the provision as contained in Rule 18(3) of the of the Orissa Civil Services(Pension) Rules,1992 has not been placed before the Hon'ble Court while adjudicating this issue, rather due to that reason no finding has beeen given under the provisions as contained in Rule 18(3) of the of the Orissa Civil Services(Pension) Rules,1992.

Since the order passed by this Court in OJC No. 11896 of 2001 is based upon the provisions as contained in Rule 47 of the of the Orissa Civil Services(Pension) Rules,1992 and without considering Rule 18 of the of the Orissa Civil Services(Pension) Rules,1992, hence the said judgment is distinguishable on the ground of non-consideration of statutory provision as contained in Rule 18(3) of the of the Orissa Civil Services(Pension) Rules,1992, hence the petitioner cannot be given benefit on the basis of the said judgment and also on the ground that in that case, no order having been passed by authority was under challenge, hence matter was referred before the authority to take a decision on the ground of equity but in this case thereis a decision having been taken by the authority which has been impugned.

Moreover, when any order has been passed by the authority and subjected to judicial scrutiny then the court is to see the order as to whether order passed by authority is in terms of the statutory provision or not?.

Here, in this case the authority has given a specific finding relying upon the provisions of Rule 18(2)(ii) of the Orissa Civil Services(Pension) Rules,1992 and as such, the propriety of the order is to be seen.

Since there is specific bar for computing service rendered by an employee in the work-charged establishment is less than five years, it cannot be calculated on the basis of qualifying thesaid period for fixing full pension, but in this case the petitioner since has not rendered five years or more

service under the work-charged establishment, rather has rendered under the work-charged establishment for a period of 3 years, 1 month and 21 days and in view of the provisions as contained in Rule 18(3) read with 18(2)(ii) of the of the Orissa Civil Services(Pension) Rules,1992 which is quoted herein above, in my considered view, the petitioner cannot be granted benefit of service rendered under the work-charged establishment. In view of the above reasons, I am not inclined to interfere with the impugned order. Accordingly, the writ petition is dismissed being devoid of merit.

Writ petition dismissed.

2015 (II) ILR - CUT-827

S. N. PRASAD, J.

W.P.(C) NO. 15833 OF 2011

SASMITA MANJARI DAS ……..Petitioner

.Vrs.

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

ANGANWADI WORKER – Appointment – Conditions stipulated in the advertisement must be followed strictly and in no case it will be deviated.

In this case advertisement made for appointment of Anganwadi Worker in respect of Khntal Anganwadi Centre – Since O.P.6 has withdrawn herself due to her engagement elsewhere position of O.P.5 and the petitioner became 2nd and 3rd respectively in the merit list – However on the date of verification of original certificates as O.P. 5 remained absent the petitioner was declared as the successful candidate – Later on O.P.5 approached the ADM who passed the order directing to prepare further merit list – Hence the writ petition – There being a condition in the advertisement that after receiving application forms, verification of original certificates are to be done on 10.6.2010 in presence of the applicants and there after name of the eligible candidate will be published – Since O.P.5 had not chosen to appear on 10.6.2010 she can not claim her right there after – Held, the impugned order passed by the ADM is set aside.

Case Laws Referred to :-

1. (1979) 3 SCC 489 : Ramana Dayaram Shetty -V- International Authy. of India
2. (2008)1 SCC 362 : B.Ramakichenin @Balagandhi -V- Union of India & Ors.

For Petitioner : M/s. Prafulla K.Rath
For Opp.Parties : M/s. D.Das

Date of order : 25.06.2015

ORDER

S.N.PRASAD, J.

Petitioner being aggrieved with the order dated 2.5.2011 in Anganwadi Appeal Case No.50 of 2010 by which the Additional District Magistrate, Jagatsinghpur has passed order to consider candidate of the private opposite party no.5 for its verification on the ground that on the date of verification she was absence, has approached this Court.

Facts of the case of the petitioner that an advertisement has been issued on 17.5.2010 inviting applications for filling up of the post of Anganwadi Worker in respect of Khntal Anganwadi Centre. Against the said vacancy the petitioner has applied along with the private opposite party no.5 and proforma opposite party no.6 and participated, but the proforma opposite party no.6 has withdrawn herself on account of her engagement elsewhere. The petitioner stood 3rd and the opposite party no.5 stood 2nd in the merit list. In the advertisement the date of verification of certificates and testimonial was fixed to 10.6.2010. The private opposite party no.5 had not appeared on 10.6.2010 for verification of certificates and testimonials and since the petitioner has appeared on10.6.2010 for verification of certificates and testimonials, the petitioner has been declared successful candidate but in the meanwhile the private opposite party no.5 has approached the A.D.M. for consideration of her candidature which has not been considered on the ground of non-verification of certificates and testimonials due to her absence on 10.6.2010, the A.D.M. has passed an order directing to prepare merit list in accordance with the law after considering candidature of the private opposite party no.5.

Being aggrieved with the said order the petitioner has approached this Court on the ground that when there is clear stipulation in the advertisement

that after participating in the assessment, respective candidates will have to appear on 10.6.2010 for verification of certificates and testimonials which has been mentioned in the advertisement, private opposite party no.5 since not appeared, she cannot be given any privilege by considering her candidature after 10.6.2010 on the ground that condition mentioned in the advertisement cannot be deviated by the authorities and is to be strictly followed.

On the other hand, learned counsel for the opposite party submitted that the A.D.M. has passed a justified order on the ground that since merit list was not prepared the A.D.M. has directed the C.D.P.O. to prepare merit list after considering candidate of the private opposite party no.5.

Heard learned counsel for the parties and perused the documents on record.

The fact which is not in dispute in this case that in the selection process candidates have participated out which the proforma opposite party no.6 has withdrawn from the selection process since she was engaged elsewhere. So only the contestant in the selection process was the petitioner and the private opposite party no.5.

Admittedly the private opposite party has secured second in the merit list and the petitioner was in the third position.

From perusal of the advertisement there is a condition that after receiving application forms, verification of all original certificates and testimonials are to be done on 10.6.2010 in presence of the applicants and name of the eligible candidate will be enlisted and published in the notice board of Block Development Office, notice Board of concerned Grama Panchayat and also publish in village level. If any objection pertains to the resident, educational qualification, caste or other certificate regarding the selected candidate be submitted before the C.D.P.O. after 7 days of publication of selection list i.e. 22.6.2010. The selection committee shall enquire and investigate the objections within 7 days(except holiday) i.e. 29.6.2010 of receiving the same. If no objection is received by the office within 7days as stated above, then it would be presumed that the select list is just and proper.

Since on the date of verification of original certificates and testimonials was to be done on 10.6.2010 and on that date the private

opposite party no.5 has not chosen to remain present before the authorities for verification of certificates and testimonials and as such the sole candidate who is the petitioner has been declared to be successful candidate and according to the condition stipulated in the advertisement, name of the selected candidate has been published subject to objections to be invited.

The content of the advertisement wherein the date of verification of certificates and testimonials has been fixed to10.6.2010 for scrutiny of certificates and inviting objections, the private opposite party no.5 had not chosen to appear and when her name has not been published in the select list, he approached to the A.D.M. and the A.D.M. has passed an order for consideration of her candidature and to prepare fresh merit list on the ground that one applicant has been permitted to withdraw her candidature which has been accepted by the selection committee, reason in the order passed by the A.D.M. does not seems to be proper and justified because withdrawal of candidature is something otherwise since from withdrawal of case other candidate will not be prejudiced, but due to consideration at belated stage right of successful candidate will be prejudiced. This aspect of the matter has not been looked into by the A.D.M. and the ground has been taken for preparation of fresh merit list which is not proper and justified.

Law is well settled that if any condition stipulated in the advertisement, it is strictly to be followed by the authority and in no case it will be deviated which has been decided in the case of **Ramana Dayaram Shetty –v- International Airport Authority of India,** reported in (1979)3 SCC 489 wherein at paragraph-10 it has been held:

"It is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them."

The Supreme Court also in the case of **B.Ramakichenin Alias Balagandhi –v- Union of India and others**, reported in (2008)1 SCC 362 has reiterated the same view after taking into consideration the ratio laid down by the Hon'ble Supreme Court in the case of **Ramana Dayaram Shetty –v- International Airport Authority of India.**

The selection committee on the basis of the settled proposition of law that the condition mentioned in the advertisement/notice is strictly to be followed, has not entertained candidature of the private opposite party on the ground that she had not chosen to appear on 10.6.2010 the date which was

fixed in the advertisement for verification of certificates and testimonials, but very surprisingly the A.D.M. without considering the settled proposition of law has passed the order.

Hence, the order passed by the A.D.M. is not sustainable in the eye of law. As such, the same is hereby set aside and the writ petition is accordingly allowed.

Writ petition allowed.

2015 (II) ILR -CUT- 831

K. R. MOHAPATRA, J.

R.F. A. NO.27 OF 2012

RITESH KUMAR PATEL @ RITESH PATEL .....Appellant

.Vrs.

KISHORE CHANDRA PATEL AND ORS. .....Respondents

INDIAN SUCCESSION ACT, 1925 – S. 213

Whether probate of the will is necessary in the district of Mayurbhanj, to establish the right of a legatee in any Court of law ? Held, No – The erstwhile princely state of Mayurbhanj was not within the territory of Lieutenant Governor of Bengal as on 01.09.1870 as envisaged U/s 57 (a) of the Act – Held, a will or testamentary disposition executed in the district of Mayurbhanj need not be probated to establish the right of the legatee or executor in the Court of justice as restriction imposed U/s 213 of the Act is not applicable to the district of Mayurbhanj – Finding of the learned court that no right accrued in favour of the plaintiff by virtue of the will in absence of its probate is not sustainable in law – The plaintiff-appellant has acquired right, title and interest over the suit properly by virtue of the will after the death of the testator. (Paras 13,14)

For Appellant : Mr. Ramakanta Mohanty Sr.Adv.
M/s. D.Mohanty S.Mohanty S.N.Biswal, A.Mohanty, P.Jena, N.Mohanty,
For Respondents : M/s. A.K.Das & Ch.N.C.Das.

Date of judgment.: 03.08.2015

JUDGMENT

K.R. MOHAPATRA, J.

The appellant as plaintiff calls in question the judgment and decree dated 25.01.2012 and 09.02.2012 respectively passed by the learned Civil Judge (Senior Division), Karanjia in C.S. No. 8 of 2010 in this appeal.

2. Plaintiff filed Civil Suit No.8 of 2010 for declaration of title in respect of the land to an extent of Ac.1.83 decimals appertaining to Plot No.571 under Khata No.96/19 of Mouza: Handipuhan in the district of Mayurbhanj (for short, 'the suit land') on the basis of a Will executed by one Rambhabati Patel.

3. The plaint story in brief is that the suit property was acquired by one Rambhabati Patel, who is grandmother of the plaintiff-appellant. Subsequently, the suit property was recorded in the name of said Rambhabati Patel in the ROR published in the year 1985 (Ext.3). Said Rambhabati Patel had executed a plain paper Will (Ext.2) in favour of the plaintiff on 11.06.2000 voluntarily bequeathing the suit land in favour of the legatee (plaintiff) and put him in possession of the suit property. Rambhabati Patel breathed her last on 03.12.2000 leaving behind three sons and one daughter, who are defendants/respondent nos. 1 to 3 and defendant/respondent no.7 respectively. Defendant Nos. 4 to 6 are successors-in-interest of pre-deceased son of said Rambhabati, namely, Kamaleshwar Patel. Plaintiff is the son of defendant no.1, namely, Kishore Chandra Patel. It is the case of the plaintiff that suit Will is in respect of the properties situated in the district of Mayurbhanj and no probate under the provisions of Indian Succession Act, 1925 (for short, the Act') is required under law in the district of Mayurbhanj to establish the right of legatee in respect of the suit land. The defendants did not cooperate to record the suit land in favour of the plaintiff on the basis of the Will after death of said Rambhabati Patel for which the suit was filed for the aforesaid relief.

4. The defendants filed their written statement admitting the execution of the Will, but denied the allegation of non-cooperation on their part for recording the suit land in the name of the plaintiff on the basis of the Will. On the other hand, they submitted that the plaintiff being the lawful owner of the 'A' schedule property is entitled to mutate his name and only due to pre-occupation and time constraints of the defendants, the mutation could not be carried out in time. Hence, they prayed for disposal of the suit in the light of Order 6 Rule 12, CPC.

5. Taking into consideration the rival pleadings of the parties, the learned Civil Judge framed as many as four issues. The main issues for consideration before the learned trial Court were issue Nos.2 and 3, which are reproduced herein below.

> "***2. Whether the plaintiff has got a valid cause of action to bring this suit in this Court?***
> ***3. Whether the right, title and interest of the suit property can be declared in favour of the plaintiff?***"

6. To substantiate his case, the plaintiff examined himself as PW-2, Scribe of the Will as PW-1 and exhibited the documents, like the Will as Ext.1, Registered Sale Deed executed in favour of said Rambhabati Patel as Ext.2 and Ext.3, the ROR of the year 1985. The defendants, on the other hand, neither examined any witness nor produced any document in support of their case.

7. On consideration of the pleadings and materials available on record, learned Civil Judge came to a categorical finding that the Will, i.e., Ext.1 was validly executed in favour of the plaintiff by the testator of the Will, namely, late Rambhabati Patel. Further, the learned Civil Judge held that late Rambhabati, the testator of the Will, was the title-holder of the suit property at the time she bequeathed the same in favour of the plaintiff through testamentary disposition, i.e., Ext.1. But, at the same time, the learned Civil Judge held that declaration of title cannot be made in favour of the plaintiff on the strength of the Will in view of the bar enumerated under Section 213 of the Act, unless the said Will is probated through a letter of administration received by the legatee. Further, he held that there is no cause of action available for the plaintiff and the cause of action given in the plaint appears to be imaginary or false. Accordingly, the learned Civil Judge dismissed the suit. It is against the said judgment and decree this appeal has been filed.

8. In view of the pleadings of the parties as well as the findings of the learned trial Court, the preliminary question to be determined in this appeal is whether the probate of Will is necessary in the district of Mayurbhanj to establish the right of a legatee in any court of law and of course, whether the plaintiff has any cause of action to file the suit.

9. Mr.R.K.Mohanty, learned Senior Advocate for the respondents while arguing on the issue of necessity of probate of Will in the district of Mayurbhanj referred to different provisions of the Act and more particularly drew the attention of this Court to Sections 213 and 57 of the Act.

"Will" as defined under Section 2(h) of the Act connotes that "Will" means the legal declaration of the intention of a testator with respect to his property which desires to be carried into effect after his death.

Section 213 of the Indian Succession Act runs as follows:

> "213 **Right as executor or legatee when establish**.—(1) No right as executor or legatee can be established in any court of justice, unless a court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.
>
> (2) This section shall not apply in the case of wills made by Muhammadans, and shall only apply—
>
> (i) in the case of wills made by any Hindu, Budhist, Sikh or Jaina where such wills are of the classes specified in cl.(a) and (b) of Section 57…."

10. From a plain reading of sub-section (1) of section 213, it is abundantly clear that a person claiming right over a property is prohibited from establishing his right on the basis of a Will in any court of law without a probate thereof. However, sub-section (2) restricts the applicability of sub-section (1) to classes specified in Clause (a) and (b) of Section 57 of the Act. Prohibition/restriction of Section 213 of the Act is applicable only to such Will covered by Clause-(a) or (b) of Section 57 of the Act.

Section 57 of the Indian Succession Act runs as follows:

> "57. **Application of certain provisions of Part to a class or wills made by Hindus, etc.—** The provisions of this part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—
>
> (a) to all wills and codicils made by any Hindu, Budhist, Sikh or Jaina on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and
>
> (b) to all such wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; and
>
> (c) xx xx xx"

11. Thus, Mr.Mohanty, learned Senior Advocate submitted that on a compendious reading of the provisions of Section 213 and Section 57 of the Act, it is manifestly clear that the restrictions prescribed under Section 213 of the Act cannot be extended to the Wills executed by a Hindu etc. on or after 1st day of 1870 in a place (area), which was not under the precincts prescribed under Clause (a) of Section 57 of the Act and testamentary successions (Wills and Codicils) made outside those territories in respect of the properties within such area (territories) as per Clause-(b) of Section 57 of the Act. A similar question came up for consideration before this Court in the case of ***Amrutlal Majhi and others Vs. Japi Sahuani and others***, reported in 1972 (2) CWR 1451, wherein, this Court in paragraph-7 held as under:-

> "7. From a plain reading, it is clear that sub-sec. (1) prohibits persons from establishing their rights in any court without obtaining a probate, while sub-sec.(2) restricts the application of the above prohibition to classes specified in clauses (a) and (b) of sec.57. In other words, if a particular will is not covered by clause (a) or (b) of sec.57, the prohibition u/s 213(1) does not apply."

The decision of this Court in ***Amrutlal Majhi and others (supra)*** was in respect of Wills executed in the district of Bolangir. The said decision was subsequently followed in the case of ***Kunja Bihari Sahu Vs. State of Orissa and others,*** reported in 2012 (II) CLR 841. Further, this Court, while dealing with a similar question in respect of the Will executed in the district of

Dhenkanal, has taken a similar view in the case of ***Sailabala Satpahy Vs. Parbati Satpathy and others***, reported in 2008 (I) OLR 729.

No doubt, the testator of the Will (Ext.1) is a Hindu and the Will was executed on 11.06.2000 in the district of Mayurbhanj, i.e., much after the 1st day of September, 1870. Now, taking into consideration the submission of Mr.Mohanty, learned Senior Advocate for the respondents, it is to be examined as to whether the district of Mayurbhanj was within the territories which on the 1st day of September, 1870 were subject to the Lieutenant Governor of Bengal and whether it situates within the local limits of the ordinary civil jurisdiction of High Courts of Judicature of Madras and Bombay. No doubt, the district of Mayurbhanj was never under the ordinary civil jurisdiction of High Courts of Judicature of Madras and Bombay, as the princely State of Mayurbhanj had its own High Court. The revenue district of Mayurbhanj became amenable to the jurisdiction of High Court of Orissa by operation of para-6 of Administration of Mayurbhanj State Order, 1949 and the High Court for Mayurbhanj State ceased to exercise jurisdiction in the State on and from the date of commencement of the said Order, i.e., with effect from 01.01.1949. Thus, the only question remains to be adjudicated is as to whether the district of Mayurbhanj was within the territories, which on the 1st day of September, 1870, was subject to the Lieutenant Governor of Bengal.

12. The district of Mayurbhanj was one of the princely States ruled by the Kings. It is submitted by Mr.Mohanty, learned Senior Advocate that while establishing British India, the Britishers had to face the antagonism of many princely States in India. Therefore, in the early part of 19th Century, Britishers pursued policy of outright conquest or a diplomatic method of subsidiary alliance for annexation of such princely States in India to the British India. However, such move of the Britishers of forcible annexation or conquest was not smooth and proved to be counterproductive, as it led to outbreak of the historic Sepoy Mutiny in 1857. This forced the British Government to change its policy towards the Indian princely States, which were still outside the British domain. In the famous Queen's Proclamation of 1888 by Queen Victoria, the Britishers made a solemn pledge to the Indian Princes not to make any further annexation of their territories to British India. This ensured the loyalty of the Indian Princes to the British Crown till India got her independence. Adopting such policy, the Britishers tried to exercise their paramountcy over these princely States with British Crown as

the ultimate suzerain, with limited estate of sovereignty and self-Government. This relationship of the British with the princely States was regulated by individual treaties. In 1921, the British made an attempt to integrate such princely States into British India by creating Chamber of Princes as a consultative and Advisory Body. To give shape to such an advent, the Government of India Act, 1935 was enacted with a view to ending the aforesaid system and establishment of a Federation of India consisting of both British India and the princely States. This law, however, did not precipitate to the desired extent because of the ongoing independence struggle and World War-II. Resultantly, at the time of independence, the princely States did not become a part of independent India. There were 565 princely States existing at the time of independence and the district of Mayurbhanj was one of such princely States. Chapter-II of Orissa District Gazettees for the district of Mayurbhanj deals with history of Mayurbhanj. It elaborately deals with the history of Mayurbhanj under different Rules. The status of Mayurbhanj under British Rule is also elaborately discussed in the said Chapter which gives no scope of doubt that though the Rulers of Mayurbhanj were loyal to the Britishers and have co-operated them during Sepoy Mutiny of 1857, but the State had never lost its sovereignty. The Rulers of Mayurbhanj were independent having their self-Government till it merged with State of Orissa by opration of 1949 Order (supra). However, as a sequel to achieving independence, many princely States acceded to independent India either voluntarily or by signing accession instruments. Independence was legalized/recognized by the British by enactment of the Indian Independence Act, 1947 enacted by the U.K. Parliament on 18.07.1947. The main aim of this Act was to grant full self Government, by dividing British India into India and Pakistan with effect from 15th August, 1947. Furthermore, this legislation lawfully terminated the British suzerainty over those princely States with effect from 15.08.1947 and bestowed upon them a right to accede either to India or to Pakistan or to remain independent. For those princely States, which did not merge with independent India, the Central Government enacted Foreign Jurisdiction Act, 1947 (Act XLVII of 1947) on 24.11.1947 to provide for exercise of certain foreign jurisdiction of the Central Government over such areas. By virtue of Section 4 of the Act XLVII of 1947, the Central Government was empowered to notify the areas over which foreign jurisdiction could be exercised. Accordingly, the Administration of Orissa States Orders, 1948 was published in the Orissa Gazettee on 01.01.1948 for the effective exercise of foreign jurisdiction of the Central Government over certain areas and to make certain laws

applicable to such areas. Pursuant to such publication, certain districts which were fiduciary States were brought into the ambit and control of provincial Government of Orissa, but the Ex-State of Mayurbhanj was not included in Schedule-I of the said 1948 Order. Thus, in order to exercise provincial jurisdiction over the Mayurbhanj State, Administration of Mayurbhanj State Order, 1949 was notified and published in the official Gazette of Orissa on 01.01.1949. Para-4 of said 1949 Order empowered the provincial Government of Orissa to exercise powers of Executive Administration over the State of Mayurbhanj. Para-5 of the said 1949 Order made the laws specified in the first column of the Schedule applicable to such States. Entry-75 of the first column of the Schedule to the 1949 Order included the provisions of the Indian Succession Act, 1925. Para-6 of the said Order, 1949 empowered the High Court of Orissa to exercise its jurisdiction over the State of Mayurbhanj and from that date High Court of Mayurbhanj ceased to exercise its jurisdiction in Mayurbhanj State.

13. A conjoint reading of the aforesaid provisions and taking into consideration the submissions and the history of merger of Mayurbhanj State into Independent India, it is abundantly clear that the erstwhile princely State of Mayurbhanj was not within the territory of Lieutenant Governor of Bengal as on 01.09.1870, as envisaged under Section 57 (a) of the Act. Obviously, Mayurbhanj constituted a fiduciary State prior to 1949 Order. By virtue of promulgation of 1949 Order, the provisions of the Act were extended to such territory after it acceded to the hegemony of Independent India by such lawful merger. In view of the above, it can be safely concluded that a restriction imposed under Section 213 of the Act to establish the right of the legatee or executor in any Court of justice is not applicable to the district of Mayurbhanj. In other words, a Will or testamentary disposition executed in the district of Mayurbhanj need not be probated to establish the right of the legatee or executor in Court of justice. Thus, finding of the learned trial Court that no right accrues in favour of the plaintiff by virtue of the Will (Ext.1) in absence of its probate is not sustainable in law.

14. The learned trial Court taking into consideration the pleadings and materials placed on record has already come to a conclusion that the Will was validly executed by the testator-late Rambhabati Patel in respect of her self-acquired property. The defendants also do not dispute the execution of such Will by late Rambhabati Patel in favour of the plaintiff/appellant. Thus, the plaintiff/appellant has acquired right, title and interest over the suit

property by virtue of Ext.1 after the death of the testator, namely, Rambhabati Patel.

15. The next question for consideration is whether the plaintiff has cause of action to file the suit which was negatively answered. Mr.Mohanty, learned Senior Advocate drew attention of this Court to paragraphs- 5 and 7 of the plaint and submitted that the Will is a plain paper Will and unless right of the plaintiff is declared by virtue of the said Will, no mutation proceeding could be initiated. Had the defendants cooperated with the plaintiff, he could have got the suit land mutated in his name. Due to non-cooperation of the defendants, the plaintiff was constrained to file the suit for the aforesaid relief. Referring to paragraph-6 of the written statement filed by the defendants, learned counsel for the respondents though did not seriously object the same, but supported the findings of the learned trial Court submitting that due to pre-occupation and paucity of time, they could not cooperate the plaintiff to file the mutation case.

16. Considering the facts and the circumstances of the case as stated above and the submissions made, I am of the view that the basis of claim of the plaintiff being a plain paper Will, ordinarily it would not be entertained by the revenue authority for mutation of the land in his name, unless other family members, who might have interest in the property, cooperate with the legatee. Thus, the plaintiff had no other option than to file a suit for declaration of his right, title and interest on the basis of the said plain paper Will (Ext.1) to get the suit land mutated in his name. Thus, the plaintiff has cause of action to file the suit.

17. In view of the above, I have no hesitation to set aside the impugned judgment and decree dated 25.01.2012 and 09.02.2012 respectively passed by the learned Civil Judge (Senior Division), Karanjia in C.S. No. 8 of 2010, which I direct. Accordingly, the appeal is allowed. C.S. No.8 of 2010 of the Court of Civil Judge (Senior Division), Karanjia is decreed on contest against the defendants (respondents herein) declaring the right, title and interest of the plaintiff over the suit land. Parties shall bear their own cost.

Appeal allowed.